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OF NEW LAW

VOLUME I.

ABANDONMENT TO FINES

GEORGE FOSTER LONGSDORF
EDITOR IN CHIEF

BAR ASSOCIATION
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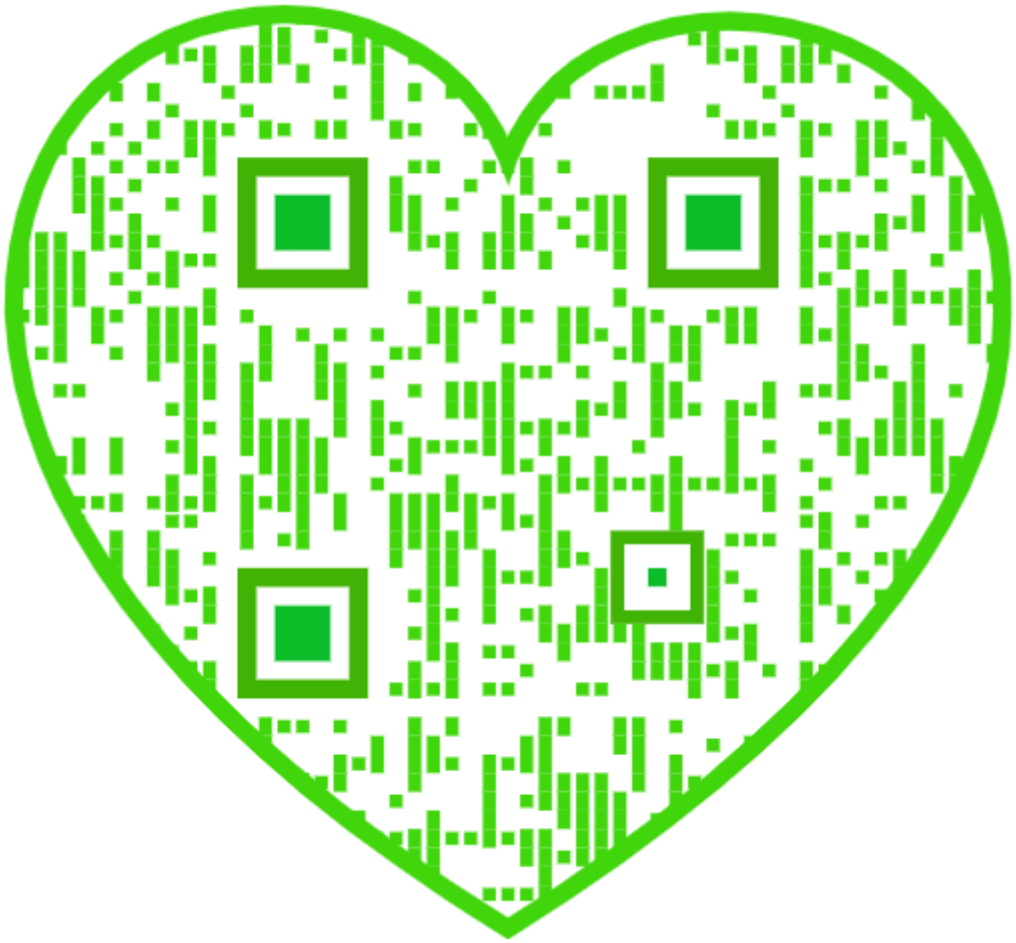

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CURRENT LAW.

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ABATEMENT AND REVIVAL.[1]

It is not attempted here to treat of criminal prosecutions,[2] nor of bills of revivor[3] or revival of judgments[4] or statute-barred causes of action.[5] Various writs are abatable for defects, which matters are not germane to this title.[6]

§ 1. *Causes for abatement.*—The pendency of another action[7] having the same object[8] and the same parties[9] and prior in time[10] is cause for abatement. It makes no difference that the prior one may prove ineffectual if it be legally capable of affording a remedy;[11] nor will the jurisdiction of the former court be determined on a plea.[12]

If discontinued or otherwise terminated, the suit or action is no longer pending.[13] It is still pending though appealed,[14] though it is not so regarded where, for instance, only one item of a judicial accounting is appealed,[15] nor is it sufficient to merely allege that it has been appealed from and is incorrect.[16] What

1. Abatement of legacies, see Wills; of nuisance, see Nuisance; of taxes, see Taxes.

2. Criminal Law; Criminal Procedure.

3. Equity.

4. Judgments.

5. Limitation of Actions.

6. Attachment, and like titles.

7. Kansas City S. R. Co. v. Railroad Commission, 106 La. 583; two mandamus proceedings—U. S. v. N. & W. R. Co., 114 Fed. 682; foreign garnishment not cause to abate but reason for stay—Margarum v. Moon (N. J. Ch.) 53 Atl. 179. Pendency of a chancery proceeding to set aside a will does not abate a proceeding before a probate court when the two are concurrent—Wright v. Simpson, 200 Ill. 56.

8. Berliner Gramaphone Co. v. Seaman, 111 Fed. 679; action for price and replevin for goods—Cobb v. Cullen Bros. & Lewis Steel Co., 68 App. Div. (N. Y.) 179; partition of land and action respecting personalty only—Robinson v. Ripprecht, 191 Ill. 424; ejectment and injunction against excluding from possession—Shaughnessy v. St. Andrew's Church (Neb.) 89 N. W. 263; mandamus to furnish cars for a shipment identical with mandamus to furnish a certain number of cars—U. S. v. N. & W. R. Co., 114 Fed. 682; action on note pending one to quiet title acquired on sale to pay the debt—Davidson v. Jefferson (Tex. Civ. App.) 68 S. W. 822; action for money and bonds in state court defeated by prior suit by a defendant for same in federal court and restraining delivery to any other person—State v. Tallman (Wash.) 69 Pac. 1115; allegations of the pendency of a cross bill which did not seek foreclosure of a note but merely brought in trustees of a deed of trust to secure it, held not to state abatable matter since the cross bill did not ask for a recovery of the debt—Walker v. Washington Title Ins. Co., 19 App. D. C. 575.

9. Dodge v. Cornelius, 168 N. Y. 242. All must be identical—Level Land Co. v. Sivyer, 112 Wis. 442. They are not identical where a person was party as executor in one action and as heir in the other—Foster v. Foster, 24 Ky. Law R. 1396.

10. Dodge v. Cornelius, 168 N. Y. 242.

11. Orman v. Lane, 130 Ala. 305; limited jurisdiction of court in which prior suit brought—Ralli v. Pearsall, 69 App. Div. (N. Y.) 254; unlawful detainer and prior injunction against landlord's exercise of right to terminate lease—Carmack v. Drum, 27 Wash. 382, 67 Pac. 808.

12. Wilson v. Atlanta, etc., R. Co., 115 Ga. 171.

13. Discontinuance—Succession of Wiemann, 106 La. 307; judgment on demurrer—Burnett v. Southern R. Co., 62 S. C. 281; abatement by death—Overlock v. Shinn (Wash.) 68 Pac. 436; dismissal without prejudice—Chesapeake & O. R. Co. v. Riddle's Adm'x, 24 Ky. Law R. 1687; suit to recover purchase money discontinued and suit to specifically enforce conveyance brought—Holt v. McWilliams, 21 Pa. Super. Ct. 137.

14. Orman v. Lane, 130 Ala. 305. Undetermined appeal from settlement of guardian's account operating as a supersedeas prevents action on bond—Municipal Court v. McDonough, 24 R. I. 498, 53 Atl. 866.

15. Saloman v. People, 191 Ill. 290.

16. Action against guardian's sureties pending appeal from final settlement—Chase v. Wright (Iowa) 90 N. W. 357.

is a pendency may also be ascertained in other titles,[17] and further authorities and precedents upon identity of causes of action may be found elsewhere.[18]

Improper splitting of a cause of action is a ground of abatement,[19] as is a misjoinder or a nonjoinder;[20] but, when the law of the place allows foreign contractors to be severally sued, they may be so sued in the forum.[21] Under acts permitting continuance in the original plaintiff's name, he may recover in his own name though he has transferred in part,[22] and the objection that plaintiff is not the real party in interest is untenable.[23]

Death abates the action though the statute reads no action shall "abate," etc., but it may be "revived."[24] Under the code practice, equitable actions abate by death the same as law actions.[25]

Mandamus to enforce an officer's personal rather than official duty does not abate by expiration of his term.[26]

Changing the personnel of an official board which has corporate power of succession does not change its legal existence.[27] Nothing short of a final discharge of receivers will abate an action against them.[28] The death of one co-plaintiff[29] or co-defendant in tort does not destroy the action either at statute or common law.[30]

§ 2. *Raising objections; waiver.*[31]—They are waived by going to trial,[32] and the plea must precede an answer to the merits[33] or a motion for continuance[34] or entry of an office judgment, unless the cause of abatement arise subsequently;[35] but it may be made without further time given to answer.[36] A former officer of a defunct corporation served in proceedings against it may object that the dissolution has abated the action.[37] One to the privilege of defendant may be made on answer without special appearance.[38]

17. Actions; Limitation of Actions (as to when "commenced").

18. Election of Remedies; Former Adjudication.

19. Fox v. Phyfe, 36 Misc. (N. Y.) 207; King v. King, 37 Misc. (N. Y.) 63.

20. 1 Enc. Pl. & Pr. pp. 13, 14. As to what is misjoinder and nonjoinder, see post. Causes of Action, Parties, and titles treating of particular proceedings, such as Partition.

21. Richards v. McNemee, 87 Mo. App. 396.

22. Civ. Code, § 40; McKnight v. Bertram, H. & P. Co., (Kan.) 70 Pac. 345.

23. Code Civ. Proc. § 385; Stufflebeem v. Adelsbach, 135 Cal. 221, 67 Pac. 140.

24. 2 Ball. Ann. Codes & St. 4837; Overlock v. Shinn (Wash.) 68 Pac. 436.

25. Overlock v. Shinn (Wash.) 68 Pac. 436.

26. Kas v. State (Neb.) 88 N. W. 776.

27. Murphy v. Utter, 186 U. S. 95, 46 Law. Ed. 1070.

28. Order to receivers to surrender property to owner—Cowen v. Merriman, 17 App. D. C. 186.

29. Heald v. Wallace (Tenn.) 71 S. W. 80.

30. (Pub. St. c. 165, § 12), a statute providing for the continuation of an action in which there are several plaintiffs or defendants, if the cause be one which survives, means that it must be one which survives to the remaining plaintiffs or against remaining defendants—Brown v. Kellogg (Mass.) 65 N. E. 378; Duis v. Fisher, 23 Ky. Law R. 1425.

31. Consult, also, Parties, Pleadings, Appeal and Review (Reversible Error). A plea alleging that decedent's interest was a homestead held sufficient to raise the question that the administrator did not succeed to it—Finlayson v. Love (Fla.) 33 So. 306. Allegations that the person served was not qualified to receive service should with certainty allege that such was the case when service was made—Ohio Oil Co. v. Griest (Ind. App.) 65 N. E. 534. An allegation that an action on a mortgage debt was pending, is demurrable in a foreclosure action unless it alleges that the other action was "without leave of court" (Code Civ. Proc. § 1628)—Schieck v. Donohue, 77 App. Div. (N. Y.) 321. In Indiana if the prematurity of the action does not appear on the face of the complaint the abatement should be urged by answer—Burns' Rev. St. § 346; Middaugh v. Wilson (Ind. App.) 65 N. E. 555.

32. Yarbrough v. De Martin (Tex. Civ. App.) 67 S. W. 177. Plea of another action pending must be ruled on—Foster v. Foster, 24 Ky. Law R. 1396.

33. Price v. Garvin (Tex. Civ. App.) 69 S. W. 985; Huntington Mfg. Co. v. Schofield, 28 Ind. App. 95; Baker v. Union Stock Yards Nat. Bank (Neb.) 89 N. W. 269. Answering to the merits at same time is waiver—Grand Lodge A. O. U. W. v. Bartes (Neb.) 90 N. W. 901; unless made subject to the plea in abatement—Kahn v. Southern B. & L. Ass'n, 115 Ga. 459.

34. Indiana, etc., R. Co., v. Cohoon, 95 Ill. App. 92.

35. Empire C. & C. Co. v. Hull C. & C. Co., 51 W. Va. 474.

36. Horn v. Noble, 95 Ill. App. 101.

37. Board of Councilmen v. Deposit Bank 120 Fed. 165.

38. Baker v. Union Stock Yards Nat. Bank (Neb.) 89 N. W. 269.

United States courts may require the objection to be by plea though under the local practice it is to be made by answer.[39]

Parties not joined must be named and shown to be within the jurisdiction,[40] and if jurisdiction of the court be assailed it must be denied and also alleged to be in another court.[41] A general allegation that the former court had jurisdiction under the declaration filed sufficiently avers it, and the jurisdiction is not a matter for determination.[42]

Evidence on the merits may be submitted with that on the question under the plea so that the jury may assess the damages if they find for plaintiff on the plea.[43] Not only pleadings but also the evidence and the judgment in another suit pending on appeal may be considered to ascertain its identity with the one at bar.[44] Slight evidence will rebut an inference of vexatiousness in a second action.[45]

§ 3. *Survivability of causes of action.*[46]—Since it affects a right, the law of the place and not of the forum governs.[47] Survival does not depend on the bringing of suit before the injured person dies.[48] When a cause is in judgment, it survives, though an appeal be pending from an order granting a new trial.[49] An official action does not abate by the death of plaintiff officer.[50] Personal actions in tort do not survive at common law.[51] An action is not ex delicto which seeks to cancel conveyances in which an agent had profited adversely to his principal and to enforce a trust thereon, though the same facts might have sustained an action in tort.[52] Personal injuries which by some statutes are made to survive will include such injuries by a railroad company.[53] A law attaching survivability to causes of action for personal injury is not limited by a law giving a right of action for damages resulting from the death of a person by defendant's wrongful act, hence recovery under the former act may include damages for pain, suffering, expenses and losses.[54]

Criminal conversation and loss of society is a "damage to the person" which dies with the person.[55] So is an action for mental anguish due to delaying a telegram,[56] and malicious prosecution, though business and property be consequentially damaged.[57] Negligence in exposing a servant to danger of an assault is an "action for assault" which abates.[58] Conspiracy to defeat a judgment

39. Whelan v. Rio Grande W. R. Co., 111 Fed. 326.

In Tennessee, allegations of fact giving the right to an attachment in equity must be denied by plea—Templeton v. Mason, 107 Tenn. 625.

40. Cone v. Cone, 61 S. C. 512. Allegations that a chattel mortgage was such that the right to the security and to enforcement of it vested in plaintiff with another does not plead his nonjoinder in replevin.—Swift v. Bank of Washington, 114 Fed. 643.

41. Kahn v. Southern B. & L. Ass'n, 115 Ga. 459.

42. Wilson v. Atlanta, K. & N. Ry. Co., 115 Ga. 171.

43. Italian-Swiss Colony v. Pease, 194 Ill. 98.

44. U. S. v. N. & W. Ry. Co., 114 Fed. 682.

45. A mere affidavit will—Citizens' St. R. Co. v. Shepherd (Ind. App.) 62 N. E. 300.

46. Where a seduced woman was not confined until after the death of her father, the mother cannot recover because the right to the daughter's services at the time of the tort was in the father—Hamilton v. Long, 36 Irish L. T.-R. 189, discussed 16 Harvard Law Rev. 298.

47. Sander's Adm'x v. Louisville & N. R. Co., 111 Fed. 708.

48. Rev. St. 1895, art. 3353a, personal injuries—Gulf C. & S. F. R. Co. v. Moore (Tex. Civ. App.) 68 S. W. 559.

49. Crawford v. C. R. I. & P. R. Co. (Mo.) 66 S. W. 350.

50. McDonald v. Algea, 96 Ill. 79.

51. Wetherell v. Chicago City R. Co., 104 Ill. App. 357.

52. Keys v. McDermott (Wis.) 93 N. W. 553.

53. Sayles Ann. Civ. St., art. 3353a; Galveston, H. & S. A. R. Co. v. Ginther (Tex.) 72 S. W. 166.

54. Rev. St. c. 3, § 123; c. 70, § 1; Wetherell v. Chicago City R. Co., 104 Ill. App. 357.

55. Pub. St., c. 165, § 1, death of defendant—Dixon v. Amerman (Mass.) 63 N. E. 1057.

56. Code, § 1491; Morton v. W. U. Tel. Co., 130 N. C. 299.

57. Porter v. Mack, 50 W. Va. 581.

58. Ky. St., § 10; Lewis' Adm'r v. Taylor Coal Co., 23 Ky. Law R. 2218.

creditor is not a tort to the judgment as property, and hence dies.[59] An action to recover damages under the statute against unlawful trusts and combinations is not abatable under a statute applying to personal torts.[60] Both by common law and the Virginia statute, an action to recover money from an official, which was paid under protest to prevent an unlawful seizure, survives him.[61] A stockholder's representatives may recover from directors for deceit by which a purchase of stock was induced.[62] In New York a bank may sue administrators for negligence of an officer.[63]

The death of the injured person does not abate the liability to punitive damages.[64] In Tennessee, if all the persons entitled to benefit of an action for wrongfully causing death be themselves dead, the action abates.[65] The contrary is the rule in Kentucky[66] and Pennsylvania.[67]

Actions against a corporation do not survive its dissolution by virtue of statutes authorizing continuance of actions against executors of wrongdoers.[68] A corporation dissolved by repeal of its charter is not within a provision saving the right to sue corporations which expire.[69] A law providing that vested rights shall not be impaired by the legislature when it repeals a charter does not protect causes of action against the corporation from dying with its dissolution.[70] Not even a bill to review a decree entered before the dissolution will lie against a defunct corporation.[71] The action does not die with the civil death of defendant.[72] A partnership's cause of action survives its dissolution.[73]

Contempt to enforce a decree is not a criminal proceeding which abates on defendant's death.[74]

A surviving joint contracting party may sue.[75] Though a creditor's right to sue fraudulently preferred creditors may have abated, he may proceed with the action against other fraudulent attaching creditors.[76]

§ 4. *Revival and continuance.*—Revivor by motion under the New York Code is a substitute for revivor by bill and adopts the rule as to laches and limitations by analogy. Mere lapse of time alone is not enough. It is allowable at discretion, after the period of limitation, where the cause stands on an interlocutory judgment.[77] Reasonable time will be given if there has been no

59. Jenks v. Hoag, 179 Mass. 583.

60. Code Civ. Proc., § 455; **Cleland v. Anderson (Neb.) 92 N. W. 806.**

61. Code Va. 1887, § 2655; **Patton v. Brady,** 184 U. S. 608, 46 Law. Ed. 713.

62. Squiers v. Thompson, 73 App. Div. (N. Y.) 552.

63. Seventeenth Ward Bank v. Smith, 67 App. Div. (N. Y.) 228.

64. Where "trespasser" has died—Code, 1917; Wagner v. Gibbs (Miss.) 31 So. 434. In Texas, where personal injuries survive, the recovery may include mental anguish and pain suffered by deceased to the time of death—Gulf, C. & S. F. R. Co. v. Moore (Tex. Civ. App.) 68 S. W. 559.

65. Sander's Adm'x v. L. & N. R. Co., 111 Fed. 408.

66. Thomas' Adm'r v. Maryville Gas Co., 23 Ky. Law R. 1879.

67. Haggerty v. Pittston, 17 Pa. Super. Ct. 151.

68. But in New York former directors may be sued after dissolution—Shayne v. Evening Post Pub. Co., 168 N. Y. 70. In Kentucky the law has been repealed allowing corporations to be sued after dissolution for the purpose of winding up their affairs. Acts Ky. 1891-93, c. 203, effected the repeal by re-enacting the previous laws, omitting however that provision—Board of Councilmen v. Deposit Bank, 120 Fed. 165.

69. Ky. St., § 561; Board of Councilmen v. Deposit Bank, 120 Fed. 165.

70. Ky. St., § 1987; Board of Councilmen v. Deposit Bank, 120 Fed. 165.

71. Board of Councilmen v. Deposit Bank, 120 Fed. 165.

72. "Actio personalis moritur cum persona" means natural death—Shayne v. Evening Post Pub. Co., 168 N. Y. 70.

73. O'Shea v. Kavanaugh (Neb.) 91 N. W. 578.

74. Hannah v. People, 198 Ill. 77.

75. Northness v. Hillestad (Minn.) 91 N. W. 1112.

76. Civ. Code, § 500, subd. 2; Chestnut v. Russell, 24 Ky. Law R. 704.

77. Code Civ. Proc. § 757. Held not improper to allow a revival after many years and numerous changes of interest and the death of all the parties, great injustice being avoided and no prejudice appearing; dictum that delay need not be ten years—Jones v. Jones, 68 App. Div. (N. Y.) 5, citing many cases; affirmed 171 N. Y. 653.

delay.[78] It may be allowed against administrators who have appeared, though the short statute would but for such appearance have run.[79] A continuance "on motion" against an administrator or transferee must be upon notice.[80]

The new party must ordinarily be brought in,[81] but in many states substitution of a pendente lite transferee is unnecessary.[82] An action to compel a guardian to account may be continued without substitution, or substitution may be made upon suggestion, since the "cause of action" is one which survives under the New York Code.[83] Succession in office is a "transfer of interest" other than death, admitting of a continuance in the name of the original party.[84]

A widow who is sole beneficiary of the will is within a provision that "heirs" may continue when there is no administration and no need for one.[85] The administrator of the only person entitled to recover for wrongful death of another may continue the action.[86] Actions on simple contract debts are not to be revived against heirs.[87] In Indiana a corporation director's statutory liability is enforceable against his administrator.[88] The administrator and heirs may, in Massachusetts, rescind a conveyance obtained by fraud.[89] The successor in office of an official party and not a personal representative must continue the action.[90] The "right of action" after appeal is the right to reverse the judgment. It survives to co-defendants under the statute.[91]

New pleadings are not always essential.[92] If one municipal organization succeeds another with no change in name, population or territory, the action proceeds without change in pleadings.[93] Executors should continue the action "as" executors.[94]

Subject or object of action revived.—If the cause of action changes pendente

78. Tilghman v. Paxson Co., 115 Fed. 906; Same v. Foundry Co., Id.

79. Phil & Read C. & I. Co. v. Butler (Mass.) 63 N. E. 949.

80. Mills, Ann. Code, § 15; Symes v. Charpiot (Colo. App.) 69 Pac. 311; Code Civ. Proc. § 756; Betts v. De Selding (Sup.) 80 N. Y. Supp. 799.

81. Symes v. People (Colo. App.) 69 Pac. 312. Under the act of amendments and jeofails, the name of another person may be substituted for that of the nominal plaintiff. —Congress Const. Co. v. Farson & Libbey Co., 199 Ill. 398.

82. May or may not be done—Parker v. Taylor (Neb.) 91 N. W. 537. In New York an ancillary receiver of a foreign corporation need not be substituted unless so ordered.—Code Civ. Proc. §§ 755, 756; Sigma Iron Co. v. Brown, 171 N. Y. 488. The transferee may be substituted—Statute 1893, § 3912; Bradford v. Brown (Okl.) 71 Pac. 655. The personal representative of an assignee may in New York continue the action though the assignee had in turn assigned to another person—Code Civ. Proc. §§ 756, 757; Betts v. De Selding (Sup.) 80 N. Y. Supp. 799. See Parties, Pleading; as to mode of substituting parties.

83. Code Civ. Proc. § 755; abatement by ward's majority—Smith v. Mingey, 72 App. Div. (N. Y.) 103, affirmed, 172 N. Y. 650.

84. Action by tax collector—Code Civ. Proc., § 385; Sheehan v. Osborne (Cal.) 69 Pac. 842.

85. 1 Rev. St., art. 1246; Yarbrough v. De Martin (Tex. Civ. App.) 67 S. W. 177.

86. Haggerty v. Pittston, 17 Pa. Super. Ct. 151.

87. Buck v. Hogeboom (Neb.) 88 N. W. 857.

88. "All causes * * * not otherwise exempt survive"; see statute—Brown v. Clow (Ind.) 62 N. E. 1006.

89. Parker v. Simpson, 180 Mass. 334. Since the right to continue an action depends on the devolution of the interest, the following titles will afford further precedents—Descent and Distribution; Estates of Decedents.

90. Hurd's St. 1897, p. 103, § 19; McDonald v. Algeo, 96 Ill. App. 79.

91. Jameson v. Bartlett (Neb.) 88 N. W. 860.

An order continuing action in the survivor's name on the original pleadings, he having succeeded to the whole interest continues the entire cause of action—McPhillips v. Fitzgerald, 76 App. Div. (N. Y.) 15. The assignee of the beneficiary interests under a policy may be substituted for the insured who died after bringing action to reform the policy as to premiums payable and to recover the surrendered value and damages for breach of contract. He succeeds to the entire claim. (Code Civ. Proc. § 756, 757)—Hunt v. Provident Sav. Life Assur. Soc., 77 App. Div. (N. Y.) 338.

92. Warren v. Robison (Utah) 70 Pac. 989. In Washington, under the statutes, a pendente lite assignee who comes in on motion must file a supplemental pleading, but it may be done afterwards—Powell v. Nolan, 27 Wash. 318, 67 Pac. 712.

93. Mobile Transp. Co. v. City of Mobile, 128 Ala. 335.

94. Suing as "A., executor," etc., not sufficient—Jenkins v. Bramlett, 131 Ala. 597.

lite, but before the death, the revival will be on the substituted new cause of action.[95]

ABDUCTION.[96]

In Tennessee it is no defense that the girl requested an elopement.[97]

The indictment need not allege the chastity of the woman when her unchastity is mere matter of defense.[98] An allegation of a taking for "prostitution and concubinage" is not double but merely charges two intents to the same offense which is proper.[99] For the purpose of proving age the inscription over the grave of one born at the same time as the abducted female may be received.[1] The prosecutrix should be corroborated.[2] Her testimony that she was taken to a certain place is not sufficiently corroborated by the fact that she was seen there with accused and others,[3] but the testimony of another woman alleged to have also been abducted at the same time is admissible for corroboration.[4] An instruction is erroneous which submits only a taking for concubinage under an indictment for taking for concubinage, prostitution or marriage. The same is true of one which requires an acquittal if the taking was simply for the purpose of "intercourse alone" since that excludes a taking for marriage.[5] Unchastity being a defense is not for the state to disprove, but for accused to prove and it is sufficient that his evidence raises a reasonable doubt.[6]

ABORTION.[7]

Unlawfully procuring a miscarriage consists in unlawfully destroying the human foetus or in causing it to be born before its time.[8] It is not essential to a conviction that a miscarriage resulted from the use of the instrument where the statute defines as a crime the use of it with intent to produce a miscarriage,[9] nor any defense that the woman consented.[10] Administering does not involve any element of compulsion.[11] The specific intent to produce an abortion must exist.[12] An affidavit on which an information is based may contain separate counts charging

95. Defendant died after giving statutory bond to release property from mechanic's lien. Action is revivable against bond and not land and heirs.—Holmes v. Humphreys (Mass.) 63 N. E. 396.

96. See, also, general matters of law and practice in Criminal Law; Criminal Procedure; Indictments and Informations; Clark and Marshall Crimes.

97. Shannon's Code, § 6462; Griffin v. State (Tenn.) 70 S. W. 61.

98. Shannon's Code, § 6462; Griffin v. State (Tenn.) 70 S. W. 61.

99. Shannon's Code, §§ 6462, 7084, 7086; Griffin v. State (Tenn.) 70 S. W. 61.

1. Boyett v. State, 130 Ala. 77; general appearance of girl and statements of accused, received in rape case—People v. Elco (Mich.) 91 N. W. 755; declarations of the woman inadmissible where she was not asked while testifying if she made them—State v. Deputy, 3 Pennewill (Del.) 19.

2. Evidence of physician that the girl had had sexual intercourse but not fixing a time and evidence of a witness who saw prosecutrix and another girl with a man not identified as accused held not corroborative of the prosecutrix—People v. Swasey, 77 App. Div. (N. Y.) 185. Corroboration of female victim of other sexual crimes see Rape, Seduction, and corroboration of accomplices, see Criminal Procedure.

3. Charge was "taking to house of prostitution"—People v. Miller, 70 App. Div. (N. Y.) 592.

4. Pen. Code, § 283; People v. Panyko, 71 App. Div. (N. Y.) 324, affirmed, 64 N. E. 1124.

5. Request by defendant, refused—Boyett v. State, 130 Ala. 77; request refused because already covered—Griffin v. State (Tenn.) 70 S. W. 61.

6. Griffin v. State (Tenn.) 70 S. W. 61.

7. See, also, general matters of law and practice in Criminal Law; Criminal Procedure; Indictments, etc., and see Clark and Marshall Crimes.

8. 17 Del. Laws, c. 226; State v. Magnell (Del. Gen. Sess.) 3 Pennewill, 307, 51 Atl. 606.

9. 17 Del. Laws, c. 226; State v. Magnell (Del. Gen. Sess.) 3 Pennewill, 307, 51 Atl. 606.

10. State v. Magnell (Del. Gen. Sess.) 3 Pennewill, 307, 51 Atl. 606.

11. State v. Jones (Del. Gen. Sess.) 53 Atl. 853.

12. Rev. Code, p. 930; § 2; State v. Jones (Del. Gen. Sess.) 53 Atl. 853.

different methods of producing the abortion.[13] An allegation of the specific intent sufficiently negatives the administering of medicine for any lawful purposes of saving life.[14] Proof of a time prior to that charged is no variance.[15] Motive may be shown by the fact that accused was the father and it is admissible that he proposed to others that they have intercourse with the woman.[16] Intent may be proved by admissions, acts of concealment or other circumstances,[17] or inferred from the entire transaction.[18] The woman may testify whether in her opinion accused intended to produce an abortion or as he claimed to treat for a venereal disease.[19] Reputation for morality and decency may be shown consisting in what is generally said about the accused respecting such traits.[20] An attempt must be proved by showing the use of means adequate to produce the effect and not merely by showing a prescription of it.[21] An instruction may follow the statute.[22]

ABSTRACTS OF TITLE.[23]

These are historical briefs or synopses of the written evidences of title to land or of the records of such titles.[24] The obligation to provide one is usually upon the purchaser, though it is very frequently a matter of the contract.[25] Public abstracts in Mississippi must be kept up, and the clerk may recover the stated abstracting fee from the owner of each subdivision of land.[26] An abstracter is liable for errors caused by failure to exercise ordinary care even though the purchaser procured the abstract through an undisclosed agency.[27]

ACCESSION AND CONFUSION OF PROPERTY.

The former of these terms signifies the incorporation of property with or its fixed annexation to other property so that the ownership of that added is acquired by the owner of that to which it is added. Confusion differs in being an intermixture of chattels of the same species into an inseparable mass to the loss of that owner who, without the other's consent, so intermixes.[28] A form of accession results from giving the character of fixtures to any structure attached to land.[29] The innocent maker of improvements may ordinarily be reimbursed.[30] Improvements made by mistake merely are not recoverable in Rhode Island.[31] A creditor may sometimes enforce his rights against improvements made by the debtor on another's land.[32] Equity may afford relief in addition to statutory remedies to

13. Burns' Rev. St. 1901, § 1813; on information—Diehl v. State, 157 Ind. 549.
14. State v. Jones (Del. Gen. Sess.) 53 Atl. 858.
15. State v. Magnell (Del. Gen. Sess.) 3 Pennewill, 307, 51 Atl. 606.
16. Fretwell v. State (Tex. Cr. App.) 67 S. W. 1021.
17. State v. Magnell (Del. Gen. Sess.) 3 Pennewill, 307, 51 Atl. 606.
18. State v. Jones (Del. Gen. Sess.) 53 Atl. 858.
19. State v. Pierce, 85 Minn. 101.
20. State v. Jones (Del. Gen. Sess.) 53 Atl. 858.
21. Ergot was prescribed but too small a dose was taken—Fretwell v. State (Tex. Cr. App.) 67 S. W. 1021; sufficiency of evidence and particulars of proof—State v. Magnell (Del. Gen. Sess.) 3 Pennewill, 307, 51 Atl. 606.
22. Fretwell v. State (Tex. Cr. App.) 67 S. W. 1021.
23. Abstracts of title auxiliary to pleadings in trespass to try title, see Trespass to Try Title.
24. Cyc. Law Dict., "Abstracts."
25. 1 Am. & Eng. Enc. Law, 213.
26. Code, 1892, § 301; L. 1898, p. 59, § 1991w; Yazoo & M. V. R. Co. v. Edwards, 78 Miss. 950.
27. Purchaser's omission to pay undisclosed judgment though in funds and intending to clear all incumbrances sufficient to prove reliance on abstract—Young v. Lohr (Iowa) 92 N. W. 684.
28. Cyc. Law Dict., "Accession"; "Confusion."
29. See Fixtures.
30. Occupying grantee given reimbursement against grantee who first recorded—Penrose v. Doherty, 70 Ark. 256. Contra if he had no title and did have notice—Texas & N. O. R. Co. v. Barber (Tex. Civ. App.) 71 S. W. 393; Willis v. McKinnon, 37 Misc. (N. Y.) 386.
31. Made by dowress on lands not of inheritance—Olney v. Weaver, 24 R. I. 408.
32. National Valley Bank v. Hancock, 4 Va. Sup. Ct. R. 20, 40 S. E. 611.

improving occupants.[33] Attempted conveyances to the grantees may tend to prove their good faith in improving.[34]

There is no confusion by a debtor who mingles surrendered collaterals with his other property, though he also fails to substitute other property of the same species for collateral as agreed.[35] The owner of innocently confused goods may recover his share in specie out of the common mass, without showing that there was any intention to thwart identification.[36] As against an innocent purchaser from the wrongdoing owner, the real owner may select the equivalent of his own.[37] A levying creditor may have satisfaction out of the entire stock of one with whose merchandise the debtor's was commingled in fraud of the creditor.[38] Priority is given the beneficiary of trust property which has been commingled if the mass has been benefited in consequence.[39]

A separation need not be demanded before suing, where the confusion makes it impossible.[40] A sheriff must not be directed to levy on a certain number of chattels as they average, for the purpose of effecting a division. That would be a judicial act. A partition must be resorted to.[41]

ACCORD AND SATISFACTION.[42]

§ 1. *The accord. A. In general.*—An accord is the making of a new agreement in substitution for the old liability or right.[43] Rights under a will may be

33. Mercer v. Justice, 63 Kan. 225, 65 Pac. 219.

34. Invalid because husband did not join—Nolan v. Moore (Tex. Civ. App.) 70 S. W. 785.

35. Samson v. Rouse, 72 Vt. 422.

36. In replevin—Rust Land & Lumber Co. v. Isom, 70 Ark. 99.

37. Blodgett v. Seals, 78 Miss. 522.

38. Eldridge v. Fidelity & Deposit Co. (Tex. Civ. App.) 63 S. W. 955.

39. Kansas State Bank v. First State Bank, 62 Kan. 788, 64 Pac. 634; Meystedt v. Grace, 86 Mo. App. 178; Pearson v. Haydel, 90 Mo. App. 253.

40. Vaughn v. Rhode Island M. & T. Co., 24 R. I. 350.

41. Two herds mortgaged to different persons and then allowed to mingle—Belcher v. Cassidy Bros. Live Stock Commission Co., (Tex. Civ. App.) 62 S. W. 924.

42. "Payment" as a discharge of obligations expressed in money, see Payment and Tender; seaman's release, see Shipping and Water Traffic.

43. Cyc. Law Dict. "Accord." If the original liability was ex contractu, the result is a Novation, q. v., as to the requisites of a novation. **A release** may be and usually is only a writing declaring the terms of an accord and satisfaction. See Releases. **Compositions with Creditors** also usually involve accords and satisfactions but with the peculiarity that an obligation between the creditors also results. Accepting orders for goods on account of wages not yet due—Martin-Alexander Lumber Co. v. Johnson, 70 Ark. 215. An accord is shown by an agreement by a debtor to pay interest to the creditor and a release of the debt excepting only such interest to be paid—Price's Adm'x v. Price's Adm'x, 23 Ky. Law R. 1911, 1947. Taking from one who had converted money a note executed by the person to whom it had been loaned is not a discharge of liability for the conversion—Black v. Black (Tex. Civ. App.) 67 S. W. 928. One who pledges borrowed property and borrows money of the owner to redeem continues his liability in an other debt—Dibble v. Richardson, 171 N. Y. 131.

Interpretation.—Agreement between heirs of the mortgagor claiming as remaindermen and the mortgagee, to pro rate the moneys derived from mortgage sale according to a scale indicated—Ex parte Felder, 61 S. C. 523; Felder v. Vose, Id; releasing a certificate held not an intended release of one already issued in lieu of the original—Western Loan & Sav. Co. v. Desky, 24 Utah, 347, 68 Pac. 141. A settlement between original owners who had deeded land and taken a reconveyance of it as security, and the grantees (and debtors) held to release all claims by the original owner—Adams v. Hopkins (Cal.) 69 Pac. 228. A contract held not to have included satisfaction for a libel committed on the same day merely because the contract was a general settlement of "all controversies"—Wallace v. Homestead Co. (Iowa) 90 N. W. 835. A compromise of judgments in consideration of compromises by other creditors and one with the same creditor in consideration of the first recited held to be one contract—Dyer v. Muhlenberg County (C. C. A.) 117 Fed. 586. Discharge from "any and all liability on judgments" for sum specified includes liability for costs and interest—Dyer v. Muhlenberg County (C. C. A.) 117 Fed. 586. "Relinquish and cancel all book accounts, contracts and demands existing" includes all mutual accounts—Kentucky River Lumber Co. v. Moore-Whipple Lumber Co., 24 Ky. Law R. 587. A release on consideration of building a wall to protect a foundation does not discharge further damage due to faulty design of the protecting wall—Paterson Extension R. Co., v. Rector, etc., of Church of Holy Communion (N. J. Err. & App.) 53 Atl. 449; family settlement construed to include a guaranty that a share should equal a certain sum—Chauvet v.

the subject of a settlement.[44] It must be understood and assented to, that a part payment is accepted in full[45] and a protest against correctness with notice of a claim will be overcome by such an acceptance.[46] If a cash payment be made with a promise for further payment, it is inferred that the offer is accepted.[47] Accepting a check from an agent known to have authority to effect only full settlement shows an accord and satisfaction.[48]

An agent may effect a compromise.[49] An attorney has presumed authority to compromise a suit,[50] but acts by an agent in substituting his own liability for a debtor's must be brought home to his principal.[51]

Trustees in bankruptcy[52] and executors and guardians under many statutes may effect compromises if for the good of the estate.[53] If the executor as an heir joins with the other heirs it is valid.[54] A satisfaction accepted by the sole heir and next of kin is made good in its origin by the subsequent appointment of such person as administrator.[55]

An agreement to discontinue a pending action without further costs is broken by the entry by plaintiff's attorney of a judgment to protect his lien thereby imposing more costs.[56]

B. The consideration may move from a third person,[57] as where he indorses notes for lesser amount which are accepted in full,[58] or it may move to a third

Ives, 62 App. Div. (N. Y.) 339; affirmed, 173 N. Y. 192.

44. Chauvet v. Ives, 62 App. Div. (N. Y.) 339; affirmed, 173 N. Y. 192. See, also, Estates of decedents.

45. Hence an endorsement by county officers on a statement of claim that the amount allowed was in full did not bind the claimant who cashed warrants for the amount but had been accustomed on previous claims to have disallowed items subsequently allowed—Board of Com'rs v. Durnell (Colo. App.) 66 Pac. 1073. Not shown where debtor failed to stipulate that a draft for part was to be in full and creditor drew without saying that it was—Horwich v. Western Brewery Co., 95 Ill. App. 162; especially not if creditor refuses tender as in full—Perin v. Cathcart (Iowa) 89 N. W. 12.

Acceptance of checks tendered in full is sufficient—Critchell v. Loftis, 100 Ill. App. 196; though they were not marked "in full"—Whitaker v. Eilenberg, 70 App. Div. (N. Y.) 489, in which case the parties effected a sale of a crop of grapes at a fixed price after part performance of which deductions for bad quality were made from remittances and finally the buyer refused to accept save on consignment; but such condition must be understood—Fremont Foundry & Mach. Co. v. Norton (Neb.) 92 N. W. 1058. A check tendered by an attorney in full "satisfaction" of moneys collected for a client who disputed the charge for services—Greenlee v. Masnot (Iowa) 90 N. W. 338.

46. McCormick v. St. Louis, 166 Mo. 315.

47. Evidence held sufficient where cash was paid on a disputed note and a promise made to pay a further sum at a future time—Worden v. Houston, 92 Mo. App. 371.

48. Agent of a municipality in dispute with contractor—Genung v. Waverly, 75 App. Div. (N. Y.) 610.

49. Williamson v. North Pac. Lumber Co. (Or.) 70 Pac. 387. Mere possessor of note cannot—Corbet v. Waller, 27 Wash. 242, 67 Pac. 567. In procuring transfer of debtor's property he may release guarantor—Martin v. Rolan Grocery Co. (Tex. Civ. App.) 66 S. W. 212.

50. Strattner v. Wilmington City Elec. Co. (Del. Super.) 53 Atl. 436. Railroad general attorney cannot agree to employ an adverse litigant—Nephew v. Michigan Cent. R. Co., 128 Mich. 599.

51. Sending a receipt to the creditor's manager for his individual debt and a check for the balance "in full" which the manager for his individual debt and a the creditor principal against whom no right of set-off of their manager's debt had ever been claimed—Mull v. Ingalls, 30 Misc. (N. Y.) 80.

52. Agreement to take half held proper—Simmons v. Richards (Tex. Civ. App.) 66 S. W. 687.

53. Code Civ. Proc., § 1588; Brosnan v. Kramer, 135 Cal, 36, 66 Pac. 979; in Kentucky a guardian must first procure approval of court, (Gen. St., c. 80, art. 2); Bunnell v. Bunnell, 23 Ky. Law R. 800. The same is required of an executor in New York; it is not sufficient that the agreement be made and presented to the court for enforcement; Laws 1893, c. 100; In re Bronson's Estate, 69 App. Div. (N. Y.) 487.

54. Merkert's Estate v. Grobe (Iowa) 90 N. W. 490.

55. Liability for death of intestate—Doyle v. New York, O. & W. Ry. Co., 66 App. Div. (N. Y.) 398.

56. Rosenthal v. Rudnick, 76 App. Div. (N. Y.) 624.

57. W. F. Taylor Co. v. Baines Grocery Co. (Tex. Civ. App.) 72 S. W. 260. Payment of an agreed sum of money to satisfy a levy against another—Marshall v. Bullard, 114 Iowa, 462; 54 L. R. A. 862. Accord and satisfaction and release to a newspaper proprietor upon his retracting bars action against his informant—Rogers v. Cox (N. J.) 50 Atl. 143.

58. Alimony decree—Fred v. Fred (N. J. Ch.) 50 Atl. 776.

person but must not be in fraud of creditors.[59] The right of other creditors to an equitable enforcement of a scheme to compromise the entire indebtedness of a county is sufficient to make it binding,[60] or it may suffice if a three party agreement has been partially performed by the other parties.[61] An agreement to employ for an indefinite time is no consideration, but employment given under it and accepted may be.[62] Surrendered rights must be real and substantial to afford a consideration.[63] Discontinuance without further costs is sufficient.[64] It makes no difference that the payor gave only what he claimed to be due.[65] If it be a settlement of title the dispute must be such as that good lawyers might easily differ.[66] The contrary was held where a claim of right was disputed on a point in reality free from doubt.[67] A belief that a policy is voidable for misrepresentation by the insured notwithstanding an "incontestable clause" suffices to raise a doubt.[68] Threatened litigation must be such as the opposing party might maintain.[69] A surrender of levied property is consideration for dismissal of a countersuit only when the levy is lawful.[70]

A part payment received in full is not sufficient since it lacks a consideration; unless the amount be unliquidated or in dispute[71] as where a judgment is appealable[72] but the payment may have been accepted only to avert financial disaster.[73] Applying on the original note proceeds of a check tendered for a part renewal creates no accord because the liability was liquidated.[74] A contract may be unliquidated though written.[75] Inclusion of one unliquidated item with liquidated ones suffices.[76]

C. Fraud, mistake and duress.[77]—An executed settlement can only be impeached for proven fraud, mistake or duress.[78] Mistake,[79] misrepresentation or fraud[80]

59. Conveyance to daughter of contestant of will invalid, though devisee aside from the fraud might have so conveyed—Smith v. Patton, 194 Ill. 638.

60. Compromise with bondholders—Dyer v. Muhlenberg County (C. C. A.) 117 Fed. 586.

61. Settlement of disputed claims between members of a corporation—Adams v. Crown Coal & Tow Co., 198 Ill. 445.

62. Carroll v. M. K. & T. R. Co. (Tex. Civ. App.) 69 S. W. 1004.

63. Waiver of right to go into bankruptcy —Herman v. Schlesinger, 114 Wis. 382; Forbearance to appeal sufficient—In re Freeman, 117 Fed. 680; waiver of right to enforce a bond of indemnity, sufficient to support surrender of bond and substitution of new one—German-American Bank v. Schwinger, 75 App. Div. (N. Y.) 393; payment of a sum due and liquidated not sufficient—Harrison v. Murray Iron Works Co. (Mo. App.) 70 S. W. 261. A "settlement" with a building and loan association is without consideration where as a matter of fact it is based on a release of rights under a certificate already cancelled by the issue of one in its stead and in consideration of such release a credit on the loan which at the time had been fully repaid—Western Loan and Sav. Co. v. Desky, 24 Utah, 347, 68 Pac. 141.

64. Rosenthal v. Rudnick, 76 App. Div. (N. Y.) 624.

65. McCormick v. St. Louis, 166 Mo. 315.

66. Family settlement—Bunnell v. Bunnell, 23 Ky. Law R. 800.

67. City Elec. R. Co. v. Floyd County (Ga.) 42 S. E. 45.

68. Franklin Life Ins. Co. v. Villeneuve (Tex. Civ. App.) 68 S. W. 203.

69. Contest of will by one who was a devisee and also had a contract for conveyance —Jennings v. Jennings (Iowa) 87 N. W. 726.

70. Hawkins v. Collins, 61 S. C. 537.

71. Abelson v. Gordon, 36 Misc. (N. Y.) 812; Prairie Grove Cheese Mfg. Co. v. Luder (Wis.) 90 N. W. 1085; giving receipt in full not effective—Bingham v. Browning, 97 Ill. App. 442; Ness v. Minnesota & Colorado Co. (Minn.) 92 N. W. 333; Evers v. Ostheimer, 37 Misc. (N. Y.) 163. Disputed amount agreed on with agent—Cleveland v. Toby, 36 Misc. (N. Y.) 319; unliquidated loss under fire policy—Riggs v. Home Mut. Fire Ass'n, 61 S. C. 448; but not a liquidated benefit under a life policy—Goodson v. National Masonic Acc. Ass'n, 91 Mo. App. 339; dispute as to whether withdrawals by retiring partners should be charged—Bingham v. Browning, 197 Ill. 122; dispute as to amount due—C. R. I. & P. R. Co. v. Buckstaff (Neb.) 91 N. W. 426; estoppel to deny dispute or lack of indebtedness after other parties had partially performed—Adams v. Crown Coal & Tow Co., 198 Ill. 445.

72. Williams v. Blumenthal, 27 Wash. 24, 67 Pac. 393; In re Freeman, 117 Fed. 680.

73. McCormick v. St. Louis, 166 Mo. 315.

74. Kelly v. Lawrence Bros., 78 App. Div. (N. Y.) 484.

75. Bingham v. Browning, 197 Ill. 122.

76. Settlement embraced an open account and a note and judgment—Little v. Koerner, 28 Ind. App. 625.

77. Evidence, see post, § 3.

78. Tansey v. Kansas City, P. & G. R. Co., 90 Mo. App. 101.

79. Mutual assumption prompted by defendant's honest prediction that injuries were not permanent—Wilcox v. Chicago & N. W. R. Co., 111 Fed. 435.

80. Imposing release on ignorant foreign-

but not mere opinion as to extent or permanency of injury may invalidate a release of liability for injuries,[81] It is not improper to rely on the opposite party's reading of the contents of the release.[82] A settlement is valid though one party was attorney and adviser of the other who acted in this without advice of counsel.[83] Medical prognosis is mere opinion and not fraud.[84] A note procured on settlement of a fraudulent transaction does not extinguish the original liability where a part of the fraudulent scheme was to procure the note.[85] Mere inadequacy of compensation to one who without being imposed on signed a release of injuries will not defeat it in equity.[86] A co-obligor cannot avail of a settlement procured by fraud of the other.[87] A belief that evidences of right were irrevocably lost, in consequence of which one compromised is not mistake.[88]

Rescission is not necessary to suit on a collateral liability which was not included in the settlement[89] but when necessary it must be seasonably made.[90] In order to rescind an accord and satisfaction for fraud what has been paid must be returned[91] though a part payment on a liquidated sum not disputable need not be[92] and money need not be returned before suing on a fraudulently released claim.[93]

§ 2. *Satisfaction or discharge.*[94]—Generally speaking the accord must be executed before a satisfaction is had[95] but an agreement to compromise on mutual performances is enforceable on showing readiness to perform.[96] It is not necessary that everything be fully executed.[97] It is a good defense to action on a judgment.[98]

ers—Schus v. Powers-Simpson Co., 85 Minn. 447; release represented to be hospital discharge—International & G. N. R. Co. v. Harris (Tex. Civ. App.) 65 S. W. 885; Id., (Tex. Sup.) 67 S. W. 316. To be available at law they must go to the procuring the execution of the release; if to the value of consideration can be remedied only in equity —Papke v. G. H. Hammond Co., 192 Ill. 631; release by legatee who was deceived as to validity of will—Lutjen v. Lutjen (N. J. Ch.) 51 Atl. 790. False statement made in good faith that an arm is healed "as good as ever" if relied on will invalidate—Houston & T. C. R. Co. v. Brown (Tex. Civ. App.) 69 S. W. 651. Omission to stipulate for a promise made as part of consideration when caused by appeals based on relation of parties (father to son) one of whom acted without counsel, held fraud—Hearn v. Hearn, 24 R. I. 328. Misrepresentation is fraud especially if the releaser is illiterate and without good advisers—Indiana, D. & W. R. Co. v. Fowler, 103 Ill. App. 565; affirmed, 66 N. E. 394.

81. Atchison, T. & S. F. Ry. Co. v. Bennett, 63 Kan. 781, 66 Pac. 1018.

82. It was fraudulently misread as including only a receipt and settlement of expenses—New Omaha Thomson-Houston Elec. Light Co. v. Rombold (Neb.) 93 N. W. 966.

83. Kidd v. Williams (Ala.) 31 So. 458.

84. As to duration permanency and consequences of broken hip—Chicago & N. W. R. Co. v. Wilcox (Iowa C. C. A.) 116 Fed. 913.

85. Kirby v. Berguin, 15 S. D. 444; see, also, duress in exacting a payment as infecting a contemporaneous settlement—First Nat. Bank v. Sargent (Neb.) 91 N. W. 595.

86. Chicago & A. R. Co. v. Green, 114 Fed. 676. $125 for wrongful death of miner in good health held so grossly inadequate as to show fraud—Russell v. Dayton Coal & Iron Co. (Tenn.) 70 S. W. 1.

87. Wolsey v. Price, 98 Ill. App. 503.

88. Connor v. Etheridge (Neb.) 92 N. W. 135.

89. Conversion was concealed by party to a settlement and the property was merely mentioned but the liability was not included in the settlement—Ballard v. Beveridge, 171 N. Y. 194.

90. Three years too long delay—Bogue v. Franks, 100 Ill. App. 434.

91. Riggs v. Home Mut. Fire Ass'n. 61 S. C. 448; or tendered—Doyle v. N. Y., O. & W. R. Co., 66 App. Div. (N. Y.) 398; Hill v. Northern Pac. R. Co. (C. C. A.) 113 Fed. 914; Niederhauser v. Detroit, etc., St. R. Co. (Mich.) 91 N. W. 1028; Hearn v. Hearn, 24 R. I. 328.

92. Life policy—Goodson v. National Masonic Acc. Ass'n, 91 Mo. App. 339.

93. Indiana, D. & W. R. Co. v. Fowler, 103 Ill. App. 565; affirmed, 66 N. E. 394.

94. Interpretation of words defining rights discharged, see ante, § 1-A.

95. Executory store-orders for wages past due—Martin-Alexander Lumber Co. v. Johnson, 70 Ark. 215; oral agreement to refund first payment on land contract of sale where title was objected to—Arnett v. Smith (N. D.) 88 N. W. 1037. Adjustment of a fire loss is an accord but not a satisfaction—Vining v. Franklin Fire Ins. Co., 89 Mo. App. 311. Thus an agreement by an insurer to pay a ratable share of loss for repairing a building must be coupled with an agreement to accept—Gerhart Realty Co. v. Northern Assur. Co., 94 Mo. App. 356. Agreement to give notes and mortgage for a smaller sum than those in dispute was never fulfilled by giving the new obligations—Slover v. Rock (Mo. App.) 70 S. W. 268.

96. Massillon Engine & Thresher Co. v. Prouty (Neb.) 91 N. W. 384.

97. Settlement comprising the taking over of a debtor corporation's assets was held

A payment in consideration of discontinuing does not necessarily extinguish the cause of action.[99]

The original liability is extinguished by a satisfaction[1] so far that an attorney's lien against it can be enforced only upon leave to prosecute notwithstanding[2]; and cannot be investigated save for fraud or mistake[3] or any item disputed,[4] but the liability of a covenantor for title, to a tenant in common with the releasing tenant may be saved by the terms of the agreement[5] and discharge of codebtors under a judgment compromised as to one of their number may be in like manner avoided.[6] Unless so agreed a satisfaction will not discharge a third person's independent liability growing out of the same transaction.[7] A release operates as fully as judgment.[8] Items of which the parties were ignorant are not included in a satisfaction.[9]

A party who violates it cannot take any advantage of a compromise.[10] If two compromises be of the same contract, acceptance of delayed performance in payment of one waives a delay in payment of the other.[11] A written release of injuries supersedes an oral satisfaction previously made.[12]

§ 3. *Pleading, issues, proofs, evidence.*—It must be specially pleaded.[13] If performance rather than the agreement to perform was to constitute the satisfaction, it must be pleaded.[14] A tender back of release money need not be pleaded when it can be set off from the recovery.[15] In Kentucky it was held against dissenting opinions that a tender back need not be pleaded where there were allegations of gross fraud in obtaining a release.[16] Since release is matter for defense, allegations assailing it for fraud in the complaint are surplusage.[17]

The jury should say whether wages were due[18] or whether acts and declarations of agents in presence of parties showed an acceptance of a tender[19] or whether a consideration was of value.[20]

Defendant pleading an accord and satisfaction must prove every element of it[21] and mistake must be proved to surcharge a settlement.[22] Inadequacy of con-

binding though not all of its accounts receivable had been collected—W. F. Taylor Co. v. Baines Grocery Co. (Tex. Civ. App.) 72 S. W. 260.

98. Though it be not a specialty—In re Freeman (N. Y.) 117 Fed. 680.

99. Terrill v. Deavitt, 73 Vt. 188.

1. Holmes v. Leadbetter (Mo. App.) 69 S. W. 23.

2. Code Civ. Proc. § 66; Doyle v. New York, O. & W. R. Co., 66 App. Div. (N. Y.) 398.

3. Baldwin v. Central Sav. Bank (Colo. App.) 67 Pac. 179.

4. Connor v. Etheridge (Neb.) 92 N. W. 135.

5. McCune v. Scott, 18 Pa. Super. Ct. 263.

6. Hadley v. Bryan, 70 Ark. 197.

7. He had tortiously induced plaintiff to accept a mortgage misrepresenting the condition of a house plaintiff had taken a conveyance in satisfaction of the mortgage—Lee v. Tarplin (Mass.) 66 N. E. 431.

8. C. & N. W. R. Co. v. Wilcox (C. C. A.) 116 Fed. 913.

9. Bloomington Min. Co. v. Brooklyn Hygienic Ice Co., 58 App. Div. (N. Y.) 66.

10. Armistead v. Shreveport & R. R. Val. R. Co., 108 La. 171; McKechney v. Weir (C. C. A.) 118 Fed. 805.

11. Compromises of county bonds—Dyer v. Muhlenberg County (Ky. C. C. A.) 117 Fed. 586. It was held immaterial that acceptance was in part the act of another if he was party to the contract.

12. Boggs v. Pacific Steam Laundry Co. (Mo. Sup.) 70 S. W. 818.

13. Covell v. Carpenter (R. I.) 51 Atl. 425. In "case", release after issue joined need not be pleaded puis darrein continuance, but may be proved under the general issue—Papke v. G. H. Hammond Co., 192 Ill. 631.

14. Perdew v. Tillma, 62 Neb. 865. Allegation that "if * * * any * * * release, it was obtained by fraudulent representations" is certain and definite enough to plead fraud—International & G. N. R. Co. v. Harris (Tex. Civ. App.) 65 S. W. 885; Id. (Tex. Sup.) 67 S. W. 315.

15. As in personal injury cases—Hedlun v. Holy Terror Min. Co. (S. D.) 92 N. W. 31.

16. McGill v. L. & N. R. Co., 24 Ky. Law R. 1244; and see L. & N. R. Co. v. McElroy, 100 Ky. 153.

17. Hedlun v. Holy Terror Min. Co. (S. D.) 92 N. W. 31.

18. Martin-Alexander Lumber Co. v. Johnson, 70 Ark. 215.

19. Perin v. Cathcart, 115 Iowa, 553.

20. Hawkins v. Collins, 61 S. C. 537.

21. Board v. Durnell (Colo. App.) 66 Pac. 1073.

22. Bailey v. Wood, 24 Ky. Law R. 801.

sideration while not sufficient is admissible.[23] A preponderance will prove fraud, but it must be clear.[24]

ACCOUNTING, ACTIONS FOR.

The action of account, whether in states without similar chancery relief or of enlarged scope in states giving chancery relief, will be treated together with the chancery suit for accounting. Agreements between parties to account fixing amount due and providing for payment, and book debts or other open or mutual accounts, as well as actions thereon will be found elsewhere.[25]

§ 1. *Nature of remedy and jurisdiction of courts.*—For an account of one item the remedy is at law,[26] but numerous and disputed items,[27] or complicated accounts and necessity for discovery,[28] require an accounting in equity. Where five years have elapsed since a mutual settlement,[29] or where both parties have been equally negligent in keeping accounts and have postponed proof until adequate evidence is impossible,[30] an accounting in equity will not be granted. No accountable relation subsists between the real owner of money and a broker who received it from a third person[31] or between one who was on certain future conditions to receive a commission and the person who was to pay it,[32] but an accounting may be given in equity to one who has a joint interest by reason of furnishing money for business with another in trust relations, though the arrangement is not a partnership.[33] A court of equity may order an accounting to enforce contribution,[34] or to determine the amount due an employe working for a percentage of the net profits of the business,[35] but not to compel an attorney to pay over money collected on a claim.[36] Accounting cannot be had in courts of inferior jurisdiction.[37]

23. Dorsett v. Clement—Ross Mfg. Co. (N. C.) 42 S. E. 612.

24. C. & N. W. R. Co. v. Wilcox (C. C. A.) 116 Fed. 913. Evidence held not to show an accord and satisfaction where a payment tendered as in full was accepted under protest that it was not a discharge—Daugherty v. Herndon (Tex. Civ. App.) 65 S. W. 891. Evidence not sufficient where a check was marked "in full" but testimony was conflicting whether it was put on before or after the check was cashed—Blodgett v. Vogel (Mich.) 90 N. W. 277. Held insufficient that check was sent without condition but with counterclaim sufficient to balance account, which counterclaim was rejected and payment of the balance immediately demanded—Fremont Foundry & Mach. Co. v. Norton (Neb.) 92 N. W. 1058.

Evidence of fraud—L. & N. R. Co. v. Carter, 23 Ky. Law R. 2017; of duress—Boydan v. Haberstumpf (Mich.) 88 N. W. 386; of mental incompetency of party—Cundell v. Hoswell (R. I.) 51 Atl. 426; L. & N. R. Co. v. Carter, supra; sufficiency of evidence of fraud in procuring release—Atchison, T. & S. F. R. Co. v. Bennett, 63 Kan. 781, 66 Pac. 1018; International & G. N. R. Co. v. Harris (Tex. Sup.) 67 S. W. 315; M., K. & T. R. Co. v. Smith (Tex. Civ. App.) 68 S. W. 543; Shook v. Illinois C. R. Co. (C. C. A.) 115 Fed. 57; Fivey v. P. R. Co., 67 N. J. Law, 627; sufficiency of pleadings and proof to show release—Kehoe v. Patton (R. I.) 50 Atl. 655. Evidence tending to show imposition on an ignorant releasor held sufficient for the jury—Dorsett v. Clement-Ross Mfg. Co. (N. C.) 42 S. E. 612; written release not overcome by testimony of contemporaneous oral agreement—Ogden v. Philadelphia & W. C. Tract. Co., 202 Pa. 480; duress in a settlement proved by the fact that it entered into a payment exacted at the same time—First Nat. Bank v. Sargent (Neb.) 91 N. W. 595; presumption that note was in full settlement not rebutted—Danes v. Slitor (Iowa) 91 N. W. 817. Claim of excessive amount settled through agents and not communicated to principal held sufficient to go to jury on issue of fraud—Williamson v. North Pac. Lumber Co. (Or.) 70 Pac. 387. Evidence held insufficient to impeach a settlement because of insanity of the injured party who did not complain for a long time—L. S. & M. S. R. Co. v. Vogelson, 23 Ohio Cir. Ct. R. 361.

25. Accounts Stated, and Open Accounts.

26. McCormick v. Page, 96 Ill. App. 447.

27. Fenno v. Primrose, 116 Fed. 49.

28. A sheriff cannot have an accounting from his deputy without showing circumstances for discovery or complicated accounts—White v. Cook, 51 W. Va. 201.

29. Nevian v. New Albany Ice Co. (Ky. App.) 68 S. W. 647.

30. Garnett v. Wills, 24 Ky. Law R. 617. Twenty years' delay after abandonment of the contract by the other party and notice thereof, and death of parties and loss of documentary evidence bars relief—Tozier v. Brown, 202 Pa. 359.

31. McKay v. Hudson, 118 Fed. 919.

32. Loan brokerage—Moore v. Hammond (Or.) 110 Fed. 897.

33. Harvey v. Sellers, 115 Fed. 757.

34. Northern Trust Co. v. Marsh, 98 Ill. App. 596.

35. Lee v. Washburn, 37 Misc. (N. Y.) 311.

36. Pfau v. Fullenwider, 102 Ill. App. 499.

37. City court of New York—Gorse v. Lynch, 36 Misc. (N. Y.) 150.

§ 2. *Persons liable and entitled to accounting.*—Accounting between persons in particular relations will be found in topics treating of those relations. The right to an accounting pertains to certain relations of a fiduciary or representative nature such as agency; trusteeships; partnerships.[38] Persons jointly interested[39] in property or profits of sale of land, as co-tenants,[40] may have an accounting. Use of a wife's name to avoid her husband's creditors will not deprive her of accounting.[41]

§ 3. *Procedure before reference or without reference.*—General questions of procedure in matters not peculiar to this remedy are treated elsewhere. A suit or action for accounting may be joined with or made incidental to other suits or actions under proper circumstances.[42] Annexation of copies of accounts to pleadings is sometimes necessary or proper.[43]

Parties.—Complainants asserting distinct rights generally cannot unite in the bill;[44] the rule applies to heirs and administrator of an estate in an accounting of personal estate or rents and profits of land.[45] Receipt of part of corporate funds, or connivance at diversion thereof, renders one a proper party to an accounting sought by a corporate creditor.[46] A son, who secured his father's debt by mortgage, is a necessary party to an accounting by the father against the creditor for excess of money received on payment.[47] That brokers have dealt with one who received funds from another for secret speculation in stock will not make them parties to a suit for accounting by the owner of the funds against the other.[48] Improper joinder of parties defendant authorizes dismissal only, not judgment for all defendants.[49]

Pleading and evidence.—A bill against two partnerships is multifarious though one defendant is a common partner.[50] The complaint must show a contract to pay, or a breach thereof, or existence of fiduciary or partnership relations,[51] and an allegation of partnership relations which may as well be construed as agency is insufficient.[52] Defendant is entitled, on demand, to a list of the items without regard to the form of action.[53] An account of profits cannot be taken where it is not shown what goods were sold.[54] A bill for accounting must allege disposal of the funds received by defendant, receipt of benefits by him from the funds, and any excess of authority he may have employed.[55] Defendant need not answer the bill fully if he denies existence of the relation on which the duty to account is based.[56] A cross-bill may be filed after the report of master.[57] The party seeking to impeach an accounting for fraud must set out the particular facts relied on.[58]

38. See Agency; Brokers; Factors; Estates of Decedents; Trusts; Partnership and the like.

39. Bradley v. Jennings, 201 Pa. 473.

40. Regan v. Regan, 192 Ill. 589. One tenant in common may require another in possession to account—Keller v. Lamb, 202 Pa. 412.

41. Bradly v. Jennings, 201 Pa. 473.

42. See Causes of Action and defenses as to joinder. Accounting as proper incidental relief see titles like Copyright; Creditor's Suits; and other titles treating of equitable remedies.

43. See Equity (Equity Practice); Pleading.

44. Fletcher Eq. Pl. & Pr., § 49; Clark v. Holbrook, 146 Mass. 366.

45. Scott v. Caloit, 3 How. (Miss.) 148.

46. Schaake v. Eagle Automatic Can Co. 135 Cal. 472, 67 Pac. 759.

47. Canon v. Ballard, 62 N. J. Eq. 383.

48. McKay v. Hudson, 118 Fed. 919.

49. Schaake v. Eagle Automatic Can Co., 135 Cal. 472, 67 Pac. 759.

50. Fletcher, Eq. Pl. & Pr., § 113; Bovaird v. Seyfang, 200 Pa. 261; Cannon v. Ballard, 62 N. J. Eq. 383; order reversed, 52 Atl. 352.

51. Rivelson v. Silverstein, 72 N. Y. Supp. 594.

52. Conger v. Judson, 69 App. Div. (N. Y.) 121.

53. Ala. Code, § 3290; Morrisette v. Wood, 128 Ala. 505.

54. Cawley v. Cawley (Mass.) 63 N. E. 1070.

55. Mere allegation that money was placed in defendant's hands is insufficient—Thompson v. Snyder, 113 Fed. 531.

56. Fletcher Eq. Pl. & Pr., § 294.

57. Sowles v. Hall, 73 Vt. 55.

58. Anderson v. Anderson (Utah) 70 Pac. 608.

Judgment or decree.—It seems a decree to account is not generally enrolled unless the accounting was only part of the relief given.[59] The judgment to account should require it to be done before the court or referee.[60]

§ 4. *Reference and proceedings thereon.*—Particular matters relating to reference to master or commissioners in chancery,[61] or to referees[62] will be found under other topics. Reference of the whole cause to a master is becoming the more common practice.[63] An accounting of surplus profits due the state from a railroad company is properly referred to a master.[64] Before ordering a reference the court should determine the right to account if it is made an issue.[65]

Stating the account; items.—An accounting may include a note given to the accounting payor as security though his liability thereon has not been determined.[66] A partner may be credited for the excess paid for his interest in property purchased by a co-partner by reason of the fraud of the latter.[67]

§ 5. *Proceedings on coming in of report.*—The proceedings after reference to an auditor in an action of account should be governed by rules of trial before the court and not by the strict rules of jury trials.[68] Judgment should not be given against non-residents who sold their interests before debts were contracted, but against the purchasers.[69] An account judgment giving a certain amount of accrued income to a beneficiary under a testamentary trust is not conclusive in a subsequent action to dispose of income accruing after his death.[70]

ACCOUNTS STATED AND OPEN ACCOUNTS.

§ 1. *Nature and elements of the several kinds of accounts.*—An account stated when itemized must show the relation of debtor and creditor,[71] but may be made orally,[72] and the assent of the party to be charged only, is necessary.[73] A mutual agreement as to the accuracy of the statement of an attorney mutually employed to calculate principal and interest on a written contract requiring payment in installments,[74] or the estimate of a water commissioner as to value of work done under a public contract together with the contractor's receipt for payment,[75] or statements of accounts between corresponding banks mutually acknowledged to be correct,[76] or the balance shown by a bank book and canceled checks,[77] or statements of account received by a bank depositor without objection for an unreasonable length of time,[78] constitute an account stated; but a statement of amount due a decedent made by her husband and a reply by the debtor promising payment,[79] or a mere request for extension of time where no account is presented, and no disputed items exist,[80] is insufficient to establish one. Fair settlement of

59. Fletcher Eq. Pl. & Pr., § 729.
60. A judgment merely directing defendant to account is insufficient—Silliman v. Smith, 72 App. Div. (N. Y.) 621.
61. Masters in Chancery.
62. Reference.
63. Fletcher Eq. Pl. & Pr. § 583; Kimberly v. Arms, 129 U. S. 512, 32 L. Ed. 764.
64. Surplus profits due under Loc. Laws, 1847, p. 77; Terre Haute & I. R. Co. v. State (Ind.) 65 N. E. 401.
65. Jordan v. Underhill, 71 App. Div. (N. Y.) 559.
66. Moss v. Odell, 134 Cal. 464, 66 Pac. 581.
67. Richards v. Fraser, 136 Cal. 460, 69 Pac. 83.
68. Pardridge v. Ryan, 134 Ill. 247.
69. Strang v. Thomas, 114 Wis. 599.
70. Rudd v. Corneli, 171 N. Y. 114.
71. Acts N. C. 1897, c. 480; Knight v. Taylor (N. C.) 42 S. E. 537.
72. Civ. Code Cal., § 1622; Converse v. Scott (Cal.) 70 Pac. 13.
73. Leiser v. McDowell, 69 App. Div. (N. Y.) 444.
74. Krueger v. Dodge, 15 S. D. 159.
75. McCormick v. City of St. Louis, 166 Mo. 315.
76. Louisville Banking Co. v. Asher, 23 Ky. Law R. 1180.
77. Kenneth Inv. Co. v. National Bank of Republic (Mo. App.) 70 S. W. 173.
78. Nodine v. First Nat. Bank (Or.) 68 Pac. 1109.
79. Kauffmann v. Judah (Sup.) 79 N. Y. Supp. 494.
80. Woodriff v. Hunter, 65 App. Div. (N. Y. 404.

a running account, by consideration of all the items therein, concludes both parties.[81] A sale of personalty for an agreed price payable at a certain or future time tends to uphold a count on account stated.[82]

Acceptance of an account stated estops denial of its correctness except for fraud or mistake,[83] and may be shown by payment of part of an account presented.[84] No objection can be made to an account rendered five months after settlement,[85] but unless special damages will result to the bank, a depositor may question an account of deposit retained without objection for an unreasonable length of time.[86]

A credit entered by one party without consent of the other, who always denied his liability, will not make a contested account mutual.[87] An account claiming a certain sum at or about a certain time is an open account.[88]

§ 2. *Binding effect, rights and liabilities.*—A liquidating partner is not bound personally, as for an account stated, by receipt of a statement of the partnership account erroneously including a personal debt of a retiring partner, which he had no reason to believe was considered a firm liability.[89] A settled account may be impeached only for fraud, mistake or omission,[90] and settlement admits the balance as a new principal unalterable except on proof of mistake or fraud.[91] A settlement is not presumed to include items not due.[92] Failure of an administrator to object to an account stated which is presented against the estate will not excuse establishment of the claim in the usual way.[93]

§ 3. *Remedies on account stated.*[94]—All prior dealings are merged in an action on an account stated.[95] Under proper circumstances equity will reform an account stated for mistake of law.[96]

Pleading.—Allegation and proof of an alleged statement of account merely supports a balance due in an action not technically on an account stated.[97] A stated account must be verified and the petition must allege its correctness.[98] Allegations of statements made to a depositor by a bank are sufficient, after verdict, as to an account stated.[99] Evidence of errors in a statement of account cannot be given by a plaintiff who did not plead them.[1] A bill to correct a settled account for mistake must allege the mistake distinctly and give the circumstances.[2]

Evidence and questions of fact.[3]—An account stated is prima facie correct,[4] and if it be assailed for a specific vice which is not proved it stands.[5] The pre-

81. Fowler v. Robinson, 98 Ill. App. 262.

82. Moore v. Crosthwait (Ala.) 33 So. 28.

83. Fitzgerald v. First Nat. Bank (C. C. A.) 114 Fed. 474.

Admission of the debt and a promise to pay it sufficiently shows the account stated—Frothingham v. Satterlee, 70 App. Div. (N. Y.) 613.

Acceptance together with subsequent statements on the same basis sufficiently show the account stated to the extent of establishing a trust.—Rand v. Whipple, 71 App. Div. (N. Y.) 62.

84. Seal Lock Co. v. Chicago Mfg. & Optical Co., 98 Ill. App. 637.

85. Poppers v. Schoenfeld, 97 Ill. App. 477.

86. Kenneth Inv. Co. v. National Bank of Republic (Mo. App.) 70 S. W. 173.

87. Bay City Iron Co. v. Emery, 128 Mich. 506.

88. Hartsell v. Masterson, 132 Ala. 275.

89. National Cycle Mfg. Co. v. San Diego Cycle Co., 135 Cal. 335, 67 Pac. 280.

90. Batson v. Findley (W. Va.) 43 S. E. 142; assent to accounts rendered so as to make them stated, see supra, § 1; Fitzgerald v. First Nat. Bank (C. C. A.) 114 Fed. 474; Frothingham v. Satterlee, 70 App. Div. (N. Y.) 613; Rand v. Whipple, 71 App. Div. (N. Y.) 62.

91. In re Peters' Estate, 20 Pa. Super. Ct. 223.

92. Beebe v. Smith, 194 Ill. 634.

93. Withers v. Sandlin (Fla.) 32 So. 829.

94. Three years' limitation does not apply—Moore v. Crosthwait (Ala.) 33 So. 28; Columbia Brewing Co. v. Berney, 90 Mo. App. 96.

95. Columbia Brewing Co. v. Berney, 90 Mo. App. 96.

96. Louisville Banking Co. v. Asher, 23 Ky. Law R. 1180.

97. Leiser v. McDowell, 69 App. Div. (N. Y.) 444.

98. Myers v. First Presbyterian Church of Perry (Okl.) 69 Pac. 874.

99. Nodine v. First Nat. Bank (Or.) 68 Pac. 1109.

1. Wonderly v. Christian, 91 Mo. App. 158.

2. Batson v. Findley (W. Va.) 43 S. E. 142.

3. Sufficency of proof—Withers v. Sandlin (Fla.) 32 So. 829; Dougan v. Dunham (Ga.) 42 S. E. 390; evidence in action—Arnold v. Cason, 95 Mo. App. 426, 69 S. W. 34.

4. Wonderly v. Christian, 91 Mo. App. 158.

5. Duress-Comer v. Illinois Car & Eq. Co., 108 La. 179.

sumption that a certain item was included is overcome by proof that it was not due.[6] Failure of plaintiff to obtain knowledge of a statement of the account for some time after it was made is not a failure of proof of an account stated.[7] The burden of proof is on a depositor to show that checks rendered on an account by the bank are forged.[8] An attorney suing his client for services on account stated may be examined as to the items.[9] Corroborative testimony as to the balance due may be given by a stenographer who took a memorandum of the agreement in presence of both parties.[10] An ex parte affidavit verifying an account stated will not establish its correctness.[11] Proof of an agreement between parties to settle and that a debt owing to one from a third person should be assigned, to the other to which the debtor did not object, shows an account stated.[12]

The effect of a receipt approving an account stated, if in issue, is a question of fact for the referee.[13]

§ 4. *Remedies on open accounts.*[14]—The statute of limitations will apply to actions on open accounts,[15] beginning with the last item where the full amount is sought.[16] A running and continuous account is not barred,[17] nor is an open mutual account,[18] until accrual of the period after the last item on either side,[19] but an item for board will not prevent bar of an action on a note, there being no mutuality,[20] and an unratified payment of one of the last items will not begin the period.[21] A plea of final settlement in an action on an open account is a complete bar where plaintiff fails to sustain his reply averring that defendant's statement rendered was not final but subject to correction.[22] A bill of particulars referred to in, and filed with, a petition in an action on a mutual account will warrant admission of evidence of mutual dealings between the parties on mutual credit.[23]

ACKNOWLEDGMENTS.[24]

§ 1. *Nature, office and necessity.*—The officers' act is ministerial.[25] As between the parties it is not necessary[26] except to make the deed admissible in evidence[27] or entitle the parties to record it,[28] or to convey a married woman's separate estate[29] or to cut off dower homestead or similar rights.[30]

6. Beebe v. Smith, 194 Ill. 634.
7. Leiser v. McDowell, 69 App. Div. (N. Y.) 444.
8. Kenneth Inv. Co. v. National Bank of Republic (Mo. App.) 70 S. W. 173.
9. McLaughlin v. U. S. (U. S.) 36 Ct. Cl. 138.
10. Converse v. Scott (Cal.) 70 Pac. 13.
11. Withers v. Sandlin (Fla.) 32 So. 829.
In Tennessee a partnership account brought from another county can not be verified by a book keeper's affidavit—Shannon's Code, § 5561; Foster v. Scott County, 107 Tenn. 693.
12. Forbes v. Wheeler, 39 Misc. (N. Y.) 538.
13. Frothingham v. Satterlee, 70 App. Div. (N. Y.) 613.
14. Sufficiency of pleading on open account—Hartsell v. Masterson (Ala.) 31 So. 616.
15. Four years will bar an action—Mizer v. Emigh (Neb.) 88 N. W. 479.
16. Carpenter v. Plagge, 192 Ill. 82.
17. Moore v. Renick (Mo. App.) 68 S. W. 936.
18. Lancieri v. Kansas City Imp. St. Sprinkling Co. (Mo. App.) 69 S. W. 29.
19. Haffner v. Scheunck, 49 App. Div. (N. Y.) 193; affirmed 168 N. Y. 649.
20. Beach v. Bennett (Colo. App.) 66 Pac. 567.
21. Rickard v. Geach (Nev.) 69 Pac. 861.
22. Wonderly v. Christian, 91 Mo. App. 158.
23. "A reasonable time" is a matter of law when the facts are clear—P. H. McLaughlin & Co. v. U. S. (U. S.) 37 Ct. Cl. 150.
24. Acknowledgements as admissions estoppels, ratification, adoption; recognition or waiver; see Evidence; Estoppel; Agency; Partnership; Limitations of Actions; Adverse Possession; Marriage; Bastards.
Acts and elements of execution of instruments other than acknowledgments, see Names, Signatures and Seals; Contracts; Deeds; Mortgages; Chattel Mortgages; Wills and the like.
25. Rev. St. § 4106; Read v. Toledo Loan Co., 13-23 O. C. C. 25.
26. Morse v. Morrison (Colo. App.) 66 Pac. 169; Messenger v. Peter, 8 Detroit Leg. N. (Mich.) 867, 88 N. W. 209.
27. An acknowledgment to an official bond admits to be received in evidence like

Merely because some household goods are included but which do not appear to have been used as such, a chattel mortgage is not one "of household goods" which must be acknowledged.[31]

§ 2. *Officers who may take.*—Justices of the peace may ordinarily take acknowledgments.[32] A consul general's deputy may do so.[33] The officer need not be disinterested it is held unless the statute so requires,[34] but a party to the instrument is disqualified.[35] A stockholder in a corporate party but not a non-stockholding officer or an agent or attorney of either party, has a disqualifying interest.[36] The corporation's interest need be only partial.[37] Foreign officers enumerated by statute may take them.[38] The power of a foreign notary does not necessarily depend on the authority given by his own state.[39] An officer empowered to take acknowledgments may sometimes act beyond the territory of his ordinary bailiwick or authority,[40] but a notary cannot act outside the place for which he is commissioned.[41] A corporate chattel mortgagor "resides" where its place of business is and should acknowledge the mortgage before a justice of the peace there.[42]

an acknowledged conveyance—Ramsay's Estate v. People, 97 Ill. App. 283.

Certified copy of deed record inadmissible if lacking legal acknowledgment—Swafford v. Herd's Adm'r., 25 Ky. Law R. 1556.

A foreign notary's certificate under seal is prima facie evidence of execution of an official bond—Ramsay's Estate v. People (Ill.) 64 N. E. 555.

Officer was financially interested hence not admissible—First Nat. Bank v. Citizen's State Bank (Wyo.) 70 Pac. 726.

28. The notary must affix his seal (Koch v. West [Iowa] 92 N. W. 663) unless the law at the time does not require it—Westfeldt v. Adams (N. C.) 42 S. E. 823.

The acknowledging officer must not be a party—Hunton v. Wood (Va.) 43 S. E. 186.

A tax deed must be acknowledged and then recorded—Leftwich v. Richmond, 4 Va. Sup. Ct. 128, 40 S. E. 651.

Unless properly acknowledged a record will not protect a mortgage lien—Cumberland B. & L. Ass'n v. Sparks (C. C. A.) 111 Fed. 647.

29. If acknowledged before an incompetent notary does not pass under the laws of Florida—Evans v. Dickenson (C. C. A.) 114 Fed. 284.

In New Jersey her contract to convey it must be separately acknowledged—Schwarz v. Regan (N. J. Ch.) 53 Atl. 1086.

30. Ogden B. & L. Ass'n v. Mensch, 196 Ill. 554; Buettgenbach v. Gerbig (Neb.) 90 N. W. 654; Rowles v. Reichenbach (Neb.) 90 N. W. 943. Unless an agreement to pass the homestead be testamentary in character, when it need not be acknowledged—Teske v. Dittberner (Neb.) 91 N. W. 181, or be a purchase-money mortgage—Irwin v. Gay (Neb.) 91 N. W. 197; Goodheart v. Goodheart (N. J. Ch.) 53 Atl. 135.

Both husband and wife must join to alien a homestead—Blumer v. Allbright (Neb.) 89 N. W. 809; Hedbloom v. Pierson (Neb.) 90 N. W. 218.

Estoppel will not operate in lieu of acknowledgment—Davis v. Thomas (Neb.) 92 N. W. 187.

If the husband die in possession of the homestead, an improperly acknowledged contract to convey it is not enforceable—Solt v. Anderson (Neb.) 93 N. W. 205.

31. 2 Gen. St., p. 2111, § 41; Dunham v. Cramer (N. J. Ch.) 51 Atl. 1011.

32. Tiffany, Real Prop., § 405; but in 1852 a married woman's deed must have been acknowledged before a court, etc., with seal (Rev. St. 1845, c. 32, §§ 35-39) hence the curtesy only passed under justice's acknowledgment—Linville v. Greer, 165 Mo. 380.

33. Stewart v. Linton (Pa.) 53 Atl. 744.

34. Rev. St., § 4106; Stockholder taking corporation's acknowledgment—Read v. Toledo Loan Co., 13-23 O. C. C. 25.

35. Meckel Bros. Co. v. DeWitt, 13-23 O. C. C. 174; grantor—Leftwich v. City of Richmond, 4 Va. Sup. Ct. 128, 40 S. E. 651; grantee—Hunton v. Wood (Va.) 43 S. E. 186; ownership of part of debt secured by mortgage—Hedbloom v. Pierson (Neb.) 90 N. W. 218.

36. Ogden B. & L. Ass'n v. Mensch, 196 Ill. 554; but see s. c. 99 Ill. App. 67 and cf.; Read v. Toledo Loan Co. supra.

Stockholding cashier of mortgagee bank is disqualified—First Nat. Bank v. Citizens' State Bank (Wyo.) 70 Pac. 726.

Assistant cashier of bank when a stockholder is disqualified—Wilson v. Griess (Neb.) 90 N. W. 866.

37. Wilson v. Griess (Neb.) 90 N. W. 866.

38. In Georgia prior to Act Dec. 18, 1893, a foreign "clerk" of courts' acknowledgment was null. The court or judge should have acted—Code 1882, § 2708; Crummey v. Bentley, 114 Ga. 746.

39. In Illinois an official bond is properly acknowledged before a foreign notary if he certifies it under his seal, whether or not his own state authorizes him to take acknowledgments of sealed instruments; Hurd's Rev. St., c. 103, § 1, c. 30, § 20—Ramsay's Estate v. People, 97 Ill. App. 296.

40. Laws 1850-51, p. 88, art. 3, § 6. Laws 1852-53, p. 244, art. 2, § 1; Mayor of Kansas City may take anywhere in county—Linville v. Greer, 165 Mo. 380.

41. In and for certain county—McClellan's Dig. (Fla.) 791, § 1; Evans v. Dickenson, 114 Fed. 284.

42. See statute—Gilbert v. Sprague, 196 Ill. 444.

§ 3. *Persons who may make.*—Generally speaking each granting party including husbands or wives must acknowledge for himself or herself. A corporation must do so by its president, secretary or other proper officer. An attorney in fact to convey land may do so in his own name for his principal.[43]

§ 4. *Taking acknowledgment.*—If the grantor is not personally known to the officer he should ordinarily be identified.[44] It is immaterial that the wife's separate examination was in presence of the grantee of her separate estate.[45]

§ 5. *Certificate of acknowledgment.*[46]—The identity of the grantor must be shown.[47] One to a wife's deed need not state that she executed it as a party.[48] And it need not state in the language of the statute that when privately examined she freely and voluntarily made the deed[49] at least where the statute so reads that it is satisfied by the taking of her examination privately without reciting it.[50] The statutes of some states require this recital.[51] Grammatical errors are of no importance[52] nor is an obvious error in stating the grantor's name.[53]

§ 6. *Authentication of officer's authority.*—A notary must attach his seal[54] unless the law at the time of making the deed and recording it required no seal.[55] It is not sufficient that he styles himself "ex officio notary" if no notary's seal be attached.[56]

§ 7. *Operation and effect.*[57]—An act making it conclusive on the question of duress or coercion of the wife does not preclude inquiry whether a private examination in legal form was had as recited.[58] The clearest and most convincing evidence is necessary to impeach the certificate.[59] It must go beyond the mere testimony of the acknowledging party.[60] Contradictory testimony by the wife has been held not sufficient to impeach the recitals of the certificate.[61] A special allegation of fraud is necessary to attack it when regarded as conclusive.[62] It releases dower without words of conveyance.[63]

§ 8. *Defects and invalidities.*[64]—A defect not apparent does not destroy the

43. 1 Am. & Eng. Enc. Law, 507.

44. Good faith of notary no defense for failure to call two witnesses (Rev. St. 1899, § 913)—State v. Grundon, 90 Mo. App. 266.

45. Tippett v. Brooks (Tex.) 67 S. W. 495, 512.

46. An indorsement—Acknowledged by "* * clerk a party" and signed "* * clerk" shows an acknowledgment before a party—Leftwich v. City of Richmond, 4 Va. Sup. Ct. 128, 40 S. E. 651.

47. It must give two identifying witnesses names and residences where grantor was personally unknown to notary—"satisfactorily identified" not sufficient—Riehl v. Noel, 89 Mo. App. 178.

48. Linville v. Greer, 165 Mo. 380.

49. Benedict v. Jones, 129 N. C. 470.

"Willingly signed * * without fear or compulsion on the part of her husband and that she wished not to retract" is sufficient without words for "purposes and consideration therein expressed"—Arnall v. Newcom (Tex. Civ. App.) 69 S. W. 92.

50. Rev. St. 1887, § 2784; Revision 1899, § 2741; Adams v. Smith (Wyo.) 70 Pac. 1043.

51. A "separate and privy examination" is not recited by recitals that she signed of "her own full will without being forced or compelled," etc. (Pasch. Dig. art. 1003)—Estes v. Turner (Tex. Civ. App.) 70 S. W. 1007.

52. Recital that husband and wife were the "person" who "are" and that "he" executed, etc.—McCardia v. Billings, 10 N. D. 373.

53. "John L." for "James M." as in deed—Kentucky L. I. Co. v. Crabtree, 24 Ky. Law R. 743.

54. Koch v. West (Iowa) 92 N. W. 663.

55. Westfeldt v. Adams (N. C.) 42 S. E. 823.

56. Hayes v. Banks, 132 Ala. 354.

57. Notary's testimony not secondary evidence—Cassidy v. Scottish-American Mortgage Co. (Tex. Civ. App.) 64 S. W. 1023.

58. Acts 1889, c. 389; Benedict v. Jones, 129 N. C. 470.

59. Dickerson v. Gritten, 103 Ill. App. 351.

60. Adams v. Smith (Wyo.) 70 Pac. 1043—holding evidence insufficient to show want of understanding on wife's part.

Failure to privately examine the wife may be shown if certificate does not recite it—Adams v. Smith (Wyo.) 70 Pac. 1043.

61. Davis v. Kelly, 62 Neb. 642.

Evidence held sufficient to identify grantee as the acknowledging officer who signed by similar name—Hunton v. Wood (Va.) 43 S. E. 186.

62. Brand v. Colorado Salt Co. (Tex. Civ. App.) 70 S. W. 578.

Affidavit of defense that acknowledgment was before consul general's deputy, insufficient—Stewart v. Linton (Pa.) 53 Atl. 744.

63. Goodheart v. Goodheart (N. J. Ch.) 53 Atl. 135.

64. Notary's bond is liable for negligently

force of the record of the instrument,[65] but, if the body of the instrument show that the officer took it outside his territorial jurisdiction the acknowledgment is null.[66] A wife joins "freely" if it appears that her reluctance if any is in no wise attributable to her husband,[67] but not if she joins under stress of threats by a drunken husband she stating to the officer that her act is not voluntary.[68] It is no objection that a wife able to read and write stated that she was ignorant of the contents of the instrument.[69] Want of a legal acknowledgment may prevent the releasing of homestead but does not destroy the conveyance.[70]

How cured.[71]—A second validly acknowledged mortgage does not by reciting the existence of the first supply the want of a wife's acknowledgment.[72]

Acts curing errors of form will not validate acknowledgments before one of the parties.[73] A statute validating deeds recorded which were acknowledged without a certificate of magistracy of the officer makes such deeds admissible in evidence.[74]

ACTIONS.

No attempt is made to treat other than the general questions relating strictly to "Actions." "Causes of Action and Defenses" and "Forms of Action" are distinct matters which are elsewhere treated.[75]

Action technically excludes the various special forms of proceedings created by statutes.[76] The word "action" as it appears in statutes is subject to varying constructions and the decisions thereupon are to be sought under titles apposite to such statutes and limited accordingly.[77] A proceeding prosecuted by a city against one for violating an ordinance is not a "criminal action prosecuted by the state."[78]

Essentials.—A proceeding is not necessarily a nullity though the nominal defendant be dead when the action is instituted.[79]

Action is begun by issuance of process and delivery to the sheriff for service,[80] but not by a service in a county other than that wherein only can the action be commenced,[81] nor by procuring a writ which was altered to a later date before service. It is begun as of the altered date.[82] In the federal courts in equity

accepting another's identification of grantor—State v. Grundon, 90 Mo. App. 266.

65. Disqualification of notary by interest—Ogden B. & L. Ass'n v. Mensch, 196 Ill. 554.

66. Code Civ. Pr. § 179 limits jurisdiction of justice of the peace to county—Middlecoff v. Hemstreet, 135 Cal. 173, 67 Pac. 678.

67. Goldstein v. Curtis (N. J. Ch.) 52 Atl. 218.

68. Blumer v. Allbright (Neb.) 89 N. W. 809.

69. Benedict v. Jones, 129 N. C. 470.

70. Ogden B. & L. Ass'n v. Mensch, 196 Ill. 554.

71. Failure of a deputy to acknowledge for himself personally in behalf of the sheriff was cured by Rev. Codes, 1887, § 3585—McCardia v. Billings, 10 N. D. 373.

72. Evans v. Dickenson (C. C. A.) 114 Fed. 284.

73. Ark. Acts 1893, p. 66; Meunse v. Harper (Ark.) 67 S. W. 869.

74. Laws 1851, p. 122; Stolford v. Goldring, 197 Ill. 156.

75. See those titles.

76. Ordering execution to enforce double liability of stockholders—Wheeler v. Chenault, 63 Kan. 730, 66 Pac. 1010; establishment of a boundary under Laws 1891, c. 89; Swarz v. Ramala, 63 Kan. 633, 66 Pac. 649. Habeas corpus is an action within Rev. St. 1898, § 2601; the person seeking liberty is plaintiff, the one detaining him is an adverse party—State v. Hurgin, 110 Wis. 189; Same v. Aikens, Id.; Same v. Hoyt, Id. Quo warranto by the state on relation of a citizen is in nature of a civil action—Fordyce v. State (Wis.) 92 N. W. 430; State v. Fordyce, Id.

77. For instance in the statute of limitations it will include suits in equity and special proceedings under the Codes; and in statutes giving the right of review the same matters may be excluded. See Appeal and Review; Limitations of Actions and other titles.

78. Comp. Laws, §§ 4813, 4814; City of Madison v. Horner, 15 S. D. 359.

79. Quieting title—McClymond v. Noble, 84 Minn. 329.

80. In justice court in Missouri—Heman v. Larkin (Mo. App.) 70 S. W. 907. Process was issued, delivered and dated before bar of limitation was complete, but was served thereafter—County v. Pacific Coast Borax Co., 67 N. J. Law, 48.

81. Code Civ. Proc., § 416; Benson v. Eastern B. & L. Ass'n, 67 App. Div. (N. Y.) 319.

82. Larrabee v. Southard, 95 Me. 385.

filing a bill begins the suit.[83] Such a commencement may be effectual though the jurisdiction be assailable,[84] or the service be somewhat delayed,[85] or the pleading defective or incomplete[86] unless it states no cause of action whatever[87] or is amended to state a new cause of action.[88] Delivering a summons which is void because it was signed in blank and filled in by an attorney is not an "attempt" to commence an action.[89] Voluntary appearance is operative as of its own date and not that of a prior but unserved summons.[90] An action is pending and not terminated until it is finally determined and the rights of parties enforced or discharged.[91]

ADJOINING OWNERS.[92]

The law of lateral support makes one liable who removes such support and causes land to subside.[93] It does not apply to lands under water on which piers rest.[94] Liability is not averted by making a wall a party wall.[95] There is negligence in failing to apprise an adjoining owner of the fact that excavations of which he already knows will go below his foundation,[96] but none in failing to provide gutters and down spouts sufficient to conduct an extraordinary precipitation or cloud burst.[97] A complaint for taking support from a wall should allege facts sufficient to support a finding of an easement.[98]

A tenant of an adjoining building may recover his damages though the owner consented to the excavation which caused the damage, nor is it material to the tenant's case that his lessor made no objection to the undermining.[99] One cannot excavate soil on the sea shore where natural causes will result in subsidence of adjoining property and thereby expose a third property to damage.[100]

Over-leaning walls are abatable as a nuisance[1] and adjoining riparian owners

83. Humane Bit Co. v. Barnet, 117 Fed. 316.

84. Non-residence—Walston v. Louisville, 23 Ky. Law R. 1852.

85. Fifty-two days' requested delay on promise of settlement not unreasonable—Wigg v. Dooley (Tex. Civ. App.) 66 S. W. 306. The contrary held with respect to a proceeding under a special statute (Code 1873, § 3157) to vacate a decree against an insane person—Hawley v. Griffin (Iowa) 92 N. W. 113.

86. Improper allegations to charge defendant as executor—Southern Contract Co.'s Assignee v. Newhouse, 23 Ky. Law R. 2141; want of denial of contributory negligence—Chicago City R. Co. v. Cooney, 196 Ill. 466; uncertainty—Bell v. Floyd, 64 S. C. 246. Amendment must be germane—L. & N. R. Co. v. Pointer's Adm'r, 24 Ky. Law R. 772; supplemental pleadings — Knickerbocker v. Benes, 195 Ill. 434; no allegation of negligence—Wolf v. Collins, 196 Ill. 281; suing corporation by wrong name but without fault on plaintiff's part—Prichard v. McCord-Collins Co. (Tex. Civ. App.) 71 S. W. 303.

87. M. K. & T. R. Co. v. Bagley (Kan.) 69 Pac. 189; Foley v. Suburban R. Co., 98 Ill. App. 108.

88. Motes v. Gila Val. G. & N. R. Co. (Ariz.) 68 Pac. 532; Pardridge v. Gilbride, 98 Ill. App. 134; Western Stone Co. v. Earnshaw, 98 Ill. App. 538; Taylor v. Atchison, etc., R. Co., (Kan.) 68 Pac. 691. Amendment to state a new place where tort occurred is not such—Chicago City R. Co. v. McMeen, 102 Ill. App. 318; Mott v. Chicago & M. El. R. Co., 102 Ill. App. 412.

89. Rev. St. 1898, §§ 4240, 3594; Johnson v. Turnell, 113 Wis. 468.

90. Hotchkiss v. Aukermann (Neb.) 90 N. W. 949. Court journal entry held sufficient to show an appearance before service—Dunne v. Portland St. R. Co. (Or.) 65 Pac. 1052.

91. When another action is pending, see Abatement and Revival. What is a determination, see Judgments.

92. See, also, Boundaries; Fences; Party-Walls; abutting owners, see Eminent Domain; Highways and Streets.

93. Joliet v. Schroeder, 92 Ill. App. 68.

94. Subsidence of pier caused by dredging in loose soil and mud—White v. Nassau Trust Co., 168 N. Y. 149; subsidence of other land at a distance not admissible to show loss of lateral support—Noonan v. Pardee, 200 Pa. 474.

95. Payne v. Moore (Ind. App.) 66 N. E. 483.

96. Davis v. Summerfield (N. C.) 42 S. E. 818.

97. Miller v. Wilson, 104 Ill. App. 556.

98. He must allege either that it was a party wall or prescription, it being insufficient to allege that it stood on the edge of the lot—Payne v. Moore (Ind. App.) 66 N. E. 483.

99. Payne v. Moore (Ind. App.) 66 N. E. 483.

100. Injunction granted—Murray v. Pannacl (N. J. Ch.) 53 Atl. 595.

1. Barnes v. Berendes (Cal.) 69 Pac. 491.

must so exercise wharfage rights as not to encroach on each other.[2] Heaped up earth should be confined by a retaining wall.[3]

Either owner of lands resting on the same rock formation may do necessary blasting whether the other has already done so or not.[4] The shock or vibration of the soil is not of itself actionable.[5] Willfulness and malice are not essential to a liability for wrongful occupancy or use of adjoining lands.[6]

The owner is not liable for trespasses by servants of a licensee.[7]

A system of drains over an entire tract becomes the property of all separate grantees[8] and when a drain is for the benefit of both, the owner on whose land it is cannot obstruct it.[9]

A frame-work four stories high covered with rough boards and roofed, under which washings were hung was held to be a structure in the nature of a fence erected to annoy.[10] A barrier to the throwing of refuse from the next lot must not unnecessarily be made so as to exclude light and air. It makes no difference that the occupants were disorderly in conduct.[11]

The measure of damages for an encroachment is the consequent reduction of the selling value.[12] Loss of profits of the use of a projected building should not be included, at least until after the building could, but for the encroachment have been erected.[13] Unless there be negligence the damage from withdrawing lateral support does not include injury to buildings.[14]

The statutory action in New York respecting narrow encroachments applies only when there is an abutting building on the plaintiff owner's property.[15]

ADMIRALTY.

This title properly includes admiralty jurisdiction, courts, practice, and procedure. It excludes the law of maritime traffic,[16] of navigation and navigable waters,[17] of war and of nations.[18]

§ 1. *Jurisdiction and courts.*—The rights of foreign seamen under articles to a foreign ship will not be determined on a suit by them, but may be incidentally to a suit by one of the seamen who is an American. If an American seaman demand process against the ship under a maritime contract jurisdiction must be taken and not remitted to a consular representative.[19] A suit against a foreign ship by a seaman for neglect and mistreatment while injured will be heard

2. Montgomery v. Shaver (Or.) 66 Pac. 923.
3. Abrey v. Detroit, 127 Mich. 374.
4. De Carvajal v. Y. M. C. A., 37 Misc. (N. Y.) 727.
5. Tucker v. Mack Pav. Co., 61 App. Div. (N. Y.) 521.
6. Permitting an excavation to fill with water; declaration sufficient alleging making of excavation in which water gathered to injury of adjoining building—Garvy v. Coughlan, 92 Ill. App. 582.
7. Cutting timber—Klotz v. Lindsay, 88 Mo. App. 594.
8. Lanter v. Hartman, 95 Ill. App. 80.
9. The parties must have agreed (Hurd's Rev. St. 1899, p. 717)—Hall v. Pfnister, 95 Ill. App. 159.
10. Under Pub. St. . 143, §§ 28, 29—Horan v. Byrnes, 70 N. H. 531.
11. Bloom v. Koch (N. J. Ch.) 50 Atl. 621.
12. Goldbacher v. Eggers, 38 Misc. (N. Y.) 36.
13. Barnes v. Berendes (Cal.) 69 Pac. 491.
14. Mining—Matulys v. P. & R. Coal & Iron Co., 201 Pa. 70.
15. Code Civ. Proc., § 1499; Goldbacher v. Eggers, 38 Misc. (N. Y.) 36, see, also, infra. The one year limitation on actions to recover a strip encroached on by a wall applies though only part of it is covered—Volz v. Steiner, 67 App. Div. (N. Y.) 504. The right to an adjudication of title to a strip encroached on is not separable from the right to sue to remove encroaching structures. They must be joined—Code Civ. Proc., §§ 481, 3339, also c. 14, tit. 1, art. 1; Hahl v. Sugo, 169 N. Y. 109.

Remedies in general, see Trespass, Ejectment, and the like.

Actions for injury to chattels and for the trespass against the possession cannot be joined—Hall v. L. Weber Bldg. Co., 36 Misc. (N. Y.) 551.
16. Shipping and Water Traffic.
17. Collision; Navigable waters.
18. International Law; War.
19. The Falls of Keltie, 114 Fed. 357.

if he would otherwise be remediless.[20] Jurisdiction must rest on the subject-matter of a set-off and not on the set-off itself.[21]

Contracts to act as seamen en voyage to fisheries, there to fish and assist in canning the catch,[22] and to navigate a vessel outward and returning are maritime within cognizance of admiralty,[23] but agreements for brokerage though written into a charter party are not.[24] A suit for wharfage against the owner of a domestic vessel,[25] or a lien for penalty under a state law against vessels which refuse to take on a pilot as well as the lien for pilotage, also are.[26]

A proceeding for limitation of liability may be brought though the owner has permitted an action to go to judgment against him but has successfully appealed.[27] It may be brought in any district where the owner is liable to suit though the vessel is not there.[28]

Recovery for wrongfully causing death.—Courts of a state have jurisdiction of an action against a registered vessel for negligence in port resulting in a death on the high seas.[29] Admiralty will enforce a statutory liability for wrongfully causing death.[30] The common law of Hawaii permits a recovery for torts causing death, hence the courts of admiralty will enforce such a right.[31]

The partition of interest in vessels is "a common law remedy" which the admiralty laws save to the state courts,[32] and hence partition may be had in the state court under circumstances, which would not give such relief in the federal court.[33]

§ 2. *Remedies and remedial rights.*—The vessel rather than her owners may be proceeded against on a remedy in rem and it is not too late to do so on her second visit after the injury.[34] A contract to proceed to a port and there tow a vessel is executory until the towage is undertaken; hence a breach in turning aside to perform other services is not remediable against the tug in a proceeding in rem.[35] The relief given when enforcing a maritime tort defined by a state law will be such only as conforms to the statute creating the liability.[36] Nominal damages for personal torts are not awarded.[37] It is proper to join both the ship and the charterers if they are both charged with liability for breach of a contract of affreightment.[38] A charterer obligated to protect the vessel from liens may interpose defenses.[39] The right to limit liability is not barred by a prior judgment for damages in a state court.[40] Payment of costs in the state court may be imposed on an owner who asks a limitation of liability after he has defended on the merits in the state court.[41] A claimant who gave an ordinary claimant's bond when a bond was required to prevent setting aside the sale of a ves-

20. The Troop, 118 Fed. 769.

21. American Steel Barge Co. v. Chesapeake & O. Coal Agency Co., (C. C. A.) 116 Fed. 857.

22. Domenico v. Alaska Packers' Ass'n, 112 Fed. 554.

23. The Laurel, 113 Fed. 373.

24. Brown v. West Hartlepool S. N. Co. (C. C. A.) 112 Fed. 1018; Taylor v. Weir, 110 Fed. 1005.

25. Braisted v. Denton, 115 Fed. 428.

26. The Lida Fowler, 113 Fed. 605.

27. The Ocean Spray, 117 Fed. 97; Gleason v. Duffy (C. C. A.) 116 Fed. 298.

28. Gleason v. Duffy (C. C. A.) 116 Fed. 298.

29. Lindstrom v. International Nav. Co., 117 Fed. 170.

30. The Northern Queen, 117 Fed. 906.

31. The Schooner Robert Lewers Co. v. Kekonoha (C. C. A.) 114 Fed. 849.

32. Rev. St. U. S., § 563; Reynolds v. Nielson (Wis.) 93 N. W. 455.

33. As where there is a majority owner—Reynolds v. Nielson (Wis.) 93 N. W. 455.

34. The Slingsby, 116 Fed. 227.

35. The Francesco, 116 Fed. 83; The F. W. Munn, Id.

36. Stern v. La Compagnie Generale Transatlantique, 110 Fed. 995.

37. In re California Nav. & Imp. Co., 110 Fed. 670.

38. Within spirit of Admiralty Rule 59—The Planet Venus, 113 Fed. 387.

39. Alaska & P. S. S. Co. v. Chamberlain & Co. (C. C. A.) 116 Fed. 600.

40. Gleason v. Duffy (C. C. A.) 116 Fed. 298.

41. The Ocean Spray, 117 Fed. 97; Gleason v. Duffy (C. C. A.) 116 Fed. 298.

sel cannot deny that it represents the vessel which was released on the strength of it.[42] Damages in addition to costs may be recovered by a vessel owner from one who procures the arrest of a vessel by due process but without an honest belief that he is using a rightful remedy.[43]

§ 3. *Practice and procedure. A. Pleading process, etc.*[44]—Libels in rem and in personam may be joined on considerations of convenience or the promotion of justice. The admiralty rules of the Supreme Court do not govern.[45] Misjoinders are waived by failure to except to the libel.[46]

It is not indispensable to state nationality of a libeled vessel if the libelant pleads his American citizenship.[47] Claims for a marine tort not litigable against the vessel in rem may be rejected as surplusage if a cause in rem remains in other allegations.[48]

Subrogation to a fund recovered from a colliding vessel may be enforced on an intervention begun after judgment on a mandate from the appellate court.[49] An answer denying negligence on the part of the ship and propounding interrogatories respecting goods and their value cannot be held sham and frivolous until interrogatories be answered.[50] Tenders and deposits made with the answer need not include fees which become taxable only on final decision.[51] Exceptions when not specific must strike at more than form or style.[52] The owner's remedy to enforce the lien on subfreight for charter money is by libeling the subfreight alone with process requiring the holder of the bill of lading or cargo-owner to bring the freight into court. This may be compelled by summary process against the cargo or its owner but it should not be proceeded against until after an order to pay in freight. A warrant of arrest prematurely issued may be retained if afterwards found to be justified.[53]

New parties may be brought in on petition, when they are responsible for the claim sued on, by analogy to practice in collision cases under the 59th rule.[54]

B. Evidence, proof and hearing, and decree.—A decree in rem against a colliding vessel is not admissible for cargo owners who were not made legally subject to it.[55] Testimony of officers and witnesses on board is of more weight than opinions of others.[56]

Issues.—On a libel for charter hire the whole contract may be gone into whether all breaches are specifically alleged or not.[57] Whether a vessel owner designedly or negligently caused a fire may be inquired into in a proceeding to limit liability.[58] On a suit for salvage against ship and cargo, the cargo owners cannot

42. The New York (C. C. A.) 113 Fed. 810; Smith v. McAllister, Id.

43. Gow v. William W. Brauer S. S. Co., 113 Fed. 672.

44. After remand see also infra, § 4.

45. The Thomas P. Sheldon, 113 Fed. 779; The S. L. Watson, Id.

46. Separate claims for salvage and towage—Merritt & Chapman Co. v. Chubb (C. C. A.) 113 Fed. 173.

47. The Falls of Keltie, 114 Fed. 357.

48. Assaults by master on seamen—The Falls of Keltie, 114 Fed. 357.

49. Intervention by insurer—Mason v. Marine Ins. Co. (C. C. A.) 110 Fed. 452.

50. The Oregon (C. C. A.) 116 Fed. 482.

51. Docket fees, Rev. St., § 824—Merritt & Chapman Co. v. Catskill & N. Y. Steamboat Co., 112 Fed. 442.

52. New Haven Towing Co. v. City and Town of New Haven, 116 Fed. 762; Castle v. Same, Id.

53. American Steel Barge Co. v. Chesapeake & O. Coal, etc., Co. (C. C. A.) 115 Fed. 669.

54. Dailey v. City of New York, 119 Fed. 1005.

55. The Harrogate (C. C. A.) 112 Fed. 1019.

56. The Captain Sam, 115 Fed. 1000.

Pleadings and proofs held not to warrant a decree against defendant owners of the salved vessel, who had been allowed a sum for salvage, that they pay salvage in exoneration of the defendant insurer who contracted for it—Merritt & Chapman Co. v. Chubb (C. C. A.) 113 Fed. 173.

57. Time of surrendering the vessel is raised by libeling for hire for the month in advance during which surrender was made—Gow v. William W. Brauer S. S. Co., 113 Fed. 672.

58. Rev. St., § 428; In re Old Dominion S. S. Co., 115 Fed. 845.

litigate against the ship her liability for the disaster.[59] An amendment after remand alleging that libelant insurer was authorized to file the libel and collect the amount paid as insurance and that the vessel owner claimed no further damages is supported by proof of a release from the vessel owner to the insurer made after remand on appeal.[60]

Commissioner's findings should when practicable be paragraphed and numbered and exceptions should refer to such numbers.[61] It is of great weight with the court.[62] Objections to a commissioner's computation should be by exception. His procedure is analagous to that of a master in chancery.[63] It is not a fatal error that on a reference a commissioner sat outside the jurisdiction.[64]

Hearing and decree.—The circuit court may if it has obtained jurisdiction consolidate suits pending before it and the district courts growing out of one disaster.[65] Damages should be confined to the claims in the pleadings.[66] A decree may be corrected after term in favor of a petitioner free from fraud or laches if justice requires it.[67] Unless the vessel was arrested and advertised, cargo owners are not affected by a decree in rem founded on an appearance by vessel owners.[68] If the court had power to permit the amendment of a libel, sureties on a stipulation to release a vessel are found by decree as on the original libel.[69]

Costs.—The premium paid to a surety company for a bond to secure libelant's responding in damages to a cross-libel, when such bond is required by a claimant under rule 53, is taxable as costs.[70] This is not so where the surety company was obligated to protect the vessel from liens and hence acted for its own protection without really receiving a premium.[71] The taking of an excessive bond will not exonerate a claimant from costs if he agreed to the amount or failed to seek a reduction.[72] The issuance of an arrest prematurely may be compensated in costs.[73] Costs subsequent to a tender of freight for cargo actually carried, less the expense entailed by failure to carry all that was agreed, will be charged to a libeling carrier and not to the shipper.[74] If the court had jurisdiction of subject matter and parties the libelant may be charged with costs though the libel be dismissed.[75]

§ 4. *Appeals and subsequent proceedings.—Practice on appeal.*—Dismissal of a cross libel on a collision is an interlocutory order not reviewable by the Supreme Court.[76] Judgment on demurrer with leave to amend is interlocutory and goes up with final decree on the amended libel.[77] An appeal by one claimant does not bring up other distinct claims covered by the decree.[78] Objections to computations by a commissioner will be waived on appeal unless saved by exception on or prior to time of hearing below.[79] Objections for nonjoinder should be made below.[80]

59. The James Turpie, 113 Fed. 700.
60. Fairgrieve v. Marine Ins. Co. (C. C. A.) 112 Fed. 364.
61. The Itasca, 117 Fed. 885.
62. The Gertrude, 112 Fed. 448.
63. The Eliza Lines (C. C. A.) 114 Fed. 307.
64. The William H. Bailey, 100 Fed. 115; affirmed, 111 Fed. 1006.
65. For salvage against ship and cargo, for possession of cargo by cargo-owner, for payment of freight and general average by master against cargo—The Eliza Lines (C. C. A.) 114 Fed. 307.
66. The Itasca, 117 Fed. 885.
67. Decree of dismissal inadvertently entered by clerk before any order was made by court set aside and re-entered to save appeal—Hall v. Chisholm (C. C. A.) 117 Fed. 807.
68. The Harrogate (C. C. A.) 112 Fed. 1019.
69. Fairgrieve v. Marine Ins. Co. (C. C. A.) 112 Fed. 364.
70. Jacobsen v. Lewis Klondike Expedition Co. (C. C. A.) 112 Fed. 73. Costs on appeal, see infra, § 4.
71. The Robert Dollar, 116 Fed. 79.
72. The Barge No. 127, 113 Fed. 529.
73. American Steel Barge Co. v. Chesapeake & O. Coal. etc., Co., 115 Fed. 669.
74. Edward Hines Lumber Co. v. Chamberlain (C. C. A.) 118 Fed. 716.
75. The Francisco, 118 Fed. 112; The F. W. Munn, Id.
76. Bowker v. United States (U. S.) 22 Sup. Ct. 802.
77. Dennis v. Slyfield (C. C. A.) 117 Fed. 474.
78. Mason v. Marine Ins. Co. (C. C. A.) 110 Fed. 452.
79. The Eliza Lines (C. C. A.) 114 Fed. 307.
80. Salvage awarded to crew of salving

Review and hearing.—Error must be made manifest by appellant before a conclusion reached by two courts below will be disturbed.[81] The same is true where testimony was conflicting or where the witnesses are not impugned in any way.[82] The trial court's award will be reduced only for injustice, palpable error or gross overallowance,[83] and the court will strongly favor the correctness of a decree for damages after an appraisement taken, as against testimony of witnesses who saw the vessel some years later.[84] The practice of taking further testimony on appeal is to be discouraged.[85] Defects in record or proof due to appellant's lack of diligence are not reversible errors.[86] If the final judgment was on one cause of action only the other having been dismissed it matters not that there was a misjoinder.[87]

A mandate reversing the decree because an insurer recovered more than he paid, and which allowed an amendment to show that no liability longer existed towards any one but insurer is satisfied by an amendment and proof that after remand the vessel owner released all right to the insurer.[88] An amendment to plead a special defense in a new form after it has gone through to the Supreme Court and been remanded will be denied.[89] Each party should pay his own costs rather than divide them where both appeal and both fail to maintain the appeals.[90]

ADOPTION OF CHILDREN.[91]

Adoptive acts and proceedings.—A parol agreement may be executed so as to dispense with a deed by reception of a child as one's own and by so treating her until grown[92] and may be specifically enforced.[93] A sealed will reciting an adoption is neither operative as a deed of adoption nor conclusive that one had been made.[94] The fact that a deed of adoption was recorded is evidence that an acknowledgement of it was regular[95] and the record of an order of adoption reciting presence of the parties and of the child and execution of consents overcomes an objection that the agreements were not executed in the judge's presence.[96] A petition may state residence of parents by reference to their written consent attached to it.[97] A probate judgment of adoption will be secure against collateral attack though not formally entered. The essential facts other than those recited will be presumed to have been found.[98] A blank decree signed and with proper

vessel not made parties—The Flottbek (C. C. A.) 118 Fed. 954.

81. Wilder's S. S. Co. v. Low (C. C. A.) 112 Fed. 161.

82. Jacobsen v. Lewis Klondike Expedition Co. (C. C. A.) 112 Fed. 73; Alaska Packers' Ass'n v. Domenico (C. C. A.) 117 Fed. 99.

83. Hume v. J. D. Spreckels & Bros. Co. (C. C. A.) 115 Fed. 51.

84. Fairgrieve v. Marine Ins. Co. (C. C. A.) 112 Fed. 364.

85. Should be produced on trial when possible—Pacific Steam Whaling Co. v. Grismore (C. C. A.) 117 Fed. 68.

86. The McDonald (C. C. A.) 112 Fed. 681.

87. The S. L. Watson (C. C. A.) 118 Fed. 945; The Thomas P. Sheldon, Id.

88. Fairgrieve v. Marine Ins. Co. (C. C. A.) 112 Fed. 364.

89. Burrill v. Crossman, 111 Fed. 192.

90. Donnell v. Amoskeag Mfg. Co. (C. C. A.) 118 Fed. 10; Amoskeag Mfg. Co. v. Donnell, Id.; following The North Star, 106 U. S. 17, 27 Law. Ed. 91; rejecting rule for division in McComb v. Frink, 149 U. S. 629, 37 Law. Ed. 876.

91. The legal relation between a foster parent and child is considered to belong to the title "Parent and Child."

92. The surrender was on the express condition that she would be so treated and the foster parent concealed from the child its real parentage—Lynn v. Hockaday, 162 Mo. 111.

93. McElvain v. McElvain (Mo.) 71 S. W. 142.

94. In re Phillips' Estate, 17 Pa. Super. Ct. 103.

95. It bore two signatures, one by the probate judge, and one by unauthorized officer. The law (Vt. Stat. 1894, § 2861) required the probate judge to be satisfied that it had been complied with—Cook v. Bartlett, 179 Mass. 576.

96. Von Beck v. Thomsen, 44 App. Div. (N. Y.) 373; affirmed, 167 N. Y. 601.

97. Substantial compliance with 1 Starr & C. Ann. St. 1896, p. 353—Flannigan v. Howard, 200 Ill. 396.

98. Blanks were left in the decree for the names of the adopter and the children—Wilson v. Otis (N. H.) 53 Atl. 439.

necessary findings is proof of rendition of such a decree.[99] Validity of the decree is unaffected by the long absence of the petition and decree from the court files.[1] An adoption is not presumed merely from the fact that the child resided with the alleged adoptor who was of the same race.[2] It cannot be proved by parol evidence, unless there be some testimony as to the legal act of adoption and explanation of why it is not produced.[3]

Consequences of adoption.—The adopting father's wife acquires no paternal rights under the Tennessee laws if she does not join in the proceedings.[4] Neither is the natural mother estopped as against her by having joined.[5] In Nebraska there is no inheritable capacity conferred if it be not so stipulated in the act of adoption.[6] In Missouri it is conferred by an executed parol adoption.[7] In Wisconsin adoption of a child during marriage revokes a will[8] and the same results in Illinois by virtue of acts giving the inheritable capacity.[9] Bastards may in some states be legitimized by acts of adoption or recognition and thus clothed with inheritable and other rights.[10] Where the proceeding confers "all the rights" of the relation, a child adopted comes under a prior policy payable to "children,"[11] but the question whether the word "child" includes an adopted one usually involves the interpretation of the instrument containing it.[12]

A contract to adopt providing that the adopter shall care for, maintain and make future provision for a child, to give her his name and teach her to regard himself and wife as parents is sufficiently definite to be specifically enforced, is consonant with public policy, and has for its consideration the surrender of parental rights by the real parents. It is not unjust to the widow and natural children if only a child's portion falls to the adopted one.[13] It is not enforceable at law and may not be in equity if the child lives unworthily.[14] Declarations and suppositions that the parent would make the adopted child a legatee must have amounted to a contract so to do, or the child will have no rights against a contrary disposal by the will.[15]

ADULTERATION.

§ 1. *Legislation and regulation.*—The police power entitles a state to repress or forbid adulterations that are deleterious[16] which are not protected because they happen to be by a patented process.[17] Statutes directed against sale of injuriously or fraudulently adulterated foods are not an interference with interstate commerce.[18] A state law against fraudulent adulterations does not conflict with the

99. Wilson v. Otis (N. H.) 53 Atl. 439.

1. Wilson v. Otis (N. H.) 53 Atl. 439.

2. Indians—Henry v. Taylor (S. D.) 93 N. W. 641.

3. Henry v. Taylor (S. D.) 93 N. W. 641.

4. Shannon's Code, §§ 5409-5411; Baskette v. Streight, 106 Tenn. 549. This statute allows a wife to join though its words import only the masculine—Balch v. Johnson, 106 Tenn. 249.

5. Baskette v. Streight, 106 Tenn. 549.

6. Gen. St. 1873, c. 57, tit. 25, § 797, provides that the adopting person "may stipulate" that the child shall have rights of a natural parent—Ferguson v. Herr (Neb.) 90 N. W. 625.

7. Lynn v. Hockaday, 162 Mo. 111.

8. Rev. St. 1898, c. 173, §§ 4021-4024; Glascott v. Bragg, 111 Wis. 605.

9. Flannigan v. Howard, 200 Ill. 396.

10. See Bastards; Descent and Distribution.

11. Laws 1887, c. 703, § 10, Von Beck v. Thomsen, 44 App. Div. (N. Y.) 373; affirmed, 167 N. Y. 601. A policy payable to the foster mother or to children if she should pre-decease the insured is not a trust dependent on survival of heirs within the exception of the statute (see section 10).

12. See Wills and like titles. Not included in "bodily heirs"—Balch v. Johnson, 106 Tenn. 249.

13. Healy v. Healy, 55 App. Div. (N. Y.) 315; affirmed, 167 N. Y. 572.

14. Winne v. Winne, 166 N. Y. 263.

15. Steele v. Steele, 161 Mo. 566. Testimony of a conversation 30 years ago not sufficient to prove agreement to make adopted child heir in face of a deed to custody of the child silent on the subject—Merchant v. White, 77 App. Div. (N. Y.) 539.

16. Commonwealth v. Kevin, 202 Pa. 23.

17. Arbuckle v. Blackburn (C. C. A.) 113 Fed. 616.

18. As in Ohio—Arbuckle v. Blackburn (C. C. A.) 113 Fed. 616.

federal law against importations of harmfully or unwholesomely adulterated foods.[19] The New York law is not unconstitutional in requiring a test from "milk of the herd" when a producer is to be prosecuted and making a test from samples of milk sold or offered when a mere vender is to be prosecuted.[20]

§ 2. *The offense.*—A prohibition of the use of certain preservatives does not make them adulterants.[21] Use of preservatives on meat is not included by the words "or food products of any nature" as used in the Minnesota statute in immediate connection with enumerated dairy products.[22] Under the Pennsylvania act an injurious adulterant need not be used in injurious quantities.[23] Oleomargarine is colored like "yellow" butter if it has a "perceptible shade" of yellow.[24] A liquid produced by soaking dried apple waste and coloring it is an imitation of cider vinegar.[25]

A statute declaring a fine on one who has in possession adulterated food with intent to sell it gives such the character of an offense though a prior clause prohibits other acts but omits this.[26] The offense of unlawfully having in possession subsists though accused did not himself procure the adulteration.[27] It is a selling to send orders and receive shipments as "agent" and distribute them,[28] but not every order procured by an agent brings him within a statute declaring that taking orders shall be deemed a sale.[29] If he takes an order for "pure" products, he is guiltless though his employer sends adulterated goods marked "pure."[30]

Defendant may show that he innocently used a preservative represented to be free from any harmful ingredient and especially from the one found.[31] Under the New York law against selling adulterated milk the intent of the vender is immaterial.[32]

When the offense is in selling or offering adulterated milk and conviction is on tests of a sample fairly taken it is not relevant that accused had not tampered with the milk nor that no sample was taken from milk of the producer's herd.[33] Reading and study may qualify one as an expert to say that formaldehyde is deleterious.[34]

§ 3. *Enforcement and prosecution.*—A law providing for the forfeiture of a certain sum for violation should be enforced by action and not criminally.[35]

19. "Coated, colored or polished." Laws 1893, c. 661, § 41, and Act Cong. 1890, c. 839—Crossman v. Lurman, 171 N. Y. 329.

20. Laws 1893, c. 338; Laws 1900, c. 101—People v. Laesser (Sup.) 79 N. Y. Supp. 470.

21. People v. Biesecker, 169 N. Y. 53.

22. State v. Rumberg, 86 Minn. 399.

23. Salicylic acid in fruit juice; Act June 26, 1895, § 3, subs. 7—Commonwealth v. Kevin, 18 Pa. Super. Ct. 414; affirmed, 202 Pa. 23.

24. Acts 1901 No. 22—People v. Phillips (Mich.) 91 N. W. 616.

25. Laws 1893, c. 308; 1901 c. 338—People v. Niagara Fruit Co., 75 App. Div. (N. Y.) 11.

26. Acts 1899, p. 189; this act forbidding manufacture or sale of adulterated food or drugs, defining foods and drugs, and stating what shall be adulteration, and fixing duties of board of health held to contain only one subject; and not to delegate the legislative power because it authorized the board to fix a standard of purity—Isenhour v. State, 157 Ind. 517.

27. Milk—Isenhour v. State, 157 Ind. 517.

28. Commonwealth v. Leslie, 20 Pa. Super. Ct. 529.

29. Pure Food Law, § 17—People v. Morse (Mich.) 90 N. W. 673.

30. Pub. Acts, 1899, No. 117—People v. Skillman, (Mich.) 89 N. W. 330; People v. Morse (Mich.) 90 N. W. 673.

31. Isenhour v. State, 157 Ind. 517.

32. Laws 1893, c. 338, § 37—People v. Laesser (Sup.) 79 N. Y. Supp. 470.

33. People v. Laesser (Sup.) 79 N. Y. Supp. 470.

34. Isenhour v. State, 157 Ind. 517. Held sufficient that proof was that the adulterated cream was taken from a wagon bearing the license number of defendant, and driven by defendant's servant—People v. Hills, 64 App. Div. (N. Y.) 584. Driver's statement that he was on his way to certain places of delivery not followed by any proof of any delivery is insufficient to show "sale or exposure"—People v. McDermott-Bunger Dairy Co., 38 Misc. (N. Y.) 365. Held sufficient to take the question of knowledge to the jury that defendant objected to an inspector's taking milk which was adulterated though his reason was that he needed it for customers—Isenhour v. State, 157 Ind. 517; sufficiency of evidence from tests of a sample taken from a milk vender's cans—People v. Laesser (Sup.) 79 N. Y. Supp. 470.

35. N. Y. Agri. Law, § 37 and though the penalty be "at least" $25 and not more than

Private persons may complain of a violation of a law though enforcement of it be enjoined on certain officers.[36] The accusation need not negative an exception in favor of certain compounds used as food.[37] It suffices to allege presence of a "substance injurious" without adding a charge that the particular adulterant was so.[38] A proviso that the vendor of food shall sell a sample for analysis if requested does not require that the accusation shall show whether any was so procured nor how evidence was obtained.[39] Whether samples of milk on which conviction is sought were fairly taken will not be submitted unless there is a contrariety of evidence thereupon.[40] Affidavits under the New York laws to sustain an application to enjoin sale of adulterated food pending prosecution should show statutory elements of the offense.[41]

ADULTERY.[42]

The offense.—Parties must dwell together in a common residence, to "live together"[43] and a single act is not "living in adultery."[44] The paramour need not be married.[45]

The indictment.—No continuendo need accompany an averment as on a certain day.[46] The words "having a lawful wife other than A" do not imply that she is the wife of accused as against a contrary averment, and an averment as to her being married is needless in such a case.[47]

Evidence.—The same rules of admissibility apply as in divorce or criminal conversation.[48] The fact that accused went into hearsay as to his relation with the paramour, does not open the way to the state.[49] Circumstances must be brought home to accused.[50] Immodest, familiar or equivocal conduct may be shown on the question of intimacy,[51] or it may be proved by declarations showing influence with the paramour[52] in connection with which the occasion of making them may be proved.[53]

Bad repute of the paramour is excluded.[54] The fact that accused being able to hear it laughed aloud when the guilty wife repulsed her husband is relevant.[55]

$100 the smaller sum may be collected despite the absence of a provision as to who shall fix the amount—People v. Bremer, 69 App. Div. (N. Y.) 14.

36. Board of health; Acts 1899, p. 189—Isenhour v. State, 157 Ind. 517.

37. Nor allege that any standard of purity had been fixed under a statute which merely authorized the health board so to do, but which in any event declared a penalty—Isenhour v. State, 157 Ind. 517.

38. Formaldehyde—Isenhour v. State, 157 Ind. 517.

39. Acts 1899, p. 189—Isenhour v. State, 157 Ind. 517.

40. The inspectors testified without contradiction that the milk was thoroughly stirred before sampling—People v. Laesser (Sup.) 79 N. Y. Supp. 470.

41. Laws 1893, c. 338, § 10—People v. Windholz, 68 App. Div. (N. Y.) 552. Injunction against further sale, in N. Y. not grantable by county judge. See statutes—People v. Windholz, 68 App. Div. (N. Y.) 552.

42. Matters of law and procedure common to all crimes see Criminal Law; Criminal Procedure; Indictment, etc. Also see, Fornication; Disorderly Conduct. Civil Liability, see Husband and Wife; Seduction. Ground for divorce, see Divorce.

43. Massey v. State (Tex. Cr. App.) 65 S. W. 911.

44. Penal Code, § 381—Lawson v. State (Ga.) 42 S. E. 752.

45. Lyman v. People, 98 Ill. App. 386.

46. "Living in open" adultery—Lyman v. People, 198 Ill. 544.

47. Lyman v. People, 198 Ill. 544.

48. State v. Kimball, 74 Vt. 223. Consult Divorce; Husband and Wife.

49. Guinn v. State (Tex. Cr. App.) 65 S. W. 376.

50. Hat and coat found where there had been wallowing on the ground but no proof of ownership nor that accused and paramour had been on the ground—Guinn v. State (Tex. Cr. App.) 65 S. W. 376.

51. Getting drunk together, the one falling into the other's lap, going riding together, going as by prearrangement to a negro's house—Guinn v. State (Tex. Cr. App.) 65 S. W. 376.

52. Professions of ability to induce him to furnish bail for a third person—Roller v. State (Tex. Cr. App.) 66 S. W. 777.

53. Making arrest of third person at home of accused—Roller v. State (Tex. Cr. App.) 66 S. W. 777.

54. Guinn v. State (Tex. Cr. App.) 65 S. W. 376.

The corpus delicti need not be separately shown.[56] Adulterous inclination or undue attentiveness together with equivocal meetings may suffice to prove the offense.[57]

Practice and trial.—The indictment is not vitiated because a transcript removing the cause unnecessarily names the offense and misdescribes it.[58] The injured spouse may insist on a dismissal if given the sole right to prosecute.[59] It is not necessary that both though jointly indicted be tried together.[60] If the offense be a misdemeanor no election is compellable.[61] Instructions need not define "adultery."[62] Whether there was in fact a cohabitation together in open adultery under a statute so defining the crime should be submitted to the jury and it is not sufficient to put to them only the question whether defendants "cohabited together and had intercourse."[63] It is not error unless made so by objection that the bastard offspring of the adulterer was in court in view of the jury.[64]

ADVERSE POSSESSION.[65]

§ 1. *Estates and property subject to adverse possession.*—There can be no adverse holding of public property against the United States or a state,[66] or a municipal corporation holding in trust for the public,[67] so a street cannot be adversely held,[68] as where abutting owners encroach.[69] Alleys dedicated for the common use of particular lots,[70] or in Minnesota, highways[71] are exceptions to this rule. Statutes in some states, exempt railroad lands from limitation acts.[72] Such acts are not grants of special privileges.[73] A town-site excepted from a

55. Campbell v. State (Ala.) 32 So. 635. A whispered statement by the paramour to the witness that a man just then getting into bed with them was accused is hearsay if accused could not have heard it—Guinn v. State (Tex. Cr. App.) 65 S. W. 376.

56. State v. Kimball, 74 Vt. 223.

57. Amorous letters written after arrest —Monteith v. State, 114 Wis. 165 and see State v. Schaedler (Iowa) 90 N. W. 91.

Evidence examined—Lyman v. People, 198 Ill. 544 ("living in open" adultery, also proof of marriage); State v. Kimball, 74 Vt. 223; State v. Schaedler (Iowa) 90 N. W. 91; subsequent acts held sufficient to show inclination, and, with other facts, to convict—State v. More, 115 Iowa, 178; evidence not sufficient to show a "living together"—Burnett v. State (Tex. Cr. App.) 70 S. W. 207.

58. Adultery called "Adultery and fornication." Code Cr. Proc., art. 471—Roller v. State (Tex. Cr. App.) 66 S. W. 777.

59. Hosford v. Gratiot Circuit Judge (Mich.) 88 N. W. 627.

60. Lyman v. People, 98 Ill. App. 386.

61. Massey v. State (Tex. Cr. App.) 65 S. W. 911.

62. Lyman v. People, 198 Ill. 544.

63. Tomlinson v. People, 102 Ill. App. 542.

64. Green v. State (Tex. Cr. App.) 70 S. W. 22.

65. Bar of actions concerning real property not dependent on possession, see Limitation of Actions.

Easements may be gained by prescriptive use and in like manner a dedication may be presumed from long use, etc., see Easements; Dedication.

Loss of property rights by abandonment, see Property.

66. Schlosser v. Hemphill (Iowa) 90 N. W. 814; U. S. v. Dastervignes, 118 Fed. 199.

67. Norrell v. Augusta R. & Elec. Co. (Ga.) 42 S. E. 466.

Tide land belonging to a city is not subject to state possessory acts; Cal. Statutes 1852, p. 158—United Land Ass'n v. Pacific Imp. Co. (Cal.) 69 Pac. 1064.

68. City of Dekalb v. Luney, 193 Ill. 185.

As where a railroad occupied by an embankment and culvert—Kelly v. Pittsburgh C. C. & St. L. R. Co., 28 Ind. App. 457.

Where possession was under a deed from the dedicator, subsequent to the execution of the deed to the city—Norrell v. Augusta R. & Elec. Co. (Ga.) 42 S. E. 466.

69. Shirk v. Chicago, 195 Ill. 298.

70. Hegan v. Pendennis Club, 23 Ky. Law R. 861.

71. Prior to Laws 1899, c. 65—City of Hastings v. Gillitt, 85 Minn. 331.

72. Railroad land if within the boundaries condemned and shown by the recorded award, though outside the track and not occupied, cannot be adversely held—Vermont St. § 3745; Drouin v. Boston & M. R. Co. (Vt.) 52 Atl. 957; construing Rev. St. 1899, § 4270, exempting lands granted to public use, in a case where the land was designated for railroad stock yards and grounds on the plat, but not occupied for railroad purposes—St. Joseph, St. L. & S. F. R. Co. v. Smith (Mo.) 70 S. W. 700.

73. Drouin v. Boston & M. R. Co. (Vt.) 52 Atl. 957. In a note to Southern Pac. Co. v. Hyatt, 132 Cal. 240, 64 Pac. 272, 51 Am. L. Reg. 236, the cases concerning acquisition of a railroad right of way by adverse possession are collected. The California cases against the possibility of adverse holding are placed on the double ground that the right of way is held for public use and is a public highway—Southern Pac. Co. v. Burr, 86 Cal. 279, 24 Pac. 1032. That a railway is

deed but actually enclosed and occupied may be acquired by a holding sufficiently continued.[74] In the case of government land, possession may become adverse as soon as the entryman is entitled to a patent,[75] and a right in public lands which may be perfected and rendered capable of assertion may be barred.[76]

§ 2. *Against whom available.*—Adverse possession will not avail against the state,[77] or a municipal corporation, or against minors.[78] After right of entry accrues to them, possession may be adverse to the remaindermen.[79] In Illinois possession by an heir is not adverse to the unassigned dower right of the widow.[80] Statutes of limitation do not run against a woman during coverture,[81] but may run against one through whom she subsequently claims.[82]

§ 3. *To whom available.*[83]—A railroad company may hold adversely.[84] A city as trustee for the public cannot hold for its own benefit.[85] A city cannot acquire title by adverse possession through the erection of a building on ground to which it makes no claim except as part of a public street.[86] One holding by purchase may also assert limitation acts.[87] A judgment purchaser may hold against a claim under a mortgage junior to the judgment.[88]

§ 4. *Definition and essential elements.*—All statutory elements must be united,[89] and there be actual possession,[90] before action brought.[91] Enclosure may be required.[92] Occupancy must be open, continuous, notorious and ad-

a public highway, is announced in Olcott v. Fond du Lac County Sup'rs, 16 Wall. (U. S.) 678, 21 Law. Ed. 382, and in accord therewith are Moran v. Ross, 79 Cal. 159, 21 Pac. 547; St. J. & D. C. R. Co. v. Baldwin, 103 U. S. 426, 26 Law. Ed. 578; Drouin v. Boston & M. R. Co. (Vt.) 52 Atl. 957; Philadelphia R. R. Co. v. Obert, 109 Pa. 193; Pennsylvania R. Co. v. Freeport, 138 Pa. 91; Bassett v. Pennsylvania R. Co., 201 Pa. 226. In a number of other jurisdictions it is held, however, that railroads are not public highways and that the statute will run against them. This is the rule announced in Northern P. R. Co. v. Ely, 25 Wash. 384, 65 Pac. 555; 54 L. R. A. 526, and the court cites in accord with its view, Illinois Cent. R. Co. v. Houghton, 126 Ill. 233; Illinois Cent. R. Co. v. O'Connor, 154 Ill. 550; Illinois Cent. R. Co. v. Moore, 160 Ill. 9; Donahue v. Illinois Cent. R. Co., 165 Ill. 640; Illinois Cent. R. Co. v. Wakefield, 173 Ill. 564; Paxton v. Yazoo & M. V. R. Co., 76 Miss. 536; Matthews v. Lake Shore & M. S. R. Co., 110 Mich. 170. The commentator states that also in accord with this holding are Coleman v. Flint & P. M. R. Co., 64 Mich. 160; Pittsburgh, C. C. & St. L. R. Co. v. Stickley, 155 Ind. 312; Wilbur v. Cedar Rapids & M. R. Co. (Iowa) 89 N. W. 101; Norton v. London & N. W. R. Co., 13 Ch. Div. 268 (which holds that the statute runs against the superfluous land of a railroad); Bobbett v. South Eastern R. Co., 9 Q. B. Div. 424 (where it is held that it runs against the railroad whether the land in question is superfluous or not); Erie & N. R. Co. v. Rosseau, 17 Ont. App. 483; N. P. R. Co. v. Hasse, 28 Wash. 353, 68 Pac. 882.

74. The original grantee held for 17 years and his wife after a conveyance to her for 13 years, under color of title of the entire tract, the land having been enclosed 25 years —Hohl v. Osborne (Iowa) 92 N. W. 697.

75. Baty v. Elrod (Neb.) 92 N. W. 1032.

76. Robles v. Cooksey (Tex. Civ. App.) 70 S. W. 584.

77. Kolb v. Jones, 62 S. C. 193, and cases cited under § 1, supra. There can be no holding of a bed of a dried up body of water owned by either the federal government or the state—Carr v. Moore (Iowa) 93 N. W. 52; Bryan v. Same, Id.

78. Mobile Transp. Co. v. City of Mobile, 128 Ala. 335; Norrell v. Augusta R. & El. Co. (Ga.) 42 S. E. 466; claim under deed from trustee of minor's estate—Hunter v. Hunter, 63 S. C. 78.

79. Widow who was life devisee procured legal title by payment of balance of purchase money due on bond and conveyed to one who held adversely to the remaindermen more than ten years after the death of the widow—Love v. Butler, 129 Ala. 531.

80. So held under twenty year section of the limitation law—Brumback v. Brumback, 198 Ill. 66.

81. Estes v. Turner (Tex. Civ. App.) 70 S. W. 1007.

82. Estes v. Turner (Tex. Civ. App.) 70 S. W. 1007.

83. See post, § 5, as to particular relationships affecting hostility of claim.

84. Ohio River R. Co. v. Johnson, 50 W. Va. 499.

85. Kansas City v. Scarritt, 169 Mo. 471.

86. This case seems to depend on the fact that the city has no power to erect buildings on land which it had dedicated for street purposes—Pettit v. Grand Junction (Iowa) 93 N. W. 381.

87. Adams v. Hopkins (Cal.) 69 Pac. 228.

88. Mortgagees cannot enforce a lien after ten years (Rev. St. Wis. 1898, § 4211)—Gunnison v. Chicago, M. & St. P. R. Co. (Wis.) 117 Fed. 629.

89. Maxwell v. Cunningham, 50 W. Va. 298. Must be open, notorious, exclusive and adverse under claim and color of title against the true owner and the world. [These are the words of the syllabus by the court but the opinion does not announce as an unqualified rule that color of title is a prime element of adverse possession.]—Beer v. Dalton (Neb.) 92 N. W. 593.

90. So held in case of a burial lot—

verse,[93] and possession must be apparent to other claimants.[94] There must be no actual occupancy by others,[95] though it seems an encroacher need not be evicted where there is no knowledge of adverse claim. Erection of telegraph lines without claim of title is not adverse possession.[97] A city cannot acquire land for a park by mere public use without a claim by the authorities that it is public property.[98]

§ 5. *Hostility.*—Possession must be adverse,[99] throughout the entire period.[1] Permissive possession is not sufficient,[2] as where under a belief that the land will be given the occupants.[3] Hostility may be unnecessary where possession is open, notorious and peaceable.[4] The occupant need not give notice of his claim to the true owner in words.[5]

In the absence of a confidential or trust relation, notice of adverse holding or knowledge thereof need not be shown,[6] though where possession is originally subordinate the hostility must be unequivocal and the true owner have notice,[7] so where a tenant conveys all his right, title and interest, possession by his grantee is not adverse to the landlord.[8] A trustee while the trust continues cannot hold adversely to the beneficiary.[9] Permissive possession need not be surrendered that it may become adverse.[10] An heir who is also an executor is not presumed to

Melggs v. Hoagland, 68 App. Div. (N. Y.) 182. Continuous use for grazing and occasional occupation for cutting wood is not sufficient —McCook v. Crawford, 114 Ga. 337.

91. Jones v. Patterson, 23 Ky. Law R. 1838; Patterson v. Davis, Id.; Davis v. Patterson, Id.

92. To secure benefit of 7 years statute—Asher Lumber Co. v. Clemmons, 23 Ky. Law R. 1771.

93. Knight v. Denman (Neb.) 90 N. W. 863.

94. McCook v. Crawford, 114 Ga. 337. Notice to the true owner is shown where with the adverse claimant he agrees to the construction of buildings over the true line—Klinkner v. Schmidt, 114 Iowa, 695. Under Hurd's Rev. St. 1899, c. 1883, § 7, it is insufficient to drive to the property occasionally and sometimes pluck flowers thereon.—Stalford v. Goldring, 197 Ill. 156.

95. McCook v. Crawford, 114 Ga. 337.

96. Lackey v. Bennett (Tex. Civ. App.) 65 S. W. 651.

97. Andrews v. Delhi and S. Tel. Co., 36 Misc. (N. Y.) 23.

98. The owners were meantime improving and controlling the land and enclosed it entirely at times—Town of Manitou v. International Trust Co. (Colo.) 70 Pac. 757; Same v. Townsend, Id.

99. Necessity therefor is not removed by Session Laws, Colorado, 1893, p. 327, § 1, providing that actions to recover land must be brought within twenty years after the claimant has been seized or possessed of the premises—Evans v. Welch, 29 Colo. 355, 68 Pac. 776. So held, where persons to whom lots were conveyed held possession of a strip designated as an out lot—Evans v. Welch, 29 Colo. 355, 68 Pac. 776. Where a wall is erected under a license, its mere continuance for 20 years does not give a right by adverse possession—Percival v. Chase (Mass.) 65 N. E. 800; Chase v. Percival, Id. When a person goes on land under contract with another as owner and builds houses but within 8 years before suit is brought makes three attempts to file on a portion as a homestead, he cannot be regarded as holding for the person under whom he entered—Watts v. Bruce (Tex. Civ. App.) 72 S. W. 258. A right to water from a spring cannot be acquired by adverse possession by taking, where not shown to be under a claim of right, adverse to plaintiff or his grantor—Hunter v. Emerson (Vt.) 53 Atl. 1070.

1. Knight v. Denman (Neb.) 90 N. W. 863.

2. Hicks Bros. v. Swift Creek Mill Co., 133 Ala. 411, 57 L. R. A. 720. So held, where the claimant lived with his father, recognizing his father's title until the father's death—Butler v. Butler, 133 Ala. 377. Where a railroad company goes into possession on an agreement for a deed in case tracks and a station are constructed—Southern Cal. R. Co. v. Slauson (Cal.) 68 Pac. 107. Where entry was permissive, subsequent acts indicate that it remained so and claimants have taken a lease of the premises—McClenahan v. Stevenson (Iowa) 91 N. W. 925.

3. McClenahan v. Stevenson (Iowa) 91 N. W. 925.

4. Toltec Ranch Co. v. Babcock, 24 Utah, 183, 66 Pac. 876.

5. Jangraw v. Mee (Vt.) 54 Atl. 189.

6. Bryce v. Cayce, 62 S. C. 546. As where two persons are living together on land of which one has title, the holding of the person without title is not adverse, though the relation of the parties is not that of husband and wife—Lloyd v. Rawl, 63 S. C. 219.

7. Maxwell v. Cunningham, 50 W. Va. 298; Stevenson v. Black, 168 Mo. 549. Notice of adverse rights is not afforded by cheap shanties erected by squatters on city lots—Blake v. Shriver, 27 Wash. 593. 68 Pac. 330.

8. Bruce v. Richardson (Tex. Civ. App.) 64 S. W. 785.

9. Dresser v. Travis, 39 Misc. (N. Y.) 358. So held though the trustee had received from the beneficiary a deed of the subject-matter void because the grantor was of unsound mind—Spicer v. Holbrook, 23 Ky. Law R. 1812.

10. Whelchel v. Gainesville & D. Elec. R. Co. (Ga.) 42 S. E. 776.

hold adversely.[11] A widow's occupancy begun in subordination to the title of her husband is not adverse to his heirs,[12] and the rule applies to a purchaser from certain heirs.[13] One entitled to an undivided interest in land as an heir may purchase from one who has acquired an interest through a tax sale and hold adversely.[14] Occupancy by the husband may be adverse to the wife's statutory estate after her death.[15] One continuing on a homestead entry after its cancellation and a grant of the land to a railroad holds adversely.[16] A grantor may hold adversely to his grantee,[17] but possession under a contract of purchase uncomplied with is not adverse,[18] as when there is a default in payment of the purchase money.[19] The vendee must be entitled to a deed.[20] Mere occupancy after a conveyance is presumed to be in subordination to the title conveyed,[21] as where grantees are children,[22] though not where there is a re-entry after conveyance with covenants of warranty.[23] An heir in joint possession with a widow who has a dower interest does not cause his wife to hold adversely by a voluntary conveyance to her.[24] Where the vendee is in partial occupancy the vendor cannot hold the unoccupied portion adversely without notice,[25] as where a vendor remains in possession of a portion of the premises described in his conveyance but makes no claim of ownership to more than the amount of land remaining in him according to the terms of his conveyance.[26] Possession under a claim that a conveyance was in trust for the occupants is not hostile to the grantee,[27] or permissive possession under a deed fraudulent as to creditors.[28] Vendees holding subject to a vendor's lien cannot claim their possession as adverse.[29]

Mortgagor and mortgagee.—A constructive mortgagee in possession under an agreement that rent shall be applied to payment of taxes and compensation of the mortgagee, does not hold adversely,[30] or a mortgagee in possession who accepts payments on the debt.[31] The grantee of a mortgagor cannot assert title as against one acquiring title through a sale under the mortgage, where the grantee has by taking a contract for a deed from the purchaser at such sale, recognized its validity.[32] Foreclosure to which a grantee of the mortgagor is not made a party does not alter the character of his possession as being consistent and subject to the title under the mortgage.[33] After foreclosure of a mortgage by exercise of the power of sale the mortgagor may hold possession adversely, though the mortgagee

11. Walker v. Killian, 62 S. C. 482.
12. Smith v. Cunningham, 79 Miss. 425.
13. Purchasers from certain heirs are regarded as holding in amity with the other heirs and widow—Sergent v. North Cumberland Mfg. Co., 23 Ky. Law R. 2226.
14. It will not amount to a mere redemption by an heir, and limitation act, § 6, Hurd's Rev. St. 1899, p. 1117, will apply—Richards v. Carter, 201 Ill. 165.
15. Llde v. Park (Ala.) 33 So. 175.
16. This holding was accompanied by acts of dominion such as fencing, cultivation, erection of buildings, and payment of taxes—Wilbur v. Cedar Rapids & M. R. R. Co. (Iowa) 89 N. W. 101.
17. Mannix v. Riordan, 75 App. Div. (N. Y.) 135.
18. Alsup v. Stewart, 194 Ill. 595; Jenkins v. McMichael, 17 Pa. Super. Ct. 476.
19. Thompson v. Dutton (Tex. Civ. App.) 69 S. W. 641; judgment reversed on rehearing, Id. 996. So held where after breach in the bond a vendor retook and held possession for 10 years without accounting for rents and profits or otherwise recognizing the purchaser—Love v. Butler, 129 Ala. 531.
20. Beer v. Dalton (Neb.) 92 N. W. 593.
21. Collins v. Colleran, 86 Minn. 199.
22. Continued for eight years—Tully v. Tully, 137 Cal. 60, 69 Pac. 700.
23. Horbach v. Boyd (Neb.) 89 N. W. 644.
24. Construing Rev. St. Ill., c. 83, § 6—Brumback v. Brumback, 198 Ill. 66.
25. So held where a portion of land granted a railroad was not used by the company—Graham v. St. Louis, I. M. & S. R. Co., 69 Ark. 562.
26. In this case the vendor did not know where the boundary of his conveyance went and although he cultivated a portion, made no improvements and claim of title—Woods v. Texas Land & Loan Co. (Tex. Civ. App.) 67 S. W. 155.
27. McClenahan v. Stevenson (Iowa) 91 N. W. 925.
28. McClenahan v. Stevenson (Iowa) 91 N. W. 925.
29. Henry v. McNew (Tex. Civ. App.) 69 S. W. 213.
30. Decker v. Decker (Neb.) 89 N. W. 795.
31. Goodman v. Pareira, 70 Ark. 49.
32. Alsup v. Stewart, 194 Ill. 595.
33. Alsup v. Stewart, 194 Ill. 595.

purchases.[34] As against a claim of adverse possession asserted in partition, it is proper to show that claimant entered as a tenant.[35]

Error as to boundary.—If occupancy is due to a mere mistake as to the location of a line neither of the adjoining owners can claim adversely,[36] but there may be adverse occupancy,[37] as where there is a claim of ownership to the line,[38] or where adjoining owners each claim to own beyond a fence erected without regard to the actual boundary,[39] but not where the occupant makes no claim to land other than his lot.[40]

Recognition of a superior title where a portion of a lot is held adversely does not result from the securing of a license to use the remainder.[41] Occupant may purchase outstanding claims of portions.[42] Assertions in legal proceedings of an intent not to claim a fee, will prevent an adverse holding.[43]

Merger or attornment.—Adverse holding ceases if adjoining tracts become the property of the same owner.[44] Attornment to the true owner interrupts possession.[45]

§ 6. *Sufficiency of possession.*—Actual occupancy and possession may suffice without enclosure, cultivation and improvement.[46] Occasional entries or cuttings of timber are not sufficient.[47] The possession should be distinct and entire.[48] Possession must be exclusive.[49] Adverse possession will not run against tenants in common when any tenant is in possession.[50] Actual, physical possession may be required.[51] It may be by tenant.[52] Permission by the claimant of appropriation of the land by others may be sufficient to defeat his claim.[53] Acts consistent

34. Garren v. Fields, 131 Ala. 304.

35. Construing Code N. C., § 147, providing that where a tenancy is established, a tenant's possession will be deemed the landlord's until the expiration of twenty years from the last payment of rent—Bulluck v. Bulluck, 131 N. C. 29.

36. Small v. Hamlet, 24 Ky. Law R. 238; Patton v. Smith (Mo.) 71 S. W. 187.

37. Where land was enclosed and cultivated for more than fifteen years—Diers v. Ward (Minn.) 92 N. W. 402; as where the strip in question is cultivated enclosed and buildings erected thereon—Webb v. Rhodes, 28 Ind. App. 393; occupancy under belief that land is part of another tract and that the true boundary is different than it really is—Baty v. Elrod (Neb.) 92 N. W. 1032.

38. Barrett v. Kelly, 131 Ala. 378. As where the occupant repudiated subsequent surveys—Gist v. Doke (Or.) 70 Pac. 704.

39. Fifteen years occupancy—Brown v. Clark, 73 Vt. 233.

40. Palmer v. Osborne, 115 Iowa, 714.

41. O'Flaherty v. Mann, 196 Ill. 304.

42. Hohl v. Osborne (Iowa) 92 N. W. 697.

43. So held where a city disclaimed an intent to hold the fee of land donated for a grave yard, which had become part of the city and only asserted the claim to it as a grave yard with right of burial therein—Kansas City v. Scarritt, 169 Mo. 471.

44. Patton v. Smith (Mo.) 71 S. W. 187.

45. Illinois Steel Co. v. Budzisz (Wis.) 90 N. W. 1019.

46. Revised Statutes, §§ 4213 and 4214—Batz v. Woerpel, 113 Wis. 442. Continuous occupancy for 20 years with enclosure, cultivation and claim of ownership is sufficient. Rev. St. 1898, §§ 1225, 4214—Gilman v. Brown, 115 Wis. 1. Where a strip of land is enclosed for 16 years and used as a passage way for more than 20 years, it is sufficient to sustain title—Batz v. Woerpel, 113 Wis. 442. It is not sufficient to blaze boundaries on timber swamp lands, cut a small amount of timber and occasionally warn off trespassers—Travers v. McElvain, 200 Ill. 377. Enclosure is not necessary if there is actual possession with acts sufficient to give unequivocal notice of an adverse claim to all others—Zepeda v. Hoffman (Tex. Civ. App.) 72 S. W. 443.

47. Combs v. Combs (App.) 24 Ky. Law R. 1691. Where defendant was never in actual possession, though her tenant occupied a cabin in a small field therein for a time, but defendant lived on an adjoining tract, and timber was occasionally cut and removed from the land in controversy under contract with her, there is no evidence of adverse possession—Patterson v. T. J. Moss Tie Co. (App.) 24 Ky. Law R. 1571.

48. So held where possession was of distinct unidentified parts less than the entire tract—Sparks v. Hall (Tex. Civ. App.) 67 S. W. 916.

49. Building a fence around a spring is not sufficient if not so constructed as to exclude other persons from using the water, and if it does not appear that it was done in the assertion of a right to the spring or its protection—Hunter v. Emerson (Vt.) 53 Atl. 1070.

50. Johnston v. Case, 131 N. C. 491.

51. Held that where land was purchased in the name of a wife without the knowledge or consent of the husband, the wife could not obtain title, neither party having actual possession—Flanner v. Butler, 131 N. C. 155.

52. Barrett v. Kelly, 131 Ala. 378; Neyland v. Texas Yellow Pine Lumber Co. (Tex. Civ. App.) 64 S. W. 696.

53. Illinois Steel Co. v. Budzisz (Wis.) 90 N. W. 1019.

with an intention to make trespasses until forbidden, are insufficient.[54] Erection of permanent improvements is a strong circumstance supporting the inference of adverse possession.[55] Possession of an alley under a claim that it is vacated is sufficiently adverse.[56] Under statutes concerning the acquisition of title to vacant land, entry must be made before the actual owner takes possession.[57]

§ 7. *Continuity.*—Interrupted possession for the statutory period will not suffice unless the possessions are connected.[58] A secret re-entry does not interrupt possession,[59] nor changes in political divisions,[60] nor a judgment in ejectment where there is no surrender, entry or execution,[61] nor proceedings in insolvency where the premises are a declared homestead,[62] nor occasional entries there being actual enclosure.[63] Possession by an executor will not be regarded as an interruption.[64] The acts must be such as to afford reasonable notice to the adverse occupant that his possession is challenged.[65] A re-assumption of possession does not relate to a former occupancy.[66]

§ 8. *Duration.*—Possession must extend through the statutory period[67] which begins to run from the first act construed as an assertion of hostile holding.[68] Possession while there is no cause of action cannot be included,[69] or pending an action against claimant to recover the land.[70] Entry while the title is in litigation will not constitute a disseisin.[71] Time between filing of an application for school land and the issue of a patent therefor may be included,[72] or after identification of railroad land.[73]

54. Knight v. Denman (Neb.) 90 N. W. 863; Ritter v. Myers (Neb.) 92 N. W. 638.

55. Brock v. Bear (Va.) 42 S. E. 307. Division fences, planting orchards or erection of substantial buildings—Hill v. Coal Val. Min. Co., 103 Ill. App. 41. It may be sufficient to use a small triangular portion of land for the purpose of access to a building—Mackall v. Mitchell, 18 App. D. C. 58.

56. Blennerhassett v. Town of Forest City (Iowa) 91 N. W. 1044.

57. So held where after a payment under Hurd's Rev. St. 1899, c. 83, § 7, the claimant made an entry after the holders of a paramount title had enclosed the land with a fence—Stalford v. Goldring, 197 Ill. 156.

58. Brinkley v. Smith, 131 N. C. 130.

59. Illinois Steel Co. v. Budzisz (Wis.) 90 N. W. 1019.

60. So held where a new county comprehending a portion of a patent was created—Kentucky Union Co. v. Cornett, 23 Ky. Law R. 1922.

61. Duffy v. Duffy, 20 Pa. Super. Ct. 25.

62. Harris v. Duarte (Cal.) 70 Pac. 298.

63. Entries to obtain rock or timber or to make sugar—Swafford v. Heid's Adm'r, 23 Ky. Law R. 1556.

64. Being authorized by Rev. St., arts. 1867 and 1869—McLavy v. Jones (Tex. Civ. App.) 72 S. W. 407.

65. As where the owner of uninclosed land enters and surveys it setting stakes and remaining on the land for a considerable time—Illinois Steel Co. v. Budzisz (Wis.) 90 N. W. 1019.

66. Illinois Steel Co. v. Budzisz (Wis.) 90 N. W. 1019.

67. In case of enclosed land, 15 years—Speer v. Duff, 23 Ky. Law R. 1323; as under a parol gift—Logan v. Phenix, 23 Ky. Law R. 2300. A lease given during proceedings to recover land under which possession is held less than three years does not show adverse holding for a sufficient period—Standard Oil Co. v. Cook, 63 Kan. 866. Under a ten year provision, adverse rights are barred when not asserted until 29 years after foreclosure of a mortgage executed by one in possession under exclusive claim of title—Dunbar v. Aldrich, 79 Miss. 698. Eight years occupancy and subsequent removal and management for the life tenant is not sufficient where right is claimed under statute requiring 10 years possession—Anderson v. Carter (Tex. Civ. App.) 69 S. W. 78. Possession for 8 years joined to a possession for 1½ years is not sufficient under a 10 year statute—Patton v. Smith (Mo.) 71 S. W. 187. Three years statute does not apply in favor of one holding under a sheriff's deed where before sale title had passed to the execution debtor's wife—Watts v. Bruce (Tex. Civ. App.) 72 S. W. 258. The five years statute does not apply in the absence of a deed of record or payment of taxes—Watts v. Bruce (Tex. Civ. App.) 72 S. W. 258. Where after grant of a right of way possession of the land is taken under a homestead application, 10 years adverse occupation of the entire right of way except a portion of which the company take forcible possession, will bar an action for its recovery; construing 2 Ball. Ann. Codes and Statutes, § 4797—Northern Pac. R. Co. v. Hasse, 28 Wash. 353, 68 Pac. 882.

68. From the date of a tax sale—Gauthier v. Cason, 107 La. 52.

69. Sparks v. Hall (Tex. Civ. App.) 67 S. W. 916.

70. St. Paul M. & M. R. Co. v. Olson (Minn.) 91 N. W. 294.

71. Entry by squatter who made slight improvements and the owner was residing on a portion of the premises, (2 Ball. Ann. Codes and St. § 4797)—Blake v. Shriver, 27 Wash. 593, 68 Pac. 330.

72. Thompson v. Dutton (Tex. Civ. App.)

One attempting to tack possessions must show a continuity of transfer.[74] Under certain statutes the doctrine of tacking possession does not apply.[75] Possession of an heir may be tacked to that of his ancestor, through whom he acquires possession,[76] but not possession under a deed from a trespasser to the trespasser's possession.[77] An adverse possession cannot be tacked to a prior possession not adverse,[78] as one under contract of purchase.[79] Possession under a tax sale against an execution purchaser may be joined to the execution debtor's possession if he acquires title from such tax purchaser.[80] One claiming by adverse possession in another must connect himself therewith.[81]

§ 9. *Color of title.*—Title of record is unnecessary[82] except under particular statutes requiring a deed and claim of title of record.[83] Where a statute provides a limitation in favor of those holding under recorded deeds, the heir of one so holding may claim a portion of the property set aside to her in partition without record of the order of court, setting it apart to her.[84] Under the same statute a will need not be recorded to enable the heir to claim by a deed of record to his ancestor.[85] Where adverse possession must be under title or color thereof or under a duly registered deed, it cannot be asserted by a grantor against his own deed.[86] Conveyance of an undefined portion of a larger tract followed by a subsequent and ratified definition of the tract conveyed breaks the continuity of title thereto as regards others claiming in the status of the grantor.[87] The fact that claimant's grantor obtained title by conveyances of constituent portions does not affect the quality of his deed of the entire tract as color.[88] Written evidence of title in grantor does not avail to his parol grantee.[89]

A tax deed is not a title deducible of record from the commonwealth,[90] but may be color of title[91] without proof of the validity of the antecedent proceedings,[92] and though it faultily describe the owner,[93] or there were defects in the assessment;[94] but the title derived from a tax sale, void for insufficiency of de-

69 S. W. 641, judgment reversed on rehearing. Id. 996.

73. Where public lands are granted a railroad on condition of identification adverse possession may begin against the railroad on filing of the certificate of identification and is not deferred to the issuance of the patent —Toltec Ranch Co. v. Babcock, 24 Utah, 183, 66 Pac. 876.

74. Evans v. Welch, 29 Colo. 355, 68 Pac. 776.

75. Revised Codes, N. D. 1899, § 3491a (Laws 1899, c. 158)—J. B. Streeter, Jr., Co. v. Fredrickson (N. D.) 91 N. W. 692.

76. Epperson v. Stansill, 64 S. C. 485.

77. Covert v. Pittsburg & W. R. Co., 18 Pa. Super. Ct. 541.

78. Patton v. Smith (Mo.) 71 S. W. 187. Where occupancy is beyond the subdivision line by mistake of the adjoining owners in locating the line one to whom the occupant conveys by a mere description of the land as a government subdivision, cannot take advantage of the prior possession beyond the true line—Patton v. Smith (Mo.) 71 S. W. 187.

79. Thompson v. Dutton (Tex. Civ. App.) 69 S. W. 641; judgment reversed on rehearing, Id. 996.

80. Gauthier v. Cason, 107 La. 52.

81. Murray v. Pannaci (N. J. Ch.) 53 Atl. 595; Johnston v. Case, 131 N. C. 491.

82. Where there was 15 years' holding—Krauth v. Hahn, 23 Ky. Law R. 1261.

83. Five years' clause of Texas statute—Lackey v. Bennett (Tex. Civ. App.) 65 S. W. 651; see Beer v. Dalton (Neb.) 92 N. W. 593, which in a syllabus by the court not supported by the opinion, says that color of title and other elements must be present.

84. McLavy v. Jones (Tex. Civ. App.) 72 S. W. 407.

85. McLavy v. Jones (Tex. Civ. App.) 72 S. W. 407.

86. Under either 3 or 5 years limitations—Goldman v. Sotelo (Ariz.) 68 Pac. 558.

87. So held in construction of the Texas statute where a portion of a homestead was conveyed and selected with the wife's ratification and she and the children attempted to avail themselves of subsequent occupation of the part selected—Mass v. Bromberg (Tex. Civ. App.) 66 S. W. 468.

88. Sharp v. Shenandoah Furnace Co., 3 Va. Sup. Ct. R. 589.

89. Acme Brew. Co. v. Central R. & B. Co., 115 Ga. 494.

90. Construing Ky. St., § 2513—Griffin v. Sparks, 24 Ky. Law R. 849.

91. A marshal's deed to one through whom occupant claims may be color of title though void.—Mackall v. Mitchell, 18 App. D. C. 58.

92. So held under the five year clause of the Texas statute though contra under the three year clause—Gillaspie v. Murray (Tex. Civ. App.) 66 S. W. 252.

93. Boyle v. West, 107 La. 347.

94. Jopling v. Chachere, 107 La. 522.

scription, will not sustain adverse possession.[95] Where a tax purchaser and his vendee have no title because of invalidity of the sale and knowledge thereof, their vendees may have a title valid on its face sufficient to sustain title by prescription.[96] A judgment in eminent domain proceedings is not a paper title,[97] or a judgment in a petitory action.[98] One purchasing at execution sale after the title has passed to the wife of the judgment debtor, is not in under color of title.[99] A voidable deed in foreclosure regular and valid on its face is color of title,[1] as where a decree and deed purport to convey a fee on foreclosure of a mortgage of a life estate.[2] Possession for 20 years under an ordinary's deed is sufficient.[3]

The instrument to be color of title must on its face be such and cannot be aided by parol,[4] though extrinsic evidence may be admissible to render the description certain.[5] A conveyance having a grantor and grantee and purporting to pass land aptly described is color of title,[6] though not sufficient to convey title,[7] void,[8] executed by one without title,[9] or under disability,[10] or a mere quitclaim deed.[11] A void headright grant is not sufficient.[12] A deed or mortgage insufficient to convey a homestead does not amount to color[13] though in some states such instrument, void through nonjoinder of the wife may be color of title as against third persons.[14] A deed by the husband though void as against the wife will operate to fix the scope of the grantee's possession.[15] If the description be such that a surveyor can from it locate the land it is sufficient.[16] A deed purporting to convey part of a larger tract must identify the part conveyed.[17] Color of title to a government fraction extends only to the line of the government survey.[18] Where an enclosed lot is sold, the fact that the boundary is doubtful on account of uncertainty as to the location of a starting point, does not prevent the grantee from acquiring title.[19] Possession under a parol contract of sale is good.[20]

95. Cooper v. Falk (La.) 33 So. 567.

96. Cooper v. Falk (La.) 33 So. 567.

97. Construing Em. Dom. Act. Hurd's Rev. St. 1899, p. 839. c. 47, § 10 and Hurd's Rev. St., p. 1118, c. 83, § 6—Converse v. Calumet River R. Co., 195 Ill. 204.

98. Ten years prescription against those claiming through the unsuccessful parties, the judgment being in favor of one holding a certificate of purchase from the state—Hargrave v. Mouton (La.) 33 So. 590.

99. Under the three years statute—Watts v. Bruce, 72 S. W. 258.

1. H. B. Claflin Co. v. Middlesex Banking Co. (Ark.) 113 Fed. 958.

2. Webb v. Winter, 135 Cal. 455, 67 Pac. 691; reversed judgment, Id., 65 Pac. 1028.

3. As where there is a sale under partition between the heirs of a lessee—Few v. Keller, 63 S. C. 154.

4. Converse v. Calumet River R. Co., 195 Ill. 204.

5. Sharp v. Shenandoah Furnace Co., 3 Va. Sup. Ct. R. 589.

6. Schlageter v. Gude (Colo.) 70 Pac. 428; Robinson v. Lowe, 50 W. Va. 75.

7. Sharp v. Shenandoah Furnace Co., 3 Va. Sup. Ct. R. 589.

8. Bennett v. Pierce, 50 W. Va. 604.

9. Roth v. Munzenmaier (Iowa) 91 N. W. 1072.

10. A warranty deed from an Indian patentee is color of title in the hands of innocent grantees, though the patentee is incompetent under the treaty and his patent provided that the land should not be conveyed without the consent of the secretary of the interior—Schrimpscher v. Stockton, 183 U. S. 290, 46 Law. Ed. 203, affirming judgment, Id., 58 Kan. 758, 51 Pac. 276.

11. Johnson v. Girtman, 115 Ga. 794.

12. Under 3 years statute—Sheppard v. Avery (Tex. Civ. App.) 68 S. W. 82.

13. So held when not joined in by the wife—Garner v. Black (Tex.) 65 S. W. 876; affirming judgment Black v. Garner (Tex. Civ. App.) 63 S. W. 918.

14. Avera v. Williams (Miss.) 33 So. 501.

15. Williams v. Bradley (Tex. Civ. App.) 67 S. W. 170.

16. Hill v. Harris (Tex. Civ. App.) 64 S. W. 820. Where a deed relied on as color of title described the land by reference to a deed of a certain date, and such deed is not introduced in evidence, the three and five years statutes of limitation are not available; though a deed is introduced between the same parties of almost identical date—Rountree v. Thompson (Tex. Civ. App.) 71 S. W. 574; Id., 72 S. W. 69.

17. So held under Hurd's Rev. St. 1899. c. 83, § 6—Hanna v. Palmer, 194 Ill. 41. "100 acres deeded to B out of a certain survey" held insufficient—Bruce v. Richardson (Tex. Civ. App.) 64 S. W. 785.

18. So held where another line was subsequently established—Barnes v. Allison, 166 Mo. 96.

19. It being understood that the description covered all the land within enclosure—Powers v. Bank of Oroville, 136 Cal. 486, 69 Pac. 151.

20. Where continued for fifteen years—Howton v. Gilpin. 24 Ky. Law R. 630.

§ 10. *Payment of taxes.*—One who on account of his peculiar relation to the title is bound to pay taxes, cannot avail himself of such payments to support a title by adverse possession.[21] Payment of taxes on vacant land while an assertion of title is not equivalent to possession.[22] Under laws making payment of taxes an element of possession all taxes must be paid by the claimant.[23] Under some statutes payment must be coupled with possession.[24] Payment under a deed of record establishes the possession to be adverse.[25] It cannot be objected that the claimant did not pay taxes, where the boundaries being uncertain, no taxes were assessed on the strip in controversy, if they were not included in the assessment paid by claimant.[26]

§ 11. *Area of possession.*—By statute, the amount of land to be acquired by limitation may be limited.[27] The instrument under which claimant entered is not conclusive as to the scope of possession.[28] One in possession of a portion of a tract under color of title to the whole has constructive possession of the entire tract, if not actually adversely occupied,[29] though the color of title is void.[30] To increase constructive possession, the boundaries of the color cannot be enlarged by intention to convey more land.[31] Such possession is lost by conveyance of the portion in actual occupancy,[32] or by sale of the part constructively possessed.[33] Possession of part may be under a deed improperly recorded[34] but does not extend to land held under distinct conveyances,[35] nor does it affect a record owner whose land is included in a deed between strangers but no portion occupied.[36] Constructive possession of the legal owner is not disturbed by a possession not within the boundaries of his grant though within the boundaries of a conflicting title which included the occupant's land.[37] There is no constructive possession of unenclosed land, a portion of which only is actually occupied.[38] Actual possession cannot be overcome by constructive possession though under a later title deed.[39]

21. So held, where a grantee in possession of the mortgagor, paid taxes on the mortgaged premises for more than seven years—Alsup v. Stewart, 194 Ill. 595.

22. Texas Tram & Lumber Co. v. Gwin (Tex. Civ. App.) 67 S. W. 892; Id., 68 S. W. 721.

23. Revised Codes N. D. 1899, § 3491a (Laws 1899, c. 158); adverse possession for ten years with payment of taxes—J. B. Streeter, Jr., Co. v. Fredrickson (N. D.) 91 N. W. 692.

24. Under the statute providing for 5 years possession and the payment of taxes—Goldman v. Sotelo (Ariz.) 68 Pac. 558.

25. Sparks v. Hall (Tex. Civ. App.) 67 S. W. 916.

26. Dierssen v. Nelson (Cal.) 71 Pac. 456.

27. Under Rev. St. art 3344, more than 160 acres cannot be claimed under the ten year limitation act, unless there is evidence of title of record describing a larger tract—Watts v. Bruce (Tex. Civ. App.) 72 S. W. 258.

28. Where possession is taken of an entire tract under a deed which by mistake fails to convey a portion thereof and conveyance is made by the occupants to others by similar descriptions, the accumulated holdings being more than the statutory period, the land omitted may be held against a subsequent grantee of the original grantor—West v. Edwards, 41 Or. 609, 69 Pac. 992.

29. Krauth v. Hahn, 23 Ky. Law R. 1261; Maxwell v. Cunningham, 50 W. Va. 298; Barrett v. Kelly (Ala.) 30 So. 824.

30. Sparks v. Farris (Ark.) 71 S. W. 945; denying rehearing, Id. 255.

31. Johnston v. Case, 131 N. C. 491.

32. Sharp v. Shenandoah Furnace Co., 3 Va. Sup. Ct. R. 589.

33. Sale of unimproved portion and retention of occupancy of improvements—Kirkpatrick v. Tarlton (Tex. Civ. App.) 69 S. W. 179.

34. In this case it is mooted whether a voluntary deed may be "duly recorded" under Civ. Code, § 3587, and Registry Laws—Baxley v. Baxley (Ga.) 43 S. E. 436.

35. Hill v. Harris (Tex. Civ. App.) 64 S. W. 820. Rightful possession of a grant is not extended constructively to the entire limits of a subsequent sheriff's deed including such grant since such possession is not sufficient to render claimant liable to ejectment—Lewis v. Covington, 130 N. C. 541. Where the tract claimed lies partly in two distinct grants, but the actual possession is limited to one grant, claimant has no constructive possession to the extent of his color of title to that part of the land described as lying within the other grant—Elliott v. Cumberland Coal & Coke Co. (Tenn.) 71 S. W. 749.

36. Walsh v. Wheelwright, 96 Me. 174.

37. Where one under a deed carrying accretions sought to claim land the legal title to which was in another it was held that in the absence of actual occupancy there was no constructive possession—Stockley v. Cissna (C. C. A.) 119 Fed. 812.

38. Zepeda v. Hoffman (Tex. Civ. App.) 72 S. W. 443.

39. Carey v. Cagney (La.) 33 So. 89.

A deed which by mistake describes land claimed will not prevent acquisition of title where immediately after, the mistake is acknowledged by all parties.[40] Execution of a lease of an entire tract by one holding a deed to a portion does not extend constructive possession to part not actually occupied by the lessor.[41] Where a lap caused by conflicting descriptions is not enclosed, in the absence of actual occupancy constructive possession enures to the superior title.[42] Under mere claim of title, possession is in certain states limited to actual inclosure,[43] but in others possession of a portion claiming the whole is possession of the whole.[44] Possession of the shore does not extend to submerged land where the titles are distinct.[45]

§ 12. *Nature of title acquired.*—When the statutory period of holding has been completed in concurrence with other elements, the claimant acquires an absolute title equivalent to a valid record title.[46] It will bar a mortgagor's action to redeem,[47] and is a sufficient defense to ejectment.[48] A transferee of one who has acquired title by adverse holding may maintain an action to remove cloud from his title.[49] Actual possession for more than seven years under a deed improperly recorded may overcome the title of a purchaser for value under a perfect paper title.[50] Where a title is divested by adverse possession and the former owner conveys, his grantee cannot assert the benefit of the three years' statute.[51] After a father has acquired title by adverse possession, such title cannot be affected by agreements between a son in possession and the former owner or by a judgmnt establishing such son's title as against the former owner's heirs.[52] Title when acquired is not affected by subsequent acts apparently showing a cessation of adverse holding,[53] or by failure to include a portion of the land in legal proceedings.[54] After forty years, possession is presumed to be under a deed.[55]

§ 13. *Pleading, evidence and instructions.*—Adverse possession need not be charged in the words of the statute.[56] It may be asserted under a general denial.[57] An allegation as to enclosure, in the absence of a paper title, is not necessary where there is an averment of knowledge of the adverse claim.[58] On pleading adverse possession the facts must be alleged or else the existence of a prescriptive right.[59] Where the statute is pleaded the adverse possession must be by the party

40. Claim under two years statute—Ellis v. Le Bow (Tex. Civ. App.) 71 S. W. 576.

41. Hill v. Harris (Tex. Civ. App.) 64 S. W. 820.

42. Kentucky L. & I. Co. v. Crabtree, 24 Ky. Law R. 743; Krauth v. Hahn, 23 Ky. Law R. 1261.

43. Maxwell v. Cunningham, 50 W. Va. 298.

44. Construing Rev. St., § 4266—Stevens v. Martin, 168 Mo. 407.

45. Gibbs v. Sweet, 20 Pa. Super. Ct. 275.

46. So held on an assessment of damages for construction of a highway—Hohl v. Osborne (Iowa) 92 N. W. 697; Renner v. Kannally, 96 Ill. App. 392; judgment affirmed, Id., 61 N. E. 1026; Bennett v. Pierce, 50 W. Va. 604; twenty-four years possession under mesne conveyance from an invalid patentee—Stevens v. Martin, 168 Mo. 407. Open, notorious, and peaceable possession of real estate with claim of right thereto for the period prescribed by statute confers title on the claimant—Kline v. Stein (Wash.) 70 Pac. 235. Evidence of possession and payment of taxes for more than 20 years will support an action for possession—Kolb v. Jones, 62 S. C. 193.

47. So held where there was 7 years possession under a voidable deed in foreclosure—H. B. Claflin Co. v. Middlesex Banking Co. (Ark.) 113 Fed. 958.

48. Bean v. Gardner, 18 Pa. Super. Ct. 245.

49. Mickey v. Barton, 194 Ill. 446.

50. Baxley v. Baxley (Ga.) 43 S. E. 436.

51. Grayson v. Peyton (Tex. Civ. App.) 67 S. W. 1074.

52. Kirton v. Bull, 168 Mo. 622.

53. Mann v. Schueling (Tex. Civ. App.) 68 S. W. 292.

54. Beam v. Gardner, 18 Pa. Super. Ct. 245

55. Jenkins v. McMichael, 21 Pa. Super. Ct. 161.

56. So the words "claiming to be the owner" need not be used where it was alleged that certain acts were done "of which the defendant well knew, knowing that complainant was doing so as owner of the land"—Bynum v. Stinson (Miss.) 32 So. 910. It is sufficient to allege holding for about fifteen years, and that land was secured fifteen years ago, where a ten years' statute is relied on—Bynum v. Stinson (Miss.) 32 So. 910.

57. Shelton v. Wilson, 131 N. C. 499.

58. Bynum v. Stinson (Miss.) 32 So. 910.

59. Where prescriptive right is pleaded, it must be alleged that it was under claim of right peaceable, without interruption, open, notorious and exclusive—Coleman v. Hines, 24 Utah, 360, 67 Pac. 1122. It is sufficient to assert the time, openness and notoriety of possession together with acts as the cutting of fire wood with knowledge of the oppos-

though otherwise where the evidence is introduced under a general denial.[60] On trespass for a portion of a tract, defendant may recover on a showing of adverse possession as to the specific portion, though he has not pleaded adverse possession as to that portion specially.[61] Record title or a written agreement of exchange need not be shown where adverse possession pursuant to a parol exchange is pleaded.[62]

The burden of proof of adverse possession is upon the person asserting it,[63] so he must show the time of inception,[64] and must establish his occupancy,[65] though he need not show want of disability in holders of the outstanding title.[66] A deed creates no presumption that actual adverse occupancy begins at the date of its delivery.[67] There is a presumption of good faith.[68] Possession is presumed to be under a deed if a deed be shown.[69] User is presumed to be in subordination to the actual title,[70] and possession presumed to continue subordinate.[71] The presumption is not overcome by a deed accompanied by circumstances showing that it was not executed in good faith,[72] nor by mere possession if the claimants are in the relation of father and son.[73] Where several hold subordinately, if one procure a deed of the interest of the other occupants, it is not presumed that the character of his possession is changed.[74] Prior possession under a bond for title will be presumed to be adverse to an intervening tax purchaser.[75]

Relevancy of evidence.[76]—Claimant cannot show legal advice to make improvements or conversation between himself and other claimants as to their right on the land.[77] Leases executed by claimants for portions of the land not in controversy are admissible to show ownership over the entire tract included in the description.[78] The owner's permission to enter may be shown by parol.[79] The fraudulent character of a conveyance is not material as between the parties as to the intention of adverse holding.[80]

Sufficiency of evidence.[81]—There must be direct evidence that possession is

ing claimant—Bynum v. Stinson (Miss.) 32 So. 910.

60. Lloyd v. Rawl, 63 S. C. 219.

61. Smith v. Abadie (Tex. Civ. App.) 67 S. W. 925; rehearing denied, Id. 1077.

62. Bynum v. Stinson (Miss.) 32 So. 910.

63. Harris v. Cole, 114 Ga. 295; Rountree v. Thompson (Tex. Civ. App.) 71 S. W. 574; Id., 72 S. W. 69.

64. Glezen v. Haskins (R. I.) 51 Atl. 219. It is held that where the time at which the statute began to run was fixed by the cessation of the sinking of a certain building, evidence of the time at which large buildings cease to sink in that city, was sufficient to shift the burden—Chapman v. Morris B. & L. Imp. Ass'n, 108 La. 283.

65. Where the evidence of one surveyor that a house is on the land is met by contrary evidence of another, it is not necessary that the court order another survey before claimant may be dismissed—Cohn v. Pearl River Lumber Co., 80 Miss. 649.

66. Construing Rev. St., art. 3347—Travis v. Hall (Tex. Civ. App.) 65 S. W. 1077; Id. (Sup.) 65 S. W. 1078.

67. Stockley v. Cissna (C. C. A.) 119 Fed. 812.

68. Baxley v. Baxley (Ga.) 43 S. E. 436.

69. Roth v. Munzenmaier (Iowa) 91 N. W. 1072.

70. Construing Cal. Code Civ. Proc., § 321—Allen v. McKay & Co. (Cal.) 70 Pac. 8.

71. Collins v. Colleran, 86 Minn. 199.

72. Allen v. McKay & Co. (Cal.) 70 Pac. 8.

73. Collins v. Colleran, 86 Minn. 199.

74. Construing Code Civ. Proc. Cal., § 326, providing that where the relation of landlord and tenant is established, the tenant's possession is deemed that of the landlord until five years from the last payment for rent—Allen v. McKay & Co. (Cal.) 70 Pac. 8.

75. Graham v. Warren (Miss.) 33 So. 71.

76. Where it is not disputed that land was appurtenant to a mill, evidence as to the meaning of the deed conveying the mill and its appurtenances is inadmissible—Allen v. McKay & Co. (Cal.) 70 Pac. 8.

77. Reagan v. Hodges, 70 Ark. 563.

78. South v. Deaton, 24 Ky. Law R. 196, 533.

79. So parol evidence of a conversation between a land owner and a right of way agent is admissible to show that a railroad entered under an agreement that it should receive the conveyance if a station were located at a certain place—So. Cal. R. Co. v. Slauson (Cal.) 68 Pac. 107.

80. Collins v. Colleran, 86 Minn. 199.

81. Evidence held sufficient to show termination of permissive possession and to show sufficient holding—Malone v. Malone (Minn.) 93 N. W. 605; Glover v. Sage (Minn.) 92 N. W. 471; Wood v. Ripley, 27 Ind. App. 356. Where a fence is recognized as being on the line by a written receipt after a lapse of 16 years, a finding that the holding was adverse may be justified though there is parol evidence that claimant's grantor stated that the fence might be removed to the true line whenever it was ascertained—Mann v. Schueling (Tex. Civ. App.) 68 S. W. 292; on

adverse.[82] Adverse possession is not satisfactorily established by general statements unwarranted by the facts, and contrary to facts conclusively established.[83] Admissions of defendant that their holding is not adverse, may be sufficient to overcome an apparent weight of evidence to the contrary.[84] Evidence of occupancy for more than the statutory period is sufficient to go to the jury.[85] Where adverse possession is claimed against an entryman, there must be evidence as to when he became entitled to his patent.[86] Where there is no evidence of compliance with the statute, the question of acquisition of title by adverse possession should not be submitted to the jury.[87] In order that adverse possession of a portion of a tract may avail as a partial defense, the tract must be identified,[88] but there may be recovery of a dwelling actually occupied and an identified portion of a tract.[89] If there is evidence of adverse possession of only a portion of the property in controversy, a verdict cannot be directed for the entire property.[90] Where adverse possession for more than the statutory period prior to filing suit is alleged, it is supported by proof of completed possession at any time precedent.[91]

Verdict and findings.—Special findings control.[92] A finding that possession is not hostile is ultimate and not overcome by other findings as to the character of the occupancy.[93] A finding of facts sufficient to support adverse possession is a sufficient finding of such possession.[94]

Questions for jury. Instructions.[95]—The sufficiency of notice of adverse possession is for the jury,[96] as is the question of intent in taking possession,[97] or whether occupancy is such as to indicate a claim of right.[98] Instructions are controlled by general rules.[99] Instructions should not be given where there is no evidence that the land has passed from the state.[1]

acquisition of title by a town to property occupied as a town house—Wiggin v. Mullen, 96 Me. 375. Where after a conveyance to his son, the father remains in possession, testimony of parties in opposing interest that the son recognized the father's title in a particular conversation, will not establish adverse possession for the father—Collins v. Colleran, 86 Minn. 199. Statement of a corporation superintendent that they claim title is insufficient—Allen v. McKay & Co. (Cal.) 70 Pac. 8. Testimony of one witness that one of defendant's predecessors accepted a license for the use of the land, and that another predecessor had disclaimed it, warrants a finding of subordination—Allen v. McKay & Co. (Cal.) 70 Pac. 8. Mere testimony of the claimant is not sufficiently corroborated by acts showing a mere intent to trespass from time to time—Ritter v. Myers (Neb.) 92 N. W. 638.

82. A presumption of adverse holding or of an intention to grant cannot be indulged merely because of the remoteness of transactions—Evans v. Welch, 29 Colo. 355, 68 Pac. 776.

83. Illinois Steel Co. v. Budzisz (Wis.) 90 N. W. 1019.

84. Mass v. Bromberg (Tex. Civ. App.) 66 S. W. 468.

85. Kirton v. Bull, 168 Mo. 622. So held where it was also shown that the adverse party had not paid taxes on the premises during the period, believing that a tax title had been acquired by third persons and had exercised no acts of ownership—Hopkins v. Deering, 71 N. H. 353.

86. Baty v. Elrod (Neb.) 92 N. W. 1032.

87. So held, where the ten years limitation was submitted—Lackey v. Bennett (Tex. Civ. App.) 65 S. W. 651.

88. Thompson v. Dutton (Tex. Civ. App.) 69 S. W. 996.

89. Thompson v. Dutton (Tex.) 71 S. W. 544; reversed judgment 69 S. W. 641, 996.

90. Kreckeberg v. Leslie, 111 Wis. 462.

91. Travis v. Hall (Tex.) 65 S. W. 1078.

92. So held, where the finding showed possession for fifteen years and a general verdict was based on the theory of twenty years possession—Terre Haute & I. R. Co. v. Zehner, 28 Ind. App. 229.

93. Webb v. Rhodes, 28 Ind. App. 393.

94. So held where there was a finding of a conveyance, acts of ownership and possession for fifteen years—Hart v. Doyle, 128 Mich. 257. Findings of an entry under conveyances and possession by the grantees and those succeeding to them, of the tracts, open, peaceable, notorious and continuous in character for more than 5 years, are sufficient to support a conclusion that the action is barred —Adams v. Hopkins (Cal.) 69 Pac. 228.

95. A question of privity of possession is for the jury—Thompson v. Dutton (Tex. Civ. App.) 69 S. W. 641. Where there is a surrender of possession after completion of the statutory period, such surrender must be submitted to the jury on the question of whether it shows that the holding was not adverse—Bentley v. Callaghan's Ex'r, 79 Miss. 302.

96. Bryce v. Cayce, 62 S. C. 546.

97. Haney v. Breeden (Va.) 42 S. E. 916.

98. Jangraw v. Mee (Vt.) 54 Atl. 189.

99. It is proper to instruct the jury that possession under claim of ownership for more than twenty years presumes a grant—

§ 14. *Adverse possession of personalty.*—Where a mortgage of goods conditionally sold is executed by the purchaser after default in payment, one holding under the purchaser on foreclosure of such mortgage may after the statutory period has elapsed hold title as against the conditional seller.[2] In detinue, rights of possession arising from the statute may be asserted under the general issue or any plea controverting ownership.[3] Where the property is bailed there must be a claim of title inconsistent to the bailor's and actual or constructive notice to him.[4]

AFFIDAVITS.

The scope of this title is limited to matters common to all affidavits, regardless of the purpose or proceeding for which they are designed.

To be valid an affidavit must contain a jurat,[5] and it must be verified by an officer authorized to administer oaths.[6] An attorney-notary may verify his client's affidavit.[7] It is not necessary in South Dakota that the notary verifying a pleading affix his seal thereto,[8] but in many states the use of the seal is required by statute.[9]

An officer in a foreign state authorized to administer oaths may verify affidavits,[10] but there must be attached a properly authenticated certificate showing such authority;[11] and if it merely recites that the officer taking it was an authorized and qualified notary, it does not show that he is authorized to take acknowledgments.[12]

If made by an officer or agent it should state the capacity in which he acts,[13] and why the affidavit is not made by the principal.[14]

Kolb v. Jones, 62 S. C. 193. A jury is properly instructed that a deed does not give possession of land outside its description though title is claimed by possession not under the deed—South v. Deaton, 24 Ky. Law R. 196, 533. An instruction considered as to the sufficiency of its definition of license preventing acquisition of title by adverse possession—Fleming v. Kemp (Mo.) 70 S. W. 694. The jury should not be instructed that the building of a fence is not conclusive evidence of actual possession, but that it may be considered as a circumstance, where the location of fences was not disputed, and it had been established that when removed it was in hostility to claimant's rights—Stalford v. Goldring, 197 Ill. 156.

1. Kolb v. Jones, 62 S. C. 193.

2. Where possession was held more than six years—L. Grunewald Co. v. Copeland, 131 Ala. 345.

3. L. Grunewald Co. v. Copeland, 131 Ala. 345.

4. Rice v. Connelly, 71 N. H. 382.

5. A mere signed statement is an insufficient basis for an application for an appeal—Peters v. Edge, 87 Mo. App. 283; or publication of process—Doheny v. Worden, 75 App. Div. (N. Y.) 47; Salt Springs Nat. Bank v. Same, Id.

6. A deputy district recorder appointed by a temporary recorder may not take affidavit to mining location notice—Van Buren v. McKinley (Idaho) 66 Pac. 936. Affidavit verified by the clerk of the superior court cannot be made the basis of an attachment writ—Heard v. National Bank, 114 Ga. 291. A notary may verify chattel mortgage affidavit—Campbell v. State (Tex. Civ. App.) 68 S. W. 513; or an affidavit for a liquor license—State v. Scatena, 84 Minn. 281.

7. For service by publication—Genest v. Las Vegas Masonic Bldg. Ass'n (N. M.) 67 Pac. 743. Contra, see Comp. Stat. Laws Mich., § 2640; and evidence held insufficient to show that affiant was party's attorney—Thos. E. Lynch Co. v. Carpenter, 8 Detroit Leg. N. 892.

8. Wiley v. Carson, 15 S. D. 298.

9. Jones v. Jones, 3 Pennewill (Del.) 14, 50 Atl. 212.

10. So held sustaining a claim filed under Comp. Laws 1897, § 2221—Genest v. Las Vegas Masonic Bldg. Ass'n (N. M.) 67 Pac. 743; as a master in chancery—Hunton v. Palmer, 67 N. J. Law, 94; or United States consular officers—Browne v. Palmer (Neb.) 92 N. W. 315.

11. Shockley v. Turnell, 114 Ga. 378; Connalley v. Wallace Co., 51 W. Va. 181; Henning v. Libke, 104 Ill. App. 303.

12. Code Civ. Pr., § 844 and Laws 1896, c. 547, § 249—Manheimer v. Dosh, 36 Misc. (N. Y.) 857.

13. St. Joseph's Polish Catholic Ben. Soc. v. St. Hedwig's Church, 3 Pennewill (Del. Super.) 229. If made by an attorney it need not state that he is an attorney—O'Brien v. Yare, 88 Mo. App. 439.

14. Guyton v. Terrell, 132 Ala. 66. If made by the agent who had charge of the transaction it is sufficient—Steele v. R. M. Gilmour Mfg. Co., 77 App. Div. 199; Carolina Grocery Co. v. Moore, 63 S. C. 184; or if made by an attorney and containing a statement that he knows the matters to be true it is sufficient—Guyton v. Terrell, 132 Ala. 66.

Affidavits on information and belief are sufficient when the source of the information and grounds of belief are given;[15] and unless the documents on which the deductions are based are produced, they will have no probative force.[16]

Affidavits are not admissible as evidence for strangers.[17]

AFFIDAVITS OF MERITS OF CLAIM OR DEFENSE.

In actions on contracts in several states, by rule of court or statute, the plaintiff may file an affidavit or statement of claim, or cause of action, and take judgment thereon, or compel defendant to file an affidavit of defense, or verify his answer.[18]

The object of the affidavit of defense is to avoid a summary judgment.[19]

A general denial of indebtedness[20] or a mere statement that defendant had a good defense to the action is not sufficient,[21] but the facts constituting the defense must be set out,[22] so as to enable the court to determine whether they constitute a defense;[23] and a general averment that there are other facts that defendant does not deem necessary to set out,[24] but which will be produced at the trial, is of no avail.[25] If on information and belief, he must state that he expects to prove the facts or point out source of belief.[26]

The time for filing the affidavit may be extended by stipulation,[27] and it may be filed after the cause is called for trial.[28]

AGENCY.

This topic will include all questions pertaining to the relations of principal and agent, except those especially applicable to particular agencies,[29] which will be found under particular topics. The liability of a principal to prosecution for criminal acts of his agent, is treated under the topics relating to principal and accessory.[30]

§ 1. *The relation between the parties. A. Competency to act as agent.*—A bank may act as agent,[31] and a cashier may act for his bank.[32] One partner may

15. Leigh v. Green (Neb.) 90 N. W. 255; affirming on rehearing, 62 Neb. 344. Moore v. Thompson (Cal.) 70 Pac. 930; Magruder v. Schley, 17 App. Cas. D. C. 227; affidavit for attachment—Oxford v. Segnine, 70 App. Div. (N. Y.) 228; affidavit held to state mere conclusions—Moore v. Monumental Mut. Life Ins. Co., 77 App. Div. (N. Y.) 209; affidavit held to show personal knowledge of affiant—Hayden v. Mullins, 76 App. Div. (N. Y.) 69.

16. Burns v. Boland, 70 App. Div. (N. Y.) 555.

17. Turner v. Gonzales (Ind. T. App.) 64 S. W. 565; see title, Evidence. Affidavits of attesting witnesses to execution, etc., of will not admissible if testimony can be had—Kettemann v. Metzger, 23 Ohio Cir. Ct. 61; see, also, Wills.

18. A judgment cannot be taken on an affidavit of claim unless the action had been brought at the time of filing the affidavit—Miller v. Hart, 3 Pennewill (Del. Super.) 297.

19. Muir v. Preferred Acc. Ins. So., 203 Pa. 338.

20. Hertz v. Sidle, 20 Pa. Super. Ct. 88.

21. In assumpsit—Potts v. Wells, 3 Pennewill (Del. Super.) 11, 50 Atl. 62; Reed v. Fleming, 102 Ill. App. 668.

22. Marston v. Trustees, 18 Pa. Super. Ct. 547; Silver Peak Min. Co. v. Harris (Nev.) 116 Fed. 439; Magruder v. Schley, 17 App. D. C. 227; Brown v. Ohio Nat. Bank, 18 App. D. C. 598. It should allege facts sufficient to satisfy the court that a good defense exists and of the good faith of defendant. The affidavit should be liberally construed—Brown v. Ohio Nat. Bank, 18 App. D. C. 598.

23. Marston v. Trustees, 18 Pa. Super. Ct. 547.

24. Pennsylvania R. Co. v. Midvale Steel Co., 201 Pa. 624.

25. Pennsylvania R. Co. v. Midvale Steel Co., 201 Pa. 624; Marston v. Trustees, 18 Pa. Super. Ct. 547.

26. Tilli v. Vandegrift, 18 Pa. Super. Ct. 485; Baum v. Union Surety & Guaranty Co., 19 Pa. Super. Ct. 23.

27. Muir v. Preferred Acc. Ins. Co., 203 Pa. 338.

28. O'Dell v. Meacham, 114 Ga. 910.

29. Brokers; Factors; Insurance; Attorneys; Corporate agents, see Corporations. Municipal Agents, see Counties, Municipal Corporations, and other municipal topics.

30. Criminal Law.

31. The bank may collect and remit money as agent though due under a lease—Knapp v. Saunders, 15 S. D. 464.

32. Campbell v. Manufacturers' Nat. Bank 67 N. J. Law, 301.

bind his firm.[33] A power of attorney in her separate property, given by a wife to her husband under a separation agreement, is invalid.[34]

B. Creation of agency.[35]—A mere offer[36] or expressed expectation,[37] or approval of a contract and receipt of its benefits by the principal,[38] or his approval of its terms pending the negotiations by the alleged agent.[39] or his approval and exercise of powers thereunder,[40] sufficiently shows the agency.

If one receiving goods to sell for another, has an option to pay for and keep them,[41] or if he is liable for the price regardless of sale, the other having an option to treat them as sold,[42] or if the goods are received under a contract requiring him to sell no other goods of the kind,[43] and under such contract an exact price is fixed,[44] the contract is a sale and not an agency.

Intermediaries.—A contract which provides for sale of goods by one as agent for another, and holds the purchaser liable for risks of transportation, shows no agency between the agent and the purchaser.[45] A carrier delivering goods shipped on prices "at place of delivery," to a purchaser who has named a consignee to receive and pay freight, is the agent of the buyer.[46] If the agent looks to one party to a contract for instructions and receives them, he is not the agent of the other.[47] A request by one party that another party should act for him as to third parties, creates an agency when so acted upon.[48] A request by one to another to act generally for him, is sufficient to show his agency for certain acts, though he procure them to be done by a third person.[49]

The authority of an agent to bind his principal by a contract within the statute of frauds must be in writing,[50] though agency for an undisclosed principal to execute such a contract may be shown by parol.[51] A contract of agency for sale of lands must describe the lands,[52] and is governed by the statute of frauds where made.[53] A warrant of attorney to confess judgment on a note, is not a power of attorney requiring a war revenue stamp.[54] Fraud of the agent may prevent creation of the agency.[55] There can be no agency to do an invalid

33. Polykranas v. Kranez, 73 App. Div. (N. Y.) 583.

34. Code Iowa, § 3154; and in connection therewith, §§ 2819, 3161; even though a statute exists allowing the husband and wife to act for each other for their mutual benefit and another allows her to convey her realty as sole—Sawyer v. Biggart, 114 Iowa, 489.

35. Contract termed a "lease" for lumbering and operation of mill, construed to be a mere agency—Petteway v. McIntyre, 131 N. C. 432.

36. By letter from investment company to a mortgagee proposing to secure a purchaser for his mortgage—Opie v. Pacific Inv. Co., 26 Wash. 505, 67 Pac. 231.

37. Statements by one of two parties to a contract that he expected the other to pay for materials, which were not acted upon by either party, show no agency to purchase materials for the other party—Parker v. Brown, 131 N. C. 267.

38. Contract for sale of lands—Payne v. Hackney, 84 Minn. 195.

39. Contract of purchase of building materials—Swanson v. Andrus, 84 Minn. 168.

40. Liability of trust company for acts of its agent as trustee under a contract secured by him in his general authority—American Bonding & Trust Co. v. Takahashi (C. C. A.) 111 Fed. 125.

41. Fleet v. Hertz, 98 Ill. App. 564.

42. Sale of machines—De Kruif v. Elleman (Mich.) 8 Detroit Leg. N. 1118.

43. Vasbury v. Mallory, 70 App. Div. (N. Y.) 247.

44. Roosevelt v. Nusbaum, 75 App. Div. (N. Y.) 117.

45. Maynard v. Weeks, 181 Mass. 368.

46. Louis Werner Sawmill Co. v. Ferree, 201 Pa. 405.

47. White City State Bank v. St. Joseph Stock Yards Bank, 90 Mo. App. 395.

48. Williamson v. North Pac. Lumber Co. (Or.) 70 Pac. 387.

49. Agency for sending telegram as shown in action for damages against company for failure to deliver—Western Union Tel. Co. v. Millsapp (Ala.) 33 So. 160.

50. Execution of lease beyond one year—Shea v. Seelig, 89 Mo. App. 146.

51. Contract for sale of realty—Brodhead v. Reinbold, 200 Pa. 618.

52. Rev. St. Mo. 1899, § 3418; Johnson v. Fecht, 94 Mo. App. 605.

53. Goldstein v. Scott, 76 App. Div. (N. Y.) 78.

54. Under Act Cong., June 13, 1898—Treat v. Tolman (C. C. A.) 113 Fed. 892.

55. A conveyance given for purpose of obtaining a loan for the grantors does not create an ostensible agency in the grantee to secure the loan for himself where it appears that he had misrepresented his relation to both parties—Macdonald v. Cool, 134 Cal. 502.

or illegal thing.[56] An intermediary between parties to a gambling contract is not an agent, but a particeps criminis.[57] A conspiracy being shown by some evidence, though circumstantial, each conspirator is an agent of the others so as to render his declarations admissible against them.[58] A corporation is bound by contracts of its duly authorized agents,[59] but not as to matters beyond the subject of their agency.[60]

C. Implied agency.—One who holds out another as possessed of certain powers to act for him,[61] or acquiesces in the acts of the other is liable for his acts within those powers[62] and formal treatment of another as agent is not necessary to establish an agency as to third persons but it is enough if he is allowed to act as such.[63] An implied agency results as to third persons by receipt of collateral securities by a debtor from the holder of his note to sell for payment of the note.[64] The surety on a note is not the agent of the payee.[65] The payee of a note, which has been transferred without notice to the maker before collection, becomes the agent of the holder for such collection.[66] The act of leaving money raised by execution of bonds to a title company with the company, to be paid out on the order of the obligor, did not make the company his agent.[67] In domestic economy of house and family, the wife may be the agent of her husband.[68] The custom of a parent to send a child for goods makes the child his agent even for articles for the child's use,[69] though the custom continues after the child becomes of age.[70]

D. Evidence of agency.[71]—The party setting up an agency must prove it;[72] and to establish an agency the evidence must be clear and convincing,[73] though

56. A cause of action will not lie to recover money wrongfully collected from a third person under an agreement for their joint benefit—Needles v. Fuson (Ky. App.) 68 S. W. 644.

57. Munns v. Donovan Commission Co. (Iowa) 91 N. W. 789.

58. Action for civil damages against conspirators—Mosby v. McKee, etc., Commission Co., 91 Mo. App. 500.

59. Ross v. Sayler, 104 Ill. App. 19; Black v. First Nat. Bank, 54 Atl. (Md.) 88.

60. Western Realty & Inv. Co. v. Haase, 53 Atl. (Conn.) 861; agreement by superintendent of express company to pension injured employe—Chenoweth v. Pac. Exp. Co., 93 Mo. App. 185; Waters v. West C. St. R. Co., 101 Ill. App. 265, and see, President, Chicago Pneumatic Tool Co. v. H. W. Johns Mfg. Co., 101 Ill. App. 349; Magowan v. Groneweg (S. D.) 91 N. W. 335. See, also, particularly, Corporations.

61. Insurance agency—Fire Ins. Co. v. Sinsabaugh, 101 Ill. App. 55.

62. Dickinson v. Salmon, 36 Misc. (N. Y.) 169.

63. Agent for collection of rents—De Witt v. De Witt, 202 Pa. 255.

64. People's Sav. Bank v. Smith, 114 Ga. 185.

65. Opie v. Pac. Inv. Co., 26 Wash. 505, 67 Pac. 231.

66. Doe v. Callow, 64 Kan. 886, 67 Pac. 824.

67. Fidelity Trust & Safety Vault Co. v. Carr (Ky. App.) 66 S. W. 990; Louisville Bank. Co. v. Same, Id.; Murray v. Same, Id.; Carr v. Ross, Id.

68. Tyler v. Mut. Dist. Messenger Co., 17 App. D. C. 85.

69. Emery-Bird-Thayer Dry Goods Co. v. Coomer, 87 Mo. App. 404.

70. Emery-Bird-Thayer Dry Goods Co. v. Coomer, 87 Mo. App. 404.

71. Facts held sufficient to show that an agent was acting for the manufacturer in a particular transaction and not for the selling representative—Sherman v. Sherman & Lyon Co. (N. J. Ch.) 53 Atl. 226. Evidence sufficient that an agent who became trustee between his principal and another was the principal's trustee, not the other's—American Bond. & Trust Co. v. Takahashi (C. C. A.) 111 Fed. 125; Gathercole v. Peck (Neb.) 91 N. W. 513; Holton v. Stroud, 88 Mo. App. 112; sufficiency of evidence of agency in purchase of horse so as to bind principal for price—Fritz v. Kennedy (Iowa) 93 N. W. 603.

72. Agency for guardian—Schmidt v. Shaver, 196 Ill. 108. An employe suing on a contract alleged to have been made with a foreman must show the latter's authority to employ—Ames v. D. J. Murray Mfg. Co., 114 Wis. 85.

73. Anzle v. Manchester (Neb.) 91 N. W. 501; sufficiency of evidence of agency to receive payment for mortgagor—Boyd v. Pape, (Neb.) 90 N. W. 646; of agency for sale of cattle—Gentry v. Singleton (Ind. T. App.) 69 S. W. 898; to send question of agency to jury —Mosby v. McKee, etc., Commission Co., 91 Mo. App. 500; of general agent's authority to contract—Mullin v. Sire, 37 Misc. (N. Y.) 807; to show agency for insurance company in securing policy and adjusting loss—Citizens' Ins. Co. v. Stoddard, 197 Ill. 330; of agency and subagency—Lucas v. Rader (Ind. App.) 64 N. E. 488; agency for both parties—Vercruysse v. Williams (C. C. A.) 112 Fed. 206; agency in making a loan on mortgage—Booth v. Kessler, 62 Neb. 704; in procuring materials on which a mechanic's lien is based —Le Valley v. Overacker, 72 N. Y. Supp. 12; conflicting evidence of authority—Droste v.

it is admissible if not convincing,[74] and facts which may be construed either way on the question of the relation will be considered as showing its existence where an agency in the particular transaction is otherwise shown.[75] Circumstances in evidence showing that one was an agent and was in the pursuit of his business will take the question of agency in a particular transaction to the jury.[76]

The agent may testify directly as to the relation,[77] though such testimony alone is insufficient,[78] but his declarations or conduct cannot be shown,[79] unless there is other evidence of the alleged agent's authority,[80] or unless his principal has recognized or acquiesced in his acts.[81]

The declarations of the principal[82] or his adoption of the agent's acts will show agency.[83] Where it is alleged that a husband acted as agent for his wife in the purchase of machinery placed on her property, directions given by a son, concerning the purchase of the machinery by his father, are properly admitted in support of a defense that it was purchased for the son.[84] That one person employed and permitted another person to act for him, is insufficient to show that the person so acting was not an agent but an independent contractor.[85]

Mere association of an alleged agent with one who was a real agent of the principal for an entirely distinct purpose, does not show the existence of the agency.[86] Proof of the relation between certain persons shows an agency only for ordinary duties of the relation.[87] Agency of a husband for his wife will not be presumed from marriage.[88] nor is additional evidence of his agency for her in another transaction conclusive evidence.[89] Mere possession of property of another does not show an agency to deliver it to a third person so as to estop the owner or his guardian from denying the agency.[90] Where it is conceded that no change in the relations took place between the time of two transactions, agency in the later transaction may be shown by acquiescence of the principal in the former.[91]

Metropolitan Hotel Supply Co., 74 N. Y. Supp. 613.

74. Dickinson v. Salmon, 36 Misc. (N. Y.) 169.

75. Detwilder v. Heckenlaible, 63 Kan. 627.

76. Domasek v. Kluck, 113 Wis. 336.

77. O'Neill v. Wilcox, 115 Iowa, 15; American Telegraph & Telephone Co. v. Kersh (Tex. Civ. App.) 66 S. W. 74; American Box Mach. Co. Bolnick, 36 Misc. (N. Y.) 765; Garber v. Blatchley, 51 W. Va. 147. In an action against a mother for goods delivered to her on her daughter's order, the daughter may be asked whether her mother gave her authority to order the goods—Stone v. Cronin, 72 App. Div. (N. Y.) 565.

78. American Box Mach. Co. v. Bolnick, 36 Misc. (N. Y.) 765.

79. Currie v. Syndicate Des Cultivators Des Oignons a'Fleur, 104 Ill. App. 165. A solicitor carrying stationery of the alleged principal and samples, cannot prove his agency on his own declaration—Peninsular Stove Co. v. Adams Hardware & Furniture Co., 93 Mo. App. 237; Americus Oil Co. v. Gurr, 114 Ga. 624; Mentzer v. Sargeant, 115 Iowa, 527; Garber v. Blatchley, 51 W. Va. 147; Wise v. International Soc., 37 Misc. (N. Y.) 871. Declarations made while in the transaction of business are not admissible—Parker v. Brown, 131 N. C. 264. The rule applies to a subagent—Lucas v. Rader (Ind. App.) 64 N. E. 488; agency to make lease—Bible v. Centre Hall Borough, 19 Pa. Super. Ct. 136; Smith v. Delaware & A. Telegraph & Telephone Co. (N. J. Err. & App.) 53 Atl. 818; insurance agent—Baldwin v. Conn. Mut. Life Ins. Co. (Mass.) 65 N. E. 837.

80. Bird v. Phillips, 115 Iowa, 703; Le Valley v. Overacker, 12 N. Y. Supp. 12; Peterson v. Stockton & T. R. Co., 134 Cal. 244; Bibby v. Thomas, 131 Ala. 350.

81. Smith v. Delaware & A. Telegraph & Telephone Co. (N. J. Err. & App.) 53 Atl. 818.

82. Arnold v. Teel (Mass.) 64 N. E. 413.

83. Orders taken for goods—Kelly v. Burke, 132 Ala. 235.

84. Rider—Ericsson Engine Co. v. Fowler, 37 Misc. (N. Y.) 810.

85. Bianki v. Greater American Exposition Co. (Neb.) 92 N. W. 615.

86. Leary v. Albany Brewing Co., 77 App. Div. (N. Y.) 6.

87. Wikle v. Louisville & N. R. Co. (Ga.) 42 S. E. 525; authority of husband to sell wife's lands—Bird v. Phillips, 115 Iowa, 703.

88. Brown v. Woodward (Conn.) 53 Atl. 112.

89. Cushman v. Masterson (Tex. Civ. App.) 64 S. W. 1031.

90. Deposit of an assignment of a judgment by a guardian does not authorize the depositary to deliver it to the guardian's assignee—Schmidt v. Shaver, 196 Ill. 108.

91. Domasek v. Kluck, 113 Wis. 336.

The authority of an agent to sell land given before passage of an act requiring such authority to be in writing, may be shown orally or by any pertinent evidence.[92] A power of attorney from a wife to her husband for execution of all papers relating to a firm of which she was a member, and his testimony that he acted for her in all firm matters, shows his agency.[93]

E. Subagency or delegation of the relation.—An agent cannot delegate his power,[94] but he may appoint subagents when it is necessary in the business of his principal,[95] or when, from its character and under business custom, the business of the principal cannot be accomplished otherwise.[96] One taking charge of business of a principal under directions of a general agent or superintendent, must be presumed to have authority as a sub-agent.[97]

F. Estoppel to assert or deny agency may arise from a holding out.[98]—A principal who allows his agent to appear as owner, or in full power of disposition of his property, whereby others are misled,[99] or who places his agent in possession of property so that the latter is enabled to misappropriate funds borrowed thereon,[1] is estopped to deny the agent's authority;[2] but the rule will not apply where third persons do not know who is the owner of the property.[3] Holding out another as agent in previous similar transactions will not estop a denial of the relation where it appears that in the particular transaction the alleged agent was the sub-agent of defendants without authority to bind them as principals.[4] When the agent has dealt with third persons the principal cannot thereafter disavow to the other's detriment.[5]

An attorney in fact who acts under an instrument giving him authority cannot deny his capacity.[6]

G. Termination of relation.[7]—A contract of agency without time limit may be terminated on reasonable notice[8] by either party in good faith;[9] but where the agent is entitled to an interest because of services rendered, the principal cannot revoke the agency without compensation.[10] The agent's right to commissions on renewals of contracts secured by him, is not such an interest coupled with his power as to prevent revocation of the agency by the principal within its terms.[11]

92. Civ. Code Mont., §§ 2185, 3085, and Code Civ. Proc. Mont., § 1276, requiring written authority, did not affect acts prior to July 1st, 1895—Cobban v. Hecklen (Mont.) 70 Pac. 805.

93. People v. Lappin, 8 Detroit Leg. N. (Mich.) 909.

94. Lucas v. Rader (Ind. App.) 64 N. E. 488. He must have special directions—Floyd v. Mackey, 23 Ky. Law R. 2030. If he has been employed because of his particular skill—Bromley v. Aday, 70 Ark. 351.

95. Insurance Co. of N. A. v. Thornton, 130 Ala. 222. See infra, § 2a as to implied authority.

96. Breck v. Meeker (Neb.) 93 N. W. 993.

97. Foreman in construction of telegraph lines supervising work under direction of general superintendent—Fritz v. Western Union Tel. Co. (Utah) 71 Pac. 209.

98. See ante, § 1-C as to implied agency. General agent for making investments had been accustomed to collect notes due principal—Cheshire Provident Inst. v. Fuesner (Neb.) 88 N. W. 849. Evidence held insufficient to support an estoppel by holding out a depositary as agent—Schmidt v. Shaver, 196 Ill. 108.

99. Williams v. Pelley, 96 Ill. App. 346.

1. Investment agent—Morris v. Joyce (N. J. Ch.) 53 Atl. 139.

2. See "holding out doctrine" discussed in Estoppel.

3. Hefferman v. Bateler, 87 Mo. App. 316.

4. Ruddock Co. v. Johnson (Cal.) 67 Pac. 680.

5. Pochin v. Knoebel (Neb.) 89 N. W. 264. Failure of an agent to account for money collected on a note will not enable his principal to repudiate the agency and collect again from the maker. Receipt of an order for goods from an agent and a check in part payment from the buyer without objection and application of the money to his own use will prevent the principal from denying the agency and refusing to deliver the goods—Farrer v. Caster (Colo. App.) 67 Pac. 171.

6. Walters v. Bray (Tex. Civ. App.) 70 S. W. 443.

7. Sufficiency of evidence of continuation of agency—Johnson v. Doon, 9 Detroit Leg. N. 409; termination of insurance agency—Andrews v. Travelers' Ins. Co., 24 Ky. Law R. 844.

8. Barrett v. Gilmour (Eng.) Com'l Cas. 72.

9. Broker—Huffman v. Ellis (Neb.) 90 N. W. 552; Taylor v. Martin (La.) 33 So. 112.

10. Royal Remedy & Extract Co., 90 Mo. App. 53.

11. Andrews v. Travelers' Ins. Co., 24 Ky. Law R. 844.

Death will terminate the agency though the agent is trying to recover land under a power giving him one-half the value recovered.[12] A subagent employed by and accountable directly to a general agent has no such contract of agency with the principal as survives removal of the general agent under his contract.[13] Appointment of a receiver for the principal will not terminate a contract of agency where the receiver affirmed it and received benefits under it.[14] Record of a deed by the owner of land is notice to his agent and all dealing with the latter, of the revocation of the authority of the agent to sell the land.[15]

§ 2. *Rights and liabilities of principal as to third persons. A. Actual and implied authority to bind principal.*—A mere agent cannot delegate his authority,[16] without special directions,[17] especially if he has been employed because of his peculiar fitness.[18] An agent may appoint subagents where necessary to proper transaction of the business of the principal.[19]

The principal is bound by acts and knowledge of his agent within the scope of the agency,[21] unless the public is the principal[22] and is presumed to have had notice, actual or constructive, of all such acts of the agent.[23] Declarations of agent, made while acting in the scope of his authority, bind his principal,[24] but not declarations after the event or completion of his agency,[25] or without the line of his duties,[26] but such declarations cannot be received unless the agency is proved.[27] Admission of an agent, to bind his principal, must be made while acting for the principal and relate to the subject of the agency,[28] and when so made, they will bind the principal as though he made them.[29] Delivery of a deed to an agent is delivery to his principal.[30]

If the agent acts for himself a third person, though with knowledge of an agency cannot recover from the principal on dealings.[31] Third persons are not bound by knowledge of an agent dealing with them for another.[32]

The implied powers of an agent are those reasonable and necessary to accomplishment of the purpose of the agency,[33] and if no directions are given him

12. Wainwright v. Massenburg, 129 N. C. 46.

13. Insurance subagent—Union Casualty & Surety Co. v. Gray (C. C. A.) 114 Fed. 422.

14. Leupold v. Weeks (Md.) 53 Atl. 937.

15. Sayles' Civ. St. Tex., art. 4652, providing the extent of notice by record of a deed—Donnan v. Adams (Tex. Civ. App.) 71 S. W. 580.

16. Lucas v. Rader (Ind. App.) 64 N. E. 488.

17. Floyd v. Mackey, 23 Ky. Law R. 2030.

18. Bromley v. Aday, 70 Ark. 351.

20. Insurance Co. of N. A. v. Thornton, 130 Ala. 222.

21. Receiver of national bank as principal—Watts v. Dubois (Tex. Civ. App.) 66 S. W. 686.

22. State v. Chilton, 49 W. Va. 453; but contra, it seems, People v. Woodruff, 75 App. Div. (N. Y.) 90, where land commissioners had notice of a defect of title.

23. Andrews v. Robertson, 111 Wis. 334.

24. Matzenbaugh v. People, 194 Ill. 108; Rhode v. Metropolitan Life Ins. Co., 8 Detroit Leg. N. 888; attorney—Murray v. Sweasy, 69 App. Div. 45; railroad conductor—San Antonio & A. P. R. Co. v. Barnett (Tex. Civ. App.) 66 S. W. 474; Holt v. Johnson, 129 N. C. 136; Callaway v. Equitable Trust Co., 67 N. J. Law, 44; Jack v. Mutual Reserve Fund Life Ass'n (C. C. A.) 113 Fed. 49. Declarations of an insurance agent as to matters coming from the company bind the latter on a policy—Ulysses Elgin Butter Co. v. Hartford Fire Ins. Co., 20 Pa. Super. Ct. 384.

25. Rice v. City of St. Louis, 165 Mo. 636; Fidelity & Casualty Co. v. Haines (C. C. A.) 111 Fed. 337; Baldwin v. Central Sav. Bank (Colo. App.) 67 Pac. 179; Callaway v. Equitable Trust Co., 67 N. J. Law, 44; McLagan v. Chicago & N. W. R. Co. (Iowa) 89 N. W. 233.

26. Leary v. Albany Brew. Co., 77 App. Div. 6.

27. It must appear that the agent knew that the property belonged to plaintiff or had authority to act for him at the time—Pease v. Trench, 197 Ill. 101.

28. Schreyer v. Citizens' Nat. Bank, 74 App. Div. (N. Y.) 478; Waters v. West Chicago St. R. Co., 101 Ill. App. 265; Stanton v. Baird Lumber Co., 132 Ala. 635.

29. Insurance agency—Sick v. American Central Fire Ins. Co. (Mo. App.) 69 S. W. 687; Moran Bros. Co. v. Snoqualmie Falls Power Co. (Wash.) 69 Pac. 759; Krohn v. Anderson (Ind. App.) 64 N. E. 621; Cooper v. Ford (Tex. Civ. App.) 69 S. W. 487.

30. Bond v. Wilson, 129 N. C. 325.

31. Dealings with bank cashier—Campbell v. Manufacturers' Nat. Bank, 67 N. J. Law, 301.

32. The insurer is not bound by knowledge of agent of the insured—Bradley v. German-American Ins. Co., 90 Mo. App. 369.

33. National Bank v. Old Town Bank (C. C. A.) 112 Fed. 786. Selling agent on commission cannot receive payment in anything save money except on special authority—Woodruff v. American Road Mach. Co., 23 Ky. Law R. 1551. Authority to make a loan does not imply authority to collect principal and

for the manner of its accomplishment he may employ any recognized usage or mode of dealing,[34] unless such usage is not within the knowledge of persons to be affected.[35] A warranty made by an agent which is no greater than the law would imply, will bind the principal.[36]

Acts of the agent are binding after discharge and will bind his principal where relied upon by a third person in good faith and without knowledge of the discharge.[37] A memorandum by an owner containing a description of land with a price named to an agent, does not show his authority to execute a written contract of sale for the owner.[38]

Evidence and proofs.[39]—Where an agency has been established by competent proof, the principal must prove that a third person had notice of its termination,[40] since it will be presumed in favor of such third person, that the agency continues until he has notice.[41] To admit evidence of the agent's acts as binding the principal, the agency must first be shown.[42] Recitals in a deed executed by an agent may be considered in determining his authority.[43] Where one person has allowed another to act for him, or failed to disavow such action, evidence of conversations between them is admissible on the question of the agency, so as to bind the alleged principal to a third person.[44] The extent of an alleged agency cannot be shown by declarations of one claiming to be the agent.[45] Ratification of similar acts will show authority.[46]

B. Apparent authority and unauthorized or wrongful acts of agent; torts.—The acts of an agent within limits of his apparent authority bind the principal;[47] especially if the principal intentionally or negligently allows third persons to act thereon,[48] or places the agent in such a position that third persons are

interest; nor authority to collect interest authority to collect principal (Hefferman v. Boteler, 87 Mo. App. 316); contra where such authority has been held out by a course of making collections—Cheshire Prov. Inst. v. Fuesner (Neb.) 88 N. W. 849. A creditor's agent to procure transfer of accounts and notes may release guarantors of the debtor in consideration of the transfer—Martin v. Rotan Grocery Co. (Tex. Civ. App.) 66 S. W. 212.

34. Rohrbough v. U. S. Exp. Co., 50 W. Va. 148. An agent to sell conditionally and to recover goods on condition broken may allow a purchaser to take an article on trial and deposit of part payment—Jesse French Piano & Organ Co. v. Cardwell, 114 Ga. 340.

35. State v. Chilton, 49 W. Va. 453.

36. Warranty of goods sold—H. B. Smith Co. v. Williams (Ind. App.) 63 N. E. 318.

37. Continental Fire Ins. Co. v. Brooks, 131 Ala. 614.

38. Donnan v. Adams (Tex. Civ. App.) 71 S. W. 580.

39. Sufficiency of evidence of payment to agent to bind principal—Fay & Eagan Co. v. Causey, 131 N. C. 350; sufficiency of evidence as to limitation of powers—Lyle v. Addicks, 62 N. J. Eq. 123.

40. Insurance agency—Merchants' Ins. Co. v. Oberman, 99 Ill. App. 357.

41. Merchants' Ins. Co. v. Oberman, 99 Ill. App. 357.

42. Warehouse agent receiving attached goods from sheriff without authority—Koyukuk Min. Co. v. Van De Vanter (Wash.) 70 Pac. 966; receipt of money by a wife for her husband—Brown v. Woodward (Conn.) 53 Atl. 112.

43. The court may look to the age of the transaction and the assertion of title thereunder, though the deed is not thirty years old—Kirkpatrick v. Tarlton (Tex. Civ. App.) 69 S. W. 179.

44. Civ. Code Cal., §§ 2300, 2317-2319—Curtin v. Ingle, 137 Cal. 95, 69 Pac. 836, 1013.

45. Currie v. Syndicate Des Cultivators Des Oignons a'Fleur, 104 Ill. App. 165.

46. Harrison Nat. Bank v. Austin (Neb.) 91 N. W. 540.

47. Darby v. Hall (Del. Super.) 3 Pennewill, 25. A wife is responsible for fraud of her husband who acted as agent in selling her land, and signed the contract with her—Quarg v. Scher, 136 Cal. 406, 69 Pac. 96; Plano Mfg. Co. v. Nordstrom (Neb.) 88 N. W. 164; shipper's agent—Nichols v. Oregon Short Line R. Co., 24 Utah, 83, 66 Pac. 768; trainmaster as agent to employ physician to attend injured employes—Southern R. Co. v. Humphries, 79 Miss. 761; authority of "manager" and selling agent of mining company to "buy"—Gates Iron Wks. v. Denver Engineering Wks. Co. (Colo. App.) 67 Pac. 173. General agent in mercantile business may buy on credit though instructed otherwise—Pacific Biscuit Co. v. Dugger, 40 Or. 362, 67 Pac. 32; McKinney v. Stephens, 17 Pa. Super. Ct. 125; agent as holding over for principal after expiration of lease—Byxbee v. Blake (Conn.) 51 Atl. 535. A general agent to buy and sell goods may pay for goods bought by indorsing checks of the principal—Graton, etc., Mfg. Co. v. Redelsheimer, 28 Wash. 370, 68 Pac. 879.

48. Lebanon Sav. Bank v. Henry (Neb.) 89 N. W. 169; Faulkner v. Simms (Neb.) Id. 171; Harrison Nat. Bank v. Williams (Neb.) Id. 245.

justified in presuming that he has certain authority;[49] where a principal treats his agent so that third persons following business custom are led to believe that the agent has certain powers, the principal is bound;[50] as where one of two parties to a contract notifies the other that all such transactions are arranged for him by another as agent, the other party is justified in treating such agent as having an ostensible agency to modify a contract already made.[51]

Private instructions to a general agent by his principal cannot be shown to prevent the principal's liability on contracts made by the agent within the scope of his authority,[52] since it is necessary that third persons should have knowledge of such limitations.[53]

One with knowledge of an agent's limited authority,[54] and with means of learning the truth of alleged false statements by the agent,[55] or with notice that the agent's acts must be approved by the principal,[56] deals with him outside that authority at his own peril, and if the agent is a special agent third persons must ascertain his authority at their peril.[57] Third persons are justified in relying on the apparent authority of an agent as held out to them,[58] and need not prove his authority to make a contract within his apparent authority[59] unless the powers assumed by the agent are contrary to ordinary business custom and there is no showing of special authority,[60] or unless the acts violate the known custom of the principal,[61] when such third persons assume the burden of showing his authority.[62] But one who was not misled by the apparent authority cannot urge it to fix liability on the principal.[63] A third person cannot assume that the relation of agency existed where not ostensible, nor, though an agency really exists, can he assume its scope without inquiry.[64] An agent cannot bind his principal beyond the scope of his authority where the third person knows such authority,[65] but they are entitled to rely upon statements of the agent respecting the subject matter of

49. Lebanon Sav. Bank v. Henry (Neb.) 89 N. W. 169; Faulkner v. Simms (Neb.) Id. 171; Harrison Nat. Bank v. Williams (Neb.) Id. 245.

50. An investment agent with general powers may be regarded as having powers to collect and extend time for payment—Harrison Nat. Bank v. Austin (Neb.) 91 N. W. 540.

51. Civ. Code Cal., § 2300—Union Paving & Contract Co. v. Mowry (Cal.) 70 Pac. 81.

52. Hirschhorn v. Bradley (Iowa) 90 N. W. 592. On the question of the authority of a general agent, instances of his general management of the principal's property in his absence may be shown—Mullin v. Sire, 37 Misc. (N. Y.) 807.

53. Hall v. Hopper (Neb.) 90 N. W. 549.

54. Thrall v. Wilson, 17 Pa. Super Ct. 376; express agent—Rohrbough v. U. S. Exp. Co., 50 W. Va. 148; Modern Woodmen v. Tevis (C. C. A.) 117 Fed. 369.

55. Sale of real estate by agent—Samson v. Beale, 27 Wash. 557, 68 Pac. 180.

56. Notice by an agent to a buyer that the principal will fix the price of goods prevents a claim of apparent authority in the agent to sell for a certain price—Lucas v. Rader (Ind. App.) 64 N. E. 488.

57. Fraudulent sale of principal's stock by agent—Fay v. Slaughter, 194 Ill. 157.

58. Murray v. Sweasy, 69 App. Div. (N. Y.) 45.

59. The burden is on the principal to overcome the presumption of the agent's authority—Nichols v. Oregon S. L. R. Co., 24 Utah, 83, 66 Pac. 768.

60. A purchaser cannot give a piano sales agent notes payable to himself unless the latter's special authority appears—Baldwin v. Tucker, 23 Ky. Law R. 1538. That a lender had possession of security for a loan shows that his agent who negotiated the loan and collected interest, had no authority to collect the principal—Hefferman v. Boteler, 87 Mo. App. 316; Corbett v. Waller, 27 Wash. 242, 67 Pac. 567; likewise where the agent never had possession of the evidence of the debt—Dewey v. Bradford (Neb.) 89 N. W. 249. See, also, Bradbury v. Kinney, Id. 257; Clarkson v. Reinhartz (Tex. Civ. App.) 70 S. W. 111.

61. Taking of money orders by employe of express agent without collecting charges thereon—Rohrbough v. U. S. Exp. Co., 50 W. Va. 148.

62. Hefferman v. Boteler, 87 Mo. App. 316; Dewey v. Bradford (Neb.) 89 N. W. 249.

63. Apparent authority of mine boss to employ laborers without approval of superintendent—Patterson v. Neal (Ala.) 33 So. 39.

64. The giving of a deed to another on his false representations regarding a loan from a third person to the grantees did not create an agency so as to bind them to secure a loan to him personally by such third person, the latter being bound to ascertain the extent of the agency—Macdonald v. Cool, 134 Cal. 502.

65. Power of auctioneer to extend time of payment beyond stated terms of sale—McKiernan v. Valleau (R. I.) 51 Atl. 102.

his agency.[66] Representations by agents as to general authority to act for their principal in all matters relating to the subject of the agency cannot be held to show authority as to particular acts alone.[67] Third persons having knowledge of an agency must take notice of its limitations,[68] as where they are expressed in the contract executed by the agent,[69] and this applies to a power of attorney unless the principal received the benefits of his agent's acts in excess of authority.[70] Third persons are bound by terms of a contract made with an agent which limits his authority,[71] though they may have dealt with a subagent,[72] and the contract of agency containing instructions may be shown on the question of his powers to bind his principal.[73] The principal cannot be held liable on a contract by his agent until it is shown that he has ratified the agent's acts, where the contract specifies that it is subject to approval by the principal.[74]

Evidence and questions of fact.[75]—In determining whether an agent has certain powers with regard to his principal's property, other instances in which such powers were exercised may be shown as bearing on the apparent scope of his authority[76] and other transactions of a like character with the same agent, and matters relating to custom in the business, may be shown on the question whether third persons could be held to have notice of peculiar limitations on the agent's instructions.[77] Apparent authority of an agent is a question for the jury.[78]

Unauthorized and tortious acts.—An unauthorized agreement by an agent is not binding on the principal unless ratified,[79] but agreements, representations and mistakes of an agent made as a part of the res gestae of his transaction for his principal, will bind the latter.[80] If a principal desires to repudiate acts of an agent in excess of authority, he must refuse to receive the benefits of the agent's acts or restore them if already received,[81] and if he has held out his agent to others as possesssed of certain powers, with notice to them to honor his acts therein, he cannot recover from persons dealing with the agent, because of fraud committed by him in the businesss of his agency.[82] Where powers of a special agent are limited, his contracts to be submitted to his principal, a secret agreement between him and the other party to a proposal to a contract will not bind the principal.[83]

66. Insured may rely on agent's statement that a vacancy permit has been attached to his policy by the company or its general agents—Morgan v. Illinois Ins. Co., 9 Detroit Leg. N. 84.

67. Real estate agents—Samson v. Beale, 27 Wash. 557, 68 Pac. 180.

68. Corporate agent—Jackson Paper Mfg. Co. v. Commercial Nat. Bank, 199 Ill. 151.

69. Insured and beneficiary are bound by limitations expressed in insurance policy—Modern Woodmen v. Tevis (C. C. A.) 117 Fed. 369.

70. Money received by the attorney in fact in excess of authority cannot be recovered from the principal—Morton v. Morris (Tex. Civ. App.) 66 S. W. 94.

71. Porter v. Home Friendly Soc., 114 Ga. 937.

72. Lucas v. Rader (Ind. App.) 64 N. E. 488.

73. J. I. Case Thresh. Mach. Co. v. Eichinger, 15 S. D. 530.

74. Sale of machinery by agent under agreement to take in part payment certain second-hand machinery—Elfring v. New Birdsall Co. (S. D.) 92 N. W. 29.

75. Advertisement in city directory describing agent as "local manager" is admissible—Graton, etc., Mfg. Co. v. Redelsheimer, 28 Wash. 370, 68 Pac. 879.

76. On the question whether an agent of a landlord had power to consent to the sale of crops by the tenant, thereby waiving the landlord's lien thereon, evidence of other sales of produce by the tenant with the agent's knowledge and consent is properly admitted to show apparent scope of his authority in dealing with the landlord's property—Fishbaugh v. Spunaugle (Iowa) 92 N. W. 58.

77. It may be shown by cross-examination that the principal had never objected to the agent's acts in similar transactions—Clarkson v. Reinhartz (Tex. Civ. App.) 70 S. W. 111.

78. Authority to purchase certain goods; evidence was given of purchases of similar goods accepted by the principal—Fitch v. Metropolitan Hotel Supply Co., 74 N. Y. Supp. 616; agency for sale of timber—Barker Cedar Co. v. Roberts, 23 Ky. Law R. 1345.

79. Agreement by sales agent to receive payment in lumber—J. A. Fay & Eagan Co. v. Causey, 131 N. C. 350.

80. Nutter v. Brown, 51 W. Va. 598.

81. Purchase of note by agent on unauthorized condition—Andrews v. Robertson, 111 Wis. 334.

82. Farquharson v. King, 70 Law J. K. B. 985, (1901) 2 K. B. 697, 85 Law T. (N. S.) 264, 49 Wkly. Rep. 673.

A purchaser of lands cannot recover from the vendor for money paid the latter's attorney in fact in excess of his authority.[84] Revocation of a special agency by the principal before the agent acts will prevent liability for subsequent performance unless third persons have been misled by the principal or he has ratified the agent's acts.[85] A principal may follow his funds, wrongfully diverted by his agent, into the hands of third persons unless they have received them in good faith, for value, and without notice of the agent's trust.[86] Instructions that a principal was entitled to recover money paid to third persons by his agent if the agent exceeded his authority cannot be given where the issue made by the pleadings is that the money was paid under a mistake of fact.[87]

The principal may be liable for agent's torts;[88] or for negligence induced by false statements of the agent,[89] and for trespass by his agent which he ratifies and is done for his benefit,[90] and, for wrongful acts of the agent within the scope of his authority though in violation of his express orders,[91] though he may not have directed or contemplated the acts,[92] but not for wrongful acts of the agent outside the scope of his authority[93] or in transactions independent of the agency[94] or of which he had no knowledge,[95] unless he accepts the fruits of the fraud or deceit of the agent.[96] Where it is shown that a third person defrauded by dealings with an agent, afterwards dealt with the principal, such person may properly show that in both dealings he relied solely on the agent's representations.[97]

C. Particular kinds of agencies.[98]—A general agent may change or waive terms of a contract for the principal,[99] or of a warranty of goods sold,[1] and may

83. Agent to secure written proposals for sale and delivery of cotton—Inman v. Crawford (Ga.) 42 S. E. 473.

84. Morton v. Morris (Tex. Civ. App.) 66 S. W. 94.

85. Florida Cent. & P. R. Co. v. Ashmore (Fla.) 32 So. 832.

86. Central Stock and Grain Exch. v. Bendinger (C. C. A.) 109 Fed. 926; Bendinger v. Central Stock and Grain Exch., Id.

87. Great Western El. Co. v. White (C. C. A. N. D.) 118 Fed. 406.

88. An exception exists where the state is principal—Billings v. State, 27 Wash. 288, 67 Pac. 583. A corporation employing an agent to give an exhibition of fire works is liable for his negligence unless the latter is an independent contractor—Bianki v. Greater American Exposition Co. (Neb.) 92 N. W. 615.

89. Telegraph company as principal—Seffel v. Western Union Tel. Co. (Tex. Civ. App.) 65 S. W. 897.

90. Brown v. Webster City, 115 Iowa, 511.

91. Arrest of patron by restaurant manager—Dupre v. Childs, 52 App. Div. (N. Y.) 306; affirmed, 169 N. Y. 585.

92. A dry goods merchant is liable for false arrest of a customer by an usher on suspicion of theft—Field v. Kane, 99 Ill. App. 1.

93. Agent for setting up machinery—Flinn v. World's Dispensary Medical Ass'n, 64 App. Div. (N. Y.) 490. That a railroad ticket agent arrested a person because of his resemblance to another suspected of stealing from the company's cash drawer, is insufficient to show such act within the scope of the agent's authority so as to render the railroad company liable for malicious prosecution—Wikle v. Louisville & N. R. Co. (Ga.) 42 S. E. 525.

94. Fraud of a husband and another in confessing judgments against the husband is not chargeable to the wife because they represented her in purchase of his property in execution—Mencke v. Rosenberg, 202 Pa. 131.

95. J. I. Case Thresh. Mach. Co. v. Eichinger, 15 S. D. 530. Evidence that a mother-in-law had previously mortgaged her property twice to secure debts of her son-in-law and her testimony that she trusted him implicitly, is insufficient to show his apparent authority, while acting as her agent, to agree that a later mortgage executed by her for another loan to him should include a prior loan he had secured by forging her name and of which she had no knowledge or notice—Nourse v. Jennings, 180 Mass. 592. Nor is such apparent authority shown by a letter from the mother-in-law assenting to the loan "as arranged"—Nourse v. Jennings, 180 Mass. 592.

96. White v. New York S. & W. R. Co. (N. J.) 52 Atl. 216.

97. Purchase of worthless mining stock under fraudulent representations of agent—Geraghty v. Randall (Colo. App.) 70 Pac. 767.

98. A person dealing with a general loan agent is not liable for payments converted by the agent—Harrison Nat. Bank v. Williams (Neb.) 89 N. W. 245. An agent having full charge of loans and security, using his own judgment, can receive payment—Pochin v. Knoebel (Neb.) 89 N. W. 264; sufficiency of evidence to show agent's authority to enter into an illegal wagering contract (Mass. St. 1890, c. 437)—Allen v. Fuller (Mass.) 65 N. E. 51. That an agent is not in possession of his principal's mortgage is not conclusive as to lack of power to collect money thereon—Harrison Nat. Bank v. Austin (Neb.) 91 N. W. 540.

99. Selling agent—Blaess v. Nichols & Shepard Co., 115 Iowa, 373. An agent with

estop the principal by specific acts relating thereto,[2] and may make optional contracts with third persons allowing them time for acceptance or refusal, though his sales are subject to ratification by the principal.[3] Authority as a general agent is presumed to continue.[4] A general agent in charge of the entire business of his principal is presumably authorized to give a note when necessary for its purposes.[5] A general agent to manage real estate is not empowered to bind his principal by entry into a partnership.[6] An agent to manage the principal's business generally, to buy and sell for him, is a general agent though for a special business, and can bind the principal by a purchase on credit though contrary to instructions.[7] An agent employed generally to conduct the business of his principal and draw drafts on the principal for payment of necessary expenses, was authorized to use money collected by him from another and distinct principal to pay such debts and remit in return to the second principal drafts on the first.[8] A general agent to purchase mill supplies and sell manufactured goods, but without authority to sign or indorse checks except for supplies purchased, has no implied authority to indorse a check for goods sold, so as to prevent recovery of the amount from the maker by his principal after the agent had absconded.[9] The authority of a general agent to hire employes for his principal is not a matter of law but a question to be settled from the evidence.[10] Statements made by a general agent to special agents are admissible as showing the authority of a certain special agent as bearing on statements made by him for the principal.[11]

An agent employed for a specific purpose cannot act beyond its scope so as to bind the principal,[12] and a third person dealing with him must learn the extent

authority to permit his principal's tenant to market crops may waive the principal's lien thereon—Fishbaugh v. Spunaugle (Iowa) 92 N. W. 58.

1. Blaess v. Nichols & Shepard Co., 115 Iowa, 373; Waupaca Elec. L. & R. Co. v. Milwaukee Elec. R. & L. Co., 112 Wis. 469.

2. A general rental agent may encourage a tenant to buy fixtures and thereby estop the principal from claiming them as part of the realty—Morrison v. Sohn, 90 Mo. App. 76.

3. General agent selling musical instruments may sell on trial and part payment with option to purchaser to return within a fixed period, and the principal cannot repudiate the contract and recover the instrument without refunding the part payment—Jesse French Piano & Organ Co. v. Cardwell, 114 Ga. 340.

4. Cheshire Provident Inst. v. Fuesner (Neb.) 88 N. W. 849.

5. Whitten v. Bank of Fincastle (Va.) 42 S. E. 309.

6. Guy v. Rosewater (Colo. App.) 69 Pac. 271.

7. Manager of mercantile business—Pacific Biscuit Co. v. Dugger, 40 Or. 362, 67 Pac. 32.

8. Great Western El. Co. v. White (C. C. A.) 118 Fed. 406.

9. Jackson Paper Mfg. Co. v. Commercial Nat. Bank, 199 Ill. 151.

10. Employment of men by foreman of mill—Ames v. D. J. Murray Mfg. Co., 114 Wis. 85.

11. Elfring v. New Birdsall Co. (S. D.) 92 N. W. 29.

12. Power of architect employed to superintend construction to change building contract—Watts v. Metcalf, 23 Ky. Law R. 2189. An attorney employed to execute a lease can not bind his client to pay commissions for the renting—Calloway v. Equitable Trust Co., 67 N. J. Law, 44. An agent to receive principal and interest can not receive principal before due—Williams v. Pelley, 96 Ill. App. 346. Authority to collect a debt carries no power to compromise—Corbet v. Waller, 27 Wash. 242, 67 Pac. 567; nor to bind the principal to apply the proceeds in a particular way—Hill v. Van Duzer, 111 Ga. 867. An agent to buy for cash can not buy on credit—Americus Oil Co. v. Gurr, 114 Ga. 624. Proof that an agent received payments of interest on a note and trust deed, and wrote a letter exercising an option on the principal to declare the entire debt due on default, is insufficient to show his authority to exercise the option—Wilcox v. Eadie (Kan.) 70 Pac. 338. An architect, described in all contracts relating to construction of a building as the agent of the owner, may bind the latter by agreement to provide for emergencies in the work—Teakle v. Moore, 9 Detroit Leg. N. 371. Authority to ship goods includes authority to accept bill of lading and limit carriers' liability—Adams Exp. Co. v. Carnahan (Ind. App.) 64 N. E. 647. An agent to collect money cannot receive payment otherwise—Cooney v. U. S. Wringer Co., 101 Ml. App. 468. Employment of a physician to attend an employe is not within the duties of a bookkeeper and timekeeper of a railroad contractor—Harris v. Fitzgerald (Conn.) 52 Atl. 315. One sometimes employed by a loan company to collect monies does not become its agent by making application for another for a loan, so as to render the company chargeable with his knowledge that a mortgage security was given by defendant as surety—International Bldg. & Loan Ass'n v. Watson, 158 Ind. 505.

of the agent's authority.[13] However, an undisclosed limitation of authority will not bind others without knowledge.[14] Payment of a note to an agent authorized to collect for the holder satisfies the debt.[15] His possession of a note shows an agent's authority to collect it.[16] A servant authorized to transport his master's property and furnished with funds for the purpose, has no apparent or implied authority to give his master's credit for transportation.[17] Where it is shown that one in control of another's business, did not employ laborers without approval of his superior, there can be no implied authority that he should so employ them[18] Where a contract secured by an agent provides that he has no authority to change its written terms, he cannot bind the principal to accept other and different terms by allowing their insertion,[19] nor can he bind the principal by a verbal modification of a written contract, though such contract was originally made by him, unless his authority to modify is shown or the change is ratified by the principal.[20] Where an agent is employed to sell certain goods of the principal and also to represent him in an arbitration concerning the sale of other goods, the principal's right to question the agent's acts for fraud is the same in both employments.[21] Authority given by a widow to another to secure privilege, from a lodge of which the agent was a member, to bury her husband in the lodge cemetery, will not bind her not to remove the body because of a prohibition in the lodge constitution of which she had no knowledge.[22] Authority to indorse commercial paper for his principal does not imply authority to ratify a sale of the principal's stock or a loan thereon.[23] The agent may bind his principal by alteration of an instrument to correspond with terms of the transaction which was conducted by the agent.[24] A promise by the owner of a building to pay a materialman on an order from the contractor, is proof that the contractor was not an agent to purchase materials for the owner, where the materialman had failed to procure the order until the contractor had abandoned his contract and nothing was due him thereunder.[25] After an agent has represented his principal in certain transactions done annually, and no notice of termination of the agency is given third persons, his ostensible agency for the succeeding year is a question for the jury.[26] Payment of a note secured by a mortgage to an agent authorized to collect, is a satisfaction.[27] A clerk acting under directions of a local manager of a manufacturing company cannot bind the company by independent dealings with third persons.[28]

An officer of an association or corporation cannot bind it as agent in transactions outside the scope of his authority,[29] nor can it be presumed that a corporate

13. Americus Oil Co. v. Gurr, 114 Ga. 624; Young v. Harbor Point Club House Ass'n, 99 Ill. App. 290.

14. Rohrbough v. U. S. Exp. Co., 50 W. Va. 148.

15. Stuart v. Stonebreaker (Neb.) 88 N. W. 653; Pochin v. Knoebel (Neb.) 89 N. W. 264.

16. Smith v. Landecki, 101 Ill. App. 248.

17. Saugerties & N. Y. Steamboat Co. v. Miller, 76 App. Div. (N. Y.) 167.

18. Authority of boss of coal mine to employ diggers without approval of the superintendent—Patterson v. Neal (Ala.) 33 So. 39.

19. Purchase of shares in loan company from agent on written application provided by the company—National Guarantee L. & T. Co. v. Thomas (Tex. Civ. App.) 67 S. W. 454.

20. Contract by dredging company with agent of lumber company for excavation of a channel; the agent was authorized only to supervise the work under the contract—Rowland Lumber Co. v. Ross, 4 Va. Sup. Ct. R. 191.

21. Sale of lumber by agent and settlement of dispute as to quality of other lumber sold but already delivered—Williamson v. North Pac. L. Co. (Or.) 70 Pac. 532.

22. Matter of Bauer, 68 App. Div. (N. Y.) 212.

23. Fay v. Slaughter, 194 Ill. 157.

24. Nichols v. Rosenfeld, 181 Mass. 525; Palmer v. Same, Id.

25. Parker v. Brown, 131 N. C. 264.

26. Agent in taking mortgage on crops raised annually on a certain farm—First Nat. Bank v. Minneapolis & N. El. Co. (N. D.) 91 N. W. 436.

27. Boyd v. Pape (Neb.) 90 N. W. 646.

28. Crane & Co. v. Bloom, 64 Kan. 884, 67 Pac. 449.

29. Charter-party signed by managing editor of publishing association—Sun Print. &

agent can act for it in matters outside its legitimate business.[30] Though third persons are bound to know the extent of power of the president of a corporation to act as its agent, they may deal with him respecting matters within the ordinary business of the corporation if he is customarily in charge thereof.[31] The manager of a corporation has no authority under his general powers to mortgage its property.[32] An agent of a building and loan association cannot bind his principal beyond the terms of its published circular and by-laws.[33]

A power of attorney[34] is an instrument setting forth the authority of a private attorney or attorney in fact.[35] It must be strictly construed,[36] general powers being controlled by special powers or express limitations.[37] A power of attorney to control and sell does not include power to mortgage.[38] A power to sell land includes authority to execute conveyances and a deed in his own name conveying his "interest" passes the owner's title.[39] A power to sell land carries authority to execute a conveyance for a consideration running to the owner only,[40] and third persons are charged with notice of powers of an agent under a recorded power so that they cannot purchase for a consideration running to the agent[41] unless they are innocent subsequent purchasers.[42] A trade usage followed by an agent in his principal's business cannot prevail against a power of attorney or the law.[43] A special power of attorney to collect debts and use them for the support of the grantor's family will not authorize a conveyance of the property to pay debts previously owed by the grantee.[44] A power of attorney to convey by quit claim deed, executed by a conveyance with general warranty, will quit claim the principal but he is not bound by the warranty.[45] Where an attorney in fact, under a recorded power of sale, sells to himself and then conveys to another, the original owner must show that such grantee had notice of his equities.[46] A power of attorney authorizing the purchase of goods for a certain business of the principal in a foreign country, and to provide for payment of same, does not confer a general borrowing power on the agent to bind the principal.[47] A sealed power of attorney, or proper evidence of its existence, must be shown to uphold a lease of lands executed by one as the agent of another;[48] or to make settlement of a

Pub. Ass'n v. Moore, 183 U. S. 642, 46 Law. Ed. 366.

30. Persons dealing with a brewing company cannot presume that an agent thereof has authority to employ labor in construction of a saloon for one of the company's customers—Leary v. Albany Brew. Co., 77 App. Div. (N. Y.) 6.

31. St. Clair v. Rutledge (Wis.) 92 N. W. 234.

32. First Nat. Bank v. Kirkby (Fla.) 32 So. 881.

33. Columbia Bldg. & L. Ass'n v. Lyttle (Colo. App.) 66 Pac. 247.

34. Definition and rules of construction of power of attorney—White v. Furgeson (Ind. App.) 64 N. E. 49.

35. Treat v. Tolman (C. C. A. N. Y.) 113 Fed. 892.

36. A joint power in a note to confess judgment will not authorize a several judgment—Mayer v. Pick, 192 Ill. 561. A power to sell mortgages "now" possessed does not include after acquired mortgages—Union Trust Co. v. Means, 201 Pa. 374. A power to collecting money, etc., under an existing contract will not apply to subsequent contracts—Shackleford v. M. C. Kiser Co., 131 Ala. 224. A power to sell and convey lands will not authorize the agent to defer payment pending an attachment in an action of tort by the grantee against the owner, of which the latter has no notice—Morton v. Morris (Tex. Civ. App.) 66 S. W. 94. A power to receipt payment of a mortgage and enter satisfaction of record will not authorize assignment of the mortgage—Googe v. Gaskill, 18 Pa. Super. Ct. 39.

37. First Nat. Bank v. Kirkby (Fla.) 32 So. 881.

38. Personal property—Reed v. Kinsey, 98 Ill. App. 364.

39. Hunter v. Eastham (Tex. Civ. App.) 67 S. W. 1080.

40. Hunter v. Eastham (Tex.) 69 S. W. 66.

41. An attorney in fact under a power of record can not convey in satisfaction of his own debt in violation of the power—Hunter v. Eastham (Tex. Civ. App.) 67 S. W. 1080.

42. Hunter v. Eastham (Tex.) 69 S. W. 66.

43. State v. Chilton, 49 W. Va. 453.

44. Lewis v. Lewis (Pa.) 52 Atl. 203.

45. Robinson v. Lowe, 50 W. Va. 75.

46. Hunter v. Eastham (Tex.) 67 S. W. 1080.

47. Jacobs v. Morris, 70 Law J. Ch. 183, (1901) 1 Ch. Div. 261, 84 Law T. (N. S.) 112, 49 Wkly. Rep. 365.

48. The lessor, after execution, repudiated the lease and gave notice thereof to the lessee—Freschi v. Molony, 65 App. Div. (N. Y.) 516.

mortgage debt by a deed for part of the property.[49] A lease by attorneys in fact, reciting that it was made by them "as attorneys in fact of widow and heirs of" decedent and the owners of the premises is a compliance with a power authorizing a lease in the name of "the estate of" the decedent, and the principals may recover rent thereon as against a surety on default of the lessee.[50]

D. Ratification by principal.[51]—An authorized act of an agent, or his tort,[52] may be ratified so as to bind the principal.[53] A principal who undertakes a contract made by his agent without authority[54] or who acts in accordance with the contract,[55] thereby ratifies it though not formal,[56] and though third persons did not know that the agent was acting for another.[57] Acquiescence in acts of an agent within the apparent scope of his authority,[58] or failure to object to acts of an agent after full knowledge,[59] or receipt and retention by principal of the benefits of an agent's unauthorized acts[60] or fraud,[61] unless qualified by a statement of the principal that he does not intend to become responsible,[62] amount to a ratification of the agent's acts, but retention of the benefits by another than the principal will not bind him,[63] nor receipt of benefits of a contract from his duly accredited agent, part of which has resulted from fraud or unauthorized acts of a third person who assumed to be his agent,[64] nor receipt of benefits from an entire transaction, part of which was fraudulent, without knowledge that any of the benefits were fruits of the fraud.[65]

The benefits must result from the transaction tainted with the agent's fraud or unauthorized acts,[66] and the principal must have knowledge of the unauthorized or fraudulent acts,[67] or the terms of contracts made by him;[68] then if he fails to

49. The agent testified further that the deed was to convey the whole property, and that the mortgagor had refused to give any deed whereupon the settlement was not made—Corbet v. Waller, 27 Wash. 242, 67 Pac. 567.

50. Rand v. Moulton, 72 App. Div. (N. Y.) 236.

51. Sufficiency of evidence of ratification—Hunter v. Cobe, 84 Minn. 187.

52. A bank may ratify a loan secured by its president for an unlawful purpose—Roe v. Bank of Versailles, 167 Mo. 406.

53. Brown v. Webster City, 115 Iowa, 511.

54. Nashville C. & St. L. R. Co. v. Smith, 132 Ala. 434; Southern Ry. Co. v. Marshall, 23 Ky. Law R. 813; President, etc., Great Western Turnpike Co. v. Shafer, 57 App. Div. (N. Y.) 331; affirmed, 65 N. E. 1121; W. F. Taylor Co. v. Baines Grocery Co. (Tex. Civ. App.) 72 S. W. 260; Jacobs v. German Workingmen's Ass'n (Mass.) 66 N. E. 605.

55. Furnishing goods for two years under the agent's contract is sufficient—Vosburg v. Mallory, 70 App. Div. (N. Y.) 247.

56. Taylor Gas Producer Co. v. Wood, 119 Fed. 966.

57. Hayward v. Langmaid, 181 Mass. 426.

58. Corporation as bound by president's acts—Bennett v. Millville Imp. Co., 67 N. J. Law, 320.

59. Employment of surgeon by corporate agent to attend injured employe—Lithgow Mfg. Co. v. Samuel, 24 Ky. Law R. 1590.

60. Russell v. Peavy, 131 Ala. 563; Plano Mfg. Co. v. Nordstrom (Neb.) 88 N. W. 164; Lyle v. Addicks, 62 N. J. Eq. 123; Bennett v. Millville Imp. Co., 67 N. J. Law, 320; attorney acting as agent in mortgage transaction—Murray v. Sweasy, 69 App. Div. (N. Y.) 45; payment to agent unauthorized to receive it—Payne v. Hackney, 84 Minn. 195; receipt of payments on unauthorized sale and warranty by machine agent—Blaess v. Nichols & Shepard Co., 115 Iowa, 373. An insurance company ratified improper delivery of a policy by its agent by retaining premium and failing to repudiate his acts—Northwestern Life Ass'n v. Findley (Tex. Civ. App.) 68 S. W. 695; contract by corporate officers—Washington Ins. Co. v. Krutz (C. C. A.) 119 Fed. 279; Michigan Cent. R. Co. v. Chicago, K. & S. R. Co., 9 Detroit Leg. N. 627, 93 N. W. 882; agent selling warehouse receipts for notes instead of cash as instructed—Sloan v. Johnson, 20 Pa. Super. Ct. 643; unauthorized employment of subagents—Bellinger v. Collins (Iowa) 90 N. W. 609.

61. Fraudulent purchase of lands—Stephens v. Ozbourne, 107 Tenn. 572; Meyerhoff v. Daniels, 173 Pa. 555.

62. Sale of lands by broker—Clark v. Bird, 66 App. Div. (N. Y.) 284.

63. That lumber was used by a contractor in repairing a building is not evidence of ratification by the owner of the contractor's representations as to the contractor's authority to purchase lumber for the owner—Parker v. Brown, 131 N. C. 264.

64. Tecumseh Nat. Bank v. Chamberlain Bank. House (Neb.) 88 N. W. 186.

65. Forged indorsements by attorney in fact dealing with principal's commercial paper—Fay v. Slaughter, 194 Ill. 157.

66. Purchasing agent of store—Schallay v. Moffit-West Drug Co. (Colo. App.) 67 Pac. 182.

67. Campbell v. Manufacturers' Nat. Bank, 67 N. J. Law, 301; employment of a coal digger by a boss without knowledge or necessary approval of the mine owner or superintendent—Patterson v. Neal (Ala.) 33 So. 39.

disavow the agent's acts within a reasonable time and third persons are induced to rely upon the validity of contracts made he has ratified them,[69] so as to bind any one claiming under him, even though the acts are clearly without the agent's authority,[70] and even though third persons dealing with the agent may have had some knowledge of his disapproval.[71] Mere failure to disavow the act of a volunteer agent is not a ratification.[72]

There can be no ratification of a contract made by the agent on his own behalf with a concealed intention to give the benefits to another,[73] nor will one dealing with another, whom he thought to be an agent representing third persons, be held to ratify a fraud of such agent though he made no inquiries as to his authority.[74]

The ratification cannot be partial; the principal must adopt or reject the agent's acts in toto.[75] Ratification of an agent's acts relates back to time of their execution unless rights of third parties intervene,[76] and binds the principal as though the agency had been made in the first instance,[77] and cannot be retracted where made with full knowledge of the facts,[78] though it may be prevented by a tender back of the consideration by the agent before consummation of the contract or damage to the other party.[79]

By bringing action against his agent for exceeding his instructions, the principal ratifies his acts as to the third person but not the agent's wrongful act.[80] An agent's collection of a bill due the principal by application on a debt of the principal is not ratified by an attempt by the principal to recover from the agent.[81] That a principal made no objection when a claim was presented by a third person is strong evidence of his ratification of the obligation made by his agent.[82] An admission that part of the results of an agent's unauthorized acts were received to balance part of the agent's embezzlement amounts to a partial ratification.[83] Deeds taken by an agent in name of another without the principal's consent are not ratified by his retention of the deeds and abstracts of title made.[84]

The third person must prove ratification by the principal,[85] by showing knowledge of the principal and appropriation by him of the benefits.[86] The reason-

Ratification by a corporation of a mortgage executed by its agent must be with knowledge of the mortgage—First Nat. Bank v. Kirkby (Fla.) 32 So. 881; loan by agent without authority—Dean v. Hipp (Colo. App.) 66 Pac. 804; Topliff v. Shadwell, 64 Kan. 884, 67 Pac. 545; Brown v. City of Webster City, 115 Iowa, 511.

68. Direction to an agent to forward a deed for signing is not ratification of his sale of lands where the principal did not know the terms of the sale—Johnson v. Fecht, 94 Mo. App. 605.

69. Lyle v. Addicks, 62 N. J. Eq. 123. The failure of the principal to repudiate the act of the assumed agent after full information from the agent and from the other party to the contract amounted to a ratification—Robbins v. Blanding (Minn.) 91 N. W. 844; Carlisle & Finch Co. v. Iron City Sand Co., 20 Pa. Super. Ct. 378.

70. Failure of principal to disavow agent's sale of property for eight years will prevent avoidance of a sale by execution creditor of principal—Knauer v. McKoon, 19 Pa. Super. Ct. 539.

71. Purchase of goods by son acting as general manager of father's store—Roundy v. Erspamer, 112 Wis. 181.

72. Robbins v. Blanding (Minn.) 91 N. W. 844.

73. Keighley v. Durant (Eng.) 70 Law J. K. B. 662, (1901) App. Cas. 240, 84 Law T. (N. S.) 777.

74. Ballard v. Nye (Cal.) 69 Pac. 481.

75. Adams Exp. Co. v. Carnahan (Ind. App.) 64 N. E. 647; Hall v. Hopper (Neb.) 90 N. W. 549; Hinman v. F. C. Austin Mfg. Co. (Neb.) 90 N. W. 934; corporation as principal—Fremont Carriage Mfg. Co. v. Thomsen (Neb.) 91 N. W. 376.

76. Execution of deed under power of attorney—Graham v. Williams, 114 Ga. 716.

77. Hunter v. Cobe, 84 Minn. 187. The rule applies to a municipal corporation as principal—Wilt v. Town of Redkey (Ind. App.) 64 N. E. 228.

78. Hunter v. Cobe, 84 Minn. 187.

79. Retention of purchase notes of land wrongfully sold by agent is not ratification where the agent tenders back the money and no deed is executed—Bromley v. Aday, 70 Ark. 351.

80. Schanz v. Martin, 37 Misc. (N. Y.) 492.

81. Holland Coffee Co. v. Johnson, 38 Misc. (N. Y.) 187.

82. Fischer v. Jordan, 54 App. Div. (N. Y.) 621; affirmed, 169 N. Y. 615.

83. Fay v. Slaughter, 194 Ill. 157.

84. Cole v. Baker (S. D.) 91 N. W. 324.

85. Dean v. Hipp (Colo. App.) 66 Pac. 804.

86. Ratification of unauthorized purchases must be shown by knowledge of principal and mingling of the purchased goods with

able time within which a principal must ratify or reject his agent's acts after notice is a question for the jury from the circumstances.[87]

E. Undisclosed agency.—An undisclosed principal is bound by acts of his agent,[88] unless there are facts putting one dealing with the agent on inquiry,[89] or it does not appear that such persons are damaged by disavowal of the agent's acts[90] and such an agent may bind the principal by sale of his property under ostensible ownership.[91] An undisclosed principal who has allowed his agent to conduct business in his own name "as agent" cannot disavow the agent's acts.[92]

That a contract was made by an undisclosed agent will not prevent enforcement by the principal,[93] and that a third person contracted with an undisclosed agent, will not prevent his liability to the principal for failure to exercise ordinary care in performance of the contract.[94] One dealing with an undisclosed agent may treat him as a principal and a payment to the agent will discharge the third person.[95] A surety who executes a bond for an agent while unaware of his undisclosed principal is not precluded from his action against the principal after payment of the bond by the fact that the agent executed the bond as principal.[96]

Execution of a written contract by one "as agent is a sufficient disclosure of the agency as to the other party.[97] That a wife knew a building was being constructed on her lots, and once saw her husband order lumber for buildings on his own lots, does not show her to be his undisclosed principal.[98]

The commencing of a suit against a principal and his undisclosed agent is not an election to hold the principal and not the agent,[99] and where one dealt with an undisclosed agent he need not elect which he will hold liable until the case is closed.[1]

F. Notice to agent.[2]—The agent is presumed to have informed the principal of contracts he has made.[3] Notice affecting matters within the agency are binding on the principal,[4] unless third persons had knowledge of limitations on the

his goods beyond separation—Thrall v. Wilson, 17 Pa. Super. Ct. 376.

87. Jones v. Consolidated Portrait & Frame Co., 100 Ill. App. 89.

88. Payment of mortgage to agent—Cheshire Provident Inst. v. Gibson (Neb.) 89 N. W. 243.

89. Effect of agent's signature as manager of a company—Mull v. Ingalls, 30 Misc. (N. Y.) 80. A statement on the face of bills that they were payable only to the principal sufficiently discloses the agency to bind third persons—Henderson, Hull & Co. v. McNally, 48 App. Div. (N. Y.) 134; affirmed, 168 N. Y. 646.

90. A son, handling his mother's funds, cannot bind the latter by dealings beyond her authority and for his own benefit—Larbig v. Peck, 69 App. Div. (N. Y.) 170.

91. Sale of bank stock always in possession of agent—Garvin v. Pettee, 15 S. D. 266.

92. Purchase of goods by agent and confession of judgment for price—Fees v. Shadel, 20 Pa. Super. Ct. 193.

93. Loan made by undisclosed agent enforceable against borrower—Kitchen v. Holmes (Or.) 70 Pac. 830.

94. Abstracter examining title under employment by the owner's agent—Young v. Lohr (Iowa) 92 N. W. 684; negligence of carrier as to goods shipped by agent—Southern R. Co. v. Jones, 132 Ala. 437.

95. Shine v. Kennealy, 102 Ill. App. 473.

96. City Trust, Safe Deposit & Surety Co. v. American Brew. Co., 70 App. Div. (N. Y.) 511.

97. If the third person made no inquiry as to the principal, he cannot be heard to deny disclosure. Insurance policy given to agent—Marine Ins. Co. v. Walsh-Upstill Coal Co., 13-23 O. C. C. 191.

98. Snyder v. Sloane, 65 App. Div. (N. Y.) 543.

99. Tew v. Wolfsohn, 77 App. Div. (N. Y.) 454.

1. Tew v. Wolfsohn, 77 App. Div. (N. Y.) 454.

2. Notice may extend to knowledge of the disposition of a vicious animal—O'Neill v. Blase, 94 Mo. App. 648. An agent's knowledge of insanity of a purchaser of the principal's goods, imputable to the principal, may be shown by notice to the agent by the purchaser's son acting for him—Kelly v. Burke. 132 Ala. 235.

3. Leszynsky v. Ross, 35 Misc. (N. Y.) 652.

4. Notice to corporate president in charge of business of defects in machinery—Houston Biscuit Co. v. Dial (Ala.) 33 So. 268; Schollay v. Moffit-West Drug Co. (Colo. App.) 67 Pac. 182; notice that the person with whom dealings are had is an agent—Mull v. Ingalls, 30 Misc. (N. Y.) 80; maker of note as agent of holder for sale of collateral security—People's Sav. Bank v. Smith, 114 Ga. 185. A different understanding of trade terms as between principal and agent in different parts of the country will not prevent the

agent's authority;[5] but it must be obtained in the course of the business of the agency,[6] and does not apply to matters beyond the agency or as to which the agent acts for himself,[7] or must be known to the agent at time of his dealings though he may have acquired it previously,[8] and must concern matters with which the agent has power to deal, or about which he is under duty to inform the principal,[9] and not arise from the peculiar knowledge of the agent.[10]

The rule that an agent is presumed to communicate such facts to his principal as his duty requires, does not apply where the agent acts also for himself and his interest or conduct would preclude such disclosure,[11] or when the knowledge is gained while in conspiracy with a third person to defraud the principal.[12] Notice actually communicated to a principal will bind him, though not within the scope of the agent's authority.[13]

Knowledge of fraud and collusion in transfer of lands by an attorney in fact is notice to his grantee who is also his principal.[14] Third persons are justified in giving an agent notice of rescission of a contract with his principal where the latter gives them good reason to believe that the agent has full charge of the transaction.[15] Notice to a general agent is notice to his principal,[16] but a servant is not an agent of his master to receive notice.[17]

The rule of notice applies to a corporation,[18] and to the state.[19]

Acceptance of the results of an agency by the principal shows notice of the nature of the contract made by the agent.[20]

agent's acts from binding the principal where he follows the meaning of the terms accepted at the place of dealing—Moulton v. O'Bryan, 17 Pa. Super. Ct. 593; agent's knowledge of insufficient payment of principal's taxes—Nutting v. Lynn, 18 Pa. Super. Ct. 59; notice to an agent, with "full authority" to purchase stock, of a lien on the stock as shown by knowledge of pleadings in a suit in which the lien was asserted, imputed to principal—Schwind v. Boyce, 94 Md. 510; Vercruysse v. Williams (C. C. A.) 112 Fed. 206; knowledge by agent of a creditor that a debtor is insolvent at time of execution of a mortgage in behalf of the principal—Babbitt v. Kelly (Mo. App.) 70 S. W. 384.

5. Purchase of prohibited goods by agent in charge of store—Schollay v. Moffit-West Drug Co. (Colo. App.) 67 Pac. 182.

6. Flanagan v. Shaw, 74 App. Div. (N. Y.) 508.

7. People's Bank of Talbotton v. Exchange Bank of Macon (Ga.) 43 S. E. 269; Lane v. De Bode (Tex. Civ. App.) 69 S. W. 437; Cooper v. Ford (Tex. Civ. App.) 69 S. W. 487; notice of cancellation of contract—Indiana Bicycle Co. v. Tuttle (Conn.) 51 Atl. 538. Notice to agent for sale of lands, under deed of trust for purchase price, of an intention of purchaser to cut timber therefrom is not notice to the beneficiary under the trust deed—Girard Life Ins. A. & T. Co. v. Mangold, 94 Mo. App. 125. A wife is not charged with knowledge of fraud in execution sale of husband's property because she was represented therein by her husband and another where the fraud was not connected with the matter in which they represented her—Mencke v. Rosenberg, 202 Pa. 131; attorney employed to examine title to lands—Weil v. Reiss, 167 Mo. 125.

8. Schwind v. Boyce, 94 Md. 510; Deering v. Holcomb, 26 Wash. 588, 67 Pac. 240, 561.

9. Corporate agents or officers—Nehawka Bank v. Ingersoll (Neb.) 89 N. W. 618.

10. A widow cannot be charged with knowledge of regulations in a lodge constitution prohibiting removal of dead from its cemetery because her son-in-law who arranged for the burial of her husband was a member of the lodge—In re Bauer, 68 App. Div. (N. Y.) 212.

11. Bank v. Thompson (C. C. A.) 118 Fed. 798. A depositor in a bank is not charged with knowledge of his bookkeeper's fraud in abstracting and destroying checks, though received in the general course of his employment, and the depositor was not precluded from recovering from the bank sums paids on forgeries because of failure to ascertain and notify the bank after prior forgeries—Kenneth Inv. Co. v. Nat. Bank (Mo. App.) 70 S. W. 173.

12. Cooper v. Ford (Tex. Civ. App.) 69 S. W. 487.

13. Hicks v. Southern R. Co., 63 S. C. 559.

14. Fraudulent transfer of ward's land by guardian in collusion with others—La Dow v. North American T. Co. (Or.) 113 Fed. 13.

15. Sale of machine by agent and rescission by buyer for defects—Weeks v. Robert A. Johnston Co. (Wis.) 92 N. W. 794.

16. Notice to general manager—Citizens' T. & S. Co. v. Zane (Pa.) 113 Fed. 596.

17. Rogers v. Dutton (Mass.) 65 N. E. 56.

18. Chicago Pneumatic Tool Co. v. H. W. Johns Mfg. Co., 101 Ill. App. 349; Waters v. West Chicago St. R. Co., 101 Ill. App. 265; Magowan v. Groneweg (S. D.) 91 N. W. 335.

19. Notice to state land commissioners of a prior lien on lands bought by them (People v. Woodruff, 75 App. Div. [N. Y.] 90; but the state is not liable for torts (Billings v. State [Wash.] 67 Pac. 583); and State v. Chilton, 49 W. Va. 453 holds that an officer's knowledge is not imputable.

20. Acceptance and foreclosure of a mort-

G. Remedies of third persons against principal.—The agent and his undisclosed principal may be joined in a suit on the agent's contract,[21] or third persons may sue the principal alone,[22] unless they first attempted to sue the agent the relation having been disclosed.[23]

Pleading and procedure.[24]—Ratification need not be pleaded to be proved.[25] When a third person deals knowingly with an agent beyond the scope of his authority, the burden is upon such third person to show what benefits the principal received because of the agent's unauthorized acts and his conversion thereof to his own use.[26] Proof of agency is necessary to admit proof of the agent's contract,[27] or his declarations,[28] as binding on the principal. A wife sued for materials sold may examine her husband as to his agency to purchase the materials for her.[29]

The power of one to bind another as his agent,[30] and whether particular acts of the agent are within the scope of his authority,[31] are questions for the jury.

H. Remedies of principal against third persons.—A principal cannot recover from third persons for fraud on the agent and deny liability to the agent for loss therein.[32] Either an undisclosed principal or his agent may sue on a parol contract made by the agent in his own name.[33] The principal may sue in his own name on a note without indorsement by the agent though the note was payable to the agent as trustee.[34]

§ 3. *Rights and liabilities of agent to third persons.*[35]—The agent cannot limit his liability to third persons by a recital in the contract that he is a general agent,[36] and where he makes contracts in his own name concerning the subject of his agency, he obligates himself though the other party has notice of the agency.[37] An agent is not liable for injuries resulting to third persons by his principal's breach of duty outside the agency,[38] but it is otherwise if the acts or omissions come within his agency.[39] A third person cannot recover damages from an agent because of misrepresentations in regard to a contract made for his principal, un-

gage by the principal shows notice that it was given on a wife's property to secure her husband's debt—Russell v. Peavy, 131 Ala. 563.

21. Tew v. Wolfsohn, 38 Misc. (N. Y.) 54.

22. Ware v. Long, 24 Ky. Law R. 696.

23. Purchase of property by alleged agent at foreclosure sale—Ranger v. Thalmann, 65 App. Div. (N. Y.) 5. But election is only required at close of case—Tew v. Wolfsohn, 77 App. Div. (N. Y.) 454.

24. Allegations of authority held sufficient—Samson v. Beale, 27 Wash. 557, 68 Pac. 180; H. B. Smith Co. v. Williams (Ind. App.) 63 N. E. 318. Where, in a suit to recover rendered at request of defendant's agent, plaintiff is unable to distinguish which of two agents gave the authority, he may prove statements of either if he shows agency of both—Harris v. Fitzgerald (Conn.) 52 Atl. 315; sufficiency of evidence of authority of agent—Johnson v. Fecht, 94 Mo. App. 605.

25. Kirkpatrick v. Tarlton (Tex. Civ. App.) 69 S. W. 179.

26. Sales agent—Thrall v. Wilson, 17 Pa. Super. Ct. 376.

27. Brigger v. Mutual Reserve Fund Life Ass'n, 75 App. Div. (N. Y.) 149.

28. American Copper, Brass & Iron Wks. v. Galland-Burke Brew. & Malt. Co. (Wash.) 70 Pac. 236.

29. Snyder v. Sloane, 65 App. Div. (N. Y.) 543.

30. American Copper, Brass & Iron Wks. v. Galland-Burke Brew. & Malt. Co. (Wash.) 70 Pac. 236; Dickinson v. Salmon, 36 Misc. (N. Y.) 169.

31. Tyson v. Joseph H. Bauland Co., 68 App. Div. (N. Y.) 310; Lovick v. Atlantic Coast Line R. Co., 129 N. C. 427. On the question of the principal's liability that the agent signed as manager of a company may be considered by the jury—Mull v. Ingalls, 30 Misc. (N. Y.) 80.

32. U. S. Mortg. & T. Co. v. Crutcher, 169 Mo. 444.

33. Coulter v. Blatchley, 51 W. Va. 163.

34. Fla. Rev. St., § 981—Little v. Bradley (Fla.) 31 So. 342.

35. Liability of agent for malicious prosecution on behalf of principal—Porter v. Mack, 50 W. Va. 581.

36. Macdonald v. Bond, 96 Ill. App. 116; see supreme opinion affirming judgment, 195 Ill. 122.

37. Dockarty v. Tillotson (Neb.) 89 N. W. 1050; Macdonald v. Bond, 96 Ill. App. 116; see supreme opinion affirming judgment, 195 Ill. 122.

38. Agent to lease property is not liable for negligence to make repairs—Drake v. Hagan, 108 Tenn. 265.

39. A rental agent in absolute control of a building is liable for injuries resulting from negligence in failing to repair—Lough v. John Davis & Co. (Wash.) 70 Pac. 491.

less the misrepresentation relates to his authority to bind the principal and was relied upon.[40] A child cannot be made personally liable for purchases as agent for its parent though the latter has fraudulently disposed of her property.[41] A joint tort-feasor sued cannot escape liability because he acted as agent.[42]

Where agency is undisclosed an agent is responsible for his acts to third persons,[43] and if he exceeds his authority his personal liability is unquestioned.[44]

Remedies and procedure.—A third person who pursues his claim against an undisclosed principal does not thereby elect to hold the principal liable so that he cannot have a remedy against the agent who contracted in his own name for any balance due after enforcement against the principal.[45] The agent may sue in his own name in property held by him as agent,[46] and where he sues on a parol contract in his own name the undisclosed principal need not be joined.[47] Defenses good against the principal are effective against an undisclosed agent suing in his own name.[48]

§ 4. *Mutual rights, duties and liabilities. A. In general; contract of employment; diligence and good faith; respondeat ouster.*—An agent cannot delegate his authority without special directions,[49] especially if he has been employed because of his particular fitness for the business of the principal,[50] but he may employ mere clerks;[51] and, if he is without experience and left to his own devices, the principal cannot complain of a sale of property by a subagent and recover it from a third person.[52]

The agent is not responsible for losses to his principal if he keeps within his instructions,[53] and takes all precautions usually employed by the principal for protection of his property.[54] But when he violates his instructions the principal may ignore his acts and hold him liable,[55] though he acts without compensation;[56] and, if by exceeding his powers the agent renders himself liable, he cannot recover over against the principal,[57] but ratification of his unauthorized acts and acceptance of the benefits flowing from the agency will prevent recovery from him by the principal unless the agent has been guilty of fraud.[58]

40. Halbot v. Lens, 70 Law J. Ch. Div. 125, (1901) 1 Ch. Div. 344, 83 Law T. (N. S.) 702, 49 Wkly. Rep. 214.

41. Emery-Bird-Thayer Dry Goods Co. v. Coomer, 87 Mo. App. 404.

42. Diamond v. Smith (Tex. Civ. App.) 66 S. W. 141; extortion of money by agent which was paid to principal—Bocchino v. Cook, 67 N. J. Law, 467.

43. Fritz v. Kennedy (Iowa) 93 N. W. 603; Jackson v. McNatt, Id. 425; liability for overpayments on a loan made by agent to third person—Thompson v. People's Bldg., L. & Inv. Co., 114 Iowa, 481. Signing as "general agent" without disclosing principal will not relieve agent—Macdonald v. Bond, 195 Ill. 122.

44. Submission to arbitration without disclosing agency; effect of undisclosed agent's exceeding authority—Macdonald v. Bond, 96 Ill. App. 116.

45. The election to sue the undisclosed principal first was merely an endeavor to be subrogated to the rights of the agent against the principal—Hoffman v. Anderson (Ky. App.) 67 S. W. 49; Tew v. Wolfsohn, 77 App. Div. (N. Y.) 454.

46. An agent may sue on an insurance policy covering property referred to as belonging to him as agent—Marine Ins. Co. v. Walsh-Upstill Coal Co., 13-23 O. C. C. 191; Ohio Rev. St., § 4995.

47. Coulter v. Blatchley, 51 W. Va. 163; Ash v. Beck (Tex. Civ. App.) 68 S. W. 53.

48. Holden v. Rutland R. Co., 73 Vt. 317.

49. Lucas v. Rader (Ind. App.) 64 N. E. 488; Floyd v. Mackey, 23 Ky. Law R. 2030. See, also, supra, § 2-A.

50. Bromley v. Aday, 70 Ark. 351.

51. Rohrbough v. U. S. Exp. Co., 50 W. Va. 148.

52. A daughter as agent for father in care of property for benefit of his children may secure the assistance of another in its disposal—Delawder v. Jones, 99 Ill. App. 301.

53. Losses on loans by agent because of failure to require sureties—Watson v. Roth, 191 Ill. 382.

54. Burglary of money collected by agent and placed in principal's office safe for the night—Louisville & N. R. Co. v. Buffington, 131 Ala. 620.

55. Agent collecting money of his principal without authority is liable for conversion—Schanz v. Martin, 37 Misc. (N. Y.) 492; failure of loan agent to take security as directed—Marshall v. Ferguson, 94 Mo. App. 175.

56. Marshall v. Ferguson, 94 Mo. App. 175.

57. Excess of authority in warranting machines sold—J. I. Case Thresh. Co. v. Gardner (Ky. App.) 67 S. W. 367.

58. Lunn v. Guthrie, 115 Iowa, 501.

He is allowed a reasonable time in which to perform his duties unless his contract provides a time limit,[59] and is not liable for negligence unless in some duty he owes to the principal,[60] as, a failure to inform his principal fully as to contracts made so that the latter may protect his rights,[61] and not then, unless the damages to the principal are the natural and reasonable result of the negligence.[62]

He can acquire no advantage in the business of his agency to the detriment of his principal.[63] Knowledge by an agent of fraud of a third person while dealing with him to the principal's injury shows a conspiracy between the agent and such third person.[64] An agent employed to collect a debt by attachment, who induced his principal to remain away from the sale and purchased the property at a small price, is guilty of fraud.[65] An indorser of a note secured by mortgage, who acted as agent in exchange of lands for one who assumed the mortgage therein, was guilty of fraud in not informing his principal of the indorsement, and his liability was not discharged by payment of the note with funds of the principal in his hands.[66]

A contract placing lands "in" another's "hands to be sold," is one of agency and does not entitle the agent to possession.[67] A general agent to collect several interests in an estate may indorse checks and collect them for the principal.[68] One employed merely to receive and care for goods of another and report on sales made from a branch office is not such an agent as is bound impliedly to pay the expenses of the business done him.[69] A principal is not liable for expenses incurred by the agent in his business where the contract of agency requires the agent to pay such expenses.[70] Where a seller of goods reserves the right to have goods returned and to revoke a contract of agency, his agent cannot recover damages for his refusal to make delivery.[71] An agent agreeing to render his best services in selling goods for the principal commits no breach of his contract by selling, at the same time, another brand of goods of the same general character, manufactured by himself.[72] One who invested money in good faith for himself and his father in a business subsequently found to be fraudulent does not bind himself on claims because of his father's interest by paying the accounts of the business to prevent threatened criminal prosecutions unless such payments were made because of profits received by his father.[73] A mortgage given by an agent to secure his principal for losses resulting from acts in excess of the agent's authority is prior to an execution against the agent obtained in an action commenced just prior to execution of the mortgage and of which the agent had no notice.[74]

A subagent who has no privity with the principals cannot repudiate the acts

59. Sale by factor—Prokop v. Gourlay (Neb.) 91 N. W. 290.

60. Crane Co. v. Columbus State Bank (Neb.) 91 N. W. 532; diligence of loan agent—Haines v. Christie, 28 Colo. 502.

61. Western Union Cold Storage Co. v. Winona Produce Co., 197 Ill. 457.

62. Liability for failure to deliver to principal order for sale of goods on time, canceled by the purchaser before delivery to the principal—Hurley v. Packard (Mass.) 65 N. E. 64.

63. Bonton v. Cameron, 99 Ill. App. 600.

64. Fraudulent execution of deed by homestead owner to procure notes which were sold to agent—Cooper v. Ford (Tex. Civ. App.) 69 S. W. 487.

65. Quinn v. Le Duc (N. J. Ch.) 51 Atl. 199.

66. Beatty v. Bulger (Tex. Civ. App.) 66 S. W. 893.

67. Raeder v. Butler, 19 Pa. Super. Ct. 604.

68. Attorney employed by several heirs and legatees to collect their interests in an estate—Macdonald v. Cool, 134 Cal. 502.

69. Especially where it appears the parties had so construed the contract by remittances of bills and payment of them by the company—Sherman v. Consolidated Dental Mfg. Co., 202 Pa. 446.

70. Liability for office rent and expenses of insurance agent—Artz v. Metropolitan Life Ins. Co., 90 Mo. App. 539.

71. Parry Mfg. Co. v. Lyon, 23 Ky. Law R. 844.

72. Hirschhorn v. Bradley (Iowa) 90 N. W. 592.

73. Ward v. Work, 65 App. Div. (N. Y.) 84.

74. Spalding v. Heideman, 96 Ill. App. 405.

of the agent within the scope of his general authority,[75] and if appointed under proper authority, is not liable as tort-feasor for conversion by the agent.[76]

B. Accounting, settlement and reimbursement.—The right of principal and agent to an accounting is reciprocal,[77] and limitations will not run against an accounting by an agent until demand by the principal and refusal by the agent.[78] A principal who has placed money in the hands of his agent, under a power of attorney, to expend it for him, is entitled to an accounting.[79] An agent cannot deny his liability to an accounting on the ground that the principal had no authority to engage in the transaction which yielded the money in the agent's hands.[80] A lien on the trust fund is not necessary to a suit for accounting in favor of an agent acting in a fiduciary capacity.[81]

In absence of an express agreement proceeds of transactions in the agent's hands belong to the principal subject only to the agent's lien for commissions and advances.[82] The agent must pay interest on money received by him to loan, of receipt of which he gave no notice to his principal,[83] but if he uses his private means to protect his principal's property he may be subrogated to the latter's rights.[84] If he guarantees notes taken by him in exchange for goods, he is not relieved from payment of a worthless note because it was declared good by an officer of the principal on settlement,[85] and the agent will be liable for notes found worthless after his settlement with the principal.[86] The agent cannot charge more for expenses of the business than he actually paid out.[87] A principal cannot avoid liability to his agent for advances in good faith on his request, because of his secret intention not to perform the contract on which the advances were made in accordance with its terms.[88] Negligence of the agent causing unnecessary advancements and expenditures will prevent his reimbursement therefor.[89] Where a tenant remains in possession after the term to care for the premises and collect rents to be applied on a debt due him from the landlord, he should be reimbursed for reasonable expenses.[90] An undisclosed agent dealing in good faith in a fraudulent business with the principal's funds cannot recover from the principal's estate for accounts settled to prevent criminal prosecutions against himself personally on the ground that he was liable to return to the third persons funds received as profits in the business when he discovered the fraud.[91] An agent entrusted with money for an unlawful purpose must account for any surplus remaining after the illegal object is accomplished.[92]

75. After an attorney acting as agent to collect several shares of an estate has properly indorsed checks for their payment, a bank acting as subagent cannot repudiate payment so as to bind the collecting bank to the principals—Macdonald v. Cool, 134 Cal. 502.

76. Ledwith v. Merritt, 74 App. Div. (N. Y.) 64.

77. An agent acting in a fiduciary capacity can have an accounting in regard to the trust fund—Underhill v. Jordan, 72 App. Div. (N. Y.) 71.

78. Cole v. Baker (S. D.) 91 N. W. 324.

79. Power of attorney executed by alleged insane woman giving custody of her money to superintendent of the poor—Duff v. Blair, 74 App. Div. (N. Y.) 364.

80. Agency for sale of municipal bonds, illegal under Burns' Rev. St. 1901, § 4202a, because sold below par—Wilt v. Town of Redkey (Ind. App.) 64 N. E. 228.

81. Underhill v. Jordan, 72 App. Div. (N. Y.) 71.

82. Britton v. Ferrin, 171 N. Y. 235. An agent must account for all profits made in his principal's business—Erskine v. Sachs (Eng.) 70 Law J. K. B. 978, (1901) 2 K. B. Div. 504, 85 Law T. (N. S.) 385.

83. Thorpe v. Thorpe's Estate (Vt.) 52 Atl. 1051.

84. Chandler v. Green, 101 Ill. App. 409.

85. Wilson v. McCormick Harvesting Mach. Co., 96 Ill. App. 545.

86. Wilson v. McCormick Harvesting Mach. Co., 96 Ill. App. 545.

87. Real estate agent—Carruthers v. Diefendorf, 66 App. Div. (N. Y.) 31.

88. Parker v. Moore (C. C. A.) 115 Fed. 799.

89. Veltum v. Koehler, 85 Minn. 125.

90. Allen v. Gates, 73 Vt. 222.

91. Ward v. Work, 65 App. Div. (N. Y.) 84.

92. Hardy v. Jones, 63 Kan. 8, 64 Pac. 969.

Accounting in illegal transactions (Note).

An agent is not discharged from accounting because of a past unlawful act or intention of the principal collateral to the subject matter

C. Compensation and lien of agent.—After an agent has fixed the value of his services and it has been accepted by the principal, the agent cannot recover additional compensation.[93] Violation of instructions,[94] or fraud,[95] or acting for the other party to a contract without knowledge of his principal,[96] or assuming other and inconsistent employment[97] will destroy his right to compensation, but a principal whose agent agreed not to work for other principals in the same business, cannot defeat his right to commissions by a breach of the contract which he knew and did not act upon.[98] Substantial performance of contract by agent for sale of machinery in local terrritory gives him the right to commissions on sales by principal within such territory.[99] The right of an agent to compensation for settling a dispute concerning a sale of lumber does not depend upon a failure of the lumber to fulfill the requirements.[1]

Where the duties of an agent terminate with the relation, he cannot retain commissions on the funds of his principal to accrue in the future.[2] Where the agency is terminated by the principal for good cause,[3] or where a contract of agency without terms as to time is terminated by the principal on reasonable notice,[4] the agent is not entitled to commissions on business done subsequently. Resignation by the agent cuts off his right to commissions on business done where his contract allows such commissions only during continuation of the agency,[5] and the agent is not entitled to compensation because he is personally liable on contracts made for the principal.[6]

An agent employed for a certain sum and commission from net profits to manage the principal's business, may recover the salaries paid to his necessary assistants from his principal,[7] and losses from sales made by him cannot be deducted from his fixed salary but only from his percentage of net profits.[8] No

of the agency. Hammon, Cont., § 253, citing Ingersoll v. Campbell, 46 Ala. 282; Woodworth v. Bennett, 43 N. Y. 273. Thus, if he sells the principal's goods in an unlawful traffic, and collects the price, the principal may recover it from him. Ibid., citing Planters' Bank v. Union Bank, 16 Wall. (U. S.) 483, 21 Law. Ed. 473; O'Bryan v. Fitzgerald, 48 Ark. 487; Hertzler v. Geigley, 196 Pa. 419. And in some states, not in all, if an attorney collects a fund pursuant to a champertous agreement, the client may recover it. Ibid., citing cases. Some courts hold that the agent must account for the fund, even though he directly participated in the illegal purpose of the principal. Hardy v. Jones, supra. Contra: Samuels v. Oliver, 130 Ill. 73. If the illegal object of the principal has not been accomplished, his right to recover back the fund from the agent is unquestionable. Hammon, Cont., § 258, citing Taylor v. Lendey (Eng.) 9 East, 49; Sampson v. Shaw, 101 Mass. 145. Thus he may recover money placed in the hands of a stakeholder on a wager. Ibid., citing Corson v. Neatherny, 9 Colo. 212; House v. McKenney, 46 Me. 94. And in most states this is so even though the wager was determined before demand made. Ibid., citing Adkins v. Flemming, 29 Iowa, 122; Willis v. Hoover, 9 Or. 418. Contra: Johnston v. Russell, 37 Cal. 670. If the principal waits until the money has been expended by the agent, however, he cannot recover it back. Hammon, Cont., § 257, citing White v. Barber, 123 U. S. 392, 31 Law. Ed. 243. A full discussion and citation of cases on these points will be found in Hammon, Cont., § 253.

93. Real estate agent—Carruthers v. Diefendorf, 66 App. Div. (N. Y.) 31.

94. Sale of land by agent—Huffman v. Ellis (Neb.) 90 N. W. 552; Howell v. Denton (Tex. Civ. App.) 68 S. W. 1002.

95. Fraudulent purchase at judicial sale in derogation of principal's interests—Quinn v. Le Duc (N. J. Ch.) 51 Atl. 199.

96. Real estate broker—Linderman v. McKenna, 20 Pa. Super. Ct. 409.

97. Carr v. Ubsdell (Mo. App.) 71 S. W. 112.

98. Davis v. Huber Mfg. Co. (Iowa) 93 N. W. 78.

99. Keene v. Frick Co. (Iowa) 93 N. W. 582.

1. Williamson v. North Pac. L. Co. (Or.) 70 Pac. 387.

2. Real estate agents retaining commission on rents to accrue after termination of the agency—Thomas v. Gwyn, 131 N. C. 460.

3. Loan agent—Urquhart v. Scottish-American Mortg. Co., 85 Minn. 69.

4. Sales agent—Barrett v. Gilmour (Eng.) Com'l Cas. 72.

5. Insurance agent—King v. Raleigh (Mo. App.) 70 S. W. 251.

6. Loan agent who personally guarantees loans to be collected for his principal; in this case the agent notified the principal that he would demand salary until guaranteed loans were settled before he received acceptance of his resignation already sent the principal—Greer v. Featherston (Tex. Civ. App.) 68 S. W. 48; Id., 69 S. W. 69.

7. A. B. Frank Co. v. Waldrup (Tex. Civ. App.) 71 S. W. 298.

8. A. B. Frank Co. v. Waldrup (Tex. Civ. App.) 71 S. W. 298.

commission can be recovered on a quantum meruit for selling lands without written authority.[9] A real estate agent who brings the parties to a sale together is entitled to commission if the sale is made within the price named in his instructions.[10] A sales agent for a commission equal to the difference between list and trade prices is entitled to such commission on credit sales, though collection had not been made.[11] A contract for percentage commissions on cash payments and paid notes for goods entitles the agent to commission on partial payments made before the goods are returned to the principal. Where a principal retains the right to make sales within the territory of his agent and agrees to give him commission on all sales resulting from his efforts, he is entitled to commission on all such sales whether completed by him or by a general agent; and the local agent is not required to submit to a reduction in price by the general agent to complete such sales.[12] A contract of agency, without time limit, giving the agent gross percentage commissions on all business done, and requiring him to bear all expenses, entitles him to the percentage less expenses on all receipts on business done prior to termination of the agency by the principal without cause.[13] Where the contract is for a stipulated salary and expenses not to exceed a certain sum, the principal may offset moneys furnished for expenses against a salary balance until the agent accounts properly for money advanced.[14] An agent who may draw on his principal regardless of the amount of his commissions due, need not show the amount of such commissions in an action to recover an instalment of his drawing account unless the agency has terminated.[15]

A subagent cannot recover compensation from the principal where the latter's contract with the general agent makes the latter alone liable,[16] but his right to recover commissions from a general agent is not affected by a rule of the latter of which the subagent had no knowledge.[17]

The basis of an agent's compensation for services remaining to be done after wrongful breach of the agency by the principal is the average value of services already rendered unless those remaining are shown to be of greater value.[18] A tenant empowered to remain in possesssion after the term to care for the premises and collect rents to be applied on a debt due him from the landlord, is entitled to reasonable compensation.[19]

Where the payment of a trust fund to his principal will remove it from the jurisdiction so that he cannot collect for services and expenses, the agent has an equitable lien on the fund.[20]

D. Remedies and procedure.—Trover will lie against an agent for conversion of money which his contract requires him to turn over in identity.[21]

Pleading.[22]—The agent must show a breach of the contract by specific averments.[23] An agent may show diligence in trying to recover property of his prin-

9. Gen. St. N. J., p. 1604, § 10 (Statute of Frauds)—Goldstein v. Scott, 76 App. Div. (N. Y.) 78.

10. McCaffrey v. Page, 20 Pa. Super. Ct. 400.

11. Sherman v. Consolidated Dental Mfg. Co., 202 Pa. 451.

12. Sales of machinery by local agent—Davis v. Huber Mfg. Co. (Iowa) 93 N. W. 78; 36. Baskerville v. Gaar, Scott & Co., 15 S. D. 211.

13. Loan agent—Urquhart v. Scottish-American Mortg. Co., 85 Minn. 69.

14. Moyses v. Rosenbaum, 98 Ill. App. 7.

15. Isaacsen v. Andrews, 64 App. Div. (N. Y.) 408.

16. Insurance subagency—Union Casualty & Surety Co. v. Gray (C. C. A.) 114 Fed. 422.

17. Lane v. Raney, 131 N. C. 375.

18. McLane v. Maurer (Tex. Civ. App.) 66 S. W. 693.

19. Allen v. Gates, 73 Vt. 222.

20. Underhill v. Jordan, 72 App. Div. (N. Y.) 71.

21. Salem Traction Co. v. Anson, 41 Or. 562, 67 Pac. 1015, 69 Pac. 675.

22. Sufficiency of pleading in action for commissions to constitute a cause for an action at law—Gee v. Pendas, 66 App. Div. (N. Y.) 566; in action against agent for recovery for property stolen from agent—Keystone Watch Case Co. v. Romero, 36 Misc. (N. Y.) 381.

cipal, stolen while in his possession, under a general allegation of diligence.[24] An admission of a principal that his general agent appointed plaintiff a subagent is not inconsistent with a defense that the agent's powers to appoint were limited and that termination of the general agency terminated the subagency.[25]

Evidence and burden of proof; questions of fact.[26]—Where an agent claims money retained by him as commission, he must establish his right to it as such.[27] A violation of his instructions by an agent must be proved by the principal.[28] An employer has the burden of showing damage in an action against an insurance company for negligence to appeal from a judgment for damages, obtained by an employe against the company, where the insurance company, under its policy, undertook the defense for the employer.[29] An agent who has charge of his principal's property does not assume the burden of proving that losses did not result from negligence of his employes in charge of the property, in an action for compensation, where it appears that before the losses were shown to have occurred the principal took possession of the property.[30] An agent to collect a debt by attachment, who induced his principal to remain away from the sale and purchased himself at a low price, has the burden to prove advancements which he claims to have made to the principal.[31] Insufficient evidence of discharge will not warrant a non-suit in an action to recover an instalment of agreed advances on commissions.[32] Declarations of an agent in course of his employment are admissible against the principal in an action for breach of contract,[33] if a part of the res gestae, or if the agent is dead,[34] but to admit them agency must first be shown.[35] In an action to recover commisssions, conversations between the agent and third persons in absence of the principal are inadmissible.[36] A finding that the agent was employed at a certain commission and that he performed his services, is sufficient to sustain a verdict in his behalf.[37]

In his action for compensation, the good faith of an agent is a question for the jury.[38] Where the evidence is conflicting as to the fact of agency the jury should not be directed to find no agency existing.[39]

AGRICULTURE.[40]

§ 1. *The pursuit of agriculture*[41] and production and sale of products[42] have been subjects of regulation, as shown in foot notes.[43]

23. An allegation that the principal "did not keep his promise and guaranty," is insufficient—Picker v. Weiss, 39 Misc. (N. Y.) 22.

24. Keystone Watch Case Co. v. Romero, 36 Misc. (N. Y.) 381.

25. Union Casualty & Surety Co. v. Gray (C. C. A.) 114 Fed. 422.

26. Sufficiency of evidence of conversion by agent—Salem Traction Co. v. Anson, 41 Or. 562, 67 Pac. 1015, 69 Pac. 675; Tyler v. Mutual Dist. Messenger Co., 17 App. D. C. 85.

27. Thomas v. Gwyn, 131 N. C. 460.

28. Marshall v. Ferguson, 94 Mo. App. 175.

29. The presumption that the judgment was correct, prima facie shows that the employer had not been damaged. The insurance company, in taking the appeal, had the same responsibility as any other agent—Getchell & Martin Lumber & Mfg. Co. v. Employers' Liability Assur. Corp. (Iowa) 90 N. W. 616.

30. Sufficiency of evidence to show that expenditures made by agent were made necessary by his negligence—Veltum v. Koehler, 85 Minn. 125.

31. Quinn v. Le Duc (N. J. Ch.) 51 Atl. 199.

32. Isaacsen v. Andrews, 64 App. Div. (N. Y.) 408.

33. Barnesville Mfg. Co. v. Love (Del.) 52 Atl. 267.

34. Southern R. Co. v. Allison, 115 Ga. 635.

35. Pease v. Trench, 197 Ill. 101.

36. Rutherford v. Simpson (Minn.) 92 N. W. 413.

37. Carr v. Ubsdell (Mo. App.) 71 S. W. 112.

38. McCaffrey v. Page, 20 Pa. Super. Ct. 400.

39. Agency for purchase of stock in consolidating corporations—Stoll v. Loving (C. C. A.) 112 Fed. 885.

40. Agricultural schools, see Colleges and Academies. Agister's liens, see Animals. Drainage or irrigation of farm lands, see

§ 2. *Products and crop liens.*—Annual crops are sometimes regarded as chattels[44] and sometimes as part of the realty,[45] but the rights as between the lessee and lessor depend on the terms and construction of the contract of lease.[46]

Liens on crops are statutory, and will be created and enforced according to the local statutes.[47] A debt for supplies necessary to raise crops is privileged in Louisiana,[48] and purchasers are presumed to know of its existence.[49]

§ 3. *Agricultural societies.*—Under a contract giving one the right to conduct a show on state fair grounds, the licensee does not take any interest in the realty where he was to exhibit.[50] One holding an exclusive privilege has a cause of action for an infringement thereof.[51]

A society may recover against an officer for acts done under color of office but without authority.[52]

An agricultural society is in duty bound to use reasonable care in keeping its grounds and approaches thereto safe,[53] and in granting exhibition privileges to, and in the exercise of such privileges by others, it must see that public safety is not jeopardized.[54] In an action for personal injuries, it is not necessary to expressly state facts in the declaration whenever the defendant neglected its duty in failing to take proper care of its grounds.[55]

ALIENS.

§ 1. *Who are aliens.*[56]—Mexican born persons residing on territory acquired by the United States remained Mexican citizens until taking the declaration required,[57] and a person born in Porto Rico remained a citizen thereof after the treaty of Paris and Act April 12, 1900.[58]

Public Works and Improvements; Waters and Watercourses.

41. Fruit tree inspectors. Utah Rev. St. 1898, § 1176 amended Laws 1899, c. 47, providing for the appointment of county inspectors, violates Const., art. 13, § 5, prohibiting the legislature from imposing taxes for county purposes, etc.—State v. Standford, 24 Utah, 148, 66 Pac. 1061. **Fertilizers.** A sale thereof is valid where the required tag had been attached but was lost in transitu. Pol. Code, § 1563—Holt v. Navassa Guano Co., 114 Ga. 666.

42. Adulteration. Food. Health. Commerce. Inspection. Warehousing.

43. Criminal prosecutions. Indictment charging a sale of fertilizers in a package "not bearing in print (and the same not being accompanied by) a statement showing its weight" is insufficient. Md. Code, art. 61, § 2, subsec. 2—State v. Long, 94 Md. 637. Purchasing seed cotton at night. Error to instruct on confessions—Smith v. State, 115 Ga. 586.

44. Swafford v. Spratt, 93 Mo. App. 631.

45. Within the homestead exemption laws—Moore v. Graham (Tex. Civ. App.) 69 S. W. 200. Tiffany Real Property, § 223, p. 521. See, also, Emblements, Estates of Decedents, Wills, Deeds of Conveyance.

46. Landlord and Tenant.

47. A minor who with his father's teams renders services in the cultivation of a crop for the father's creditor, if entitled to his own services may have a lien therefor, but not for the horse's services—Tuckey v. Lovell (Idaho) 71 Pac. 122. A farm laborer in Texas, making affidavit for a lien need not state the particular crops raised—Allen v. Glover (Tex. Civ. App.) 65 S. W. 379.

48. Weill v. Kent, 107 La. 322.

49. Knowledge need not therefore be pleaded or proved—Weill v. Kent, 107 La. 322.

50. License held violated and license not entitled to recover part consideration paid under the contract—Mackay v. Minnesota State Agr. Soc. (Minn.) 92 N. W. 539.

51. Privilege to vend refreshments—Mason v. Dewis, 24 Ky. Law R. 1312, but being harassed, annoyed and disturbed in mind thereby, is not an element of damage—Mason v. Dewis, 24 Ky. Law R. 1312.

52. Selling and assisting in the removal of buildings without authority makes the officer a trespasser ab initio—Kent Co. Agr. Soc. v. Ide, 128 Mich. 423.

53. A railroad platform without the society's grounds used by the public to reach the grounds is an approach to the grounds—Thornton v. Maine State Agr. Soc., 97 Me. 108.

54. It is liable for the death of one killed by a bullet from a shooting gallery within the grounds, conducted by one having exhibition privileges, which passed through the fence and killed the person standing on a railroad platform without the grounds—Thornton v. Maine St. Agr. Soc., 97 Me. 108. It is liable for injuries sustained by the falling of seats negligently erected by an exhibitor—Texas State Fair v. Marti (Tex. Civ. App.) 69 S. W. 432; Same v. Brittain (C. C. A.) 118 Fed. 713.

55. Obstruction of bicycle race track—Benedict v. Union Agr. Soc., 74 Vt. 91.

56. As to American born Chinese, see U. S. v. Leung Sam, 114 Fed. 702; Same v. Lee Yee, Id.; Same v. Leung Foo, Id.

57. And could not recover for Indian dep-

§ 2. *Disabilities and privileges.*—The common law disability of aliens to inherit land, has been changed in some states by statute.[59] As against third persons a devise of realty to a non-resident alien,[60] or the location of a mining claim by an alien, is valid,[61] since the question of disability to take and hold realty can only be raised by the state.[62]

A non-resident alien may sue.[63] An alien cannot hold public office, but may render non-official service.[64]

§ 3. *Immigration, exclusion and expulsion.*—An attempt to import women for purposes of prostitution in not an offense under the immigration laws,[65] nor is a mere advertisement for laborers in a foreign country a violation of the Alien Contract Labor Law.[66] An action for debt is the proper remedy to recover the penalty for importing contract labor,[67] and the declaration must particularly show the character of the assistance rendered and services to be performed.[68]

Exclusion.—It is within the power of congress to vest in executive officers the power to determine the mode of ascertaining citizenship with a view to the exclusion of aliens.[69] The right to exclude an immigrant is not lost by giving him permission to land for temporary purposes.[70] A Chinaman born, and permanently residing, in the United States cannot be excluded, though the parents were aliens.[71]

Right of transit.—The right of Chinese persons to cross the United States in journeys to and from other countries was not dependent on any treaty,[72] and the treaty with China of December 8th, 1894, in effect recognized and agreed to the continuance of the treasury department regulations of the privilege then in force;[73] the treaty of March 17, 1894, was not violated by rule of December 8, 1900, placing the burden on Chinese persons to show "that a bona fide transit only was intended."[74] The decision of the customs officer refusing to grant the privilege is final and not subject to review.[75]

Registration.—Act May 5, 1892, providing for the registration of resident Chinese and imposing on them the burden of establishing the right to remain is valid,[76] and "laborers" as defined in that act and as amended Nov. 3, 1893, and

redations committed before making the declaration—De Baco v. U. S., 36 Ct. Cl. 407.

58. In re Gonzalez, 118 Fed. 941.

59. Nebraska Comp. St., c. 73, §§ 70-73, abolished the disability as to land within the corporate limits of a municipality—Dougherty v. Kubat (Neb.) 93 N. W. 317, and under it heirs of a deceased alien may inherit such lands, irrespective of their citizenship. Sess. Laws 1889, c. 58. Glynn v. Glynn, 62 Neb. 872. This statute is not special legislation but is constitutional—Dougherty v. Kubat (Neb.) 93 N. W. 317.

60. Under Laws 1875, c. 38—Smith v. Smith, 70 App. Div. (N. Y.) 286.

61. McKinley Creek Min. Co. v. Alaska United Min. Co., 183 U. S. 563, 46 Law. Ed. 331.

62. Smith v. Smith, 70 App. Div. (N. Y.) 286; McKinley Creek Min. Co. v. Alaska United Min. Co., 183 U. S. 563, 46 Law. Ed. 331.

63. A mine owner for damages by reason of failure to comply with Hurd's St. page 1157, c. 93—Kellyville Coal Co. v. Petraytis, 195 Ill. 215; affirming 95 Ill. App. 635. Alienage of party as ground for removal to federal court, see Removal of Causes.

64. Cal. Pol. Code, § 841, but an alien may be appointed by county supervisors to attend indigent sick—People v. Wheeler, 136 Cal. 652, 69 Pac. 435.

65. Merely proposing during the voyage that women brought on promise of employment engage in prostitution is not an offense within Act March 3, 1875, § 3—In re Guayde, 112 Fed. 415.

66. U. S. v. Baltic Mills Co., 117 Fed. 959.

67. 23 U. S. Stat. at Large 332, § 3—U. S. v. McElroy, 115 Fed. 252.

68. Merely negativing the statute is not sufficient—U. S. v. McElroy, 115 Fed. 252.

69. U. S. v. Lee Huen, 118 Fed. 442.

70. And he is bound to show that he is not likely to become a public charge—In re Gayde, 113 Fed. 588.

71. U. S. v. Leung Sam, 114 Fed. 702; Same v. Lee Yee, Id.; Same v. Leung Foo, Id.

72. 25 U. S. Stat. at Large, 478, § 8—In re Lee Gon Yung, 111 Fed. 998.

73. 28 U. S. Stat. at Large, 1211, art 3, par. 2—In re Lee Gon Yung, 111 Fed. 998.

74. 28 U. S. Stat. at Large, 1211—Fok Yung Yo v. U. S., 185 U. S. 296, 46 Law. Ed. 917; Lee Gon Yung v. Same, 185 U. S. 306, 46 Law. Ed. 921.

75. Fok Yung Yo v. U. S., 185 U. S. 296, 46 Law. Ed. 917; Lee Gon Yung v. Same, 185 U. S. 306, 46 Law. Ed. 921; In re Lee Gon Yung, 111 Fed. 998, cannot be reviewed by habeas corpus—Fok Yung Yo v. U. S., 185 U. S. 296, 46 Law. Ed. 917; Lee Gon Yung v. Same, 185 U. S. 306, 46 Law. Ed. 921.

76. Evidence insufficient to show Chinese

in the treaty of 1880, may be excluded.[77] A Chinese prostitute is within the definition.[78] These statutes, however, do not apply to a resident Chinese woman who married an American citizen after their passage,[79] nor to a resident who thereafter became a laborer;[80] though if he thereafter disposes of his business, departs from and returns to the United States as a laborer, he may be deported.[81] If registered under the original act, registration under the amendment need not be made.[82]

Certificate.—The customs officer in determining the right of a Chinese person to enter, may disregard the certificate of residence,[83] and his decision cannot be attacked collaterally.[84]

Deportation; procedure.—The treaty with China of December 8, 1894, left in force the previous statutes governing the procedure for deportation of Chinese laborers.[85] A United States commissioner has jurisdiction to determine the right of a Chinese laborer without certificate to remain;[86] and the commissioner first taking has exclusive jurisdiction,[87] which is not lost because the complainant does not positively aver his official character,[88] or because a defense of citizenship is interposed.[89] The persons sought to be deported are only required to produce sufficient credible evidence, as, when fairly considered, will satisfy the judgment of a reasonable man of their right to remain;[90] and the proceedings not being criminal, the failure of the persons sought to be deported, to testify, may be taken into consideration.[91]

The appeal from his decision is to the district judge,[92] and may be taken on oral notice,[93] but the notice alone does not constitute an appeal.[94] The appeal need not be presented within ten days,[95] but whether the right to a review has been lost by delay in bringing on a hearing, is to be determined by the judge.[96] If no objection has been taken to the commissioner's finding the appeal will be considered as though submitted on an agreed statement of facts,[97] and unless against the weight of evidence the findings will not be disturbed.[98] Where the sufficiency of facts on the right of a Chinese person to remain is alone involved, the decision of the judge of the district court on appeal is final.[99]

a native of Hawaiian Islands.—U. S. v. Chun Hoy (C. C. A. Hawaii) 111 Fed. 899.

77. Lee Ah Yin v. U. S. (C. C. A.) 116 Fed. 614.

78. Lee Ah Yin v. U. S. (C. C. A.) 116 Fed. 614.

79. Tsoi Sim v. U. S. (C. C. A.) 116 Fed. 920.

80. In re Chin Ark Wing, 115 Fed. 412.

81. U. S. v. Moy Yim, 115 Fed. 652; Same v. Chung You, Id.; Same v. Dong Wor, Id.; Same v. Fee Toy, Id.; Same v. Moy Shang, Id.; Same v. Leong Hau Che, Id.

82. U. S. v. Jung Jow Tow, 110 Fed. 154.

83. Lee Lung v. Patterson, 186 U. S. 168, 46 Law. Ed. 1108; affirming In re Lee Lung, 102 Fed. 132.

84. In subsequent deportation proceedings—U. S. v. Wong Soo Bow, 112 Fed. 416.

85. U. S. v. Lee Yen Tai, 185 U. S. 213, 46 Law. Ed. 878. Lee Lung v. Patterson, 186 U. S. 168, 46 Law. Ed. 1108; affirming judgment, In re Lee Lung, 102 Fed. 132.

86. Fong Mey Yuk v. U. S. (C. C. A.) 113 Fed. 898; Chin Bok Kan v. U. S., 186 U. S. 193, 46 Law. Ed. 1121; Chin Ying v. Same, 186 U. S. 202, 46 Law. Ed. 1126. Congress may vest the power to determine right to remain in executive officers—U. S. v. Lee Huen, 118 Fed. 442.

87. U. S. v. Luey Guey Auck, 115 Fed. 252.

88. Chin Bok Kan v. U. S., 186 U. S. 193, 46 Law. Ed. 1121; Chin Ying v. Same, 186 U. S. 202 46 Law. Ed. 1126.

89. Chin Bok Kan v. U. S., 186 U. S. 193, 46 Law. Ed. 1121; Chin Ying v. Same, 186 U. S. 202, 46 Law. Ed. 1126.

90. U. S. v. Lee Huen, 118 Fed. 442; of residence—Quong Sue v. U. S. (C. C. A.) 116 Fed. 316; of domestic birth—Lee Ah Yin v. U. S. (C. C. A.) 116 Fed. 614; Yee N'Goy v. Same (C. C. A.) 116 Fed. 333; U. S. v. Lee Huen, 118 Fed. 442; of right of resident to enter after departure—U. S. v. Leung Sam, 114 Fed. 702; Same v. Lee Yee, Id.; Same v. Leung Foo, Id.; of British citizenship; deception in procuring arrest—U. S. v. Lee Kee (C. C. A.) 116 Fed. 612.

91. U. S. v. Lee Huen, 118 Fed. 442.

92. Act Sept. 13, 1888—Chow Loy v. U. S., 112 Fed. 354; not by habeas corpus—In re Chow Loy, 110 Fed. 952.

93. Chow Loy v. U. S. (C. C. A.) 112 Fed. 354.

94. In re Chow Loy, 110 Fed. 952.

95. Chow Loy v. U. S. (C. C. A.) 112 Fed. 354.

96. Chow Loy v. United States (C. C. A.) 112 Fed. 354.

97. In re Chin Ark Wing, 115 Fed. 412.

98. U. S. v. Leung Sam, 114 Fed. 702; Same v. Lee Yee, Id.; Same v. Leung Foo, Id.; Same v. Lee Huen, 118 Fed. 442.

99. Chin Bok Kan v. U. S., 186 U. S. 193;

§ 4. *Naturalization.*—A native of Japan cannot be naturalized.[1] A mere want of knowledge of the nature of our institutions will not alone warrant a refusal of citizenship.[2] A judgment naturalizing an alien excluded from the right, may be attacked collaterally.[3]

ALIMONY.[4]

§ 1. *Nature and purpose of the allowance.*—Alimony is not a "debt."[5] though as to fraudulent transfers the wife may be regarded as a creditor.[6] The temporary allowance is for the wife, and not for officers and witnesses. They must look to her. It is given so she can meet expenses.[7] Awards are property which is protected by "due process of law,"[8] but a prospective recovery of alimony is not assignable. It is personal to the wife.[9] A permanent award bars dower in Georgia.[10] Temporary allowances do not necessarily supersede separation agreements,[11] but if there is an allowance for alimony besides counsel fees, an attorney in possession of the alimony cannot pay out of it disbursements.[12]

§ 2. *Jurisdiction and power to award.*—Jurisdiction of the husband's person must be had; therefore his share in an estate cannot be reached, though the executor has been enjoined from paying it over.[13]

A non-resident wife who appears, may have an allowance on her cross-complaint.[14]

A transfer or suspension of jurisdiction may, but does not always, result from taking the case up for review;[15] thus the granting of temporary alimony is not a "remedial writ," which is "necessary or proper" to the appellate jurisdiction of a supreme court under laws which leave the case still pending in the lower court after appeal.[16] If the order for alimony and counsel fees is appealed, the appellate court usually has power to make a proper allowance.[17]

Collateral relief is proper; e. g., on claims of creditors against whom the plaintiff procured a custodianship of defendant's property,[18] or on proper pleadings to determine what, if any, interest the husband has in land standing in a third party's name, and to award it to the wife.[19]

§ 3. *Stage or condition of the divorce proceeding.*—The divorce action is not "pending" until process be served.[20] An award must be made in the divorce decree, or else in terms reserved for a future time.[21] An allowance pending appeal

46 Law. Ed. 1121; Chin Ying v. U. S. 186 U. S. 202, 46 Law. Ed. 1126.

1. In re Takuji Yamashita (Wash.) 70 Pac. 482.

2. Ex parte Johnson, 79 Miss. 637.

3. In re Takuji Yamashita (Wash.) 70 Pac. 482.

4. Costs in divorce, see Divorce; Costs.

5. Imprisonment for debt—Bronk v. State (Fla.) 31 So. 248; In re Cave, 26 Wash. 213, 66 Pac. 425; State v. Cook, 66 Ohio St. 566; bankruptcy—Welty v. Welty, 96 Ill. App. 141.

6. McFaddin v. McFaddin, 134 Ala. 337. See, also, post, § 7.

7. Lynch v. Lynch, 99 Ill. App. 454; includes costs, fees and expenses—Gundry v. Gundry, 11 Okl. 423, 68 Pac. 509.

8. Cannot be subjected retrospectively to reduction by modification—Livingston v. Livingston, 74 App. Div. (N. Y.) 261.

9. Also opposed to public policy—Lynde v. Lynde (N. J. Ch.) 50 Atl. 659.

10. Civ. Code, § 2742—Harris v. Davis, 115 Ga. 950.

11. Chamberlain v. Cuming, 37 Misc. (N. Y.) 815.

12. In re Bolles, 79 N. Y. Supp. 530.

13. Published service insufficient—Smith v. Smith, 74 Vt. 20; Larson v. Larson (Miss.) 33 So. 717.

14. Fisk v. Fisk, 24 Utah, 333, 67 Pac. 1064.

15. See Appeal and Review for an extended discussion.

16. Code Civ. Proc., §§ 1795, 1830; Civ. Code, § 191; Const. art. 8, §§ 2, 3, 11—Bordeaux v. Bordeaux, 26 Mont. 533, 69 Pac. 103.

17. N. Y. Appellate division will do so—Haddock v. Haddock, 75 App. Div. (N. Y.) 565.

18. Bradley v. Ramsey (Tex. Civ. App.) 65 S. W. 1112.

19. Van Vleet v. De Witt, 200 Ill. 153.

20. Civ. Code, § 137, construed, with Code Civ. Proc., § 350—Baker v. Baker, 136 Cal. 302, 68 Pac. 971.

21. Comp. Laws, § 8641—Moross v. Moross (Mich.) 87 N. W. 1035.

for defense on appeal, is not premature.[22] It may be awarded to defend an appeal from a permanent award.[23]

§ 4. *Reasons for or against. Provisional allowances.*—Bad faith in suing, as where a former action was unsuccessful, in which all the facts now alleged might have been proved,[24] or when the avowed sole motive is to adjust property rights,[25] defeats the application. It is error to refuse counsel fees and alimony when the wife is poor and the husband is able to provide them.[26] Ability of the husband should appear; hence, an order for suit money on his appeal was refused when it seemed probably futile.[27]

If the parties had made a separation agreement providing support, temporary allowance will not be made[28] but it is no obstacle that the husband is paying and willing to pay all bills contracted for the wife.[29] It may be granted though the validity of the marriage be assailed.[30] In Kentucky the husband may be required to pay a reasonable fee to the wife's attorney, though there be a dismissal by agreement.[31]

Permanent allowances.—Ordinarily the guilty forfeits the right;[32] but by way of adjusting property rights alimony may be awarded to such party,[33] and the wife for whose desertion a divorce was given may have alimony, the husband having married her solely to escape a prosecution.[34]

In the absence of contrary reasons permanent alimony may be refused to a woman in good health, of middle age and self supporting.[35]

Undue delay may defeat the right to file an original bill for alimony after divorce, even where there was fraud.[36] In Louisiana it is equivalent to leaving the husband's domicile if, on opposing his action for divorce after a separation, she fails to procure the assignment of a domicile.[37]

A foreign divorce on published service bars alimony.[38]

Support of child.—If divorce be given the wife there should be an allowance for a child;[39] such an allowance, if not a lien, will cease with the death of the husband.[40]

§ 5. *Amount, character and duration.*—The amount is discretionary.[41] Counsel fees should be fixed with reference to the husband's ability and the character of the services,[42] or by what appears from the evidence a reasonable fee.[43] Gen-

22. Hurd's Rev. St., c. 40, § 15, allows granting of allowance "on" appeal—Miles v. Miles, 102 Ill. App. 130.

23. Haddock v. Haddock, 75 App. Div. (N. Y.) 565.

24. The abandonment had been found justified and the second action was for cruelty—Deisler v. Deisler, 65 App. Div. (N. Y.) 208.

25. Property owned by the community in another state—Bradford v. Bradford, 80 Miss. 467.

26. Action by husband for absolute divorce—Hunter v. Hunter (Sup.) 79 N. Y. Supp. 618.

27. He was injured, swore that he was unable to pay and previous attempts to make him do so had failed—Bachelor v. Bachelor (Wash.) 70 Pac. 491.

28. Grube v. Grube, 65 App. Div. (N. Y.) 239.

29. Civ. Code, § 137 gives allowance "necessary" for support—Anderson v. Anderson, 137 Cal. 225, 69 Pac. 1061.

30. Eickhoff v. Eickhoff, 29 Colo. 295, 68 Pac. 237.

31. Ky. St., § 900—Powell v. Lilly, 24 Ky. Law R. 193.

32. Rev. St. 1899, § 2929—Motley v. Motley, 93 Mo. App. 473. The husband will not be made to release his marital rights in the erring wife's property or to pay her alimony—Becklenberg v. Becklenberg, 102 Ill. App. 504.

33. Code, § 3180—McDonald v. McDonald (Iowa) 90 N. W. 603.

34. Alderson v. Alderson's Guardian, 24 Ky. Law R. 595.

35. Abele v. Abele, 62 N. J. Eq. 644.

36. 12 years; fraudulent conveyance to defeat alimony—Moross v. Moross (Mich.) 87 N. W. 1035.

37. Ellerbusch v. Kogel, 108 La. 51.

38. Eldred v. Eldred, 62 Neb. 613.

39. See Divorce Act, § 23—Abele v. Abele, 62 N. J. Eq. 644.

40. Schultze v. Schultze (Tex. Civ. App.) 66 S. W. 56.

41. Breedlove v. Breedlove, 27 Ind. App. 560. Code, § 1291 reads as "appears * * * just and proper"—Moore v. Moore, 130 N. C. 333.

42. Powell v. Lilly, 24 Ky. Law R. 193.

43. Schneider v. Kohn, 24 Ky. Law R. 924.

erally, past services are not included.[44] An award equal to the whole salable value of his personalty, and for counsel fees besides, is excessive.[45]

Support of children may be provided pendente lite, though counsel fees and alimony be denied the wife.[46]

Permanent awards; division of property.—A money award may be had under the Washington statute, which sanctions a just and equitable disposition of property of the parties in view of their future.[47] The fact that plaintiff is a childless second wife will not affect the amount.[48] The Wisconsin statute authorizing a division of the husband's estate and that of the wife derived from him, does not admit of a division of the husband's alone, letting that which he gave her stand.[49] Giving all the community property to the wife offends a law against divesting title to land. A half should be given in fee, and a life estate in the other.[50] Under a statute authorizing only support on a limited divorce, it is improper to decree the extinguishment of the wife's marital rights in the husband's estate, setting out in its stead a sum to provide her support as long as she lives.[51]

§ 6. *Procedure and practice.*—Questions of pleading and practice in divorce are always involved and should be investigated.[52]

Temporary allowances.—The motion should be in the name of the wife, and not of the attorney.[53] Omission of notice does not make an application lack due process of law,[54] but at least it is necessary if defendant has not been served.[55] Continuing the application does not require a new notice.[56] In some jurisdictions it may be heard outside the county, anywhere within the district.[57] Counter affidavits should be allowed.[58] Affidavits tending to disprove a very recent common-

44. Lynch v. Lynch, 99 Ill. App. 454. Under a statute (Code Civ. Proc., § 1769) providing for an allowance "to carry on" the action past services are not reckoned—Poillon v. Poillon, 75 App. Div. (N. Y.) 536.

45. $300—Baker v. Baker, 136 Cal. 302, 68 Pac. 971; $500 fees not excessive to wife worth $1,900 clear—De Ruiter v. De Ruiter, 28 Ind. App. 9. $150 additional to a like sum for counsel's services on a former trial which lasted a week was held not excessive; the wife, who was poor, having already paid $100 expenses and gone into debt $50—Schuster v. Schuster, 84 Minn. 403; $5 a week and $100 for counsel proper where defendant earned $100 per month and had received $4,000 advances from plaintiff and her father—Mayer v. Mayer (N. J. Ch.) 49 Atl. 1078; $40 inadequate where necessary depositions cost $60 and wife lives abroad—Cairnes v. Cairnes, 29 Colo. 260, 68 Pac. 233; $50 a month, $250 fees, $25 suit money not excessive to indigent wife against husband of wealth—Eickhoff v. Eickhoff, 29 Colo. 295, 68 Pac. 237; $4,000 reasonable where husband was worth over $80,000 and suit was expensive—Moore v. Moore, 130 N. C. 333. $1,500 to a husband with a pension of $360 was reduced to $750 against a wife who had land worth $4,400 clear and producing $250 income—McDonald v. McDonald (Iowa) 90 N. W. 603, in which case the appeal was from alimony only and the evidence on the divorce was not before the reviewing court.

46. She did not sue in good faith—Deisler v. Deisler, 65 App. Div. (N. Y.) 208.

47. 2 Ball. Codes & Stat., § 5723—In re Cave, 26 Wash. 213, 66 Pac. 425.

48. $4,000 not excessive against defendant with $20,000 realty—De Ruiter v. De Ruiter, 28 Ind. App. 9; $600 not excessive against one who had $1,500 in bank just before suit but who filed affidavits against temporary allowance professing to have only $800 real and personal and no bank account—Wagoner v. Wagoner, 128 Mich. 635; $20 a month sustained against husband worth $9,000 with good income—Brandt v. Brandt, 40 Or. 477, 67 Pac. 508.

49. Rev. St., § 2364, she received $1,187 out of his $3,500 while she had 57 acres from him producing $1,500 per year—Martin v. Martin, 112 Wis. 314; home farm given to wife whose father furnished money to buy it, but costs, support of children and $75 per year for husband was charged on it: Casey v. Casey (Iowa) 88 N. W. 937; seven-twelfths of community to a successful spouse in cruelty case upheld—Gorman v. Gorman, 134 Cal. 378, 66 Pac. 313.

50. Rev. St., art. 2980—Long v. Long (Tex. Civ. App.) 69 S. W. 428.

51. Comp. Laws, § 8654—Wagner v. Wagner (Mich.) 93 N. W. 889.

52. Divorce. A wife's failure to negative in her complaint that she was at fault for the separation may be cured if the husband denies that he was at fault—Boreing v. Boreing (App.) 24 Ky. Law R. 1288.

53. Lynch v. Lynch, 99 Ill. App. 454.

54. Gundry v. Gundry, 11 Okl. 423, 68 Pac. 509.

55. Baker v. Baker, 136 Cal. 302, 68 Pac. 971. In Oklahoma it may be awarded in vacation without notice—Gundry v. Gundry, 11 Okl. 423, 68 Pac. 509. In North Carolina. Code, § 1291, requires it only on application out of term—Moore v. Moore, 130 N. C. 333.

56. Moore v. Moore, 130 N. C. 333.

57. Code, § 1291—Moore v. Moore, 130 N. C. 333. A motion to reduce temporary alimony is ancillary and may be heard in another county—Moore v. Moore, 131 N. C. 371.

58. When the moving party is allowed to

law marriage, as alleged, should be received,[59] beside which oral testimony may be heard.[60] If the misconduct be denied, and the wife charged with the fault, and the husband's affidavits be unopposed, it will be refused;[61] but her denial will overcome counter charges of adultery, unless her success seems improbable.[62] If a verified answer be not filed as such, but merely received as an affidavit, its negations of the fact of a marriage will still leave the allegations of that fact stand as admitted.[63] A wife who sues for separation and support will not be relegated to her statutory remedy for support, if the affidavits make a case for alimony to enable her to sue.[64] After a motion to reduce a temporary allowance is denied, it cannot be renewed until circumstances change and the applicant presents a receipt for such a sum as would be proper under such new circumstances.[65]

Permanent award may be made on a cross-complaint.[66] If a complaint avers facts for the purpose of procuring a custodianship, as against creditors, they may respond by pleas setting up their rights.[67]

§ 7. *Decree, enforcement and discharge.—The decree* of divorce may reserve the control of collection of alimony and the amount.[68] The order must run to the wife.[69] When alimony passes into judgment it becomes a debt fixed in amount,[70] but a decree for payment of monthly sums until a certain amount shall be paid "in full for alimony," is not a mere money decree.[71] If the decree for alimony be by consent, the subsequent actions of parties in relation to it may be regarded in construing the award.[72] A money award in addition to household furniture, and confirming each one's title to his own land, is not a decree for a division in addition to alimony.[73] Payments made pending appeal and stay of an award will be credited on the decree as affirmed.[74] A bond for alimony under the Missouri act is not penal, so that judgment on it stands to secure future breaches.[75]

Orders for alimony are usually appealable.[76] The decree survives the death of both parties, pending appeal.[77]

A foreign award is presumptively valid, and may be enforced.[78] A foreign decree giving a guilty wife an allowance in pursuance of a stipulation that she should not oppose the divorce, is not collaterally assailable as against the wife suing for such support, though the agreement was void; such provision is a judgment of a competent court, and conclusive beyond the power of the foreign court to modify, not being "alimony against an offending husband," which alone the foreign statutes authorize such court to grant or to modify.[79]

Vacating or modifying; discharge.—The court has general power to modify its

file affidavits "in reply" to the other's but really to allow proof de novo of her need and the husband's ability; the husband should be allowed to file further counter affidavits or the "replying" ones should be stricken—Poillon v. Poillon, 75 App. Div. (N. Y.) 536.

59. Roberts v. Roberts, 114 Ga. 590.

60. Stewart v. Stewart, 28 Ind. App. 378.

61. Williams v. Williams, 114 Ga. 772.

62. Glaser v. Glaser, 36 Misc. (N. Y.) 231.

63. It set forth a "pretended" marriage—Eickhoff v. Eickhoff, 29 Colo. 295, 68 Pac. 237.

64. Statutory remedy is a quasi criminal proceeding in police court—Miers v. Miers, 35 Misc. (N. Y.) 476.

65. Moore v. Moore, 131 N. C. 371.

66. Fisk v. Fisk, 24 Utah, 333, 67 Pac. 1064.

67. Bradley v. Ramsey (Tex. Civ. App.) 65 S. W. 1112.

68. Jones v. Jones, 131 Ala. 443.

69. Not to attorneys—Lynch v. Lynch, 99 Ill. App. 454. Hurd's Rev. St., c. 40, § 15—Miles v. Miles, 102 Ill. App. 130; Werres v. Werres, 102 Ill. App. 360.

70. Coffman v. Finney, 65 Ohio St. 61, 55 L. R. A. 794, see, also, ante, § 1.

71. Welty v. Welty, 195 Ill. 335.

72. Decree is also a contract—Wickes v. Wickes, 98 Ill. App. 156.

73. Palica v. Palica, 114 Wis. 236.

74. Haddock v. Haddock, 75 App. Div. (N. Y.) 565.

75. Rev. St. 1899, §§ 468 et seq.—Burnside v. Wand (Mo.) 71 S. W. 337.

76. See Appeal and Review, § 4.

77. Coffman v. Finney, 65 Ohio St. 61, 55 L. R. A. 794.

78. Land held in another's name was subjected—McFaddin v. McFaddin, 134 Ala. 337.

79. A decree was granted in North Dakota and wife sued in New York to recover upon it. France v. France, 38 Misc. (N. Y.) 459, affirming 79 N. Y. Supp. 579.

order or judgment for alimony.[80] An order granted after illegally refusing a change of venue, will be set aside.[81] When circumstances have changed it may be reduced[82] if no payments are in arrear,[83] or discharged, provided that the award be for support and not as compensation.[84] Inability to pay must be more than burdensome. It must be enough to excuse payment.[85] No relief will be granted to one who is in contempt, until he submits to the jurisdiction of the court.[86] Adultery by a wife divorced from bed and board will warrant a discharge of the award.[87] If the support of children be not fixed, the decree may as to that be modified without a reservation of the question.[88] Provision may be made for a child born after divorce.[89]

In general the procedure, unless prescribed, should be that for vacating or modifying the divorce decree,[90] or any ordinary decree or judgment.[91] A motion for an increase should not combine support of wife and support of children, which should in the decree be separately awarded.[92] The inquiry on such an application will be whether circumstances have been, according to equitable principles, changed.[93] Under the Illinois laws it can be done after term.[94] In Minnesota specific findings of fact need not be made on such a motion.[95]

Bankruptcy proceedings do not discharge a decree.[96]

Attachment of the person will lie for non-payment, the proceeding not being an "imprisonment for debt,"[97] but the husband must be able to pay.[98] The concurrence of a remedy at law on notes given for the sum awarded,[99] or excessiveness of the award is no defense to contempt;[1] poverty is.[2] There is no contempt in failing to pay after a reconciliation.[3] Contempt should be brought in a court to which a decree is sent for execution,[4] and ability to pay need not be alleged.[5] If he have money in possession available to pay he may be imprisoned at once, since the contempt is in refusal to do an act which he "is able to do."[6] An order to show cause must, under the New York statutes, be served on the party and not on his attorney.[7] A contempt will not be enforced by refusing permission to defendant to plead.[8]

80. Gen. St. 1894, § 5386—Barbaras v. Barbaras (Minn.) 92 N. W. 522.

81. People v. District Court (Colo.) 69 Pac. 597.

82. Depreciation of husband's property—Barbaras v. Barbaras (Minn.) 92 N. W. 522.

83. Wife remarried and not in need, all children but one self-supporting, husband poor—cut down to support the one child—Kiralfy v. Kiralfy, 36 Misc. (N. Y.) 407. Inability to care for child suffices—Tobin v. Tobin (Ind. App.) 64 N. E. 624.

84. Installments accruing after remarriage of wife and all further payments may be discharged by court; see statute—Brandt v. Brandt, 40 Or. 477, 67 Pac. 508.

85. Palica v. Palica, 114 Wis. 236.

86. He fled from jurisdiction and before returning asked for reduction of amount and vacation of contempt order—Sibley v. Sibley, 66 App. Div. (N. Y.) 552.

87. Cariens v. Cariens, 50 W. Va. 113, 55 L. R. A. 930.

88. Tobin v. Tobin (Ind. App.) 64 N. E. 424; Miles v. Miles (Kan.) 70 Pac. 631.

89. Rev. St. 1899, § 2926—Shannon v. Shannon (Mo. App.) 71 S. W. 104.

90. Divorce.

91. Equity; Judgments.

92. Rev. St. 1899, § 2926—Meyers v. Meyers, 91 Mo. App. 151.

93. Warren v. Warren, 101 Ill. App. 308; Tobin v. Tobin (Ind. App.) 64 N. E. 624.

94. 2 Starr & C., c. 40, § 18—Welty v. Welty, 195 Ill. 335.

95. Barbaras v. Barbaras (Minn.) 92 N. W. 522.

96. Welty v. Welty, 195 Ill. 335.

97. Rev. St. § 5640—State v. Cook, 66 Ohio St. 566; In re Cave, 26 Wash. 213, 66 Pac. 425; see, also, Bronk v. State (Fla.) 31 So. 248; evidence of willful disobedience,—departure from state having disposed of property, avowed intention not to pay alimony, and proof of earnings—Deen v. Bloomer, 191 Ill. 416; commitment held proper—Baker v. Baker (Ga.) 43 S. E. 46.

98. Attachment is incident to chancery practice adopted in divorce; see construction of statutes—Welty v. Welty, 195 Ill. 335.

99. Bonney v. Bonney, 98 Ill. App. 129.

1. Should have sought a modification—Deen v. Bloomer, 191 Ill. 416.

2. Wester v. Martin, 115 Ga. 776.

3. Dillon v. Shiawassee Circuit Judge (Mich.) 91 N. W. 1029.

4. Sent from Circuit to Common Pleas—State v. Cook, 66 Ohio St. 566.

5. The decree imports it—State v. Cook, 66 Ohio St. 566.

6. 2 Ball. Codes & St., § 5808—In re Cave, 26 Wash. 213, 66 Pac. 425.

7. Goldie v. Goldie, 77 App. Div. (N. Y.) 12.

8. Bachelor v. Bachelor (Wash.) 71 Pac. 193.

Execution should not issue after the husband's death, unless the award was a lien; but a claim should be proved against his estate.[9] A petition for further execution should show a change in the husband's condition, when the decree reserves the right to such time as petitioner can show a change.[10] Execution must be had and exhausted before resorting to supplementary proceedings.[11]

Subjection of property.—Conveyances in anticipation of an award may be assailed by the wife as fraudulent, even before judgment or award of alimony; and the land may be judicially sold,[12] even though by fraud the wife was induced to join;[13] but not where they preceded the marriage.[14] The grantee may have been innocent.[15] A conveyance to children is voidable only so far as to let in the wife's rights.[16] In order to enforce a decree against property, there must have been an award founded on jurisdiction of the person.[17] The wife may, if the husband absents himself, subject his property in equity to payment of the temporary award.[18] Periodical amounts made a lien on land, may, if not paid, be commuted in a gross sum, and the lien foreclosed.[19] In Nebraska an alimony judgment is a lien on homestead.[20] Unless saved by original decree or by agreement, the wife has no right to attorney's fee as cost of enforcing a lien for the alimony.[21]

§ 8. *Suits for annulment and actions for separate maintenance.*—No allowance will be given on suit for annulment, if both parties admit the marriage to be void.[22] In some jurisdictions separate maintenance or alimony may be given without divorce.[23] The parties must be residents of the state;[24] and in Louisiana the wife must not have unwarrantably left the matrimonial domicile.[25] The cause for the separation is immaterial under the North Carolina law.[26] To warrant an allowance abandonment need not, in Washington, continue for any fixed time, but support must be really withdrawn.[27] In that state the statutory remedy to determine mutual rights in property may be administered in an action for separate maintenance.[28] Refusal to receive at a time certain and ever since, alleges a living

9. Award for child's support: Schultze v. Schultze (Tex. Civ. App.) 66 S. W. 56.

10. Jones v. Jones, 131 Ala. 443.

11. Ostrom v. Ostrom, 38 Misc. (N. Y.) 232. In South Dakota, the court may require payment of a fixed sum and make it a lien on the husband's homestead under Comp. Laws, §§ 2584, 2585, which allows the court to grant alimony, modify it from time to time, and assign the homestead to the innocent party; and since a judgment debtor is given a year to redeem, he cannot be compelled to immediately surrender possession—Harding v. Harding (S. D.) 92 N. W. 1080.

12. Evidence sufficient that there was fraud in a conveyance to a daughter, accompanied by artifice during separation and leaving insufficient available assets to pay the award—De Ruiter v. De Ruiter, 28 Ind. App. 9; averment of insufficient property to pay alimony after fraudulent conveyances not contradicted by allegation on information of property which he secretes—De Ruiter v. De Ruiter, 28 Ind. App. 9. She is creditor from time of award—McFaddin v. McFaddin, 134 Ala. 337.

13. Chittenden v. Cnittenden, 12 Ohio Cir. Ct. R. 526.

14. Chittenden v. Chittenden, 12 Ohio Cir. Ct. R. 526.

15. Voluntary transfer—McFaddin v. McFaddin, 134 Ala. 337.

16. Tully v. Tully, 137 Cal. 60.

17. Smith v. Smith, 74 Vt. 20.

18. Executors of his father compelled to pay over income—McGlynn v. McGlynn, 37 Misc. (N. Y.) 12 the alimony being incident to an action for separate maintenance.

19. Trumble v. Trumble, 26 Wash. 133, 66 Pac. 124. Under the South Dakota laws, if the husband is in default of monthly payments a fixed sum may be awarded to her instead and enforced against his property—Harding v. Harding (S. D.) 92 N. W. 1080.

20. Fraaman v. Fraaman (Neb.) 90 N. W. 245.

21. Trumble v. Trumble, 26 Wash. 133, 66 Pac. 124.

22. Knott v. Knott (N. J. Ch.) 51 Atl. 15.

23. In equity—Pearce v. Pearce, 132 Ala. 221. $50 at the rate of $5 a month allowed against an able bodied man earning wages and possessed of property—Dorsey v. Dorsey (Ind. App.) 64 N. E. 475.

24. Separation of property asked—Carter v. Morris B. & L. I. Ass'n, 108 La. 143.

25. Rev. Civ. Code, art. 2437—Carter v. Morris B. & L. I. Ass'n. 108 La. 143.

26. Code, § 1292—Skittletharpe v. Skittletharpe, 130 N. C. 72.

27. Desertion a month before, forbidding credit, and suggesting a divorce do not show a refusal to provide, where money was furnished—Schonborn v. Schonborn, 27 Wash. 421, 67 Pac. 987.

28. Branscheid v. Branscheid, 27 Wash. 368, 67 Pac. 812.

apart at the time of suit and without plaintiff's fault,[29] and refusal to live with the wife is equivalent to abandonment.[30] Findings on the question of fraud in conveying property will be rendered needless, where, by reason of a finding that there was no desertion, the right to separate maintenance to assail transfers fails.[31] The allowance being provisional no final judgment will be given, since the relation may be dissolved by divorce or resumed.[32] Nor can monthly payments be awarded under a statute merely requiring the husband to "secure" a support.[33] An award of alimony, made after appeal from the reversal of a sentence of nullity against the wife, is regarded as provisional, and not as an enforcement of the judgment of reversal which was stayed by the appeal.[34] Grantees of the husband pendente lite, with notice, are not protected.[35]

ALTERATION OF INSTRUMENTS.

Alteration of an instrument as a criminal act,[36] or reformation by proper proceedings to properly define the rights of its parties,[37] do not properly come within this topic.

§ 1. *Definition, distinctions, and what constitutes.*—Alterations of written instruments must be material to affect their validity, such as insertion of terms not contemplated by the parties at time of execution,[38] and not mere interlineations, erasures or alterations apparent on the instruments.[39] Alterations by mistake are not material,[40] nor is an erasure material which makes a description of land obscure where it is followed by a definite and correct description.[41] Insertion of a clause, omitted by negligence of the draughtsman, by agreement of the parties will not avoid the instrument as to subsequent creditors who attach the property.[42] An alteration made before signature by the other party, cannot affect the contract, however material, since he is presumed to read the contract before signing.[43] Signing a note and its delivery to a joint maker impliedly authorize him to insert the date of actual negotiation.[44]

§ 2. *Particular instruments.*—Alteration of a note by erasure of one of several indorsements without knowledge or consent of other indorsers,[45] or addition of an obligor to a note at instance of the obligee and without consent of other obligors,[46] or of another surety to a bond after delivery without consent of the other sureties,[47] or insertion of name of a bank at which the note is thereby made payable,[48] or erasure of the name of an attesting witness from a note after delivery without the maker's consent though the name is re-inserted in a different place

29. Branscheid v. Branscheid, 27 Wash. 368, 67 Pac. 812.

30. Schonborn v. Schonborn, 27 Wash. 421, 67 Pac. 987.

31. Civ. Code, § 172—Greer v. Greer, 135 Cal. 121, 67 Pac. 20, in which it was held that the finding need not show that the reasons for his leaving home were sufficient or good.

32. Skittletharpe v. Skittletharpe, 130 N. C. 72.

33. Code, § 1292—Skittletharpe v. Skittletharpe, 140 N. C. 72.

34. Code Civ. Proc., § 1310—Di Lorenzo v. Di Lorenzo (Sup.) 79 N. Y. Supp. 566.

35. Starr v. Kaiser, 41 Or. 170, 68 Pac. 521.

36. Forgery.

37. Reformation of Instruments.

38. Entry of additional name in mileage book conditioned to carry only persons named therein—Holden v. Rutland R. Co., 73 Vt. 317.

39. Alterations in deed—Harper v. Reaves, 132 Ala. 625.

40. Indorsements by mistake on note which are subsequently erased—Lau v. Blomberg (Neb.) 91 N. W. 206.

41. Description of land in special tax bill—Henlan v. Gilliam (Mo.) 71 S. W. 163.

42. Bryant v. Bank, 107 Tenn. 560.

43. Building contract altered by architect and contractor before signature—Mockler v. St. Vincent's Inst., 87 Mo. App. 473.

44. Lance v. Calvert, 21 Pa. Super. Ct. 102.

45. International Bank of St. Louis v. Parker, 88 Mo. App. 117.

46. M. Rumley Co. v. Wilcher, 23 Ky. Law R. 1745.

47. State v. Paxton (Neb.) 90 N. W. 983; Brown v. State, Id.

48. Burn's Rev. St., 1901, §§ 7515, 7516, 5517—Young v. Baker (Ind. App.) 64 N. E. 54.

on the instrument,[49] or insertion of "gold" before "dollars" in a mortgage bond after execution and delivery,[50] is a material alteration which avoids the instrument as to parties not consenting to the change. Failure to name a receiving bank in a blank in a complete note will not authorize its insertion by the payee though the blank is not erased;[51] however there are cases holding that the payee has implied authority to fill a blank for place of payment.[52]

A contract to convey a homestead is not altered by subsequent signature of the wife whose signature was thought unnecessary at time of execution.[53] Detachment of a skeleton note from a contract of which it is a part, and filling its blanks so as to make it negotiable is a material alteration which the signers are not estopped from asserting to avoid their liability.[54] A change of the rate of interest in a note to conform to the actual agreement of the parties will not avoid it.[55] Interlineation of a provision for liability according to front footage in a contract for street grading which already provides for liability of property owners according to interest,[56] or change of an insurance policy payable to insured's "estate" to make it payable to "wife and children,"[57] or indorsement by payee of a note of an agreement to take a less rate of interest,[58] or indorsement of a note whereby a grantee of the equity under a mortgage security is enabled to pay a less rate of interest,[59] or filling of skeleton notes by makers in whose hands they are placed, in accordance with their general purpose,[60] or interlineation of words "Interest at 6 per cent on notes remaining over a year," in a contract of conditional sale where such deferred payments are represented by notes,[61] is not such a material alteration as will avoid the instrument. Negotiability of a note is not affected by the act of the payee in filling the blank for amount, after the maker has signed, with figures less than marginal figures agreed on, and changing the latter to agree with the blank so filled.[62]

§ 3. *Effect of material alteration; rights of parties.*—Any material alteration of a written instrument after delivery avoids the instrument unless ratified.[63] Material alterations by a party or with his consent destroy his rights as against those not consenting,[64] or as against persons liable who are not original parties to the instrument,[65] but where the contract is separable, the parts unaltered will not be affected.[66]

An unintentional alteration, though material, will not avoid the instrument if the original terms can be ascertained.[67] A transfer of title cannot be divested by alteration of a deed fully executed and delivered with or without the grantee's consent,[68] and interpolation of other names in tax deeds after their execution will

49. Girdner v. Gibbons, 91 Mo. App. 412.
50. Foxworthy v. Colby (Neb.) 89 N. W. 800.
51. Young v. Baker (Ind. App.) 64 N. E. 54.
52. Cason v. Bank, 97 Ky. 487; Redlich v. Doll, 54 N. Y. 234; Cox v. Alexander, 30 Or. 438, 46 Pac. 794; Wessell v. Glenn, 108 Pa. 104.
53. Epperly v. Ferguson (Iowa) 91 N. W. 816.
54. Porter v. Hardy, 10 N. D. 551.
55. Osborn v. Hall (Ind.) 66 N. E. 457.
56. Young v. Borzone, 26 Wash. 4, 66 Pac. 135, 421.
57. Steeley's Creditors v. Steeley, 23 Ky. Law R. 996.
58. Reed v. Culp, 63 Kan. 595.
59. The makers cannot be credited with the reduction—Boutelle v. Carpenter (Mass.) 65 N. E. 799.
60. Porter v. Hardy, 10 N. D. 551.
61. Edward Thompson Co. v. Baldwin, 62 Neb. 530.
62. Prim v. Hammel, 134 Ala. 652.
63. Consumers' Ice Co. v. Jennings (Va.) 42 S. E. 879.
64. Porter v. Hardy, 10 N. D. 551.
65. Addition of obligors or sureties to a note or bond without consent of other obligors or sureties, will relieve them—M. Rumeley Co. v. Wilcher, 23 Ky. Law R. 1745; State v. Paxton (Neb.) 90 N. W. 983; Brown v. State, Id.
66. Alteration of part of a series of notes will not affect the remainder, nor a contract of conditional sale for liability of which they were given—Edward Thompson Co. v. Baldwin, 62 Neb. 530.
67. Civ. Code Ga., § 3702—Burch v. Pope, 114 Ga. 334.
68. Gulf Red Cedar Lumber Co. v. O'Neal, 131 Ala. 117.

not affect the transfer of title to persons properly named therein and properly joined in the tax suits.[69] Alteration of notes will not prevent recovery where the security was not assailed and the debt was unpaid.[70]

The party who did not participate in the alteration alone can complain of it,[71] and, though it may be ground for rescission by him, he may still enforce it in its original form.[72] A material alteration is avoidable to any one bound by the instrument who did not consent, though not a surety and though the person making the change did not know of such result.[73] Bona fide holders stand in the same position as parties to the instrument and cannot enforce it[74] either against the maker or his sureties,[75] but if the bona fide holder is not a party to the alteration, he may enforce a negotiable instrument in its original form.[76]

Pleading and evidence.—Plaintiff atttempting to enforce an instrument must disprove or explain alterations.[77] That an alteration is material and apparent will not relieve the party asking relief from alleging that there was fraudulent intent.[78] While it is presumed that an alteration was made on execution or before delivery,[79] where it is sufficiently apparent on the face of the instrument to arouse distrust and raise a necessity of explanation,[80] or where a part restricting the liability of one party has been taken from the contract by the other,[81] the presumption will not lie, and the time, manner and intent of the alteration are questions for the jury.[82] Unless an alteration is suspicious, it is unnecessary to show that it was made before execution,[83] but if it is not plainly ascertainable on inspection of the instrument[84] the party alleging the alteration must prove it. Where the alteration is apparent, and plaintiff claims benefit of it, he must prove that it was made before signing and delivery.[85] Where an instrument in evidence is not referred to in the pleadings, evidence of its alteration may be given without allegations of alteration.[86] An alteration, which makes an instrument appear to have been executed before it was executed, will prevent its admission in evidence, especially, where the acknowledgment was of a date later than the actual signing.[87] To admit an instrument containing alterations and interlineations, it must be proved that all material changes were made before execution,[88] though proof of execution has been made.[89]

69. Holladay-Klotz Land & L. Co. v. T. J. Moss Tie Co., 89 Mo. App. 556.

70. Alteration of notes on piano secured by chattel mortgage—Hoffman v. Molloy, 91 Mo. App. 367.

71. Creditors cannot complain of alteration of an insurance policy in attacking an assignment—Steeley's Creditors v. Steeley, 23 Ky. Law R. 996.

72. Lane v. Pacific & I. N. R. Co. (Idaho) 67 Pac. 656.

73. Ball v. Beaumont (Neb.) 92 N. W. 170.

74. Alteration of note—Bank of Herington v. Wangerin (Kan.) 70 Pac. 330; Young v. Baker (Ind. App.) 64 N. E. 54; alteration of written instrument to make it a negotiable note—Porter v. Hardy, 10 N. D. 551.

75. He cannot collect even the original amount of a note the amount of which has been altered—Moss v. Maddux, 108 Tenn. 405.

76. Negotiable Inst. Law N. Y., § 205. Mutual Loan Ass'n v. Lesser, 76 App. Div. (N. Y.) 614.

77. Removal of clause from insurance policy—Burton v. American Guaranty Fund Mut. Fire Ins. Co. (Mo. App.) 70 S. W. 172.

78. Civ. Code Ga., § 3702—Miller v. Slade (Ga.) 43 S. E. 69.

79. Holladay-Klotz Land & L. Co. v. T. J. Moss Tie Co., 87 Mo. App. 167.

80. Holladay-Klotz Land & L. Co. v. T. J. Moss Tie Co., 87 Mo. App. 167.

81. Burton v. American Guarantee Fund Mut. Fire Ins. Co., 88 Mo. App. 392.

82. Holladay-Klotz Land & L. Co. v. T. J. Moss Tie Co., 87 Mo. App. 167.

83. Rosenbloom v. Finch, 37 Misc. (N. Y.) 813.

84. Alteration in note filed as claim against estate—Jackson v. Day, 80 Misc. 800. Portion cut off insurance policy—Burton v. American Guarantee Fund Mut. Fire Ins. Co., 88 Mo. App. 392.

85. Consumers' Ice Co. v. Jennings (Va.) 42 S. E. 879.

86. Coppock v. Lampkin, 114 Iowa, 664.

87. Died-Long v. Stanley, 79 Miss. 298.

88. Altered lease—Landt v. McCullough, 103 Ill. App. 668.

The rule applies to receipts for assessments on mutual benefit certificate showing alterations, in an action on the benefit certificate—Rambousek v. Supreme Council. (Iowa) 93 N. W. 277.

89. Holladay-Klotz Land & L. Co. v. T J.

§ 4. *Curing or ratifying alterations.*—An alteration is immaterial where the other party has knowingly accepted the altered instrument and complied with its terms.[90] Even material alterations may be ratified by sureties to the instrument if approved intentionally with respect to the particular alterations,[91] or by an agent acting for his principal in the transaction.[92] A party who insists on performance of a written contract after knowledge of its material alteration thereby waives his right to question its validity on that ground.[93]

AMBASSADORS AND CONSULS.

An Italian consul may, by virtue of the most favored nation clause, administer on estates of his nation's subjects who die intestate within the consular district.[94] Since consular officers are given power by congress to perform any notarial function authorized by law within the United States, they may take affidavits or depositions.[95] A consul general's deputy may take an acknowledgment.[96] The fact that a consul institutes a proceeding in which his government is interested, and in which he uses his official signature and title, sufficiently shows his authority.[97]

AMICUS CURIAE.

A mother may as amicus curiae attack a collusive decree of nullity of marriage of a daughter, though not invested with a litigable interest.[98] A justice of the peace may consult an amicus curiae.[99] Interested persons should be notified and heard on objections so presented.[1]

ANIMALS.

§ 1. *Property in animals.*—The owner of a domestic animal has a property right in its carcass after death.[3]

§ 2. *Personal injuries inflicted by animals.*—One who harbors a vicious dog,[4] or permits him to remain on his premises,[5] if the premises are under his control,[6] or to run at large,[7] or an employer who permits an employee to use a vicious dog in the

Moss Tie Co., 87 Mo. App. 167.

90. Change in order for machinery so as to provide for security—J. I. Case Thresh. Mach. Co. v. Ebbighausen (N. D.) 92 N. W. 826.

Insertion of date in an instrument already signed by a joint maker is ratified by his notice of it without objection—Lance v. Calvert, 21 Pa. Super. Ct. 102.

91. State v. Paxton (Neb.) 90 N. W. 983; Brown v. State, Id.

92. Alteration in mortgage note executed by husband and wife, charging rate of interest to correspond with agreed terms of the mortgagee's attorney and the husband who acted for his wife—Nichols v. Rosenfeld (Mass.) 63 N. E. 1063; Palmer v Same, Id.

93. Oil lease altered by lessee by insertion of names of other parties interested in royalties—Barnsdall v. Boley, 119 Fed. 191.

94. Treaty of 1871 with Italy, making applicable, article 9 of the Argentine treaty—In re Lobrasciano's estate, 38 Misc. (N. Y.) 415.

95. Rev. St. V. S., § 1750; Neb. Code Civ. Pr., § 371 et seq.—Browne v. Palmer (Neb.) 92 N. W. 315.

96. Stewart v. Linton (Pa.) 53 Atl. 744.

97. Extradition proceeding—In re Grin, 112 Fed. 790

98. Steimer v. Steimer, 37 Misc. (N. Y.) 26. Such an one has no appealable interest—E. B. v. E. C. B., 28 Barb. 299, 8 Abb. Pr. (N. Y.) 44.

99. Bocock v. Cochran, 32 Hun, 521.

1. Matter of Guernsey, 21 Ill. 443.

2. Law relating to wild animals not in captivity or domesticated, see Fish and Game Law. There are many regulations and laws which relate to the business of slaughtering animals or of selling meat products. They mostly relate to Food Licenses or Adulteration.

3. Campbell v. District of Columbia, 19 App. D. C. 131.

4. Duval v. Barnaby, 75 App. Div. (N. Y.) 154, 11 N. Y. Ann. Cas. 227; sufficiency of instruction on what constitutes harboring a vicious dog—Trumble v. Happy, 114 Iowa, 624.

5. The property owner is not liable at common law merely because the injuries were inflicted while on his premises—Trumble v. Happy, 114 Iowa, 624, Ky. St. § 68 changed the common law rule; and one who entered to visit the owner was held not unlawfully on the premises—Dillehay v. Hickey, 24 Ky. Law R. 1220. Evidence held sufficient to submit question of defendant's control of dog to jury—Clark v. Disbrow, 77 App. Div. (N. Y.) 647.

6. The dog not being kept under his direction and he not having knowledge of its character, he cannot be held liable where the animal was owned by a tenant, the property being used as a stable, merely because he received a portion of the rents from stalls—Laguttuta v. Chisolm, 65 App. Div. (N. Y.) 326.

7. That a weak minded child had, on previous occasions while the dog was secured, annoyed it is not a defense; the injuries being inflicted while the dog was at large and unmolested by such child—Schilling v. Smith, 76 App. Div. (N. Y.) 464.

course of his employment is liable for injuries inflicted by it,[8] so also an employer who furnishes an employe a vicious mule,[9] but the relation of master and servant is not essential to a recovery for injuries inflicted by an animal placed in the care of another.[10]

A vicious,[11] or mischievous character,[12] and knowledge thereof on the part of the owner must be shown to render him liable,[13] though knowledge may be presumed.[14]

Negligence may also be presumed.[15]

The owner conducting a vicious animal along a street is bound to exercise due care to protect passers-by from injury.[16]

The plaintiff has the burden of proving liability of defendant.[17]

If the vicious character of the dog were known to the owner punitive damages may be recovered.[18]

§ 3. *Injuries to property by animals trespassing or running at large.*—The owner of cattle is liable if they trespass upon lands of another[19] though the land was not marked or inclosed,[20] but a herder is held not liable,[21] where such animals are not allowed to run at large and the land is sufficiently fenced against animals permitted to range;[22] if he wilfully drives them thereon though the right of free range exists, it is a trespass.[23] It is not a wilful trespass within penal laws if it be done under a license.[24] The party bound to erect a division fence cannot recover for trespass committed by the adjoining owner's cattle.[25]

8. Watchman of corporate property—Chicago & A. R. Co. v. Kuckkuck, 98 Ill. App. 252; affirmed, 64 N. E. 358.

9. The employer being charged with and the employe not having knowledge of its dangerous character—East Jellico Coal Co. v. Stewart, 24 Ky. Law R. 420.

10. If the owner of a bull placed him in the care of one working his farm on shares, with knowledge of its vicious character but without warning him, recovery may be had. The relation of master and servant is not essential—Talmage v. Mills (Sup.) 80 N. Y. Supp. 637.

11. The mere fact that the dog did bite is not sufficient—Martinez v. Bernhard, 106 La. 368, 55 L. R. A. 671. Evidence in action to recover by one kicked by a horse held insufficient to show vicious character—Eastman v. Scott (Mass.) 64 N. E. 968; sufficiency of evidence to show vicious character of dog and knowledge thereof on the part of the owner—Kippen v. Ollasson, 136 Cal. 640, 69 Pac. 293. Judicial notice will be taken of the treacherous and vicious nature of a mule—Borden v. Falk Co. (Mo. App.) 71 S. W. 478.

12. Crowley v. Groonell, 73 Vt. 45, 55 L. R. A. 876.

13. That the animal had once attacked the owner is sufficient proof of knowledge—Talmage v. Mills (Sup.) 80 N. Y. Supp. 637. Evidence held sufficient to warrant finding of knowledge—Duval v. Barnaby, 75 App. Div. (N. Y.) 154, 11 N. Y. Ann. Cas. 227.

14. Chicago & A. R. Co. v. Kuckkuck, 98 Ill. App. 252; affirmed, 64 N. E. 358.

15. If the owner had actual knowledge—O'Neill v. Blase, 94 Mo. App. 648.

16. O'Neill v. Blase, 94 Mo. App. 648.

17. Laguttuta v. Chisolm, 65 App. Div. (N. Y.) 326. Evidence held sufficient to submit to the jury question of liability for injuries by a dog, and of ownership of the animal—Laguttuta v. Chisolm, 65 App. Div. (N. Y.) 326.

18. Dillehay v. Hickey, 24 Ky. Law R. 760.

19. Owner of land held liable for hay consumed by his cattle on his premises left thereon by his permission—Spaulding v. Nesbitt, 87 Mo. App. 90.

20. If he had knowledge that the public land on which he grazed his cattle had been purchased; though the same was not distinctly marked—Cosgriff v. Miller (Wyo.) 68 Pac. 206.

21. Sweet v. Ballentine (Idaho) 69 Pac. 995.

22. Frazer v. Bedford (Tex. Civ. App.) 66 S. W. 573. Actions in Utah. One-half costs in civil cases can alone be recovered in actions of trespass by sheep. Rev. St. § 20—Smith v. Valentine, 23 Utah, 539, 66 Pac. 295.

23. Addington v. Canfield, 11 Okl. 204, 66 Pac. 355; the trespass occurring between Nov. 1st and Apr. 1st during which time under Rev. Codes, §§ 1549 and 6153, certain stock is permitted to run at large—Ely v. Rosholt (N. D.) 93 N. W. 864. Code Civ. Proc., c. 42, has been abolished.

24. One who under permission of the owner of land drives his horse thereon held justified in continuing to do so where the subsequent purchaser of the land had on several occasions falsely stated that he had purchased it—Kimmons v. State (Tex. Cr. App.) 71 S. W. 283; and a license from the owner to enter is a defense to the prosecution—Franks v. State (Tex. Cr. App.) 68 S. W. 985.

25. Hill's Ann. Laws, § 3445; Oliver v. Hutchinson, 41 Or. 443, 69 Pac. 139, 1024; nor can he impound them—Gilmore v. Harp, 92 Mo. App. 77. An instruction in an action for trespass by cattle where the parties' land was a common enclosure that if plaintiff attempted to erect a partition fence on the line between his and defendant's land "or approximately so" and was prevented, etc., is reversible error since it left the construction of the quoted words to the jury.

An escaped animal is not generally speaking "running at large,"[26] nor if grazing on a highway under the care and control of an attendant.[27] Injuries resulting from the negligent management of horses on highways will create a liability.[28]

Action to recover damages will lie,[29] or the remedy may be by attachment,[30] or by a proceeding before a justice of the peace instituted on notice[31] or by distraint as at common law[32] in the latter case they can be held only for the damages committed at the time of distraining them.[33] The remedy to recover damages for trespass by the animals of an adjoining landowner is at common law.[34]

In determining the damages resulting from the trespass the crop[35] or pasture shrinkage will be considered.[36]

§ 4. *Liability for killing or injuring animals.*—The owner or occupant of land may use such force as is reasonably necessary to eject trespassing animals and can be held liable or punished only for injuries wantonly or purposely inflicted,[37] nor is the landowner in the absence of wantonness liable for injuries sustained by trespassing animals caused by dangerous agencies on his land.[38]

One who without right drives an animal into an inclosure, is liable for injuries resulting to other animals therein.[39]

Recovery in tort for the killing of sheep by dogs[40] or allowances for such losses under the various local statutes is treated in foot notes.[41]

—Oliver v. Hutchinson, 41 Or. 443, 69 Pac. 1024.

Fences, as to duty to maintain division fences.

26. It escaped from an enclosure without fault of the owner and he was making reasonable effort to recapture it—Myers v. Lape, 101 Ill. App. 182.

27. Morgan v. People, 103 Ill. App. 257.

28. Highways and Streets.

29. Frazer v. Bedford (Tex. Civ. App.) 66 S. W. 573. Petition in trespass held sufficient though it failed to allege that the entry was on inclosed or cultivated lands; the court taking judicial notice that the crops alleged to have been destroyed were not the spontaneous product of the soil—Meyers v. Menter (Neb.) 88 N. W. 662.

30. Against the owners property in general as well as the stock. Comp. Laws, Nev., § 781—Smith v. Fisher, 24 Utah, 506, 68 Pac. 849.

31. It is not necessary that a summons be issued. Neb. Comp. St. c. 2, art. 3, § 4—Randall v. Gross (Neb.) 93 N. W. 223. Except as to jurisdiction, proceedings under the statute will be liberally construed. Nebraska Comp. St., c. 2, art. 3, §§ 2, 3, 6, providing for the taking and selling on execution of trespassing stock is constitutional—Randall v. Gross (Neb.) 93 N. W. 223.

32. Graves v. Rudd (Tex. Civ. App.) 65 S. W. 63. North Dakota Rev. Codes. § 6153—Ely v. Rosholt (N. D.) 93 N. W. 864. The distrainer may hold under Laws 1890, c. 569, §§ 120, 121 though he may have attempted to proceed under Code, § 3085 et seq.—Lynch v. Ford, 72 App. Div. (N. Y.) 536. The distrainer loses his lien if he fails to have the damages assessed and cannot set them up in an action of replevin by the owner. Iowa Code, § 2317—Holaman v. Marsh (Iowa) 90 N. W. 82. In case of estrays entering from highway the distrainer may hold the animals for the time allowed to perfect his lien; and not until after such time and the failure to perfect the lien can the owner replevy the cattle—Laws N. Y. 1890, c. 569, § 120—Lynch v. Ford, 72 App. Div. (N. Y.) 536. Neb. Comp. St. c. 2, art. 3, § 4, did not take away the common law remedy to recover for trespass by stock—Randall v. Gross (Neb.) 93 N. W. 223.

33. Holaman v. Marsh (Iowa) 90 N. W. 82.

34. Rev. St. 1899, § 354 does not apply where the entry was on adjoining land occupied under a common enclosure—Jackson v. Fulton, 87 Mo. App. 228. If he distrains under Rev. St. 1899, c. 69, art. 2, he cannot set up failure to erect a division fence under an agreement—Jones v. Habberman, 94 Mo. App. 1.

35. Oliver v. Hutchinson, 41 Or. 443, 69 Pac. 1024.

36. Oliver v. Hutchinson, 41 Or. 443, 69 Pac. 1024; including expense for feeding landowner's stock—Cosgriff v. Miller (Wyo.) 68 Pac. 206; and the number of the stock plaintiff has depending on pasturage—Sweet v. Ballentine (Idaho) 69 Pac. 995.

37. Addington v. Caufield, 11 Okl. 204, 66 Pac. 355. The killing a dog which entered another's premises and stole provisions is justifiable—Fisher v. Badger, 95 Mo. App. 289; or if he had been worrying sheep though, at the time of the killing the dog had left—Smith v. Wetherill, 78 App. Div. (N. Y.) 49. Whether one was justified in killing a trespassing dog is a question for the jury—McChesney v. Wilson, 9 Det. Leg. News (Mich.) 591, 93 N. W. 627.

Criminal Procedure. An indictment for wilfully injuring animals must allege the value of the injury—Dunklin v. State, 134 Ala. 195; Cr. Code, § 5091. Evidence held insufficient to show wanton or wilfull killing of trespassing cow—Alexander v. State (Tex. Cr. App.) 70 S. W. 425.

38. Beinhorn v. Griswold, 69 Pac. (Mont.) 557.

39. Irrespective of ownership or knowledge of viciousness—Martin v. Farrell, 66 App. Div. (N. Y.) 177.

40. Complaint held to state a cause of action under the statute allowing recovery for sheep killed or maimed by dogs—Peeler v. McMillan, 91 Mo. App. 310. An answer

The liability of railroad companies for injuries to animals[42] and for injuries to horses resulting from the defective construction and negligent use of highways is treated elsewhere.[43]

§ 5. *Contracts of agistment.*—One who is employed to herd cattle in the possession of the owner is not an agister.[44]

The lien of an agister is statutory and did not exist at common law.[45] He is entitled to possession as against the owner,[46] and his rights have priority over a subsequent chattel mortgage,[47] or a chattel mortgage recorded without the county of the mortgagor's residence.[48] In the absence of such intention surrender of possession will not operate as a waiver of the lien in favor of third parties with notice of its existence,[49] nor is it lost merely because the agister demands excessive charges for care,[50] but if he brings an attachment action against the cattle he will lose his lien.[51] If the agister is not paid his lien will include expenses for keeping after demand for possession by the owner.[52]

The procedure for enforcing such liens varies in the different jurisdictions.[53]

Agisters are not liable for loss resulting from act of God.[54]

§ 6. *Estrays and impounding.*—The right to take and impound animals found at large and the enforcement of charges for the keeping of them has been the subject of various enactments, as shown in the foot notes.[55]

which set up that plaintiff invited dogs by permitting unburned carcasses of sheep to remain on his premises is demurrable—Peeler v. McMillan, 91 Mo. App. 310; that the dog was tracked to defendant's residence and was subsequently seen near the carcasses, and that defendant killed his dog shortly after the sheep were killed may be considered by the jury on the question whether defendant's dog killed the sheep—Peeler v. McMillan, 91 Mo. App. 310.

41. Indiana. A buyer and seller of sheep is within Burns' Rev. St. 1901, § 2857 and may be allowed for sheep killed from the dog tax fund—Wayne Tp. v. Jeffery (Ind. App.) 64 N. E. 933. Report should be made to the trustees of the township wherein the damage is done—Wayne Tp. v. Jeffery (Ind. App.) 64 N. E. 933. **Massachusetts.** A bill for damages may be allowed by the commissioners at any time. St. 1889, c. 454, § 5 being merely directory—Johnson v. Griswold, 179 Mass. 580. That the appraisal certificate stated joint ownership of the sheep when but one of the parties owned them will not defeat a recovery against the owner of the dog—Johnson v. Griswold, 179 Mass. 580.

42. Carriers; Railroads; Street Railroads.

43. Highways.

44. Boston & K. C. Cattle Loan Co. v. Dickson, 11 Okl. 680, 69 Pac. 889.

45. And the statutes giving such lien should be liberally construed—Becker v. Brown (Neb.) 91 N. W. 178; Same v. Dale, Id.

46. And the forcible taking them from the agister's possession constitutes a larceny—Tennalty v. Parker, 100 Ill. App. 382.

47. Becker v. Brown (Neb.) 91 N. W. 178; Same v. Dale, Id. If Gen. St. 1901, § 3931 had not been followed a mere agreement with the mortgagor will not give the agister priority over the pre-existing mortgage—Central Nat. Bank v. Brecheisen (Kan.) 70 Pac. 895.

48. Rev. St. 1899, § 5404—Duke, Lennon & Co. v. Duke & Woods, 93 Mo. App. 244.

49. Becker v. Brown (Neb.) 91 N. W. 178; Same v. Dale, Id.

50. There being no tender or refusal of the sum actually due—Folsom v. Barrett, 180 Mass. 439.

51. Boston & K. C. Cattle Loan Co. v. Dickson, 11 Okl. 680, 69 Pac. 889.

52. Nothing appearing showing an intention to revoke the contract or to pay the lien—Folsom v. Barrett, 180 Mass. 439.

53. In Nebraska the parties may agree on a mode of enforcing the lien and whether there was such an agreement is a question for the jury—Dale v. Council Bluffs Sav. Bank (Neb.) 9 N. W. 526; Brown v. Same, Id. **In Maine** municipal courts have jurisdiction to enforce an agister's lien though the owner resides without the county. Rev. St. c. 91, § 56; Pub. Laws 1901, c. 262—McGillicuddy v. Edwards, 96 Me. 347.

54. Humbert v. Crump (Kan.) 71 Pac. 239; contract construed and agister held not liable for cattle killed by storm—Wells v. Sutphin, 64 Kan. 873, 68 Pac. 648.

55. Georgia. The charter of the city of Waycross does not give a right to impound cows—Mayor, etc., of City of Waycross v. Walker, 42 S. E. 375. **Missouri.** An adjoining owner who fails to erect a division fence according to agreement cannot impound trespassing animals belonging to the adjoining owner—Gilmore v. Karp, 92 Mo. App. 77. Sale. **In Colorado** failure to give the owner personal notice of sale when his address is known renders the estrayer a trespasser ab initio, and the owner may recover the animal without tendering the charges for keeping, and this though the owner had actual knowledge of the sale—Mills' Ann. St. § 114—Bailey v. O'Fallon (Colo.) 70 Pac. 755. **In Texas** the presence of the estrayer and two other persons is not a compliance with the statute—Floyd v. State (Tex. Cr. App.) 68 S. W. 690; Sayles, Ann. Civ. St. arts. 2373, 4963, 4969.

The owner's consent to the sale need not be negatived in the information on a prosecution for illegal sale—Floyd v. State (Tex. Cr. App.) 68 S. W. 690. **Vermont.** Absence

A public impounder is liable for all wrongful acts done under color of office.[56]

§ 7. *Regulations as to care, keeping and protection and health.*—Statutes prohibiting or limiting the running at large of stock have been generally held to be valid[57] and in several of the states an enabling provision in prohibitory statutes has left the question whether they shall apply to certain districts to the municipal authorities or by election of freeholders thereof.[58] One claiming the benefit of free range has the burden of showing the existence of the right in his district.[59]

Statutes providing for the killing of animals affected with contagious diseases have also been held to be valid.[60]

The keeping of male animals for breeding purposes is usually regulated by statute.[61]

Interstate transportation; quarantine; inspection.—It is within the power of a state to quarantine cattle for a period or compel inspection before bringing them into the state,[62] and the mode and time of declaring a quarantine is to be determined by reference to the statutes.[63] A criminal accusation of violating such regulations must with certainty allege the regulation.[64]

of the impounding officer from home is not an excuse for the failure to advertise the sale within four days. St., § 4780—Farrar v. Bell, 73 Vt. 342.

56. Kansas City v. Minor, 89 Mo. App. 617.

57. Alabama.. Sufficiency of title of stock law—Street v. Hooten, 131 Ala. 492. **Oklahoma.** Permitting the running at large in one instance and prohibiting it in another is not a local law—Addington v. Caufield, 11 Okl. 204, 66 Pac. 355. **South Carolina.** Statute exempting a part of a county from the operation of the stock law is not a taking of property without compensation—Goodale v. Sowell, 62 S. C. 516. **Texas.** Does not deprive one of his property without due process of law. Laws 1899 c. 128—Graves v. Rudd (Tex. Civ. App.) 65 S. W. 63. **Idaho.** Rev. St., §§ 1210, 1211 prohibiting herding or grazing within two miles of inhabited dwellings is valid—Sweet v. Ballentine, 69 Pac. 995.

58. Alabama. A district may be extended by legislative action without the consent of the owner—Street v. Hooten, 131 Ala. 492.

Mississippi. By board of supervisors, and their order establishing an irregular district being void may be collaterally attacked. Laws 1899, c. 17—Garner v. Webster County, 79 Miss. 565.

North Carolina. Petition to board of commissioners; the majority may include landowners of a part of the district wherein the law had been established. Laws 1901, c. 531—Perry v. Commissioners, 130 N. C. 558.

Texas. By election of freeholders. Sufficiency of petition and order for an election —Graves v. Rudd (Tex. Civ. App.) 65 S. W. 63; description of the district in petition held sufficient—Jones v. Carver (Tex. Civ. App.) 67 S. W. 780. An election order to determine whether hogs, sheep or goats shall be permitted to run at large is alternative and void—Reuter v. State (Tex. Cr. App.) 67 S. W. 505; or it is void if made during the term in which the petition was filed—Robertson v. State (Tex. Cr. App.) 70 S. W. 542. Conveying land to persons merely to enable them to vote will not qualify them—Jones v. Carver (Tex. Civ. App.) 67 S. W. 780.

59. He must to allege his petition to restrain interference with his stock—Addington v. Caufield, 11 Okl. 204, 66 Pac. 335.

60. Rev. St. §§ 4931-4933 providing for the killing of certain animals affected with contagious diseases do not provide for the taking of private property for public use without just compensaton, and are valid—Livingston v. Ellis County (Tex. Civ. App.) 68 S. W. 723.

61. If a certificate of pedigree is not filed the owner cannot recover for the services rendered, even though the previous owner had filed a certificate—Davis v. Randall, 97 Me. 36.

62. Such a requirement not being a regulation of interstate commerce. Colo. Sess. Laws 1885, p. 335, § 2—Reid v. People, 29 Colo. 333, 68 Pac. 228; affirmed, 23 Sup. Ct. (U. S.) 92; or with the Fed. Const. guarantying equal privileges of the citizens of all the states—Reid v. People, 29 Colo. 333, 68 Pac. 228; affirmed, 23 Sup. Ct. (U. S.) 92; nor in conflict with act of Cong. May 29, 1884 to prevent spreading of disease among domestic animals—Reid v. People, 29 Colo. 333, 68 Pac. 228; affirmed, 23 Sup. Ct. (U. S.) 92. A certificate from the state inspector is necessary though the shipper held a certificate from the federal officers.

63. Ill. Laws 1885 (Hurd's R. S. 1889, p. 155, § 4, to prevent importation or sale of diseased cattle is penal and should be strictly construed—Pierce v. Dillingham, 96 Ill. App. 300. The commissioners and the governor have no power to prohibit importation of particular kinds of domestic animals from all parts of the world except on such conditions as they might prescribe—Pierce v. Dillingham, 96 Ill. App. 300. An officer can not quarantine cattle on the mere request of the commissioners. A formal complaint is necessary. Gen. St. 1899, § 7091—Asbell v. Edwards, 63 Kan. 610, 66 Pac. 641. A quarantine line to be valid must conform to the line fixed by the federal agricultural department. Rev. St. 1895, art. 5043k—Ft. Worth & D. C. R. Co. v. Masterson (Tex.) 66 S. W. 833.

64. An information charging the defendant with moving cattle from a certain district without inspection but which fails to charge that such a rule was promulgated is

§ 8. *Marks and brands.*—Under some statutes it has been held that a brand to be recorded must designate on what part of the animal it is placed;[65] if recorded a certified copy is admissible to prove, and is prima facie proof of ownership of the animals when running at large,[66] and parol proof of use of a particular mark or brand may be admitted for purposes of identification only.[67] A criminal liability for wrongful branding or use of brands has been imposed in many states, the procedure being illustrated in footnotes.[68]

§ 9. *Cruelty to animals.*—Laws for the killing of decrepit or crippled animals to prevent cruelty must provide opportunity for the owner to have notice and be heard.[69] Persons who are carried for hire are not guilty of overloading and overdriving.[70] One who wilfully neglects to furnish a domestic animal with sufficient food for sustenance is guilty of cruelty.[71]

If the indictment charges the act as being wilfully and unlawfully done it need not charge that it was maliciously done.[72] The offense may be laid on a day and "each day" thereafter.[73]

ANNUITIES.

There must be a fixed sum payable at all events to constitute an annuity as distinguished from a gift of income.[74] An annual payment covenanted for in a deed is not to be regarded as rent merely because made a lien on the land,[75] though in strictness as distinguished from a rent charge an annuity is always charged on a person merely and hence is personal estate.[76]

In creating annuities if by will many questions of interpretation arise which pertain to the law of wills. Local limitations on the right to suspend alienability must be avoided if a corpus be set out to raise the payments.[77] An annuity for life in satisfaction of a debt is valid though not computed on the actual sum falling due as principal and interest.[78] When payable on a day certain an annuity will not be apportioned on the annuitant's earlier death,[79] but it may be paid by installments if the will does not provide otherwise.[80] If a fund to produce the annuity is to be set out the executors should decide how much and if any surplus of income is produced it is not for the annuitant.[81] An annuity payable by an executor out of lands is within a law declaring a trust not assignable.[82] An annuity will be regarded as a charge on lands where it is payable from "money" of the estate but lands and money are given in a common mass.[83]

insufficient—Wallace v. State (Tex. Cr. App.) 69 S. W. 506.

65. "On the shoulder or side" is not sufficient—Reese v. State (Tex. Cr. App.) 67 S. W. 325; or "Left jaw, left shoulder or side" is not sufficient—Steed v. State (Tex. Cr. App.) 67 S. W. 328.

66. Gale v. Salas (N. M.) 66 Pac. 520.

67. Gale v. Salas (N. M.) 66 Pac. 520; Steed v. State (Tex. Cr. App.) 67 S. W. 328.

68. Indictment for unlawfully branding cattle held to sufficiently state the time of the commission of the offense and not objectionable as charging two offenses—Ortega v. Territory (Ariz.) 68 Pac. 544. Evidence held sufficient to show change of brand with intention to defraud—Samples v. State (Tex. Cr. App.) 64 S. W. 1041.

69. Laws 1897, c. 22, § 1, held unconstitutional—Carter v. Colby, 71 N. H. 230.

70. Atkins v. State (Miss.) 32 So. 921.

71. Under Ga. Pen. Code, §§ 703, 705—Griffith v. State (Ga.) 43 S. E. 251.

72. Ex parte Mauch, 134 Cal. 500, 66 Pac. 734.

73. Though the offense was charged as being committed on "January 1st and on each day until March 11th" the information was held to charge but a single offense—State v. Cook (Conn.) 53 Atl. 589.

74. Sum named was to be paid out of "income" and corpus was not to be impaired—Homer v. Landis, 95 Md. 320. In Gillispie v. Boisseau (App.) 23 Ky. Law R. 1046 a gift out of "rents and interest" was called an annuity but there were words pointing to an intention to give it at all events.

75. Nehls v. Sauer (Iowa) 93 N. W. 346.

76. Cyc. Law Dict., "Annuity" citing 10 Watts, 127, 2 Bl. Comm. 40.

77. Consult Perpetuities; Wills.

78. It was called "interest" and assailed as usurious—Price's Adm'x v. Price's Adm'x (App.) 23 Ky. Law R. 1911, 1947.

79. Nehls v. Sauer (Iowa) 93 N. W. 346.

80. Rucker v. Maddox, 114 Ga. 899.

81. Morse v. Tilden, 35 Misc. (N. Y.) 560.

82. Rothschild v. Roux, 78 App. Div. (N. Y.) 282, also holding the evidence sufficient to show an assignment to have been for security only. As to assignability of expectant or contingent rights generally, see Assignments.

83. Perkins v. First Nat. Bank (Miss.) 33 So. 18.

CURRENT LAW.

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APPEAL AND REVIEW.

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Scope.—"Appeal" is loosely used to designate both appeal and error and also statutory substitutes for them. It is intended to exhaustively treat cases pertinent to any of such modes of review. Proceedings for the review of special and anomalous proceedings, like drainage proceedings, eminent domain, equalization of taxes, and others which readily suggest themselves, are also treated more fully and specifically under titles dealing with the procedure to which such review is incidental.[1] The review of criminal prosecution[2] and of the proceedings of certain inferior tribunals[3] is subject to such rules that separate treatment is required. For the same reason certiorari practice, and procedure upon bills of review and bills to obtain relief from judgments, must be excluded.[4] Limited revisory and supervisory relief is afforded by such remedies as injunction, habeas corpus, mandamus, and prohibition, but it is also foreign to this article.

In a future number of Current Law an article on "Harmless Error" will be printed, such subject being broader in its relations than this, and containing matters equally applicable to "New Trial." The mode of saving questions for review is in like manner pertinent to a wider range of proceedings than appeal.[5]

1. See forthcoming articles on Eminent Domain, Public Works and Improvements, Taxes.
2. Criminal Procedure.
3. See Courts, Justices of the Peace.
4. See articles on Certiorari, Equity, Judgment.
5. See Harmless Error, Saving Questions for Review.

§ 1. *The right in general. A. Constitution and statutes.*—Appeal is a strict statutory right,[6] which may be lost by a repeal of a statute giving it,[7] if not protected by the constitution.[8] If a statutory right of appeal be given, a court cannot add conditions.[9] A right to appeal is not a "vested" one,[10] nor want of it a "denial of justice";[11] and an appeal to courts of last resort in all cases is not essential to satisfy the constitutional requirement that "all courts shall be open." Therefore, when it is provided that no appeals shall "hereafter" be taken, the statute retroacts on pending cases.[12]

B. Waiver, election, transfer, or extinguishment.[13]—The right may be waived.[14] Certiorari to review the granting of a writ of error by the circuit court of appeals should be seasonably applied for.[15]

Extinguishment of the subject-matter or interest destroys the right.[16] Payment of costs on a judgment carrying no money is not a satisfaction,[17] nor is the application of a deposit in court, when there is a dispute as to the excess unpaid.[18] Mistake may reopen a satisfaction.[19] One party cannot defeat an appeal by entering satisfaction of record.[20] An interlocutory order cannot be reviewed after it is materially changed.[21]

Under a statute providing that causes of action for personal injuries shall survive when the plaintiff obtains judgment, but dies pending appeal, in which the judgment is reversed, an appeal is impliedly given to the defendant in case the plaintiff dies before the appeal is perfected.[22] A stay until revival, and not a loss of the right of review, is the effect of death of the adversary after judgment.[23]

Obedience to an order waives the right to a review;[24] but the intention must be clear,[25] as where judgment is voluntarily paid,[26] and payment accepted.[27] Parties so paying a judgment may reserve the right of review.[28]

6. Hawkins v. Burwell, 191 Ill. 389. Act providing no appeal may be valid if certiorari lies—State v. Com'rs, 87 Minn. 325.

7. Appeal not a "suit instituted" within a saving clause—Lake Erie & W. R. Co. v. Watkins, 157 Ind. 600.

8. Legislature may regulate but not give or destroy the right (Const. art. 8, §§ 2, 3) —Finlen v. Heinze (Mont.) 69 Pac. 829.

9. Eminent domain proceedings—Mauldin v. Greenville, 64 S. C. 444.

10. Lake Erie & W. R. Co. v. Watkins, 157 Ind. 600.

11. Ins. Co. of N. A. v. Schall, 96 Md. 225.

12. Lake Erie & W. R. Co. v. Watkins, 157 Ind. 600.

13. See post, § 3, "Persons entitled."

14. Participating in new trial—Geraghty v. Randall (Colo. App.) 70 Pac. 767. Not waived by asking for entry of judgment on the verdict after being refused a new trial —Carlson v. Benton (Neb.) 92 N. W. 600. Original order of injunction not appealable after parties have proceeded and it has been materially modified on pleadings—Sharples v. Baker, 100 Ill. App. 108. Mortgagee may appeal from condemnation proceedings though he also claims against fee owner—Omaha Bridge Co. v. Reed (Neb.) 92 N. W. 1021.

15. Ayers v. Polsdorfer, 187 U. S. 585.

16. Appeal from temporary injunction fails by final determination of the controversy—Wallace v. Deane (Idaho) 69 Pac. 62. Appeal from action to enforce judgment fails by reversal of the judgment—McGill v. Bartman (Ky.) 68 S. W. 1100. Appeal from judgment on demurrer after defects have been cured by pleading over—Wirth v. Wirth, 181 Mass. 541. An administrator may continue an appeal from divorce and alimony—Coffman v. Finney, 65 Ohio St. 61, 55 L. R. A. 794. Satisfaction of the judgment extinguishes the right—Klinkle v. McClintock (Iowa) 93 N. W. 86. Contra,—Shannon v. Padgett, 24 Ky. Law Rep. 1281.

See, also, post, § 11, as to want of interest as ground for dismissal.

17. Territory v. Cooper, 11 Okl. 699, 69 Pac. 813.

18. Duggan v. Smith, 27 Wash. 702, 68 Pac. 356.

19. Judgment omitted interest—Jackson v. Brockton, 182 Mass. 26.

20. MacEvitt v. Maass, 64 App. Div. (N. Y.) 382.

21. Interlocutory injunction—Sharples v. Baker, 100 Ill. App. 108.

22. Transcript was not yet filed when plaintiff died—Western Union Tel. Co. v. Adams, 28 Ind. App. 420.

23. Barton v. New Haven, 74 Conn. 729.

24. Order to elect—Morris v. Wofford, 114 Ga. 935. Mandatory injunction obeyed—Knight v. Hirboun, 64 Kan. 563, 67 Pac. 1104. State v. Maloney, 108 Tenn. 82. Obeying mandamus after appealing—Campbell v. Hall, 28 Wash. 626, 69 Pac. 12; Betts v. State (Neb.) 93 N. W. 167.

25. O'Rourke v. New Orleans, 106 La. 313.

26. Cowell v. Gregory, 130 N. C. 80, de-

Enforcement of a judgment affirms it.[29] So, too, adopting it; as if one accepts costs imposed as a condition to an order for the other's relief.[30] Thus a judgment for possession of land may be adopted by harvesting a crop thereon, though a condition remains unperformed;[31] but merely urging a proceeding and decision therein as ground for some action by the court in other litigation does not.[32] The right of appeal is not waived by scheduling the judgment in bankruptcy.[33] Neither does availing of one kind of relief granted prevent appeal for error in refusing complete relief.[34]

Acceptance of benefits will show a waiver unless the rights to them are absolute, so that an appeal could work no change.[35]

Waiving an appeal carries with it appeal from a dependent proceeding.[36] The right to appeal from a provisional order is not waived by going to trial on the main case on changed issues.[37] A right to review an order is not lost by failing to appeal a former order denying the same relief,[38] or failing to move sooner.[39]

Agreement to terms of judgment waives an appeal,[40] but an agreement for trial of a cause does not relinquish the right to review because it does not in terms reserve a right of exception.[41]

Successive orders or reviews.—A person who exercises one concurrent right of appeal is deprived of the other.[42] Appellant cannot dismiss his appeal, and reenter another in the same case;[43] and an appellant from the appointment of guardian, who was nonsuited for failure to appear, and made no attempt to sustain his appeal, cannot take a further appeal.[44] The right is not necessarily lost by prosecuting a different form of review proceeding unsuccessfully;[45] but an unsuccessful appellant to an intermediate court cannot bring error from the trial court to the court of last resort.[46] There must be the elements of an election,[47] or the judg-

ciding also that Code, § 886, relating to appellate practice after payment, referred only to involuntary payments.

27. Trimble v. First Nat. Bank, 101 Ill. App. 75.

28. Receipt reserved it—Staehle v. Leopold, 107 La. 399.

29. Owens v. Phosphate Co., 115 Ga. 768.

30. Opening default — San Bernardino County v. Riverside County, 135 Cal. 618, 67 Pac. 1047.

31. Payment of certain moneys—Easton v. Lockhart (N. D.) 89 N. W. 75.

32. Judgment appealable though pleaded as former recovery—Missouri, K. & T. Ry. Co. v. Bagley, 65 Kan. 188, 69 Pac. 189. Urging separation as final in suit to divide community—Melancon v. Wilson, 107 La. 628.

33. Bennett v. Bennett, 23 Ky. Law Rep. 1281.

34. Judgment set aside conveyances but did not fully adjudge property rights—Milam v. Hill (Tex. Civ. App.) 69 S. W. 447.

35. Easton v. Lockhart (N. D.) 89 N. W. 75. Trapp v. Off, 194 Ill. 287, holds it a release of errors.

Ballinger v. Connecticut Mut. Life Ins. Co. (Iowa) 91 N. W. 767, in which case a stipulation as to amount of an attorney's fee had made uncertain the net amount recoverable after deducting "expense of collection." Retaining costs paid as a condition of opening default—Lounsbery v. Erickson (S. D.) 92 N. W. 1071.

Acceptance of public warrant for part waives appeal from disallowance of the remainder of a claim—Weston v. Falk (Neb.) 92 N. W. 204; Dakota County v. Borowsky (Neb.) 93 N. W. 686.

36. Acquiescing in the dismissal of mandamus as against a principal officer destroys the right to appeal from the order as affecting a subordinate for incidental relief—Evans v. United States, 19 App. D. C. 202. Appealability of release of sureties is waived by consent to dissolution of injunction for which bond was given—Kraeger v. Warnock, 114 N. Y. St. Rep. 687.

37. Temporary injunction—Stewart v. Pierce, 116 Iowa, 733.

38. For injunction bond—Sanders v. Ditch, 107 La. 333.

39. Delaying two years to move against an order allowing counsel fees for probating will does not defeat right to appeal from orphans' court's order refusing to vacate such order—Hamilton v. Shillington, 19 App. D. C. 268.

40. West v. West, 23 Ky. Law Rep. 1645.

41. Ball v. Wright, 115 Ga. 729.

42. Bergkofski v. Ruzofski, 74 Conn. 204.

43. Da Costa v. Dibble (Fla.) 33 So. 466.

44. He did not rest his case nor move to open the nonsuit—Appeal of White (Conn.) 53 Atl. 582.

45. Writ of error allowed after dismissal of appeal—Burdick v. Security Life Ass'n, 91 Mo. App. 529; Reed v. Kimsey, 98 Ill. App. 364. Certiorari conclusive of jurisdiction only; therefore no election—Porter v. Butterfield, 116 Iowa, 725.

46. Platte Land Co. v. Hubbard (Colo.) 69 Pac. 514.

47. Certiorari and appeal—Furman v. Motley, 67 N. J. Law, 174.

ment on review must be final, to destroy the right to further review.[48] The opposite party may bring error after an appeal if the review was only partial,[49] if he has assigned no cross-errors.[50] A loss of the right to review an order nisi by adoption and affirmance draws with it the right to appeal from an absolute order which follows.[51]

C. Pendency of a former appeal is ground for dismissal of a second,[52] unless the appeals are from determinations which lack identity.[53]

§ 2. *The remedy for obtaining review.*[54] *A. Appeal or error.*—An action for violating an ordinance being civil, and not criminal, is reviewable only as other civil actions.[55] Federal courts review decrees by appeal, judgments by error;[56] and this is the general rule,[57] though in some states error lies concurrently with appeal to the final decree or order,[58] and to some judgments error is a statutory mode of review.[59] In Illinois a chancery decree is reviewable in the trial court either by rehearing or bill of review, and in appellate courts either by appeal or error.[60] Only errors of law will be reviewed on a petition in error, and an appeal will not reach such matters.[61] For error on a trial in equity in Nebraska, error, and not appeal, is the remedy.[62] Error, and not appeal, is the remedy in Colorado of one who recovers judgment, but is dissatisfied with the relief given.[63] To be appealable it must adjudge something against appellant.[64] Those cases which in Missouri are reviewable without final judgment must be reviewed by appeal.[65] In Illinois, writ of error will lie to an invalid decree appointing conservators of insane persons, though there is also an appeal to the circuit court.[66] It makes no difference that parties agreed to try the cause on the wrong side of the court.[67] If it be doubtful which is right, both methods may be pursued, and the reviewing court will follow the correct procedure.[68] Appeal will lie to a certiorari improperly begun.[69] A writ of error will lie to a court of record to review a decision for which no statu-

48. Appeal and writ of error—Harburg v. Arnold, 87 Mo. App. 226. Judgment on procedendo—Johnson v. Murphy, 107 Tenn. 558.

49. Armijo v. Neher (N. M.) 68 Pac. 914.

50. Rector v. Hartford Deposit Co., 102 Ill. App. 554.

51. Order nisi opening default judgment—San Bernardino County v. Riverside County, 135 Cal. 618, 67 Pac. 1047.

52. Swortfiguer v. White, 134 Cal. xx., 66 Pac. 80.

53. Two applications for two different railway locations—Appeal of Cherryfield & M. E. R. Co., 95 Me. 361. To different parts of transaction—State v. Tolman, 106 La. 662.

54. How to proceed, see post, §§ 4-11.

55. Appeal and not error—Madison v. Horner (S. D.) 89 N. W. 474.

56. Highland Boy Min. Co. v. Strickley (C. C. A.) 116 Fed. 852.

57. Uecker v. Magdanz, 62 Neb. 618; Van Doren v. Empkic-Shugart Co. (Neb.) 90 N. W. 220. In New Jersey circuit court judgments are open to error only—Morse v. State (N. J. Law) 53 Atl. 693.

Proceeding to disconnect land from municipality is at law—Heebner v. Orange City (Fla.) 32 So. 879. Executor's application to sell land is at law and not in equity—In re Entenmann (Neb.) 89 N. W. 1033. Mandamus is at law—Jabine v. Oates, 115 Fed. 861. Error lies to judgment in eminent domain—Denver Power Co. v. Denver & R. G. R. Co. (Colo.) 69 Pac. 568. A proceeding before a probate court to open a decree of probate is equitable (Code Civ. Proc. § 675)—Williams v. Miles, 63 Neb. 859.

58. Bannard v. Duncan (Neb.) 90 N. W. 947.

59. To judgments in the supreme court under the Railroad Tax Act, § 28, error lies—State v. Erie R. Co. (N. J. Err. & App.) 50 Atl. 918.

60. Mathias v. Mathias, 104 Ill. App. 344.

61. Hume v. U. S. (C. C. A.) 118 Fed. 689. Denial of leave to amend—Reiss v. Argubright (Neb.) 92 N. W. 985. Exclusion of evidence—Kinney v. Bittinger (Neb.) 92 N. W. 1005. Right to jury trial of an issue of fact—Day & Frees Lumber Co. v. Bixby (Neb.) 93 N. W. 688. Admitting or excluding evidence—Hillers v. Yeiser (Neb.) 93 N. W. 989.

62. Browne v. Palmer (Neb.) 92 N. W. 315.

63. Patrick v. Morrow (Colo. App.) 70 Pac. 952.

64. Colorado Fuel & Iron Co. v. Knudson (Colo. App.) 70 Pac. 698.

65. Rev. St. 1899, § 806; Pittsburgh Plate Glass Co. v. Peper (Mo. App.) 70 S. W. 910.

66. Haines v. Cearlock, 95 Ill. App. 203.

67. Hooven, Owens & Rentschler Co. v. John Featherstone's Sons (C. C. A.) 111 Fed. 81, 49 C. C. A. 229, holding that enforcement by foreclosure of mechanic's lien is in equity.

68. Appeal and error—Hooven, Owens & Rentschler Co. v. John Featherstone's Sons (C. C. A.) 111 Fed. 81, 49 C. C. A. 229.

69. People v. Feitner, 65 App. Div. (N. Y.) 224.

tory mode of appeal is given.[70] Error should be brought where for some reason the party injured by a judgment has been unable to avail of his primary statutory remedy by appeal.[71] Error will not review an order not final.[72] Since a voluntary nonsuit is in defendant's favor, he cannot appeal, but error will lie.[73] Error lies to review nonsuit or dismissal as to part of defendants.[74]

B. Certificate or reservation.[75]—Not cases, but questions of law, may be certified by the circuit court of appeals to the supreme court,[76] and only when they present a distinct legal proposition separated from the mass of the record;[77] and the question must be one upon which the circuit judges are doubtful or desire instruction.[78]

Mixed questions are not "questions of law" which may be reserved or certified.[79] The Massachusetts superior court may report a decision coming from the registration court, though the latter may also do so direct.[80]

C. Ordinary or extraordinary and special modes of review.—Statutory remedies, as appeal or error, must, if adequate or applicable, be resorted to, and not certiorari or writ of review,[81] or supervisory control,[82] or prohibition,[83] though prohibition may

70. Decision of county court on apportionment of property on division of towns—Jamaica v. Vance, 96 Ill. App. 598.

71. Want of notice—Haines v. Cearlock, 95 Ill. App. 203.

72. J. L. Gates Land Co. v. Olds, 112 Wis. 268.

73. Florence & C. C. R. Co. v. Maloney (Colo. App.) 69 Pac. 270.

74. Ellis v. Almand, 115 Ga. 333; Johnson v. Porter, 115 Ga. 401.

75. Courts may also specially order matters to be included in bills of exceptions, thus reserving questions which would not otherwise go up. See post, § 9.

76. German Ins. Co. v. Hearne (C. C. A.) 118 Fed. 134.

77. Felsenheld v. U. S., 186 U. S. 126.

78. German Ins. Co. v. Hearne (C. C. A.) 118 Fed. 134.

79. Burns' Rev. St. 1901, § 642—Lautman v. Miller, 158 Ind. 382.

80. See Statutes—Lancy v. Snow, 180 Mass. 411.

81. Eels v. Bailee (Iowa) 92 N. W. 668; P. L. 1899, p. 552, § 6—Smith & Co. v. Holshauer (N. J. Sup.) 52 Atl. 308. Temporary injunction—Parker v. Superior Ct., 25 Wash. 544, 66 Pac. 154, but certiorari was allowed as to part of it because appeal was too slow and relief doubtful. Distribution of an estate, appealable (Code Civ. Proc. §§ 1721,1722)—State v. District Ct., 26 Mont. 378, 68 Pac. 411. Action for violation of ordinances appealable—State v. Lockhart, 28 Wash, 460, 68 Pac. 894. Appeal not too slow to review denial of discharge of receiver—State v. Superior Ct., 28 Wash. 584, 68 Pac. 1052. Order of distribution under earlier will probated pending appeal from annulment of former probate, appealable—State v. Superior Ct., 28 Wash. 677, 69 Pac. 375. Restraining order—State v. Superior Ct., 30 Wash. 177, 70 Pac. 256. Certiorari proper where no detriment had yet befallen—Huyser v. School Inspectors (Mich.) 91 N. W. 1020. Denial of motion to dismiss an appeal from a justice's judgment (Code, § 4154)—Eels v. Bailee (Iowa) 92 N. W. 668. Dismissal of appeal for failure of the sureties on the bond to justify is not an excess of jurisdiction, hence certiorari is not the remedy—State v. District Ct. (Mont.) 70 Pac. 516; nor are rulings sustaining objections to introduction of evidence on the ground that the complaint stated no cause of action dismissing it, discharging jury and entering judgment—State v. District Ct. (Mont.) 70 Pac. 981. Judgment in favor of materialman against owner reviewable by appeal and not by writ of review—Weldon v. Superior Ct., 138 Cal. 427, 71 Pac. 502. Appeal lies from district court judgment on appeal from mayor's court—State v. Miller (La.) 33 So. 739. Motion to postpone disbarment proceedings for absence of witnesses and shortness of time is reviewable on appeal—State v. District Ct. (Mont.) 71 Pac. 159.

Certiorari is proper to review lunacy proceedings—State v. Jackson, 93 Mo. App. 516. In Pennsylvania, the merits cannot be reviewed in inquisition of lunacy, because no way is provided to bring the evidence into the record, the review being by certiorari—Commonwealth v. Harrold (Pa.) 53 Atl. 760.

82. Denial of survey and inspection of mining claim—State v. District Ct., 26 Mont. 274, 67 Pac. 625.

83. In re Huguley Mfg. Co., 184 U. S. 297; Johnston v. Hunter, 50 W. Va. 52. Appeal pending from injunction against enforcement of ordinance—People v. District Ct., 29 Colo. 1, 66 Pac. 888. New trial in violation of mandate on reversal; appeal lies—King v. Doolittle, 51 W. Va. 91. Removal of police commissioners—People v. Sherman, 171 N. Y. 684; affirming 66 App. Div. 231. Review of special assessment appeal lies—People v. McCue, 74 App. Div. (N. Y.) 302. Errors curable by nunc pro tunc entry which will be appealable—Wand v. Ryan, 166 Mo. 646.

Want of jurisdiction assailable by certiorari—People v. De France, 29 Colo. 309, 68 Pac. 267. Error on motion for change of venue not reviewable by prohibition—People v. District Ct. (Colo.) 71 Pac. 388. Action of lower court on appeal from county commissioners is reviewable by appeal and not prohibition—State v. Neal, 30 Wash. 702, 71 Pac. 647. Proceedings on application for distribution of an estate reviewable by appeal and not prohibition—State v. Superior Ct., 30 Wash. 700, 71 Pac. 648. Judgment im-

lie concurrently with appeal if jurisdiction is totally divested.[84] or if irreparable injury would follow a resort to appeal or error.[85] An appeal is not inadequate merely because expensive, dilatory, and annoying.[86] Like rules apply to mandamus,[87] which does not lie to review judicial acts.[88]

Mandamus, not appeal or error, is the remedy for refusal to settle a bill of exceptions.[90] If the refusal of the district court to dismiss an appeal for insufficiency of the bond be complained of, an order refusing to dismiss should be appealed, or mandamus brought to increase the bond.[91]

Suspension of an attorney with application or notice is open to a "writ of review" or certiorari.[92] The provision that one of the class of actions over which the circuit court of appeals has final jurisdiction may be brought to the supreme court "by certiorari or otherwise" means by other proceeding of the same kind as certiorari: hence it excludes appeal.[93] To review an unjust judgment, appeal from which has been prevented by the adversary, certiorari, if applicable, and not injunction, is the remedy;[94] but injunction may issue instead of appealing if jurisdiction has failed.[95] An order or judgment will not be controlled by injunction if appeal or error afford a remedy,[96] nor nullified by habeas corpus if otherwise reviewable or adequately remediable.[97] Especially will it be seldom done if the action of a state court is thus brought to a federal court.[98] Proceedings of the district court as distinguished from those of the judge under the Chinese exclusion act, being appealable, are not reviewable by this remedy.[99]

Concurrent modes of review may present an election.[1] Appeal may lie in the

posing penalty for contempt by error and not by prohibition—Aichele v. Johnson (Colo.) 71 Pac. 367.

84. By change of venue—People v. District Ct. (Colo.) 69 Pac. 597.

85. Exposure of manner in which voters voted at election in controversy—State v. Spencer, 166 Mo. 271. Receivership proceedings, appeal too slow—Gates v. McGee, 15 S. D. 247.

86. State v. Superior Ct., 30 Wash. 700, 71 Pac. 648. Error in taking jurisdiction is reviewable by appeal, not prohibition—State v. Superior Ct. (Wash.) 71 Pac. 722.

87. **Remedy by appeal**—In re Huguley Mfg. Co., 184 U. S. 297, 46 Law. Ed. 549. Code Civ. Proc. § 646—State v. Westover (Neb.) 89 N. W. 1002. Refusal to issue commission to take testimony—State v. Judge Civil District Ct., 107 La. 474. Order in contempt against contumacious juror—Ponpard v. Frazer (Mich.) 89 N. W. 577. Justice's order dismissing garnishment against corporation (Comp. Laws, §§ 1014, 1018)—Hyde v. Chadwick (Mich.) 90 N. W. 333. Striking scandalous affidavits and refusing new trial thereupon—State v. District Ct., 26 Mont. 372, 68 Pac. 465. Vacation of order for new trial—State v. Westover (Neb.) 89 N. W. 1002. Refusal to revoke probate—State v. Tallman, 29 Wash. 317, 69 Pac. 1101. Application of lunatic to be declared sane—Aldrich v. Superior Ct., 135 Cal. 12, 66 Pac. 846. Denial of motion to compel clerk to reinstate cause—Southern R. Co. v. Walker, 132 Ala. 62.

Mandamus will not lie if error or appeal is appropriate—State v. Jessen (Neb.) 92 N. W. 584. Mandamus will not lie to correct errors of fact by a board of equalization sitting in review of assessments—State v. Savage (Neb.) 91 N. W. 716.

Dismissal of appeal on court's motion entitles either party to entry of judgment which may be reviewed on error, hence mandamus to compel vacation of dismissal is wrong—Detroit, G. R. & W. R. Co. v. Eaton Cir. Judge, 128 Mich. 495.

Interlocutory vacation of dismissal, not appealable—Ex parte Jones, 133 Ala. 212. Appeal from commitment for contempt too slow—Dillon v. Shiawassee Cir. Judge (Mich.) 91 N. W. 1029. Appeal and not mandamus is the remedy where a court decides that the complaint states no cause of action, discharges the jury and enters judgment for defendant—State v. District Ct. (Mont.) 70 Pac. 981.

88. See Mandamus.

90. Williamson v. Joyce, 137 Cal. 151, 69 Pac. 980; Hartford L. & A. Ins. Co. v. Rossiter, 196 Ill. 277; affirming 98 Ill. App. 11.

91. Metropolitan Bank v. Blaise (La.) 33 So. 95.

92. McNamee v. Steele (Idaho) 69 Pac. 319.

93. Act of Congress, March 3, 1891, c. 517, § 6—Hugu[illegible]y Mfg. Co. v. Galeton Mills, 184 U. S. 290, 46 Law. Ed. 545.

94. Chapman v. Kane, 97 Ill. App. 567.

95. Judgment on new trial granted without notice—Smith v. Carroll (Tex. Civ. App.) 66 S. W. 863.

96. Enforcement of ordinance, appeal lies—Boin v. Jennings, 107 La. 410. Injunction not available to one who failed to appeal—Kyle v. Richardson (Tex. Civ. App.) 71 S. W. 999. Injunction may lie if because there is no right of appeal plaintiff would be remediless—Board of Com'rs v. Spangler (Ind.) 65 N. E. 743.

97. In re Lewis, 114 Fed. 963; but see Ex parte Green, 114 Fed. 959.

98. Storti v. Massachusetts, 183 U. S. 138.

99. In re Chow Loy, 110 Fed. 952.

1. Furman v. Motley, 67 N. J. Law, 174.

same cause wherein certiorari has been brought, being for the review of different matters.[2] The remedy by motion to vacate may sometimes concur with appeal.[3]

Judgment for demurrant to a petition to vacate an order in bankruptcy is reviewable by petition under section 24b of the bankruptcy act, and not by appeal under section 25.[4]

If a cause has been improperly brought to the circuit court of appeals on error, certiorari will issue from the supreme court.[5] Prohibition in similar cases must issue before the court below is concluded by the judgment's becoming final.[6] If a court, in refusing to remand a cause, acts within its jurisdiction, certiorari will not lie, though the court making the transfer did exceed its jurisdiction.[7]

§ 3. *The parties. A. Persons entitled to take up the cause.*—No person can obtain a review unless he has a legal interest which is affected.[8] An interpleading party who has been dismissed cannot appeal the main cause.[9] If a partner of an attachment debtor intervene to claim property for the firm, and it be decided against his claim, he may appeal.[10] An intervening stockholder of an original party is a third party, and may appeal from a dismissal of his petition, though he fails to make his corporation a party.[11] A successful party may appeal if there was no jurisdiction.[12] Any person interested and aggrieved may appeal from a proceeding not inter partes, especially in probate and administration orders.[13]

Plaintiff cannot say that a defendant whom he sued lacks an appealable interest.[14] A mere lien, as that of an attorney, on a judgment, is not an appealable interest;[15] but a lien on the subject-matter of the judgment is.[16]

An appeal by the head of an executive department of a municipality is equivalent to an appeal by the municipality.[17] A public officer who is agent for transaction of legal business may appeal without special authorization.[18] A municipality which has no standing to oppose confirmation of a special assessment cannot, for lack of grievance, appeal from a refusal to confirm.[19] An action for penalties being civil, the state may appeal.[20]

2. Porter v. Butterfield, 116 Iowa, 725.

3. Order for final settlement made without notice to co-executor may be attacked by motion in orphans' court to set aside as well as by appeal—Yakel v. Yakel, 96 Md. 240.

4. In re Ives (C. C. A.) 113 Fed. 911.

5. Security Trust Co. v. Dent, 187 U. S. 237.

6. Klingelhoefer v. Smith (Mo.) 71 S. W. 1008.

7. State v. Circuit Court (Wis.) 93 N. W. 16.

8. If neither a party nor a privy the record must show interest—J. L. Gates Land Co. v. Olds, 112 Wis. 268. Must be party to suit or judgment—Carlson v. Gilbert, 99 Ill. App. 574; Ackerman v. People, Id. 576. Voluntary appearance and answer recognized by court suffices—Richey v. Guild, 99 Ill. App. 451. Abstract questions not heard—McComb v. Title & Trust Co. (N. Y.) 36 Misc. 370.

Foreclosure decree setting aside a conveyance and revesting title in an intermediate grantee, who assumed the mortgage, does not aggrieve the original mortgagor—Gandy v. Coleman, 196 Ill. 189.

9. Warner v. Crandall, 88 Mo. App. 321.

10. Hopkins v. Prichard, 51 W. Va. 385.

11. Massey v. Louque (La.) 33 So. 764; White v. Louque, Id.

12. Libelant in divorce—English v. English, 19 Pa. Super. Ct. 586.

13. Probate or refusal thereof—In re Cartright's Will (N. J. Eq.) 51 Atl. 713. Trustees of a cemetery in which a vault was to be built and who were to take a legacy upon a trust in case the legatee should die, have no interest to appeal from a refusal of probate—People v. McCormick, 201 Ill. 310. Board of medical examiners if aggrieved by decision of district court on appeal from their action on application for a license, may appeal to supreme court—State v. District Court (Mont.) 69 Pac. 710. Heirs can appeal decree to sell lands—Kronenberger v. Heineman, 104 Ill. App. 156. Comp. St. c. 20, § 42, surviving husband of deceased wife has interest in accounting of administrator who collected rents of land in which husband had life estate—In re Gannon's Estate (Neb.) 89 N. W. 1028; Gannon v. Phelan, Id.

Probate surety cannot appeal from final settlement—Shaw v. Humphrey, 96 Me. 397.

14. State v. Cranney (Wash.) 71 Pac. 50.

15. Attorney for deceased plaintiff—Barton v. New Haven, 74 Conn. 729.

16. Mortgagee of lands condemned—Omaha Bridge Co. v. Reed (Neb.) 92 N. W. 1021.

17. People v. Sturgis (N. Y.) 30 Misc. 596.

18. Township supervisor—Long v. Ionia Probate Judge (Mich.) 89 N. W. 938.

19. Construing Yonkers Charter, tit. 7, §§ 10, 11—In re Nepperhan St. in Yonkers (N. Y.) 71 App. Div. 534.

Representatives or trustees are not aggrieved by orders which simply adjust rights of contending beneficiaries.[21] An individual is not aggrieved by a judgment affecting him in a representative capacity.[22] An executor is aggrieved by refusal to probate a codicil,[23] or by an order directing an account.[24] A receiver's personal interest goes only to compensation and reimbursement;[25] but a trustee appointed simply to make sale in partition may appeal if by any means he becomes subjected to the jurisdiction of the court and rendered liable.[26] A statutory guardian cannot appeal or review a decision on terms of a compromise made by the guardian ad litem.[27]

Order compelling a witness to answer questions on a commission,[28] adjudging against a disclaiming party,[29] or sustaining demurrer to an intervening co-defendant's plea which would abate the action,[30] aggrieves the witness, the disclaimant, and the defendant, respectively. An answering defendant alleged to be a co-owner with plaintiff is interested to appeal from the striking of a partition complaint.[31] Opening a decree settling titles and deciding adversely after the successful party has sold and taken a mortgage affects his lien, and he may appeal.[32] No one who is not restrained can appeal from an injunction.[33]

If in default, a party cannot appeal, even against a co-party,[34] except to attack jurisdictional defects.[35] A plaintiff is in default if he allows his action to lapse;[36] but failure to plead over after demurrer is not a default.[37]

Though not record parties, persons claiming as representatives may appeal.[38] A covenantor for title called in to defend has the right, though he defends in the covenantee's name;[39] but a mortgagee, not party, whose right is prior to the beginning of ejectment against the mortgagor is not affected.[40]

B. Necessary or proper parties to be joined or brought in.[41]—There must be an appellee;[42] and if, by death of a party and failure to substitute a personal representative, there is none, jurisdiction fails.[43]

Co-parties need not appeal or join where "any person who considers himself aggrieved" may appeal as of right.[44] One named as a co-defendant, but never

20. State v. Waters-Pierce Oil Co. (Tex. Civ. App.) 67 S. W. 1057.

21. Taxation of costs to one of several funds of the estate—Grabill v. Plummer, 95 Md. 34. Decree which applies a property to the claim of a particular creditor excluding the others—Chinn v. Curtis, 24 Ky. Law Rep. 1563.

22. An executor—State v. District Ct., 26 Mont. 369, 68 Pac. 334.

23. In re Stapleton's Will (N. Y.) 71 App. Div. 1.

24. Tillinghast v. Brown University (R. I.) 52 Atl. 891.

25. Sutton v. Weber, 104 Ill. App. 260.

26. Arnold v. Carter, 15 App. D. C. 359.

27. Elder v. Adams, 176 Mass. 303.

28. In re Dittman (N. Y.) 65 App. Div. 340.

29. Stearns Ranchos Co. v. McDowell, 134 Cal. 362, 66 Pac. 702.

30. Both claimed rights in maintenance of a dam, because of defect in parties—Castle v. Madison, 113 Wis. 346.

31. Younger v. Superior Ct., 136 Cal. 652, 69 Pac. 435.

32. Hackleman v. Hackleman, 199 Ill. 54.

33. Stearns-Roger Mfg. Co. v. Brown (C. C. A.) 114 Fed. 939; Portland G. M. Co. v. Brown, Id.

34. Henderson Hull & Co. v. McNally, 168 N. Y. 646. Co-defendants—Lexington v. Home Const. Co., 23 Ky. Law Rep. 1957.

35. Failure of attachment writ to state cause of action—Cline v. Patterson, 191 Ill. 246. Default judgment after improper refusal to transfer cause to another district—Goldman v. Jacobs (N. Y.) 38 Misc. 791.

36. Action to try validity of will—Delmar v. Delmar (N. Y.) 65 App. Div. 552. Eminent domain proceeding—Florida, C. & P. R. Co. v. Bear (Fla.) 31 So. 287.

37. People v. Manhattan R. E. & L. Co. (N. Y.) 74 App. Div. 595.

38. Executrix succeeding temporary administrators—Kidd v. Morris, 127 Ala. 393.

39. Covenantee who was nominal appellant sought to dismiss—Ladd v. Kuhn, 27 Ind. App. 595.

40. J. L. Gates Land Co. v. Olds, 112 Wis. 265.

41. Mode of impleading parties, see post, § 6.—"Applications," etc.

Amending as to parties, and substitutions, see post, § 11,—"Amendments of parties."

42. In re Hurst Home Ins. Co., 23 Ky. Law Rep. 940.

43. Barton v. New Haven, 74 Conn. 729.

44. Appeal under Rev. St. art. 2759, from refusal to appoint appellant as guardian, sureties for costs did not appeal—Arthur v. Reed, 26 Tex. Civ. App. 574.

served or brought, need not join in the appeal, though a necessary party to the action.[45] Licensee of patent may appeal in patent case without the patentee.[46] Defaulting defendants need not be joined with appellees who answered.[47] Under statutes permitting part of co-parties to appeal in the names of all, all must be joined,[48] or at least named as appellants.[49] Co-defendants may unite as on original action if the judgment be on a cross complaint.[50] Persons who were heard to plead or demur are parties.[51] Defect of parties is not cured by the fact that on an independent appeal they are impleaded.[52]

In Indiana, vacation appeals must bring in all parties,[53] though different kinds of relief be granted, and one party be not affected.[54] The statute does not require it in term-time appeals.[55]

All the parties who may be affected by a reversal should be brought in,[56] in order to give jurisdiction.[57] All joint defendants must be brought in, or else a severance of interest in the judgment must appear on record.[58] If the success of an appeal may leave too large a judgment standing against a co-party, he should have notice of the appeal to bring him in.[59] A co-beneficiary of a deed has an interest which makes him a necessary party if the deed is to be set aside.[60] A receiver is necessarily affected by writ of error to a judgment settling his final report.[61] All who by a supplemental pleading stand as adverse to appellant must be made appellees to an appeal from a dismissal of it as a whole.[62] Attorneys for poor persons accused of crime are the adverse parties who must be cited when the county appeals from an allowance of fees to such attorneys.[63]

Proper parties.—An administrator cannot have a person to whom money was paid made party on appeal from an accounting in order to have judgment against him in case of disallowance.[64]

Successors in title and interest and substituted parties.—A personal representative has sufficient title to bring error without a revival of the judgment,[65] but, if the interest be one which passes to heirs, the revival should be in their

45. Hooven, Owens & Rentschler Co. v. John Featherstone's Sons (C. C. A.) 111 Fed. 81.

46. Latter refused to appeal—Excelsior Pipe Co. v. Seattle (C. C. A.) 117 Fed. 140.

47. Kaufmann v. Preston, 158 Ind. 361.

48. 3 Starr & C. 1896, p. 3099, § 70—Cooke v. Cooke, 194 Ill. 225.

49. Burns' Rev. St. 1901, § 647, allows part to appeal; held not sufficient to join others as appellees in assignment of errors—Smith v. Fairfield, 157 Ind. 491.

50. Downing v. Rademacher, 136 Cal. 673, 69 Pac. 415.

51. Commissioners in suit against sheriff —Small v. Edwards, 65 Kan. 858, 69 Pac. 165. Voluntary appearance and answer permitted —Richey v. Guild, 99 Ill. App. 451.

52. Collateral appeals from foreclosure of lien—Hall v. New York, 79 App. Div. 102.

53. Burns' Rev. St. 1901, § 647—Brown v. Sullivan, 158 Ind. 224.

54. Mellott v. Messmore, 158 Ind. 297.

55. Burns' Rev. St. 1901, § 647a—Gunn v. Haworth (Ind.) 64 N. E. 911.

56. Schrage v. McCoy, 28 Ind. App. 434; Moyer v. Badger Lumber Co., 64 Kan. 885, 67 Pac. 852.

On appeal from confirmation of sale, the purchasers should be brought in—Phillips v. Keel, 24 Ky. Law Rep. 1752. On foreclosure of sale of land by assignee of the notes the vendor if held as a warrantor has such an interest as to make him a necessary party—Massie v. Louque (La.) 33 So. 764; White v. Louque, Id. Mortgagor against whom deficiency is awarded must be made party to appeal by lienor claiming above the mortgage, though after he be adjudged bankrupt—T. C. Power & Bro. v. Murphy, 26 Mont. 387, 68 Pac. 411.

Unaffected ones may be omitted—Coler v. Allen (C. C. A.) 114 Fed. 609. Disclaiming parties not necessary or proper—Smalley v. Laugenour (Wash.) 70 Pac. 786.

57. Willits v. Harlan County (Neb.) 90 N. W. 656.

58. Fitzpatrick v. Graham (C. C. A.) 119 Fed. 353.

59. Appellant was the co-party's grantee and sought to establish a deficiency in acreage, which would have lessened the co-party's liability for purchase money—Clayton v. Sievertsen, 115 Iowa, 687.

60. Arnett v. McGuire, 23 Ky. Law Rep. 2319.

61. Haigh v. Carroll, 197 Ill. 193.

62. Kreuter v. English Lake Land Co. (Ind.) 65 N. E. 4.

63. Green Lake County v. Waupaca County, 113 Wis. 425.

64. James v. Craighead (Tex. Civ. App.) 69 S. W. 241.

65. Haines v. Cearlock, 95 Ill. App. 203. Personal representative may continue appeal from divorce decree and grant of alimony after death of both parties—Coffman v. Finney, 65 Ohio St. 61, 55 L. R. A. 794.

names.[66] If administration is unnecessary, and the heirs are brought in, failure to substitute an administrator of a deceased party does not vitiate jurisdiction.[67] The administrator of a receiver should be substituted when the appeal concerns personalty in his hands.[68] When the plaintiff in a personal injury case has died before the transcript is filed, the appeal is perfected in Indiana by substituting the personal representative as appellee and serving him with notice of appeal.[69] It is not necessary to bring in transferees pendente lite if no abatement thereby results;[70] nor to make a substitution for one who dies pending appeal.[71] Therefore, on the death of a co-plaintiff in error, the right to reverse an erroneous judgment is in the survivors;[72] but there must be an adversary in court either by appearance or substitution.[73]

§ 4. *Adjudications which may be reviewed. A. Statutes and legislation.*—The appealability of a judgment may be retroactively changed or destroyed.[75] An act taking away jurisdiction of certain judgments will operate on all those subsequently rendered, but a further provision that it shall apply to all causes pending in inferior courts at the time does not make it retroact on judgments already rendered and subject to review;[76] but an act repealing a restrictive act does not, ipso facto, give jurisdiction to review judgments which, being rendered while the earlier act was in force, were not at the time reviewable.[77] Provisions allowing the legislature to limit and regulate the appellate jurisdiction given by the constitution should not be construed to authorize the destruction of the right of appeal.[78]

B. Dependent on the general form or the character of the adjudication. 1. *Nature of decision in general.*—Nonjudicial acts[79] and ministerial orders are not reviewable,[80] and hence "action or suit" which is appealable does not include a proceeding to obtain a vessel license from the district court of Alaska.[81] Nor can an act be reviewed which is for the judge, and not for the court.[82] The action of a justice cannot be reviewed under a statute giving an appeal from decisions of a court.[83] A pro forma decree without reference to the merits, but to allow the case to go up, will not be reviewed.[84] A futile review will not be made.[85]

66. Urlau v. Weeth (Neb.) 89 N. W. 427.

67. Applied where guardian died pending appeal from settlement of his account—Magness v. Berry (Tex. Civ. App.) 69 S. W. 987.

68. State v. German Exch. Bank, 114 Wis. 436.

69. Western Union Tel. Co. v. Adams, 28 Ind. App. 420.

70. Code, § 3476—Emerson v. Miller, 115 Iowa, 315.

71. Code, § 4150—Williams v. Williams, 115 Iowa, 520.

72. Administrator need not be brought in—Jameson v. Bartlett, 63 Neb. 638, holding that the "right of action" which survives under Code Civ. Pr. § 456, is the right to reversal.

73. Barton v. New Haven, 74 Conn. 729.

75. Statutes may retroactively take away appeal (Act March 12, 1901, § 6)—Fitch v. Long (Ind. App.) 64 N. E. 622. Act March 12, 1901, took away right to appeals from justice's court which were not perfected until after the act, though the judgment was rendered and appeal taken before—Southern Indiana R. Co. v. Thompson, 27 Ind. App. 367. Right of appeal from judgment of court of claims was taken away by the Act of Congress, March 3, 1887, c. 387, though appeal had already been made and notice given—District of Columbia v. Eslin, 183 U. S. 62. The act repealing the right to appeal from the opening of a default in a municipal court is operative only as to actions subsequently commenced (Laws 1902, c. 580, §§ 257, 261)—Johnson v. Manning, 114 N. Y. St. Rep. 738.

76. Act May 12, 1902, limiting jurisdiction of supreme court—Gompf v. Wolfinger (Ohio) 65 N. E. 878.

77. Act Oct. 22, 1902, repealing Act May 12, 1902—Gompf v. Wolfinger (Ohio) 65 N. E. 878.

78. Const. art. 8, § 3—Finlen v. Heinze (Mont.) 70 Pac. 517.

79. Refusal by collector to permit transit of Chinese—Fok Yung Yo v. U. S., 185 U. S. 296.

80. Proceeding by probate court under 94 Ohio Laws, pp. 332, 333—Casper v. Norris, 23 Ohio Cir. Ct. 119. Grant or refusal of liquor license is quasi-judicial and appealable—State v. Alliance (Neb.) 91 N. W. 357.

81. Pacific Steam Whaling Co. v. U. S., 187 U. S. 447.

82. Appointment of a notary—Steinheimer v. Jones, 114 Ga. 349.

83. Denial of certiorari—Inhabitants of Brockton v. Plymouth County Com'rs (Mass.) 66 N. E. 427. Error does not lie from judgment of supreme justice in habeas corpus to supreme court—Ex parte Cox (Fla.) 33 So. 509.

The judgment must have been completed or perfected, as well as decision announced.[86] The clerk's filing indorsement is equivalent to entry.[87] It must in terms of certainty finally determine the rights.[88] An equity decree, filed with opinion findings and requests, is nisi until exceptions are heard.[89] When conditions are attached the judgment must show what will be the consequence if they are not met.[90] After judgment is entered, appeal should be from it, and not from an order for judgment.[91]

Void orders are not appealable,[92] nor are judgments which rest on them;[93] but an order made on a notice which was merely irregular is.[94] A void order should be first assailed by motion, and the order thereon appealed.[95]

Adjudications founded on the discretion or wisdom of the trial court are not reviewable,[96] except where the judicial, and not the absolute, discretion is ad-

84. Brown v. Brown, 64 App. Div. (N. Y.) 544.

85. Ledebuhr v. Krueger (Wis.) 91 N. W. 1012. Error must be one which the court can correct—Rausch v. Barrere (La.) 33 So. 602. Of injunction against holding election after time for it has passed—Tampa Gas Co. v. Tampa (Fla.) 33 So. 465.

Appeals will be dismissed if there is no longer an actual controversy—Wallace v. Deane (Idaho) 69 Pac. 62; McGill v. Bartman (Ky.) 68 S. W. 1100; Wirth v. Wirth, 181 Mass. 541. See, also, cases cited under § 11, post, "Grounds for dismissal."

86. Demurrer sustained or overruled but no judgment yet entered is incomplete (Hollis v. Nelms, 115 Ga. 5; Sloss Iron & Steel Co. v. Knowles, 129 Ala. 410; Tutwiler Coal, C. & I. Co. v. Enslen, 129 Ala. 336; Tinney v. Central of Georgia R. Co., 129 Ala. 523; Memphis & C. R. Co. v. Martin, 131 Ala. 269; Martin v. Sherwood, 74 Conn. 202; Foster v. Bowles, 138 Cal. 449, 71 Pac. 495) even though the party stand on his pleadings—Hollingsworth v. Hollingsworth (Ind. App.) 64 N. E. 900. Sustaining demurrer and refusing leave to plead over—Turner v. Hamilton (Wyo.) 67 Pac. 1117. Overruling demurrer by one defendant—Mackenzie v. Judson, 96 Ill. App. 26. Sustaining demurrer and ordering dismissal for want of amended pleadings—Harvey v. Cochran, 103 Ill. App. 576.

Judgment against plea to the jurisdiction—Ross v. Mercer, 115 Ga. 353. Striking answer on a rule to bring in new parties—Ray v. Anderson (Ga.) 43 S. E. 408.

Approval of referee's report on third person's claim against property of bankruptcy, final decree is directly reviewable—Walter Scott & Co. v. Wilson (C. C. A.) 115 Fed. 284.

Order nisi for dismissal not followed by judgment—Plaisted v. Cooke, 181 Mass. 118. Order to clerk to enter judgment upon default of certain conditions—Kennedy v. Citizens' Nat. Bank (Iowa) 93 N. W. 71.

Mere verdict—Nordin v. Berner, 15 S. D. 611. Findings, sufficiency of words examined and held not to be a judgment—Barnemann v. Morrison, 132 Ala. 638. Judgment not entered on verdict when appeal taken—Kimmel v. Johnson, 18 Pa. Super. Ct. 429.

Finality from which to compute time for appeal, see post, § 6-B.

Finality of judgment as distinguished from the mere completion of it by rendition entry or the like, see post, §§ 4-B, 5.

87. O'Connor v. McLaughlin, 114 N. Y. St. Rep. 741.

88. Judgment on demurrer "in favor of defendants and against plaintiff for costs" held uncertain—Butte & B. Consol. Min. Co. v. Montana Ore Purchasing Co. (Mont.) 69 Pac. 714. Defendant "discharged hence without day" held sufficient—Powell v. Canaday, 96 Mo. App. 27. Mere recital that demurrer was sustained insufficient—White v. Whatley, 128 Ala. 524; Memphis & C. R. Co. v. Martin, 131 Ala. 269. Clerk's entry on record by way of mere recital—Richter v. Koopman, 131 Ala. 399; Cowan v. Campbell, 131 Ala. 211.

89. Shamokin & C. T. Light & Power Co. v. John, 18 Pa. Super. Ct. 498.

90. Order to reinstate dismissed officer provided he claims no salary for interim—People v. York, 169 N. Y. 452.

91. Halliday v. Barber, 38 Misc. Rep. (N. Y.) 116.

92. Decree in vacation—Adams v. Wright, 129 Ala. 305. Order continuing a temporary restraining order after appeal taken to a higher court—Jones v. Walter, 24 Ky. Law Rep. 878. Probate order for transfer of property not in state—Stafford v. American Missionary Ass'n, 22 Ohio Cir. Ct. 399. Proceedings under certiorari after judgment refusing to dismiss it for want of a bond—Alabama Midland R. Co. v. Stevens (Ga.) 43 S. E. 46. Special term cannot tax register's fees under Code Civ. Proc. § 3287—In re Howe, 66 App. Div. (N. Y.) 7. Refusal of special term to dissolve ex parte injunction is appealable under Code Civ. Proc. §§ 626, 1347, 1348—Marty v. Marty, 66 App. Div. (N. Y.) 527.

93. On retrial after invalid vacation of first judgment—Akerman v. Ford (Ga.) 42 S. E. 777.

94. New trial, notice premature—Bell v. Staacke, 137 Cal. 307, 70 Pac. 171.

95. Ex parte order allowing attorney fees out of funds in court—Board of Education v. Ward, 50 W. Va. 443. The objector should move to vacate and appeal from that; ex parte order vacating an accounting before surrogate—In re Armstrong, 110 N. Y. St. Rep. 40.

96. Stephens v. Addis, 19 Pa. Super. Ct. 185. Refusal to permit amendment after mandate and before entry of judgment—Kelly v. New Haven Steamboat Co. (Conn.) 52 Atl. 261. Refusal to hear oral evidence on motion for new trial, not within Pub. St. c. 153, § 8—Borley v. Allison, 181 Mass. 246. Refusal to open a default (Code, § 602)

dressed.[97] Discretionary rulings during trial are not reviewed even when the appeal is entertained. Cases will be cited elsewhere.[98] A verdict set aside, or a refusal to do so, on considerations addressed to discretion, as excessiveness or sufficiency of evidence, is not reviewable, while, if error of law be the ground, the ruling is reviewable.[99]

"Merits," "principles of the cause," "orders preventing judgment," etc.—"Merits" of the controversy are not involved by a refusal to hear a motion to dismiss before a demurrer.[1] "Principles of the cause" cannot be settled by an appeal from exceptions to a pleading because too vague or uncertain,[2] nor by judgment on demurrer against an additional bill, which, however, is not supplemental.[3] Denial of a transfer of the cause is not appealable "to avoid delay" or decide "principles."[4] Judgment is not "prevented" by refusal to dismiss the action,[5] or by discharging attachment,[6] or by refusing to strike an application to amend for the purpose of recovering on a quantum meruit for a public improvement after a procedendo to enter injunction against a special assessment.[7] Dismissing an action for failure to bring it timely to trial after reversal is not a determination of the action preventing an appealable judgment; nor is a refusal to extend such time one.[8]

2. *Rulings relating to pleadings and process, and before trial.*—Orders denying the right to become a party (in a few states),[9] or sustaining[10] or dissolving jurisdictional process,[11] may be reviewed, but not the mere dissolution of,[12] or refusal to quash, attachments.[13] Rulings on motions to amend[14] or strike a pleading,[15]

—Browne v. Croft (Neb.) 91 N. W. 177. Refusal to set aside a verdict for insufficiency of evidence—Crossen v. Oliver, 41 Or. 505, 69 Pac. 308. Relief from orders taken by surprise or excusable neglect—Dunton v. Harper, 64 S. C. 338. Decree for costs in equity—West v. East Coast Cedar Co. (C. C. A.) 113 Fed. 742. Denial of leave to amend as matter of right—Hanley v. Board of County Com'rs, 87 Minn. 209. Refusal to exact cost bond or affidavit—Spicer v. Holbrook, 23 Ky. Law Rep. 1812. Surrogate's refusal to resettle an order—In re Sondheim, 69 App. Div. (N. Y.) 5. Setting aside of default during term—Norton v. Maddox (Tex. Civ. App.) 66 S. W. 319. Assignment of cause to one of two unoccupied trial terms—Collis v. Press Pub. Co., 68 App. Div. (N. Y.) 38. Motion for new trial for newly discovered evidence—Streep v. McLoughlin, 36 Misc. Rep. (N. Y.) 165; overruling motion for rehearing—Clerks' Inv. Co. v. Sydnor, 19 App. D. C. 89. Motion to amend is discretionary though statute gives it of right subject to terms imposed—Snook v. Munday, 96 Md. 514.

97. Appeal lies from decree on bill to vacate decree for fraud—Hendryx v. Perkins (C. C. A.) 114 Fed. 801.

98. See infra, § 13—"Rulings peculiar to province of trial court."

99. Wood v. Atlantic & N. C. R. Co., 131 N. C. 48. And see Streep v. McLoughlin, 36 Misc. Rep. (N. Y.) 165.

1. Garthwaite v. Bank of Tulare, 134 Cal. 237, 66 Pac. 326.

2. Answer disclosed no defense—Wallace v. Bobbitt, 79 Miss. 402.

3. A stockholder's bill to enforce a contract whereby he was to buy up a corporate property, is not supplemental to his bill for a receivership, though filed with it, and hence a judgment against it on demurrer does not adjudge the principles of the cause so as to be appealable—Smith v. Pyrites Min. & C. Co. (Va.) 43 S. E. 564.

4. Code, § 34—Vicksburg Waterworks Co. v. Vicksburg, 79 Miss. 510.

5. For non-compliance with Rev. St. 1898, § 2632—Benolkin v. Guthrie, 111 Wis. 554.

6. Spokane Dry Goods Co. v. Fritz, 26 Wash. 433, 67 Pac. 252.

7. Allen v. Davenport, 115 Iowa, 20.

8. Rev. St. 1898, §§ 3069, 3072—Sutton v. Chicago, St. P., M. & O. R. Co., 114 Wis. 647.

9. Rutledge v. Tunno, 63 S. C. 205.

Contra, see 17 Am. & Eng. Encyc. Law (1st Ed.) 648; Wenborn v. Boston, 23 Cal. 321; Cobre Grande Copper Co. v. Greene (Ariz.) 68 Pac. 524. Conditional leave to intervene was set aside before the party had come in and the petition showed only a case for leave in discretion of the court; not appealable—Massachusetts L. & T. Co. v. Kansas City & A. R. Co. (C. C. A.) 110 Fed. 28.

10. Against one who specially appears—Plano Mfg. Co. v. Kaufert, 86 Minn. 13.

11. Discharge of trustees after dissolution of attachment—Sprague v. Auffmordt (Mass.) 66 N. E. 416. Nonsuiting attachment action not a dismissal of writ for irregularity—Gates v. Avery, 112 Wis. 271.

12. Dissolution or vacation of attachment before judgment—Machen v. Keeler (N. M.) 68 Pac. 937; Jung v. Myer (N. M.) 68 Pac. 933. Order (before 1901) discharging attachment neither determines action nor prevents judgment—Spokane Dry Goods Co. v. Fritz, 26 Wash. 433, 67 Pac. 252.

13. Refusal to quash foreign attachment—Bellah v. Poole, 202 Pa. 71.

14. Denial of leave to amend—Ayers v. Makely, 131 N. C. 60. To amend notice of election contest—Hanley v. Board of Com'rs Cass County, 87 Minn. 209.

15. Demurrer—Breeding v. Grantland, 135 Ala. 497.

or for security for costs,[16] unless the right to it be statutory,[17] or to change the venue,[18] do not ordinarily affect any substantial right nor have appealable finality. Contra, as to an amendment out of time to conform to proof.[19]

If, on demurrer, the ruling must be final,[20] which it is not if the demurrer be special,[21] or if leave be given to amend,[22] or a pleading[23] or count[24] or cause of action be left standing.[25] The judgment, and not the mere ruling against demurrant, is appealable.[26] Judgments on dilatory pleas are not final.[27]

3. *Dismissals, nonsuits, orders to strike cause, etc.*—Dismissals determining the cause are reviewable;[28] otherwise, not.[29] Neither is a refusal to dismiss.[30] A ruling on a "motion" to dismiss an action as having abated will not be deemed to be judgment on a plea in abatement, which is not appealable.[31] If it works a final disposal of the cause, an order striking it,[32] or permitting a voluntary dismissal after allowing opening of an adverse judgment, is reviewable.[33] A voluntary nonsuit,[34] or an order taking one off,[35] is not reviewable, except by statute.[36] An involuntary nonsuit,[37] or ruling on motion to set it aside, is.[38] Nonsuiting an attachment action is not a dismissal of the writ for irregularity.[39] Refusal to direct a verdict after disagreement is not final.[40]

16. Refusal to require security for costs (Rev. St. 1898, § 3069)—Cullen v. Hanisch, 114 Wis. 24.

17. Watson v. Glassie, 95 Md. 658.

18. Rulings on change of venue (Comp. Laws, § 3422)—Peters v. Jones, 26 Nev. 259, 66 Pac. 745.

19. Wicker v. Messinger, 22 Ohio Cir. Ct. 712, 12 Ohio Cir. Dec. 425.

20. Sustaining demurrer to complaint for injunction, plaintiff not pleading over—Peters v. Lewis, 28 Wash. 366, 68 Pac. 869; see also infra, this section. Sustaining demurrer of only defendant of whom jurisdiction was had—Lough v. John Davis & Co. (Wash.) 70 Pac. 491. Sustaining demurrer and entering dismissal and final judgment—People v. City Council, 97 Ill. App. 72.

21. Special demurrer for misjoinder—Leavitt v. S. D. Mercer Co. (Neb.) 89 N. W. 426.

22. Walker v. Nat'l G. Loan & Trust Co., 133 Ala. 240. Sustaining demurrer with leave to amend, also allowing appeal to settle the principles of the case—Barrier v. Kelly (Miss.) 32 So. 999.

23. To amended bill leaving first bill standing—Hobson v. Hobson, 4 Va. Sup. Ct. R. 156.

24. To one of two counts without passing on the other—Greig v. Elliot, 29 Colo. 283, 68 Pac. 237.

25. Demurrer by sureties and awarding costs but overruling demurrer by principal defendant (Code Civ. Pr. § 939)—Nolan v. Smith, 137 Cal. 360, 70 Pac. 166.

26. Stromberg-Carlson Tel. Mfg. Co. v. Bisbee, 115 Ga. 346; Padley v. Gregg, 26 Wash. 322, 67 Pac. 72. To petition for prohibition and sustaining temporary writ—Dumont v. Payne, 24 Ky. Law Rep. 288. To petition for condemnation of land—Parker v. Superior Ct., Snohomish County, 25 Wash. 544, 66 Pac. 154. Order directing judgment overruling plaintiff's demurrer and dismissing complaint—Gabay v. Doane (N. Y.) 66 App. Div. 507.

27. Plea to jurisdiction of the person—State Mut. Life & An. Ass'n v. Kemp, 115 Ga. 355. Order overruling plea to the procedure and not to jurisdiction is not final—Puritan Trust Co. v. Coffey, 180 Mass. 510. Dilatory plea to an interpleaded claimant's answer, the liability remaining undecided—Hely v. Lee, 108 Tenn. 715. Motion to dismiss on abatable grounds not a plea in abatement—Brown v. Kellogg, 182 Mass. 297.

28. Without prejudice after submitting cause (Code, § 4101)—Carney v. Reed (Iowa) 91 N. W. 759. Denial of extension of time to proceed after reversal and grant of new trial and dismissal on cross motion—Sutton v. Chicago, St. P., M. & O. Ry. Co., 114 Wis. 647.

29. Dismissal of part of defendants alleged to be jointly liable—Carmichael v. Texarkana (C. C. A.) 116 Fed. 845. Dismissal of a cross-libel in admiralty—Bowker v. United States, 186 U. S. 135, 46 Law. Ed. 1090.

30. Refusal to dismiss (Meekins v. Norfolk & S. R. Co., 131 N. C. 1; Clinard v. White, 129 N. C. 250) for want of service—Jester v. Baltimore Steam Packet Co., 131 N. C. 54. Refusal to dismiss for delay in taking out mandate—Gregory v. Thompson Sav. Bank (Tex. Civ. App.) 71 S. W. 988.

31. Brown v. Kellogg, 182 Mass. 297.

32. Striking from calendar because removed to federal court—Ashland v. Whitcomb, 114 Wis. 99.

33. Without notice and with leave to withdraw costs paid as condition to vacating.—Dane v. Daniel, 28 Wash. 155, 68 Pac. 446.

34. Graham v. Parsons, 88 Mo. App. 385.

35. Heilman v. McKinstry, 18 Pa. Super. Ct. 70. Setting aside nonsuit entered to avoid adverse ruling not a new trial—Mobile Light & R. Co. v. Hansen, 135 Ala. 284.

36. Laster v. Blackwell, 128 Ala. 143, holding that it must appear that it was entered in consequence of rulings on trial.

37. Nonsuit as to part of defendants—Ellis v. Almand, 115 Ga. 333.

38. Veatch v. Norman, 95 Mo. App. 500.

39. Gates v. Avery, 112 Wis. 271.

40. Crowley v. Richards (Iowa) 89 N. W. 103.

4. Orders directing or arresting judgment, or on motion for new trial, are not reviewable at common law,[41] or generally, because lying in discretion,[42] but in some states are made so by statute.[43] Referring a cause to the assignment list after disagreement of the jury is not a grant of a "new trial," which is appealable if it affects a substantial right,[44] nor is setting aside a voluntary nonsuit entered to avoid an objection to evidence.[45]

5. *Final judgment or decree.*[46]—The adjudication must be finally determinative of the controversy, and must substantially affect the rights of parties.[47] Substantial rights are not affected by the court's assigning reasons for giving to a plaintiff the relief which he demands.[48]

It must be so far final that, if affirmed, nothing remains to the trial court but to execute it;[49] but it may be final, though it open or give rise to other causes of action,[50] or leave some questions reserved or undecided.[51] It is not final if the case be retained.[52] If a refusal to enter judgment on a mandate be merely to permit the trial of a newly-asserted claim, it is not final, but in substance a postpone-

41. Order for judgment non obstante—Sanderson v. Northern Pac. R. Co. (Minn.) 92 N. W. 542. Arresting judgment—Brazel v. New South Coal Co., 131 Ala. 416. New trial not in federal courts—South Penn Oil Co. v. Latshaw (C. C. A.) 111 Fed. 598.

42. Streep v. McLoughlin (N. Y.) 36 Misc. 165. Setting aside verdict and ordering new trial at same term—Bird v. Bradburn, 131 N. C. 488.

43. Code, § 4101—Boyce v. Timpe (Iowa) 89 N. W. 83. Denying new trial in proceedings to distribute an estate (Code Civ. Proc. § 1722)—In re Davis' Estate (Mont.) 70 Pac. 721. Probate court decisions on motion for new trial not included in statute relating to "circuit or city courts" (Code, § 434)—Beatty v. Hobson, 133 Ala. 270.

44. The fact that plaintiff had moved to amend before defendant appealed did not raise any substantial right in defendant—Dossett v. St. Paul & T. Lumber Co., 28 Wash. 618, construing Ball. Ann. Codes & St. §§ 5006, 5007, 5070, 5071, 6500, subd. 6.

45. Mobile Light & R. Co. v. Hansen, 135 Ala. 284.

46. Finality is a necessary element of orders other than judgments and decrees determinative of the action. As to such, see subsections 6-9 following. Bock v. Grooms, (Neb.) 90 N. W. 204; Brodhead v. Minges, 99 Ill. App. 435; Coleridge Creamery Co. v. Jenkins (Neb.) 92 N. W. 123; De Harrison v. Perea (N. M.) 70 Pac. 558. When trial is to jury order must be final—Creamery Package Mfg. Co. v. Magill (Neb.) 89 N. W. 170. Circuit court decree not appealable to supreme court on the merits until entirely disposed of—Covington v. First Nat. Bank, 185 U. S. 270, 46 Law. Ed. 906.

47. Orders held final: Denial of petition to be appointed guardian and reinstatement of former guardian—Arthur v. Reed, 26 Tex. Civ. App. 574. Decree to sell mortgaged land—Kronenberger v. Heinemann, 104 Ill. App. 156. Final injunction against discontinuing a telephone service so long as the defendant continues in business in the jurisdiction—Chesapeake & P. Tel. Co. v. Manning, 186 U. S. 238, 46 Law. Ed. 1144. Confirmation of referee's report on reference of damages on injunction bond—Wisconsin M. & F. Ins. Co. Bank v. Durner, 114 Wis. 369. Default judgment after improper refusal to transfer cause to another district—Goldman v. Jacobs, 38 Misc. Rep. (N. Y.) 781.

Orders held not final: Judgment overruling special plea to jurisdiction—Ross v. Mercer, 115 Ga. 353. Final judgment on demurrer as to one defendant only not final so as to be reviewable by error—Pittsburgh Plate Glass Co. v. Peper (Mo. App.) 70 S. W. 910; Rock Island Implement Co. v. Marr, 168 Mo. 252. Order fixing a priority but not determining the amount—Davis v. McCullouch, 192 Ill. 277. Decree fixing rights of annuitant in lands of an estate but suspended until reference to adjudicate further rights—Ohio River R. Co. v. Fisher (C. C. A.) 115 Fed. 929. Refusal to enter default—Brockway v. W. & T. Smith Co. (Colo. App.) 66 Pac. 1073. Decree subjecting lands of trustee to payment of trust moneys and referring to commissioner to state accounts—Savings & B. & L. Ass'n v. Tart (Miss.) 30 So. 693. Report of referee stating an account—Shankle v. Whitley, 131 N. C. 168. Confirmation of commissioner's report—Paul v. Wetlauf, 24 Ky. Law Rep. 1480.

48. Where an injunction based on prescriptive rights was granted partly on the ground that a statutory right warranted it—Hume v. Turner (Or.) 70 Pac. 611.

49. Brodhead v. Minges, 99 Ill. App. 435.

50. A decree on original bill in the nature of a bill of review impeaching a decree for fraud and letting the parties proceed in the original suit—Hendryx v. Perkins (C. C. A.) 114 Fed. 801. Judgment on dismissal of suit, but referring damages from issuing of injunction therein—West v. East Coast Cedar Co. (C. C. A.) 113 Fed. 742.

51. Railroad Commission v. Weld, 95 Tex. 278. Partition decree for sale is final though rights in proceeds remain undecided—East Coast Cedar Co. v. People's Bank (C. C. A.) 111 Fed. 446. Adjudication of one legatee's rights on bill to construe will—Hawes v. Kepley, 28 Ind. App. 306.

52. Assessment of taxes against national bank decreed null and case reserved to inquire into future assessments—Covington v. First Nat. Bank, 185 U. S. 270, 46 Law. Ed. 906. Decree finding that one mortgage was

ment.[53] It must be res adjudicata as to all parties who were brought in, but need not be as to others merely named as parties;[54] and it does not suffice that a judgment was entered for one co-party on an amended petition alleging that he had taken a transfer of the others' rights.[55]

6. *Orders and adjudications in interlocutory or provisional, extraordinary, and special proceedings.*—Interlocutory or provisional orders are not separately reviewable,[56] in the absence of legislation. Those intermediate orders and rulings which go up for review with the main judgment are the subject of a later section of this article. This section refers only to their separate appealability.[57]

Statutes in most states designate certain proceedings or orders therein, and certain interlocutory orders, which may be appealed or reviewed.[58] An enumeration of particular ones excludes the reviewability of others.[59] A statute giving appellate jurisdiction in all civil cases does not include special statutory proceedings,[60] and this meaning is not enlarged by a provision that writs of error or appeals shall lie in the same manner as provided for the supreme court.[61] A proceeding before a judge, as such, is not reviewable as a proceeding before the court.[62] A statute of a territory giving an appeal from interlocutory orders is void if the organic act provides for review of final orders only.[63]

These orders must be final,[64] or affect a substantial right.[65] Allowing an ap-

paid and ordering retention of cause on the other to await other litigation—Brodhead v. Minges, 198 Ill. 513.

53. Justice v. Phillips, 24 Ky. Law Rep. 290.

54. Hooven, Owens & Rentschler Co. v. John Featherstone's Sons (C. C. A.) 111 Fed. 81. Judgment on one demurrer only—Pittsburgh P. G. Co. v. Peper (Mo. App.) 70 S. W. 910.

55. Joint suit to recover land—Jackson v. Coombs (Tex. Civ. App.) 65 S. W. 385.

56. Coleridge Creamery Co. v. Jenkins (Neb.) 92 N. W. 123; De Harrison v. Perea (N. M.) 70 Pac. 558.

57. Section 13, infra.

58. Temporary alimony — Eickhoff v. Eickhoff, 29 Colo. 295, 68 Pac. 237; Motley v. Motley, 93 Mo. App. 473; Marx v. Marx, 94 Mo. App. 172. Allowance of counsel fees to wife in divorce is appealable though made pending a second trial, and also as a final order affecting a substantial right—Schuster v. Schuster, 84 Minn. 403. An allmony decree in Louisiana before final judgment appealable regardless of amount (Const. 1898, art. 85)—Dale v. Hauer (La.) 33 So. 741.

Refusal to grant removal to federal courts is not within Code, § 34, allowing granting of an appeal from interlocutory orders "to state principles" or "avoid delay"—Vicksburg Water Works Co. v. Vicksburg, 79 Miss. 510.

State may appeal in proceedings for indirect contempt (Burns' Rev. St. 1901, § 1915)—State v. Rockwood (Ind.) 64 N. E. 592. By statute in Oregon, one adjudged to be in contempt may appeal as in an action—State v. Gray (Or.) 70 Pac. 904.

59. Refusal to vacate an order denying appointment of administrator ad litem not enumerated (Rev. St. 1899, § 806)—Creech v. Young, 94 Mo. App. 90. Order quashing information to remove county commissioners (Rev. St. § 4807)—Mahoney v. Elliott (Idaho) 69 Pac. 108. Provisions for appealing judgments of a common pleas court settling accounts of county officers do not include an order discharging a rule to strike off such proceedings, it being interlocutory—Moore's Appeal, 203 Pa. 376.

60. 3 Mills' Ann. St. § 1002 D—Fletcher v. Smith (Colo. App.) 70 Pac. 697.

61. Such provision refers to procedure only—Fletcher v. Smith (Colo. App.) 70 Pac. 697.

62. To compel delivery of papers under Pol. Code, § 272—Albea v. Watts, 114 Ga. 149. Applications for certiorari—Brockton v. Plymouth County Com'rs (Mass.) 66 N. E. 427; or habeas corpus—Ex parte Cox (Fla.) 33 So. 509.

63. Laws 1901, c. 82—Jung v. Myer (N. M.) 68 Pac. 933; Laws 1899, c. 75, §§ 8, 9—Machen v. Keeler (N. M.) 68 Pac. 937.

64. Final orders: Refusal to compel delivery of books, etc., to public officer under Code Civ. Pr. § 2471a, is appealable—In re Brenner, 170 N. Y. 185. Reversal of order continuing a proceeding to settle an administrator's account, ordering objections withdrawn and account approved, is a final order in a special proceeding which goes to the court of appeals—In re Fitzsimons, 174 N. Y. 15. Decision under Rev. St. arts. 4564-4566, that certain rates of freight were unreasonable and giving no other relief; statute provides that reasonableness shall be the only issue tried—Railroad Commission v. Weld, 95 Tex. 278. Refusal to make a rule to pay money absolute—Hollis v. Nelms, 115 Ga. 5.

Orders not final: Judgment with findings in habeas corpus but leaving child in respondent's custody until further order is not final—Hart v. Cotten (Fla.) 31 So. 817. Decree for possession pending taking of final proofs and hearing—Lewis v. New Music Hall Co., 100 Ill. App. 415. Order to remove fence pending action for permanent removal—McKinney v. Thomson, 24 Ky. Law Rep. 337. Order for accounting in a partition suit—Glos v. Clark, 199 Ill. 147.

plication to amend after a procedendo in an injunction suit to prevent a special assessment, so that defendant might recover on a quantum meruit, goes to the merits, and is material.[66] If the same questions arise on appeal from final judgment,[67] or if an interlocutory decree has passed into final decree, the appeal must be from the latter.[68] Refusal of nonsuit should be reviewed on appeal from judgment or from motion for a new trial.[69]

A decision on lunacy proceedings finding the person sane is not appealable in Indiana.[70]

Provisional orders for relief.—It is not the "grant, refusal, continuance, or modification of a provisional remedy" to refuse to limit an examination.[71] Injunctional orders are generally made reviewable,[72] when made on hearing, and not in vacation.[73] The refusal of an injunction is an exception in some jurisdictions.[74] A dismissal of a complaint for an injunction may be appealable as refusing an injunction or on demurrer, if substantially that, though irregular;[75] and a refusal to dissolve a temporary restraining order or injunction may be regarded as equivalent to granting one.[76] A refusal to grant or dissolve a preliminary injunction is not now appealable to the United States circuit court of appeals.[77] In Louisiana, dissolution of an injunction against acts which, if done, may be adequately reparable in money, is not appealable.[78] There should, as in other cases, be some invasion of substantial right or effect upon the merits and a final decision.[79]

Order nisi to remove trustee—Chappell v. Clarke, 94 Md. 178. Denial of application by attorneys for creditors to be recognized as attorneys for an insolvent estate—In re People's Sav. Bank (Colo. App.) 71 Pac. 397, 398. Order in special tax proceedings setting aside dismissals of certain defendants and construing statutes, then referring the case—Specht v. Barber Asphalt Co., 24 Ky. Law Rep. 887.

Order to executor to file inventory and account—In re Allen's Estate, 20 Pa. Super. Ct. 32; or to petition for sale of land—Lane v. Thorn, 103 Ill. App. 215. Order dismissing attorney's petition for allowance from estate because not brought up on accounting of executor who employed him—Nash v. Wakefield, 30 Wash. 556, 71 Pac. 35.

65. A determination under the Iowa statutes that a consent to the sale of liquors was sufficient affects such a right—Porter v. Butterfield, 116 Iowa, 725. A non-taxpaying applicant for removal of an officer is not substantially affected by an adverse decision—In re Aldrich, 114 Wis. 308.

Orders in administration must decide rights, affect merits or aggrieve parties—Lane v. Thorn, 103 Ill. App. 215. Refusal to revoke probate affects a substantial right, i. e., to declare an escheat—State v. Tallman, 29 Wash. 317, 69 Pac. 1101. Appointment of appraisers of an estate does not—Mayrand v. Mayrand, 95 Ill. App. 475.

66. Allen v. Davenport, 115 Iowa, 20.

67. Dismissal of complaint—Kelly v. Theiss, 77 App. Div. (N. Y.) 81.

68. Judgment against cross-bill on demurrer merged into dismissal of cross-bill—Wilder v. Dunne (Fla.) 33 So. 508.

69. Brauer v. Oceanic Steam Nav. Co., 77 App. Div. (N. Y.) 407.

70. State v. Branyan (Ind. App.) 66 N. E. 464.

71. Rev. St. 1898, § 3069—State v. Mathys (Wis.) 91 N. W. 114.

72. Interlocutory injunction (23 Stat. at Large, p. 673)—Williams v. Jones, 62 S. C. 472. Rev. St. 1899, § 806, dissolution of interlocutory order of injunction—Powell v. Canaday, 96 Mo. App. 27. Right may be lost by proceeding to trial of main issue—Sharples v. Baker, 100 Ill. App. 108.

73. On hearing—Fuller v. Schutz (Minn.) 93 N. W. 118. In Alaska an interlocutory grant or dissolution of an injunction is appealable (Alaska Code, § 507), though not on a "hearing in equity," as it must be under the federal practice, which so far as applicable is adapted to Alaska—Lane v. Jordon (C. C. A.) 116 Fed. 623. Orders of judges granting or refusing to dissolve injunctions in vacation—Hawkins v. Burwell, 191 Ill. 389; Sharples v. Baker, 100 Ill. App. 108.

74. Remedy was to apply to supreme court—Hudson v. Barham (Va.) 43 S. E. 189.

Contra: Dissolution of writ of temporary injunction—Stansbury v. Storer (Neb.) 91 N. W. 197. Refusal to dissolve injunction—United States Heater Co. v. Iron Molders' Union (Mich.) 88 N. W. 889.

75. The demurrer was coupled with answer and the judgment ignored the merits pleaded by answer—Quayle v. Bayfield County, 114 Wis. 108.

76. Act of Congress, Feb. 9, 1893—McFarland v. Washington, A. & M. V. R. Co., 18 App. D. C. 456. Refusal to dissolve injunction (Hurd's Rev. St. 1899, c. 22, § 52) is equivalent to granting one—Hately v. Myers, 96 Ill. App. 217.

77. Since Act Cong. June 6, 1900—March v. Romare (C. C. A.) 116 Fed. 354; Berliner Gram. Co. v. Seaman (C. C. A.) 113 Fed. 750.

78. Injunction against execution sale—Globe Lumber Co. v. Griffeth, 107 La. 621.

79. Order granting temporary allowance for alimony is not a "trial" and not final—Stewart v. Stewart, 28 Ind. App. 378.

Injunctional orders affecting substantial rights: Against operation of a ginnery—

Though a bill of discovery is ancillary to another action, yet the order to answer is final;[80] and so are other determinative orders in proceedings which arise as collateral to the main cause.[81]

Eminent domain proceedings are covered by statute, as shown in footnotes.[82] When final, such orders must be reviewed as an entirety.[83] Footnotes collect the decisions on finality of such orders, and effect on substantial rights.[84]

7. *Orders after judgment* on the main cause may, under many statutes, be appealed if final as to the parties and subject-matter.[85] An order extending time to

Williams v. Jones, 62 S. C. 472. Refusal to allow defendant to bond an injunction, devolutively appealable—Sanders v. Ditch, 107 La. 333. Against litigating claim for damages on condemnation until title be decided —South Bound R. Co. v. Burton, 63 S. C. 348. Mandatory injunction to surrender possession of disputed property—State v. Superior Ct., 28 Wash. 403, 68 Pac. 865. Injunction to restrain disturbance of receiver's disputed possession of premises—State v. Superior Ct., 30 Wash. 177, 70 Pac. 256.

Receivership proceedings held final and appealable: Order for issuance of receiver's certificates to be prior to existing mortgage liens—Bibber-White Co. v. White River Valley E. R. Co. (C. C. A.) 115 Fed. 786. Order to receiver of banking partnership to turn over property to trustee in bankruptcy of the partners (Rev. St. 1898, § 3069, sub. 2). Refusal to settle final account of receiver in foreclosure suit and to charge expenses and costs against the complainant—Chapman v. Atlantic Trust Co. (C. C. A.) 119 Fed. 257. Order in escheat proceedings that heirs surrender to receiver property after final distribution—State v. O'Day, 41 Or. 495, 69 Pac. 542. Interlocutory orders appointing receiver or extending his powers—St. Louis, V. & T. H. R. Co. v. Vandalia, 103 Ill. App. 363. Order appointing receiver appealable as transferring property though appellant claims it to be exempt (Code 1892, § 34)—Levy v. T. J. Rossel & Co. (Miss.) 33 So. 651.

Not final: Appointment of receiver—Barber v. International Co., 74 Conn. 652; Coons v. Frost, 100 Ill. App. 303. Order to receiver to purchase plant to work tailings of a mining company is neither final order nor judgment in a collateral controversy (Code Civ. Pr. § 963)—Free Gold M. Co. v. Spiers, 135 Cal. 130, 67 Pac. 61. Directing purchases by receiver—Free Gold M. Co. v. Spiers, 136 Cal. 484, 69 Pac. 143. Order to clerk to pay over to receiver—Coons v. Frost, 100 Ill. App. 303.

80. Hurricane Tel. Co. v. Mohler, 51 W. Va. 1.

81. Commitment of witness for refusing to answer is final—Flower v. MacGinniss (C. C. A.) 112 Fed. 377. Order nisi for removal of trustee not final—Chappell v. Clarke, 94 Md. 178.

82. County court judgment on report of commissioners to assess damages to land taken for railroad is ultimate and not appealable (V. S. §§ 3821, 1625)—Goodsell v. Rutland-Canadian R. Co., 74 Vt. 206. An eminent domain act giving the right to appeal from the "decision of a city council in awarding damages," but not operating to prevent making of the contemplated works, allows an appeal from damages only—Stearns v. Barre, 73 Vt. 281.

83. Confirmation of inquisition on eminent domain proceedings is conclusive and not reviewable as to all except the right to condemn—Hopkins v. Philadelphia, W. & B. R. Co., 94 Md. 257.

84. Orders held final: Refusal to appoint commissioners—Denver P. & I. Co. v. Denver & R. G. R. Co. (Colo.) 69 Pac. 568. Appointment of appraisers to assess damages by flowage by water company's works (Sp. Laws 1873, p. 478; 1897, p. 708); also acceptance of their report on its return into court —New Milford Water Co. v. Watson (Conn.) 52 Atl. 947; Id. (Conn.) 53 Atl. 57.

Not final: Order fixing amount of bond in condemnation proceeding.—Pittsburgh, C. & W. R. Co. v. Gamble (Pa.) 53 Atl. 759. Appointment of commissioners to fix compensation for railroad crossings under Railroad law, § 12, not final—Stillwater & M. St. R. Co. v. Boston & M. R. R., 67 App. Div. (N. Y.) 367.

Substantial rights: If an unconstitutional taking of property be sought (taking one carrier's tracks for another carrier) appeal lies from the appointment of viewers before any assessment of damages—In re Philadelphia, M. & S. St. Ry. Co., 203 Pa. 354. Refusal to re-tax costs on appraisal and assessment is an order affecting a substantial right in special proceeding—In re Collis, 78 App. Div. (N. Y.) 495.

85. Barber v. International Co. of Mexico, 74 Conn. 652. Vacation of judgment not made appealable by Laws 1893, p. 119, § 1, subd. 1—Nelson v. Denny, 26 Wash. 327, 67 Pac. 78.

Held final: Decision that party had failed to meet terms of decree for specific performance is appealable—Lamprey v. St. Paul & C. Ry. Co., 86 Minn. 509. Vacation of decree after term (Code Civ. Proc. § 581)—Bannard v. Duncan (Neb.) 90 N. W. 947. Refusing to vacate—In re Lamona's Estate, 29 Wash. 394, 69 Pac. 1093. Modifying or reversing order reducing alimony decree appealable—Davis v. Davis, 78 App. Div. 500; Livingston v. Livingston, 173 N. Y. 377. Orders opening judgment on judgment-note (Act May 20, 1891, p. 101), also appealable with final judgment (Act April 4, 1877)—Schomaker v. Dean, 201 Pa. 439. Taxation of costs of prosecution to county whence it came and in favor of county where tried, appealable—Green Lake County v. Waupaca County, 113 Wis. 425. An order subjecting to a judgment money deposited as security for appeal costs only and in lieu of a bond is appealable—Mitchell v. Evans, 18 App. D. C. 254.

Held not final or appealable: Vacation of judgment—Metler v. Metler, 28 Wash. 734, 69 Pac. 9. Opening decree and allowing answer —Browne v. Croft (Neb.) 93 N. W. 406. Over-

settle a bill of exceptions is neither a "special order after judgment" nor a final order, under the California statute.[86] Refusal to vacate judgment,[87] or denying confirmation of a partition sale in part, is such a special order.[88] Setting aside execution levy and sale is such.[89] A cost decree is not appealable in Louisiana simply because in a divorce proceeding.[90]

8. *Decisions of intermediate courts* on appeal are often not subject to further review.[91] A provision giving writ of error to review judgments of named city courts and other "like" courts does not include a city court which differs in not having a common-law jury trial.[92] If only a law point remains, appeal may lie to the court of last resort, without a retrial below;[93] but if the intermediate court modifies the lower court's order, the judgment of the lower court as entered should not be taken to the highest court, but the order of the intermediate court.[94] When the first appeal is tried de novo, the judgment will go up, if other essentials of reviewability coexist.[95]

They must ordinarily be final to be so reviewable,[96] or leave nothing further to

ruling motion to set aside judgment from which findings were omitted: the error was reviewable with the judgment—Mantel v. Mantel, 135 Cal. 315, 67 Pac. 758. Refusal to vacate judgment which reserved leave to make such application—Magruder v. Schley, 17 App. D. C. 227. Order imposing terms on vacation of judgment—Board of Socorro County v. Blackington (N. M.) 65 Pac. 995.

Order taxing costs, etc.—Murray v. Northern Pac. R. Co., 26 Mont. 388, 67 Pac. 625. In impeachment proceedings against justice of the peace—In re Kelly, 17 Pa. Super. Ct. 344. Refusing to retax—Warner v. Godfrey, 17 App. D. C. 102; Williams v. Getz, 17 App. D. C. 388. Order allowing additions of fees to a return to a writ, not reviewable until taxed as costs—Harding v. Riley, 181 Mass. 334. Order taxing cost reviewable with judgment—Montana Ore Co. v. Boston & M. M. Co. (Mont.) 70 Pac. 1114.

Refusal to extend time for settling a bill of exceptions does not affect substantial right. The statute only authorizes extensions of time of proceedings other than appeals (Rev. St. 1898, § 2831)—Hatch v. Kurtzwell, 112 Wis. 231.

86. Kalischmidt v. Weber, 136 Cal. 675, 69 Pac. 447.

87. (Code Civ. Pr. § 939)—Hibernia Sav. & L. Soc. v. Cochran, 134 Cal. xix, 66 Pac. 742.

88. Dunn v. Dunn, 137 Cal. 51, 69 Pac. 457.

89. Otis Bros. & Co. v. Nash, 26 Wash. 39, 66 Pac. 111.

Refusal to set aside execution is not the vacation of a judgment which is specially made appealable—Stephens v. Addis, 19 Pa. Super. Ct. 185.

90. Frele v. Lubben, 107 La. 79.

91. "Federal review of state decisions," see post, subsection C-13. Ordinarily this is done by prescribing as jurisdictional facts an amount in controversy or by classifying the decisions with respect to their nature as freehold cases, constitutional cases, etc.; see below, § 4-C. **Appealable to higher court:** Refusal to compel delivery of books under Code Civ. Pr. § 2471a, goes from appellate division to court of appeals—In re Brenner, 174 N. Y. 185. Melody v. Goodrich, Id. Refusal on appeal to circuit to grant liquor license goes to appeals—Appeal of Candill, 23 Ky. Law Rep. 2139. The court of appeals of the District of Columbia will not review a decision on appeal from a justice of the peace except for want of jurisdiction apparent on the record—Mitchell v. Evans, 17 App. D. C. 233. Action before a justice against railroad for killing stock (Burns' Rev. St. 1901, § 5313) is within justice's jurisdiction though concurrent with the circuit court if demand is for over $50; hence decision of circuit is conclusive and no higher appeal lies—Lake Erie & W. R. Co. v. Watkins, 157 Ind. 600.

92. City court of Americus (Acts 1900, p. 93)—Monford v. State, 114 Ga. 578.

93. Erie R. Co. v. Steward, 170 N. Y. 172. Judgment and order for entry of judgment on answer as frivolous presents law point—Halliday v. Barber (N. Y.) 38 Misc. 116.

94. Surrogate's decree was modified by appellate division. Appeal should be from the order modifying or from an order affirming as modified—In re Union Trust Co., 172 N. Y. 494.

95. Denial of application for letters of administration and refusal to revoke existing letters on appeal from probate court (Rev. St. 1899, §§ 278, 284, 285)—Burge v. Burge, 94 Mo. App. 15.

96. Reversal and remand on error not final—Montana M. Co. v. St. Louis M. & M. Co., 186 U. S. 24, 46 Law. Ed. 1039. An appellate decision that a deed and bond for reconveyance constituted a mortgage and remanding the cause to take an account thereon is not final—Callahan v. Ball, 197 Ill. 319. Judgment of general term on appeal from special term, reversing judgment of special term on demurrer and dismissing the cause for failure to plead over is not a final determination of the general term on the issue raised by demurrer, hence it is appealable in the first instance to the appellate division—Abbey v. Wheeler, 170 N. Y. 122. Exceptions in the circuit court in Indiana held sufficient to appeal from commissioners' award in eminent domain proceedings for a railroad crossing; which being undisposed of left no appealable judgment to go further up—Wabash R. Co. v. Cincinnati, etc., R. Co., 29 Ind. App. 546.

be done by the trial court but to execute the mandate.[97] When the appellate division in New York reverses an order for new trial on ground of newly-discovered evidence, and affirms the judgment, only the affirmance can go on to the court of appeals, the other being on the merits.[98] Finality of an affirmance is neutralized by a reversal and remand of the same judgment on a cross writ of error.[99] Consent of the intermediate court cannot give appealability.[1] Want of jurisdiction may take the case to the highest court.[2] Judgments on appeals to lower courts are not appealable when declared to be "final."[3]

The act creating federal circuit courts of appeal did not destroy finality of a circuit court's decision on appeal from a general board of appraisers of customs; hence no further appeal is allowed unless there be a certificate of importance.[4]

9. *Parts of judgments.*—Judgments may be reviewed in part so far as they are severable.[5]

C. Dependent on character or value of action, subject-matter, or controversy.—A cause is not appealable by stipulation unless one of the jurisdictional conditions exists.[6] If special grounds of appeal be relied on, the proceeding must be one which may involve such grounds.[7]

1. *Nature of action.*—Whether an action is civil does not depend on the proofs offered.[8] A penal[9] or mandamus action is civil.[10] Mandamus to compel placing an officer's name on a pay roll is not, however, a civil action for "recovery of

A judgment of the appellate division reversing a decree which reduced alimony goes to the court of appeals—Livingston v. Livingston, 173 N. Y. 377.

97. Remand to enter judgment "according to opinion"—Friedman v. Lesher, 198 Ill. 21. Not final when remanded for further proceedings in conformity with opinion which held that the error consisted in failing to establish one element of the right to recover—Haseltine v. Central Nat. Bank, 183 U. S. 130, 46 Law. Ed. 117. Denial of motion in appellate division to vacate attachments and judgment, not final—Hammond v. National Life Ass'n, 168 N. Y. 262. Reversal by appellate division of special term order modifying final order is final and appealable—In re Board of Education, New York, 169 N. Y. 456. Reversal by court of appeals of D. C. of decree refusing injunction and dissolving preliminary one, and remanding cause for final injunction, will go to U. S. supreme court—Chesapeake & P. Tel. Co. v. Manning, 186 U. S. 238, 46 Law. Ed. 1144.

98. The appeal was was dismissed because the record showed no entry of the affirmance—Reiss v. Pelham, 170 N. Y. 54.

99. Error from U. S. circuit court of appeals to circuit, dismissed on error from supreme court—Montana M. Co. v. St. Louis M. & M., 186 U. S. 24, 46 Law. Ed. 1039.

1. Lewin v. Lehigh Val. R. Co., 169 N. Y. 336.

2. Justice's judgment—Darrell v. Biscoe, 94 Md. 684.

3. Appeal to circuit court from surveyor's apportionment of ditch maintenance (Burns' Rev. St. 1894, §§ 5633-5636)—Pittsburg, F. W. & C. Ry. Co. v. Gillespie, 158 Ind. 454. Dismissal of appeal by district court for want of prosecution, not appealable beyond district court—Smith v. District Court, 24 Utah, 164, 66 Pac. 1065. Award of damages in eminent domain—Goodsell v. Rutland-Canadian R. Co., 74 Vt. 206.

4. Error from the higher court will not lie—United States v. Diamond Match Co. (C. C. A.) 115 Fed. 288.

5. In re Kittson's Estate, 84 Minn. 493. Judgment of partial dismissal after directed verdict as to other part—Wilson v. Mechanical Orguinette Co., 170 N. Y. 542. One feature was favorable to each party; appeal must be entire—Crane v. Odegard (N. D.) 91 N. W. 962. Decree of interpleader not severable so as to be appealable as to the discharge of plaintiff only—New Zealand Ins. Co. v. Smith, 41 Or. 166, 69 Pac. 268. Dissolution of injunction not appealable apart from dismissal of bill—Burnham v. Driggers (Fla.) 32 So. 796. Though divorce is not appealable costs and alimony are—Alderson v. Alderson, 24 Ky. Law Rep. 595.

6. Denver v. Marselis, 29 Colo. 79, 66 Pac. 887.

7. A petition for correction of an assessment is limited to a comparison of values fixed on other assessable property (Mills' Ann. St. § 3841), and hence presents no constitutional freehold or franchise questions—First Nat. Bank v. Board of Montrose County, 29 Colo. 114, 66 Pac. 890.

8. Action to cancel a charter under the anti-trust act is appealable to the civil appeals though the facts might support an indictment—State v. Shippers' Compress & W. Co. (Tex. Civ. App.) 67 S. W. 1049. Action for penalties under anti-trust law is civil—State v. Waters-Pierce Oil Co. (Tex. Civ. App.) 67 S. W. 1057.

9. Action for penalty under city ordinance—Springfield v. Starke, 93 Mo. App. 70.

10. Mandamus is a civil action within the jurisdiction of the court of appeals. (3 Mills' Ann. St. § 1002 d)—Orman v. People (Colo. App.) 71 Pac. 430. In Illinois mandamus being appealable as civil cases, goes to the appellate and not to the supreme court—People v. Deneen, 201 Ill. 452.

money."[11] Nor is an action one for recovery of money when only the right to interest is disputed.[12] An action ex contractu within the intermediate jurisdiction refers to the nature of the cause of action, and not to the form of the action.[13]

2. *Questions of law* afford, in some courts, a jurisdictional ground.[14] Errors assigned in the form of an application to condemn property, or in the jurisdiction or the form of the award, are purely of law, which makes the case reviewable in the supreme court, and not in the superior court, in Connecticut.[15]

3. *The existence of a constitutional question* makes cases appealable, either directly or ultimately, to the highest court in many states, and to the federal supreme court.[16] Such a question is involved if the judgment is in pursuance of decisions on the unconstitutionality of the law,[17] or necessarily involves constitutional questions.[18] A constitutional question is raised by requesting an instruction that a certain vending of merchandise was interstate commerce.[19] If the question is no longer an open one, the constitutionality of a statute cannot be raised.[20] Claims of right under federal laws must have some litigable merit.[21] Validity of a statute is not in question on a contention merely as to its repeal[22] or construction.[23] If a direct question of validity of the statute be disposed of on another ground without objection, the constitutional question is not raised.[24] The lower court must decide against constitutionality in order to raise a question for jurisdiction of the

11. And hence is appealable though the salary involved is less than $200 (Const. art. 4, § 4)—State v. Daggett, 28 Wash. 1, 68 Pac. 340.

12. Whitehead v. Brother's Lodge, 24 Ky. Law Rep. 1633.

13. Action to reform a policy and compel a payment thereon—Clinton Mut. County Fire Ins. Co. v. Zeigler, 201 Ill. 371.

14. Striking case from city court docket (Gen. Stat. 1902, § 788, giving appeal from "any" question of law)—Sanford v. Bacon (Conn.) 54 Atl. 204.

15. Gen. St. § 1146; Public Acts 1897, p. 888, § 1—Hubbard v. Hartford, 74 Conn. 452.

16. W. U. Tel. Co. v. Reynolds (Va.) 41 S. E. 856. See also infra, this section, "13, Federal review of state decisions." Question of conflict between state law and federal constitution, ground for error from supreme to circuit court—Fidelity M. L. Ass'n v. Mettler, 185 U. S. 308, 46 Law. Ed. 922.

17. Clark v. West Virginia C. & P. R. Co., 50 W. Va. 1.

18. Refusal to allow receiver to pay costs of suit in which he was appointed does not involve "due process of law"—Chicago Gen. Ry. Co. v. Sellers, 191 Ill. 524. Legality of adoption of amendment to constitution adopting three-fourths vote of jury—Boling v. St. Louis & S. F. R. Co., 94 Mo. App. 67. Prohibition of retrospective laws involved in a controversy over the validity of a pledge made before the usury laws and renewed afterwards—Marx v. Hart, 166 Mo. 503. A county attorney rightfully employed under a statute contemplating that he shall serve in addition to the district attorney, does not supplant a constitutional officer; hence when the district attorney sues for fees in suits conducted by the county attorney, no constitutional question arises. (Const. art. 6, § 21; Mills' Ann. St. §§ 813, 1551)—McMullin v. Board of Commissioners, 29 Colo. 478, 68 Pac. 779. Habeas corpus tried on the theory that the prisoner was twice punished for the same offense—Carter v. McClaughry, 183 U. S. 365, 46 Law. Ed. 236. Refusal to charge on the burden of proof in a libel suit does not raise the constitutional right to prove the truth in such a case—Hanlon v. Pulitzer Pub. Co., 167 Mo. 121.

19. Action for penalty for selling without license—Canton v. McDaniel, 91 Mo. App. 626.

20. Equitable Life Soc. v. Brown, 187 U. S. 308. Domesticity of commerce by telegram between domestic termini but over route partly in foreign state—W. U. Tel. Co. v. Reynolds (Va.) 41 S. E. 856. Legality of act already settled by decisions—Van Camp Hardware & Iron Co. v. O'Brien, 28 Ind. App. 152. Constitutionality of Acts 1895, pp. 58, 59, dispensing with allegations of freedom from contributory negligence, has been settled—Atlanta Nat. Gas, etc., Co. v. Boyer, 28 Ind. App. 516.

21. A federal question is not raised so as to oust jurisdiction by an answer in replevin that as a forwarder having paid customs duties on the goods defendant was entitled under the federal laws to be subrogated to the lien of the customs duties—State v. Bland, 168 Mo. 1.

22. Pearce v. Vittum, 193 Ill. 192.

23. The question whether an act authorizing a recovery of damages from dealers in intoxicating liquors required that the injury be attributable to the intoxication as a cause, is one of construction and not of constitutionality—Sauter v. Anderson, 199 Ill. 319. The question whether Act Feb. 25, 1898, created the office of supervisor of assessment or merely added such duties to the county treasurer is one of construction and not constitutionality—Foote v. Lake County, 198 Ill. 638.

24. Instruction that law was invalid refused because inapplicable to issue—Village of Morgan Park v. Knopf, 199 Ill. 444.

supreme court in Louisiana.[25] The constitutional question must be raised on trial,[26] or at least in the trial court.[27] None is presented if the cause was dismissed before hearing.[28] Such a question is not presented so as to give jurisdiction to the United States supreme court when first raised in the state court of appeal, and for that reason not passed on.[29]

4. *Construction of statutes and public regulations* is of itself a ground in Indiana.[30] An action to recover a fine is not one "to test the validity of regulations" adopted by a public body, and made specially appealable.[31] A justice's judgment does not involve construction of the statute, where the pleadings bring the parties within the statute, and the sole question is one of proof.[32]

5. *Jurisdictional questions* are not raised by a finding of the existence or nonexistence of facts calling into force a special remedy.[33]

6. *Conflicting or overruling decisions.*—In Missouri, a decision, to be certifiable to the supreme court as in conflict with its decisions, must be on the whole case, and not alone on a single point.[34] In Texas, error will lie if civil appeal decisions be in conflict, though the latter one is a reversal, and remands the case.[35] A conflict must be well defined to warrant certification.[36] The case should be certified if one decision conforms to the supreme court decision, and the other conflicts;[37] but if the question has already been decided by the supreme court, it should not be certified again.[38] The supreme court will not issue a writ of error on the ground that the civil appeals has overruled its former decision, unless the lower court "practically settles the case."[39]

7. *Revenue and tax cases.*—The revenue is not directly affected by a suit to annul a public contract for street improvements, and to enjoin payments thereunder,[40] or by controversy as to apportionment of funds,[41] or by action to compel the furnishing of duplicate books.[42] An action to collect taxes may involve the construction of facts for the collection of taxes by cities without construing "the revenue laws of the state."[43]

In Louisiana, a question of the legality, but not the regularity, of tax, carries

25. State v. Pollock, 108 La. 594.

26. To oust jurisdiction of court of appeals—Kreyling v. O'Reilly (Mo. App.) 71 S. W. 372.

27. Question raised on new trial timely if there was no occasion to do so earlier—Barber Asphalt Co. v. Ridge, 169 Mo. 376. General statement of unconstitutionality of an ordinance in brief does not raise question—Standard Oil Co. v. Danville, 199 Ill. 50.

28. Enjoining acts of a city as unconstitutional—Harding v. Carthage (Mo.) 71 S. W. 673.

29. Jacobi v. Alabama, 187 U. S. 133.

30. An action involving construction of a statute relating to fees of constables will go from the circuit court to the supreme court, though the amount sued for was within a justice's jurisdiction (Rev. St. 1901, § 1337h)—State v. Bagby, 29 Ind. App. 554.

31. Regulations of a railroad commission (Const. art. 285)—Railroad Commission v. Kansas City So. R. Co., 107 La. 450.

32. Terre Haute & L. R. Co. v. Erdel, 158 Ind. 344.

33. Dismissal of a petition in voluntary bankruptcy on the ground that defendant was chiefly engaged in farming—First Nat. Bank v. Klug, 186 U. S. 202, 46 Law. Ed. 1127.

34. Const. Amend. 1884, § 6—Gipson v. Powell, 167 Mo. 192.

35. Harn v. American B. & S. Ass'n, 95 Tex. 79.

36. McCurdy v. Conner (Tex.) 66 S. W. 664.

Decision that district can adopt local option though it is already in force in part of district does not conflict with one that it cannot vote when it is already in force in the county—Kidd v. Rainey, 95 Tex. 556. Decisions on the right to make openings in a railroad fence held not in conflict—International & G. N. R. Co. v. Richmond (Tex. Civ. App.) 67 S. W. 1029.

37. Decisions upon materiality of survey in trespass to acquire title—McCurdy v. Conner (Tex.) 66 S. W. 664.

38. Yoacham v. McCurdy, 27 Tex. Civ. App. 183.

39. Rev. St. art. 941, subd. 8, art. 943—Rotan Grocery Co. v. Rogers, 95 Tex. 437.

40. Wells v. Rogers, 196 Ill. 292.

41. Conflict of claims of municipalities to public funds—Reed v. Chatsworth, 201 Ill. 480.

42. Assessment books—People v. Hendee, 199 Ill. 55.

43. Const. art. 6, § 12—Hannibal v. Bowman, 167 Mo. 535.

the case to the supreme court.[44] Its constitutionality or legality is not involved by seeking to compel issue of certificate that poll tax has been paid.[45] Assessments levied by action of taxpayers do not, unless the proper amount be involved, go to the supreme court.[46]

S. *Cases involving freeholds and titles.*—A judgment and not the prayer determines whether freehold is involved.[47] A freehold or the title to realty is involved if the effect of decree is to transmute it from one person to another, or if the decision necessarily involves passing of the title, though it is not in fact changed.[48] In Missouri it is not sufficient that the title to land is collaterally investigated.[49] It is necessarily involved whenever title is disputed;[50] hence it is involved if the question be whether a highway legally exists,[51] or on proceedings to vacate and reestablish a highway,[52] but not if the mere fact of existence is in issue, as in an action for penalties for obstructing.[53] The assertion of a life estate as against the claim of easement is one of freehold.[54] So is the assertion of an easement in a highway,[55] or the assertion of a right of inheritance of a child against devises by its father.[56] If one in possession of land, resisting an attempt to evict him, seeks the annulment of plaintiff's title, the title, and not alone the possession, is in issue for jurisdictional purposes.[57] A title is involved if an ejectment defendant bought in on execution sale to pay the costs, and was afterwards sued to recover possession.[58] It may be involved by intervention to assail an attachment defendant's title,[59] but is not affected by a suit to remove a sheriff's certificate of sale as a cloud on the title.[60] A suit to compel a conveyance to the purchaser whose right

44. Legality of sidewalk tax appealable —S. D. Moody & Co. v. Chadwick, 108 La. 66. Action assailing tax books for want of taxing power and also because of illegality of assessment, is appealable though the latter ground alone would be insufficient, unless the jurisdictional amount was involved —Tebault v. New Orleans, 108 La. 686. If an assessment be assailed solely for irregularity, it must involve the jurisdictional amount—State v. Board of Assessors, 107 La. 572. A tax assailed because the collector had failed to do certain things and was therefore without authority to proceed, does not involve constitutionality and legality of the tax but only regularity of the collector's proceedings—State v. Delgado, 107 La. 72.

45. McAyeal v. Murrell, 108 La. 116.

46. Ayers Pav'g Co. v. Loewengardt (La.) 33 So. 553.

47. The complainant sought to recover mining claims and judgment was given under the cross complaint for a lien on the claims—Weiss v. Gullett, 29 Colo. 121, 67 Pac. 155.

48. Mills v. Wilson, 95 Ill. App. 88; Pettyjohn v. Adams, 95 Ill. App. 243; Hanon v. Jones, 100 Ill. App. 583; Smith v. Patton, 97 Ill. App. 180; McDavid v. Sutton, 104 Ill. App. 626. Suit to set aside a divorce as against heirs of one of the parties who died seised of realty, does not involve freehold—Maher v. Title Guaranty & Trust Co., 95 Ill. App. 365. Suit to vacate a decree amounting to a muniment of title, involves title to realty —Pelz v. Bollinger, 87 Mo. App. 540. Seeking to set aside fraudulent conveyance and revest title in owner involves title—Balz v. Nelson (Mo.) 72 S. W. 527. Suit to cancel a trust deed and the notes secured for failure of consideration and duress, involves title—Lappin v. Crawford, 92 Mo. App. 453.

49. Side issue on the question of ownership to determine whether proper notice was given to foreclose a mechanic's lien—P. M. Bruner Granitoid Co. v. Klein (Mo.) 70 S. W. 687.

50. Smith v. Patton, 97 Ill. App. 180. Title is involved by suit designed to assert title as against an estoppel to claim it—Spence v. Renfro, 88 Mo. App. 59. Freehold pleaded to trespass q. c. f.—Patterson v. T. J. Moss Tie Co., 24 Ky. Law Rep. 1571. Freehold pleaded to trespass—Roach v. T. J. Moss Tie Co., 24 Ky. Law Rep. 1222. It may be put in issue by plea of general issue —Dolton v. Malin, 102 Ill. App. 417.

51. Cox v. Commissioners, 97 Ill. App. 218. Injunction against laying out road on the ground that title had not been divested, involves freehold—Commissioners of Highways v. Elwood, 96 Ill. App. 239. Title decided in suit enjoining penal action for obstruction of a highway—Village of Dolton v. Dolton, 196 Ill. 154.

52. Perry v. Bozarth, 198 Ill. 328.

53. Action for penalty for failure to cut hedge fences—Herman v. Commissioners, 197 Ill. 94. Freehold not involved in action for penalty for obstructing highway—Seidschlag v. Antioch, 198 Ill. 413.

54. Truax v. Gregory, 98 Ill. App. 395.

55. Village of Dolton v. Dolton, 99 Ill. App. 141. Village street—Harlem v. Suburban R. Co., 198 Ill. 337.

56. Flannigan v. Howard, 101 Ill. App. 616.

57. State v. Judges, 107 La. 487.

58. Tice v. Hamilton, 94 Mo. App. 198.

59. Alsdurf v. Williams, 196 Ill. 244.

60. Johnson v. McDonald, 196 Ill. 394. A sheriff's certificate was assailed on the ground that the property was a homestead and that the sale was not regular—Charleston State Bank v. Brooks, 197 Ill. 388.

is not controverted involves no title.[61] No question of freehold is involved in application for writ of assistance,[62] or an injunction against interfering with opening a road, and to compel acceptance of damages awarded,[63] or on petition to disconnect land from a city, where the sole questions are whether it is unplatted, and whether petitioner owns all of it;[64] but "title to realty" is affected by injunction against obstruction of an easement.[65]

Proceedings to foreclose liens on land do not, as a rule, involve freeholds.[66] Title is not the substantive fact put in litigation by a plea of adverse title to a foreclosure suit;[67] otherwise, if it be by cross bill.[68]

Suit of trustee in bankruptcy to set aside fraudulent conveyance does not involve freehold if claims are paid from another source;[69] otherwise it does.[70]

Boundary cases do not include all actions in which a boundary is the issue.[71]

9. *A franchise* is involved wherever the court must necessarily determine whether or not one exists,[72] as in quo warranto assailing validity of a municipal organization,[73] or action seeking dissolution and receivership of a corporation.[74] No franchise is involved on a bill to set aside a conveyance of letters patent,[75] nor in a controversy over the right to a corporate name.[76]

10. *Probate and administration* orders are usually appealable.[77] A judgment of the county court in Illinois, holding a legatee's petition for an accounting demurrable, is appealable to the circuit, and not to the appellate, court;[78] also a proceeding to compel the surrender of property under the administration act.[79]

11. *The jurisdictional amount* in controversy, as prescribed by statute,[80]

Freehold not involved in appeal to set aside judgment and suppress record as a cloud on title for lack of jurisdiction of the person—Helton v. Elledge, 199 Ill. 95.

61. Krepp v. St. L. & S. F. R. Co. (Mo. App.) 72 S. W. 479.

62. Kerr v. Brawley, 193 Ill. 205.

63. Rhoten v. Baker, 193 Ill. 271.

64. Roodhouse v. Briggs, 194 Ill. 435.

65. Against obstruction of a stairway claimed as an easement—Peters v. Worth, 164 Mo. 431.

66. The mere question whether a mortgage continued in existence or was extinguished, does not involve a freehold—Poole v. Kelsey, 95 Ill. App. 233. Judgment in suit to quiet title finding a lien and charging same, does not involve title—Rowe v. Current River Land & Cattle Co., 167 Mo. 305. A suit to subject a trustee's title to a lien of her creditor as against the cestui que trust on the ground that they had held out the trustee's ownership and procured credit to her, does not involve title to real estate though the prayer is that title be declared in the trustee for such purpose—Klingelhoefer v. Smith (Mo.) 71 S. W. 1008.

67. Tarr v. Abrams, 64 Kan. 887, 68 Pac. 605.

68. Cross bill alleging adverse title to a foreclosure involves freehold—Parlin & Orendorff Co. v. Galloway, 95 Ill. App. 60.

69. Lamont v. Regan, 96 Ill. App. 359.

70. Smith v. Patton, 97 Ill. App. 180.

71. An action on a contract for sale of land will go to the Texas supreme court though the sole issue is on a boundary—Steward v. Coleman County, 95 Tex. 445.

72. People v. School Directors, 97 Ill. App. 108.

73. People v. Marquiss, 192 Ill. 377.

74. Bixler v. Summerfield, 195 Ill. 147.

75. Maginn v. Bassford, 196 Ill. 266.

76. Jockish v. Deutcher Krieger Verein, 98 Ill. App. 9.

77. Interlocutory orders must decide rights, affect merits or aggrieve parties—Lane v. Thorn, 103 Ill. App. 215. Order to file inventory and accounting appealable in Rhode Island (Gen. Laws, c. 248, §§ 1-3)—Tillinghast v. Brown University (R. I.) 52 Atl. 891. A petition for a fuller accounting by one administrator will in Maryland be regarded as addressed to the general jurisdiction of the orphans' court and not to the special jurisdiction given where he has "concealed" or has omitted to return property in his hands, hence a decree should be reviewed in the court of appeals instead of making up issues to try the fact as provided in the special statute.—Cummings v. Robinson, 95 Md. 83. May be further appealed when tried de novo—Burge v. Burge, 94 Mo. App. 15. An order refusing to set aside an order of final settlement may be appealed though it is without prejudice if it is too late to apply again—Yakel v. Yakel, 96 Md. 240. Order to executor to petition for sale of land decides no right—Lane v. Thorn, 103 Ill. App. 215. An executor is aggrieved by refusal to probate a codicil—In re Stapleton's Will (N. Y.) 71 App. Div. 1.

78. The proceeding is statutory and not a suit or proceeding "at law" or "in chancery" within the appellate court act—Rochey v. Downey, 98 Ill. App. 320.

79. People v. Benson, 99 Ill. App. 325.

80. The supreme court will not entertain appeal to grant new trial from Buffalo municipal court if neither party pray judgment for $50—King v. Norton (N. Y.) 36 Misc. 53. Less than $25 will not go either to the appeals or supreme—Moore v. State, 63 Kan. 886, 66 Pac. 239.

usually excludes costs,[81] and is reckoned by the sum claimed, not the amount recovered.[82] Thus, the demand, and not the amount owing by a garnishee,[83] or the amount of liens claimed, not that of the decree adjusting them, controls;[84] but if a judgment be the subject of action, the original demand is ignored.[85] Costs taxed against an attorney on dismissing an action should be regarded as a part of the main judgment in determining the amount;[86] but contra if the taxation or allowance of costs is not an incident of the main demand.[87]

Jurisdiction of suits on "contract" involving a specified amount excludes interest and costs.[88] If the appealability depends on the amount of the "judgment," a provision for the transfer of property of unspecified value will not aid a money judgment which is below a specified sum.[89]

If title to land be involved, the value of it is in many states no longer a jurisdictional element;[90] but in Louisiana the appealability of an action for partition by licitation among the heirs is determined by the sum in controversy, if the only dispute is the obligation of an heir to collate.[91] Likewise of a suit for partition of the community property when independent of a judgment of separation.[92] In other states a certificate of importance or the like must also be had if the land is worth less than the limit of value.[93] An action by a partial assignee in his own name alone on a chose in action is at law, and must involve the jurisdictional amount.[94] Actions to recover money or personalty do not include those where the right to interest is the subject of litigation.[95]

The amount not only may, but must, be necessarily involved.[96] The amount of the mortgage debt will be included with defaulted interest in an action seeking foreclosure on the ground that the default matured the debt.[97] In forcible entry, the rental value is the amount in controversy.[98] In a boundary case, the value

81. Lockett v. Clifford, 24 Ky. Law Rep. 1. Judgment in disbarment proceedings reprimanding respondent and taxing him with $61 costs is appealable though less than $100 is involved—State v. Tracy, 115 Iowa, 71.

82. Kirby v. Ranier-Grand Hotel Co., 28 Wash. 705, 69 Pac. 378; Howard v. Maysville & B. S. R. Co., 24 Ky. Law Rep. 1051. Demand for over $200.—judgment $185 is appealable—Dugdale v. Doney, 28 Ind. App. 283. In Kansas it is the amount which might have been recovered under the allegations of the complaint — Pampel v. Downey, 64 Kan. 888, 68 Pac. 607. The amount in controversy exceeds $100 so as to give an appeal to the court of civil appeals, where the suit was originally for $200 before a justice of the peace but judgment for $50 was recovered in the county court (Rev. St. 1895, art. 996)—Gulf, C. & S. F. R. Co. v. Cunnigan, 95 Tex. 439.

83. Hutmacher v. Anheuser-Busch Brewing Ass'n, 198 Ill. 613.

84. M. Pugh Co. v. Wallace, 198 Ill. 422.

85. Defendant's action of nullity upon a judgment against him for $1500 resulting from a suit for $5000 involves too little—Royal v. Frederick Leyland & Co. (La.) 33 So. 49. On a decree for money found due on a trustee's accounting, the amount decreed and not the difference between it and the amount originally claimed against him was held to be in controversy—Prentice v. Hancock (Pa.) 53 Atl. 763.

86. Dismissal of $34,000 suit taxing costs of less than $300—People v. Madden, 134 Cal. 611, 66 Pac. 874.

87. Attorney's fees allowed for services in a foreclosure—State v. Judges, 106 La. 241.

88. Note for $100 with interest, making in all less than $200, is within "justice's jurisdiction" of "suits on contract not involving more than $100" and not within concurrent jurisdiction of justices up to $200 (see Statutes)—Shaul v. Citizens' State Bank, 157 Ind. 281.

89. Ducey v. Patterson, 29 Colo. 290, 68 Pac. 239.

90. Injunction against execution—Park v. McReynolds, 23 Ky. Law Rep. 894. Foreclosure of liens—Davis v. Ramage, 23 Ky. Law Rep. 1420.

91. Succession of Magi, 107 La. 208.

92. Melancon v. Wilson, 107 La. 628.

93. Judgment lien of less than $100—Hidy v. Hanson. 116 Iowa, 8.

94. Barto v. Seattle & I. R. Co., 28 Wash. 179, 68 Pac. 442.

95. In Kentucky if the right to interest as distinguished from the amount due be in controversy, the court of appeals may take jurisdiction though the amount would otherwise exclude it (Ky. St. § 950)—Whitehead v. Brothers Lodge, 24 Ky. Law Rep. 1633; Same v. Ellis, Id.

96. $200 fees and $65 a month alimony is not $1000—Miles v. Miles, 200 Ill. 524.

97. Forest Hill B. & L. Ass'n v. McEvoy's Ex'r, 24 Ky. Law Rep. 161.

98. Towle v. Weise, 64 Kan. 760, 68 Pac. 637.

is not that of the adjoining tracts, but that of the disputed strip.[99] In replevin, the total value of all the property is taken, though different persons recover particular chattels, worth less than the limit.[1] Successive yearly values of a right like a lease or easement are aggregated only when all are involved.[2] When specific recovery of a chattel is sought, its value as alleged is taken.[3] An injunction against a fee bill is not a money judgment or one for property, within the limitations.[4] Sometimes the value of the right to be protected by the injunction is taken.[5]

Admitting part of a demand reduces the amount in controversy,[6] as does entering a remittitur of part before judgment,[7] or withdrawing part by amendment before going to the jury.[8] If property claimed be surrendered and accepted, its value is no longer in controversy, and cannot be added to the damages claimed.[9] In an action to recover land, its value is to be computed notwithstanding defendant's disclaimer, if he claims the value of the buildings and denies plaintiff's title.[10] On an executor's accounting, the amount with which he voluntarily charges himself is not in dispute.[11] Abandonment of an appeal by a defendant does not abandon his plea of reconvention, on which alone the jurisdictional amount is brought into controversy.[12]

Sums demanded in each of several counts may be aggregated.[13] A contract debt and a counterclaim may be added to make the amount.[14] When one sues for himself and others, then the entire sum is taken.[15] Likewise when actions are consolidated and tried without objection.[16] A judgment in solido against the principal and surety may be appealed if a judgment exceeding the jurisdictional amount was sought against the principal only, while a lesser sum was asked against the surety,[17] but the judgment must be joint.[18] Intervening claimants cannot aggregate disconnected claims,[19] nor can several beneficiaries of a trust.[20]

99. Salles v. Jacquet, 108 La. 107.

1. Goodyear Rubber Co. v. Schreiber, 29 Wash. 94, 69 Pac. 648.

2. Easement worth $1200 a year for 30 years, involves more than $4500—Overall v. St. L. Traction Co., 88 Mo. App. 175. The jurisdictional sum of $100 is not involved in a proceeding to forfeit a lease after one year's payment had been made, the lease providing that it might be continued for 5 years on payment of $20 a year—Barker v. Lanyon Zinc Co., 64 Kan. 884, 67 Pac. 629.

3. Action for recovery of horse (alleged worth $100) and for $25 damages, not $200 in controversy—Ziegler v. Heile, 23 Ky. Law Rep. 1125.

4. Shackelford v. Phillips, 24 Ky. Law Rep. 154.

5. Sufficient if damages exceeding jurisdictional amount will befall if injunction be refused—Marx & Haas Co. v. Watson, 168 Mo. 133, 56 L. R. A. 951. Injunction against misusing public property worth twenty thousand (20,000) dollars—Sugar v. City of Monroe, 108 La. 677, 32 So. 961.

6. To the difference between the amounts—Hedrick v. Mutual Guarantee B. & L. Ass'n, 51 W. Va. 421. The statutory amount $200 was recovered but appellant had admitted $1.40 due; hence not appealable—Illinois Cent. R. Co. v. Landram, 23 Ky. Law Rep. 1956.

7. State v. Judges, 107 La. 784.

8. Dodge v. Corliss, 28 Wash. 474, 68 Pac. 869.

9. Kaufman v. Cade, 107 La. 144. Property was surrendered by defendants and damages claimed were less than $2000—Howat v. Howat (La.) 33 So. 106.

10. New Orleans v. Fredericks, 107 La. 496.

11. And cannot be added to disputed items to give jurisdiction.—In re Burke's Estate, 169 Mo. 212; Green v. Hussey, Id.

12. A counter-proceeding in error was brought by the plaintiff to review the decision of the county court on appeal from a justice—Benchoff v. Stephenson (Tex. Civ. App.) 72 S. W. 106.

13. Pub. St. c. 150, § 5—Gilman v. American Producers' Controlling Co., 180 Mass. 319.

14. $1000 and $950, recovery of $994—Foster v. McKeown, 192 Ill. 339.

15. Recovery of taxes paid—Commonwealth v. Scott, 23 Ky. Law Rep. 1488, 55 L. R. A. 597.

16. Skinner v. Board of Com'rs, 63 Kan. 557, 66 Pac. 635. Two suits on bail bonds for $2500 each, if consolidated in one action, involve $5000—State v. Fraser, 165 Mo. 242.

17. Perkins v. Lapeyronnie, 107 La. 502.

18. In an action for trespassing on a particular tract, if the several defendants do not plead a common title, and separate judgments are asked and awarded, the amount is determined by that which is asked against each—Southern Timber & Land Co. v. Wartell (La.) 33 So. 559.

19. Mechanics' liens—Davis v. Upham, 191 Ill. 372.

20. Beneficiaries under a trust cannot lump their shares held in trust so as to appeal to supreme instead of superior court

If there be several conflicting claims or liens, the amount of each, and not the aggregate amount, is decisive.[21] If a successful party appeals, the difference between the demand and the recovery is the amount;[22] and when a judgment disposes of a part only of the sum, reserving the balance, that sum only is in controversy.[23] On appeal by the garnishee, the judgment against him, and not the demand, fixes the right.[24]

12. *Review of intermediate appeals* often depends on one or more jurisdictional facts or conditions.[25] Neither of such grounds can exist when the decision is made without opinion.[26] In Ohio, the supreme court could not under Act May 12, 1902, review a judgment in error rendered by a lower court except as provided by statute;[27] but the act which repealed it did not give jurisdiction to review judgments which, being rendered while the earlier act was in force, were not at the time reviewable.[28] Statutes taking away the right of appeal of a class of cases to the appellate court, and making them direct to the supreme, disentitle one to appeal such a case to the appellate court and thence to the supreme.[29]

In Indiana, only money judgments of the specified amount, and not those for title or possession of realty, are appealable from the appellate to the supreme court.[30] The whole amount, and not only that affected by the error assigned on an intermediate appeal, takes the case up.[31] The amount claimed, not that recovered, determines whether the cause was within a justice's jurisdiction;[32] but allegations as to amount control the prayer for damages.[33] Certiorari will not lie to an intermediate court as having, without authority, decided federal questions, where the only question was a forwarder's baseless claim to subrogation to the government lien for customs duties which he had paid.[34]

No "new question of law" or "contravention of" a higher court's decision exists when the intermediate court misrepresents or misstates the facts.[35] The Texas statute allowing an appeal if the civil appeals overrules its own decision

(P. L. 248)—In re Samson's Estate, 201 Pa. 590.

21. Suits by garnishing plaintiffs were consolidated — Hutmacher v. Anheuser-Busch Brew'g Ass'n, 198 Ill. 613. M. Pugh Co. v. Wallace, 198 Ill. 422, holding that a subcontractor below the limit cannot appeal merely because the contractor whose claim is above the limit has appealed.

22. People's B. & L. Ass'n v. Zimmerman, 65 Ohio St. 176.

23. Judgment gave $50 (less than appealable sum) to appellant and made no disposition of remaining proceeds—Newton v. Porter, 23 Ky. Law Rep. 1388.

24. Schreiner v. Emel, 26 Wash. 555, 67 Pac. 228.

25. Gen. St. Kan. 1901, § 5019. The record must show $100 in controversy or title to land involved—Grant v. Robb, 64 Kan. 886, 67 Pac. 852. Statute making appellate court findings of fact binding on supreme court, held constitutional—Earnshaw v. Western Stone Co., 200 Ill. 220. Applications of such statutes to the cases are shown in the former part of this section.

26. Craig v. Bennett, 158 Ind. 9.

27. Act May 12, 1902. Injunction commenced in common pleas and taken to circuit—Slingluff v. Weaver, 66 Ohio St. 621.

28. Act Oct. 22, 1902, repealing Act May 12, 1902—Gompf v. Wolfinger (Ohio) 65 N. E. 878.

29. Freehold cases (Act June 7, 1877, p. 69, §§ 88, 90, as amended)—Perry v. Bozarth, 198 Ill. 328.

30. In granting the right to appeal referring only to money judgments (Acts 1901, p. 565, § 10)—Smith v. American Monument Co. (Ind.) 65 N. E. 524.

31. Towne v. Towne, 191 Ill. 478.

32. Dugdale v. Doney, 28 Ind. App. 283; Gulf, C. & S. F. R. Co. v. Cunnigan, 95 Tex. 439. Action to recover $160 on a guaranty is within the jurisdiction of a justice (Burns' Rev. St. 1901, § 1500)—Crew v. Sager (Ind. App.) 65 N. E. 934. In Texas an action involving less than $100 and originating in a justice court, ordinarily being a cause for the county court on appeal, is not brought within the clause making all district court judgments appealable, merely because in Roberts county the district court exercises county court jurisdiction (Sayles' Rev. St. art. 996; Acts 22d Leg. 1891, p. 12)—Southern Kan. R. Co. v. Cooper (Tex. Civ. App.) 72 S. W. 409. An action in the circuit court for judgment for $100 and costs is within the jurisdiction of a justice—Taylor v. Geiger (Ind. App.) 65 N. E. 192.

33. Allegations and bill of particulars for $174 held within justice's jurisdiction though prayer was for $200 and interest accrued—Seward v. Steeley (Ind. App.) 65 N. E. 216.

34. State v. Bland, 168 Mo. 1.

35. Burns' Rev. St. 1901, § 1337j—Barnett v. Bryce Furnace Co., 157 Ind. 572.

or that of another court of "civil appeals" does not include overruling a decision of the former court of appeals.[36]

For lack of finality, rules nisi[37] or rulings on motions for a decision,[38] dismissals of appeals for lack of jurisdiction,[39] or remands for further proceedings,[40] are not reviewable.

A mandate to decree in accordance with the prayer of the bill is reviewable by error as leaving nothing further for the trial court to do.[41]

If parties seek a review in the circuit court of appeals, its final jurisdiction will conclude them on constitutional questions which might have taken the case direct to the supreme court;[42] nor can its judgment be reviewed because a federal question incidentally arose which was not of a character to make the matter appealable directly to the supreme court.[43] The refusal of the circuit court to settle a receiver's accounts, and to charge certain costs against complainant, involves no question of jurisdiction which will take the case to the supreme court, though it was done on the ground that the court lacked authority to charge such costs to the complainant.[44]

13. *Federal review of state or territorial decisions* will lie if there is a federal question.[45] The federal question must have been raised in the state court,[46] and decided against the validity of an act of congress, to be thus reviewable;[47] but it is of no moment that the state court, in addition to a federal question, inadvertently and needlessly decide a question not federal,[48] or that the state court decide that no federal question existed;[49] but jurisdiction is not ousted by the correctness of the state court's decision.[50] Writs of error will issue from the supreme court in all cases where constitutionality of the state law is decided against either party.[51] The question of repugnancy of a state law is not presented when the state appellate court merely declines to pass upon it;[52] and none is presented by assailing a law for invading the power of congress if it has been construed as intended to apply only to matters of state control.[53] Ordinarily it must not be withheld until after decision on appeal or error,[54] unless it could not have been tried sooner;[55] but it may be

36. Gossett v. Citizens' R. Co. (Tex.) 69 S. W. 976. Opinions held not conflicting on the law of negligence per se by a railway company which violates an ordinance—Gossett v. Citizens' R. Co. (Tex.) 69 S. W. 976.

37. To strike off from the common pleas docket an appeal from county officers is interlocutory—Huntington County v. Mason, 21 Pa. Super. Ct. 148.

38. Refusal to affirm probate court's settlement of executor's accounts—McGinty v. Kelley, 85 Minn. 117.

39. Dismissal of appeal from justice of the peace for lack of jurisdiction—Valley Turnpike Co. v. Moore (Va.) 42 S. E. 675.

40. Order of remand for further proceedings "in accordance with * * * opinion" not final—Friedman v. Lesher, 198 Ill. 21. A remand in eminent domain proceedings to take proceedings and impanel a jury as ordered by statute or to vacate a part of the order and for further proceedings is not final so as to go to the U. S. supreme court—Macfarland v. Brown, 187 U. S. 239.

41. Curran v. Houston, 201 Ill. 442.

42. Cary Mfg. Co. v. Acme Clasp Co., 187 U. S. 427.

43. Ayres v. Polsdorfer, 187 U. S. 585.

44. Chapman v. Atlantic Trust Co. (C. C. A.) 119 Fed. 257.

45. If the question is a settled one review will be denied—Equitable Life Soc. v. Brown, 187 U. S. 308.

46. Home for Incurables v. New York, 187 U. S. 155. Invalidity of state law was a defense—Manley v. Park, 187 U. S. 547.

47. Act making silver dollar legal tender, sustained—Baker v. Baldwin, 187 U. S. 61.

48. Balk v. Harris (N. C.) 43 S. E. 477.

49. Missouri, K. & T. R. Co. v. Elliott, 184 U. S. 530, 46 Law. Ed. 673.

50. Andrews v. Andrews, 188 U. S. 14.

51. Unconstitutionality was urged as a defense by plaintiff in error—Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 46 Law. Ed. 679.

52. Because not raised at trial does not present—Layton v. Missouri, 187 U. S. 356; Erie R. Co. v. Purdy, 185 U. S. 148, 46 Law. Ed. 847.

53. Act regulating the domestic transportation—Erie R. Co. v. Purdy, 185 U. S. 148, 46 Law. Ed. 847.

54. Too late on an application for rehearing in the highest state court—Weber v. Rogan, 188 U. S. 10. Too late on petition for writ of error after state court had passed on the case on other than the constitutional question—Telluride Power Co. v. Rio Grande Western R. Co., 187 U. S. 569. Too late when first made in a petition in error to the supreme court—Johnson v. New York L. I. Co., 187 U. S. 491.

made on a motion to set aside judgment.[56] It may have been raised in a state court other than the one to which the writ is directed.[57] Objection raised below must specify whether the state or the federal constitution is offended, else it will be deemed that the former is invoked.[58]

Illustrative cases showing federal questions are collected in the footnotes.[59] If the state court necessarily passed on the question what rights were vested under a federal decree, a federal question is involved; but there must be more than a mere question of practice as to whether any grounds for relief are stated.[60] One is involved where the state court bases its judgment on infractions of numerous statutes collectively, some of which are alleged to be repugnant to the federal constitution.[61] A federal right, and not its mere existence in the case at bar, must be attacked.[62] Thus, the validity of a federal grant or reservation of land must be questioned.[63] A contention that United States surveys and patents will be changed in legal effect by the admission of certain evidence is federal.[64] State rights of sovereignty over beds of meandered waters within the state depend on no federal question, but on the common law;[65] and the making of government surveys, meandering waters, and the approval of such surveys by government officers, is not an adjudication of submerged lands to the state, so that a question of state title thereto can present a federal question.[66] A claim of title in ejectment, under a Spanish confirmation by treaty and patent, raises a federal question.[67] Defenses not federal in an action of ejectment are estoppel, licenses, payment of taxes, invalidity of a statute because not described in its title, want of power to grant public property, and limitations.[68] A municipal ordinance passed pursuant to law is a law of the state, and conflict between it and the federal constitution gives jurisdiction to the supreme court.[69] Repealability of a tax exemption, but not the question whether it was repealed, is a federal question.[70] No contract is impaired by a change in the decisions of a state

55. On rehearing—Missouri, K. & T. R. Co., v. Elliott, 184 U. S. 530, 46 Law. Ed. 673.

56. Manley v. Park, 187 U. S. 547.

57. Error to lower court after question had been tried and remanded by state supreme court—Rothschild v. Knight, 184 U. S. 334, 46 Law. Ed. 573.

58. Layton v. Missouri, 187 U. S. 356.

59. Arresting a judgment on the ground that it enforced an unconstitutional statute, shows a federal question—St. Louis Consol. Coal Co. v. Illinois, 185 U. S. 203, 46 Law. Ed. 872. Denial of right of action to recover usurious interest expressly founded on Act of congress, shows a federal question—Talbot v. First Nat. Bank, 185 U. S. 172, 46 Law. Ed. 857. The question of what damages are recoverable on an injunction bond given in federal courts is federal. It is a liability depending on authority exercised in the U. S.—Tullock v. Mulvane, 184 U. S. 497, 46 Law. Ed. 657. The objection is untenable that obligation of contract, due process of law or equal protection was denied by a quo warranto in which a charter was forfeited after a full hearing by all the parties in court, when the charter itself prescribed mandamus as the remedy; neither does it matter that the attorney general was instructed by statute to take such action as was proper—New Orleans Waterworks Co. v. Louisiana, 185 U. S. 336, 46 Law. Ed. 936. The question of proper or necessary parties in an action to forfeit a charter is not federal—New Orleans Waterworks Co. v. Louisiana, 185 U. S. 336, 46 Law. Ed. 936. It is not a federal contention that a "judgment" impairs a contract—New Orleans Waterworks Co. v. Louisiana, 185 U. S. 336, 46 Law. Ed. 936. State decision that executing a power brings a grantee under the taxable transfer act though power was given by will before act was passed—Orr v. Gilman, 183 U. S. 278, 46 Law. Ed. 196.

60. National Foundry & Pipe Works v. Oconto City Water Supply Co., 183 U. S. 216, 46 Law. Ed. 157.

61. Capital City Dairy Co. v. Ohio, 183 U. S. 238, 46 Law. Ed. 171.

62. Findings of fact or conclusions of local law on which a federal right is predicated are not federal—Telluride Power Co. v. Rio Grande Western R. Co., 187 U. S. 569.

63. Not sufficient to allege that the description in a patent failed to cover the tract intended—Sweringen v. St. Louis, 185 U. S. 38, 46 Law. Ed. 795. Decision that Indian Reservation is public lands within a federal act (Act April 19, 1864, § 12) does not question the validity of such act—Kennard v. Nebraska, 186 U. S. 304, 46 Law. Ed. 1175.

64. Riparian rights under swamp land grants—French-Glenn L. S. Co. v. Springer, 185 U. S. 47, 46 Law. Ed. 800.

65. Iowa v. Rood, 187 U. S. 87.

66. Iowa v. Rood, 187 U. S. 87.

67. Mobile Transp. Co. v. Mobile, 187 U. S. 479.

68. Mobile Transp. Co. v. Mobile, 187 U. S. 479.

69. Owensboro v. Owensboro Water Works Co. (C. C. A.) 115 Fed. 318.

70. Allegation that an exemption from taxation became part of a contract between

as to ownership in tide lands.[71] It is not a denial of full faith and credit to hold a foreign law inapplicable.[72]

If a federal question existed, error will lie to the circuit court of appeals, though the case could not go directly to the supreme court;[73] but if a decree of a circuit court of appeals be improperly appealed, it is not aided by a certiorari to perfect the record.[74]

Decrees and judgments of supreme courts of the territories are reviewable in the circuit court of appeals only in cases enumerated.[75]

Appeals from the territorial court of Hawaii by virtue of Act April 30, 1900, § 86, will lie when appeals would lie from state courts to United States courts; and the fact that the territory has been assigned to a judicial circuit, or that a district court with powers of a circuit court has been erected in Hawaii, the judgments of which are appealable to the United States courts, does not extend the right of appeal from the territorial courts.[76]

D. Dependent on the parties.—A mandamus against county clerk to furnish duplicate assessment books is not a case in which the state is interested as a party or otherwise.[77]

The state is a party when the suit is by state officers and in relation to a state canal. In Illinois, if the state is interested, an appeal still lies direct to the supreme court.[78] The supreme court of Missouri takes the case if a county is party.[79]

E. Questions certifiable.—A law for the certification of a dissent from an inferior court does not apply to those cases wherein the inferior court is the last resort.[80] Questions of great public interest, and those whereon a judge is in doubt, only, will be certified.[81]

§ 5. *Courts of review and their jurisdiction.*—In the preceding section the jurisdiction of courts was incidentally involved. When the reader's inquiry is simply whether a case belongs to a class, such as freehold or constitutional cases, or those involving a stated amount, that section should be consulted.[82] A constitutional grant of general appellate jurisdiction "under such limitations" as the legislature may prescribe does not enable the legislature to extend or restrict the right of appeal, but only to limit or regulate appellate procedure and relief,[83] and should not be construed to authorize the destruction of the right of appeal.[84] Under such a provision, the court may be authorized to affirm, reverse, or modify, to continue or dissolve injunctions, and the orders which are directly appealable may be enumerated, and power given to review intermediate orders on an appeal from the final judgment.[85] In Rhode Island, the constitution does not vest all appel-

the state and a corporation and was violated by a subsequent statute shows a federal question—Gulf & S. I. R. Co. v. Hewes, 183 U. S. 66, 46 Law. Ed. 86.

71. Mobile Transp. Co. v. Mobile, 187 U. S. 479.

72. Johnson v. New York Life Ins. Co., 187 U. S. 491.

73. Jurisdiction in part resting on diversity of citizenship—Howard v. United States, 184 U. S. 676, 46 Law. Ed. 754.

74. Huguley Mfg. Co. v. Galeton Mills, 184 U. S. 290, 46 Law. Ed. 546.

75. Alienage or diverse citizenship of parties, patent cases, revenue cases, criminal cases, admiralty cases—Union Cent. L. I. Co. v. Champlin (C. C. A.) 116 Fed. 858.

76. In re Wilder's S. S. Co., 183 U. S. 545, 46 Law. Ed. 321; Wilder's S. S. Co. v. Low (C. C. A.) 112 Fed. 161; Equitable Life Soc. v. Brown, 187 U. S. 308.

77. People v. Hendee, 199 Ill. 55.

78. Practice Act, § 88, not repealed by Act 1887 amending Appellate Court Act—Canal Com'rs v. Sanitary Dist. of Chicago, 191 Ill. 326.

79. Corbin v. Adair County (Mo.) 71 S. W. 674.

80. Local option election contest—Kidd v. Rainey, 95 Tex. 556.

81. Habermann v. Heidrich (Tex. Civ. App.) 66 S. W. 795. Decision admitting evidence of a prior accident of the same sort not important or distinctive—Vandecar v. Universal Trust Co., 114 N. Y. 783.

82. Ante, § 4-C.

83. Const. art. 8, §§ 2, 3—Finlen v. Heinze, 27 Mont. 107, 69 Pac. 829.

84. Const. art. 8, § 3—Finlen v. Heinze (Mont.) 70 Pac. 517.

85. Such statutes are all rules of proce-

late jurisdiction in the supreme court as one body; hence the creation of an appellate division of which three members should be a quorum, was valid.[86] If a court of intermediate appeals be created for a time, by act providing that the jurisdiction of the supreme court shall remain except as changed, on the extinction of the court of appeals the jurisdiction of the supreme court is restored without further legislation.[87]

One, at least, of the jurisdictional grounds prescribed, must exist to carry the case to the highest court.[88] If one of such grounds remain in dispute, a transfer to such court is imperative.[89] Conversely, if grounds excluding jurisdiction exist, a transfer by the lower court will not confer it.[90] A constitutional provision for appellate courts having jurisdiction of such appeals as the legislature may provide, and giving a further appeal to the supreme court in freehold cases, does not intend that the appellate courts shall have jurisdiction of franchise cases unless the legislature so provides.[91] Footnotes show laws of the several states.[92]

The action of the highest court in transferring a case to the intermediate court is conclusive as to jurisdiction.[93]

In federal courts the fact that treaty questions are commingled with other essential ones does not authorize the circuit court of appeals to pass on the former.[94] Nor can it hear a cause wherein the sole question is on the conflict between the federal constitution and a state law,[95] though the decision may have been wholly on other grounds.[96] The supreme court's jurisdiction is exclusive where the record shows a controversy on constitutional questions on which alone the jurisdiction of the circuit court was invoked.[97] If the constitutional question arose incidentally, the jurisdiction of the circuit court of appeals is not ousted,[98] or if jurisdiction was invoked because of diversity of citizenship, and a constitutional question subsequently arose, the circuit court of appeals has jurisdiction.[99] A district court decree

dure and do not affect the right of review—Finlen v. Heinze, 27 Mont. 107, 69 Pac. 829.

86. Const. art. 14, § 3, devises the jurisdiction "until otherwise prescribed" by law—Floyd v. Quinn (R. I.) 52 Atl. 880.

87. Act Feb. 27, 1895—Atchison, T. & S. F. R. Co. v. Morris, 65 Kan. 532, 70 Pac. 651.

88. Eccles v. Missouri Pac. R. Co. (Mo.) 68 S. W. 1041.

89. McClure v. Feldman (Mo. App.) 67 S. W. 732. The transfer will be made if it appears on appeal that a constitutional question was raised during the trial—Watkins v. Edgar, 94 Mo. App. 285.

90. In Colorado if the supreme court was without jurisdiction of an appeal direct from the county court of a justice case it could not take the case by transfer from the court of appeals—Altman v. Huffman (Colo.) 70 Pac. 420.

91. Perry v. Bozarth, 198 Ill. 328.

92. In Colorado forcible entry cases became reviewable in the court of appeals by conferring on it jurisdiction like the supreme court, though in consequence of a later amendment at the same term the forcible entry statute was impliedly restored, so as to make the appeal go only to the supreme court (Laws 1891, pp. 119, 228)—Schafer v. Hegstrom (Colo. App.) 71 Pac. 396. Validity of a statute is for the supreme court exclusively—People v. Church, 103 Ill. App. 132. A license suit involving fact only held appealable on the ground of amount involved to the court of appeal and not to the supreme court—State v. Judges of Appeal Ct. (La.) 33 So. 756. In Colorado, a civil proceeding in contempt is reviewable in the supreme court only when it possesses proper jurisdictional elements—Naturita C. & R. Co. v. People (Colo.) 70 Pac. 691. New Jersey surrogate's decision on probate is appealable to orphans' court—In re Cartwright's Will (N. J. Prerog.) 51 Atl. 713. County court judgments are not reviewable directly in supreme court—Kingman v. Davis, 63 Neb. 578. Allowance of a claim against an estate should go to the law and not to the probate side of the supreme court—Morgan v. McCausland, 96 Me. 449. Appeals from taxation of costs after remand should go to that court which heard the appeal—State v. Judges Ct. of Appeals, 107 La. 69.

93. Bowlby v. Kline, 28 Ind. App. 659; State v. Ohio & I. M. Land Co., 95 Mo. App. 349. A proceeding to establish a will of realty and personalty—Ortt v. Leonhardt (Mo. App.) 68 S. W. 577.

94. It may either affirm or reverse disregarding such question, or may certify it and reserve decision—United States v. Lee Yen Tai (C. C. A.) 113 Fed. 465.

95. St. Clair County v. Interstate S. & C. Transfer Co. (C. C. A.) 110 Fed. 785.

96. Owensboro v. Owensboro Waterworks Co. (C. C. A.) 115 Fed. 318.

97. Seattle v. Thompson (C. C. A.) 114 Fed. 96.

98. A statute offered as evidence was objected to as being unconstitutional—Watkins v. King (C. C. A.) 118 Fed. 524.

99. Keyser v. Lowell (C. C. A.) 117 Fed. 400.

dismissing suit to enforce private land claim is not directly appealable.[1] Prize causes are appealable from the supreme court of the District of Columbia direct to the supreme court of the United States when the former is sitting as a district court.[2]

Ancillary powers.—When the trial court has authority to grant injunctions pending appeal, application for one will not be heard, even though the trial court should refuse to examine it on the merits;[3] but, if the laws authorize the reviewing court to issue remedial writs necessary to complete the exercise of appellate jurisdiction, it may grant an injunction to preserve the statu quo.[4] Certiorari will issue from the court of last resort if jurisdiction be wrongfully assumed.[5] The highest court will not attempt by prohibition to supervise the improper assumption of jurisdiction by a court below after it has completely disposed of the case and adjourned the term.[6]

§ 6. *Bringing up the cause. A. General nature and mode of practice.*[7]—The reader should consult section 2 of this article on the question of what remedy to invoke,—whether appeal, error or other mode. The present section deals with the practice on the several proceedings. It should be borne in mind that the several terms, "appeal," "error," and the like, no longer are capable, in a general discussion, of technical strict use, but signify forms of appellate procedure analogous to appeals and writs of error. The distinctions of the various remedies should be kept in mind.

Appellate practice in the federal courts does not follow or conform in any way to state practice,[8] unless, as in the Indian Territory, the practice of an adjoining state is adopted by statute.[9] The practice should conform to that of the court which is to review, though the trial was as one reviewable to a lower court.[10] Appeals from probate courts frequently follow the practice of appeals from justices of the peace.[11] If the trial judge exceeds his power, and sets aside a judgment and retries the case, the remedy is not against the second judgment, but the first, taking a bill of exceptions, and, if necessary, compelling the trial judge to sign it.[12] Erroneous appeals or proceedings in error may be attacked by certiorari from a higher court if promptly brought.[13]

B. Time for instituting and perfecting.—Length of the period in which to appeal is a matter of legislation,[14] inferior and probate court review being generally specially limited in time.[15] The time is sometimes dependent on the class of errors attacked,[16] or the kind of proceeding.[17] Under a statute requiring a speedy

1. Act Cong. July 1, 1864, § 3—Gwin v. U. S., 184 U. S. 669, 46 Law. Ed. 741.

2. The act making judgments of the supreme court of the District of Columbia appealable to the court of appeals is not applicable—United States v. Sampson, 19 App. D. C. 419.

3. It should be renewed before the trial court—Ajax Min. Co. v. Triumph Min. Co. (Colo.) 69 Pac. 523.

4. Finlen v. Heinze, 27 Mont. 107, 69 Pac. 829.

5. Security Trust Co. v. Dent, 187 U. S. 237.

6. Klingelhoefer v. Smith (Mo.) 71 S. W. 1008.

7. Mode of perfecting election contest appeal in Kentucky—Stewart v. Rose, 24 Ky. Law Rep. 347, 68 S. W. 465.

8. West v. East Coast Cedar Co. (C. C. A.) 113 Fed. 737.

9. Missouri, K. & T. R. Co. v. Truskett, 186 U. S. 480, 46 Law. Ed. 1259.

10. Forcible entry from municipal court (Gen. St. 1894, c. 86)—Watier v. Buth, 87 Minn. 205.

11. Barker v. Thompson, 98 Ill. App. 78.

12. Akerman v. Ford (Ga.) 42 S. E. 777.

13. Refused because of six months' delay after the record in error was filed in circuit court of appeals and the case docketed—Ayres v. Polsdorfer, 187 U. S. 585.

14. Perfected within six months (appointment of receiver)—First Nat. Bank v. Ashley (Neb.) 93 N. W. 685.

15. Bond on appeal from county court must be filed within thirty days and transcript within forty days from order appealed (Comp. Sts. ch. 20, §§ 42, 46)—Jones v. Piggott (Neb.) 93 N. W. 1000. Since Act Feb. 28, 1881, county court appeals in probate matters must be taken within ten days (repealing Comp. St. 1901, c. 23, § 242)—Drexel v. Rochester L. & B. Co. (Neb.) 91 N. W. 254.

16. Error in ruling on demurrer is not one "occurring at trial" from which a year

appeal if the sufficiency of the evidence to support the jurisdiction is to be reviewed, no inquiry as to such matter can be made upon a bill of exceptions in an appeal taken after the expiration of the short time.[18] Special time limitations on appeals from interlocutory and provisional orders not otherwise appealable must be strictly followed.[19] When interlocutory judgments are reviewable only at the trial court's discretion, a general statute requiring exceptions to be filed within a limited time does not apply to interlocutory orders appealed from;[20] nor does an act relating to vacation judgments fix the time for taking exceptions to an interlocutory judgment.[21] Interlocutory orders cannot be appealed after the time fixed, although they are subject to review with the final judgment.[22]

The taking of it within such time is ordinarily essential to a transfer of jurisdiction;[23] whence delay may work a cause for dismissal,[24] or cure errors by making the judgment conclusive.[25] If several orders be appealed, only those taken in time will be considered.[26]

An appeal is premature if brought before a final determination is had, or if the judgment be incomplete.[27] It is not final when incident to it there is pending some necessary proceeding to fix rights.[28] An appeal may be brought within the statutory time after final judgment, though the same matters might have been reviewed by appealing from an interlocutory order.[29] It must be final as to all coparties.[30] If a judgment be amended, the period is computed from the amendment;[31] and ordinarily the time does not begin until after determination of motions for new trial.[32] Time is computed from the date of record entry of a decree in

is given—Mechanic's Sav. Bank v. Harding, 65 Kan. 655, 70 Pac. 655.

17. Under statutes in Idaho, district court judgments on appeal from county commissioners not reviewable upon the facts unless appealed within sixty days—Mahoney v. Board of Com'rs (Idaho) 69 Pac. 108. Timely filing of transcript in election case is jurisdictional—Krimm v. Helmbold, 24 Ky. Law Rep. 551, 68 S. W. 1103.

18. Code Civ. Proc. § 939, prescribes 60 days—People v. Jones, 138 Cal. xix, 70 Pac. 1063.

19. Appointment of receiver not final and not appealable after thirty days—Coons v. Frost, 100 Ill. App. 303. Neither the parties nor the court can extend the time for appeals from appointment of receiver for corporations beyond ten days—Crichton v. Webb Press Co., 107 La. 86.

20. Goodsell v. Rutland-Canadian R. Co., 74 Vt. 206.

21. Goodsell v. Rutland-Canadian R. Co., 74 Vt. 206.

22. Receivership orders (Burns' Rev. Sts. 1901, § 1245)—Chicago Horseshoe Co. v. Gostlin (Ind. App.) 66 N. E. 514.

23. In Alabama, the time within which appeal from the overruling of a demurrer must be taken—Blackburn v. Huber Mfg. Co., 135 Ala. 598. District court judgments on appeal not taken up within ninety days—Warren v. Humble, 26 Mont. 495, 68 Pac. 851.

24. See post, § 11. Dismissal cannot be averted by filing new bond after time—David v. Guich, 30 Wash. 266, 70 Pac. 497. Notice must be within the time—Southern Cal. R. Co. v. Slauson (Cal.) 68 Pac. 107. Failure to substitute party in time—Hays v. Pugh, 158 Ind. 500. Tardy appeal from refusal to revoke probate—In re Reilly's Estate, 26 Mont. 358, 67 Pac. 1121.

25. See post, § 15. If judgment not seasonably appealed, the appeal from new trial reviews only errors presented on the motion—Mechanic's Bank v. Harding, 65 Kan. 655, 70 Pac. 655.

26. Steenburg v. Richbourg (Fla.) 33 So. 521. If two interlocutory decrees are appealed and one was entered more than six months before the appeal will take up the later one only—Mattair v. Furchgott (Fla.) 32 So. 925; Ray v. Frank (Fla.) Id. It is sufficient if one of two orders which includes the other was appealed from in time—In re Lamona's Estate, 29 Wash. 394, 69 Pac. 1093.

27. Sustaining demurrer not appealable; must be judgment—Martin v. Sherwood, 74 Conn. 202. An order sustaining demurrer, though made appealable by statute, is not final—Farmers' & Merchants' Bank v. School Tp. (Iowa) 92 N. W. 676. Report of referee stating an account is not—Shankle v. Whitley, 131 N. C. 168, 42 S. E. 574. Sustaining demurrer by part of defendants only—Rock Island Implement Co. v. Marr, 168 Mo. 252. As to when adjudication becomes final, see also ante, § 4-B.

28. Accounting—Trammell v. Ashworth, 99 Va. 646.

29. Demurrer sustained and leave to amend; afterwards leave to amend stricken, and judgment of dismissal given against plaintiff sustained on demurrer—Farmers' & Merchants' Bank v. School Tp. (Iowa) 92 N. W. 676.

30. Appeal by one co-defendant—McVey v. Barker, 92 Mo. App. 498.

31. Hayes v. Silver Creek Water Co., 136 Cal. 238, 68 Pac. 704.

32. Especially so where in order to review certain questions motion for new trial must be made (R. S. 1889, § 2248)—Walter v. Scofield, 167 Mo. 537, as in a law action reviewable only by error, where the motion is not

equity.[33] Judgment on demurrer to an additional bill should be appealed from within the statutory time from its rendition, if it be in its nature separate from the original bill, and not supplementary to it.[34]

Under statutes limiting the time from the service of notice of entry of the judgment, notice must be served by the prevailing party,[35] and it must correctly describe the judgment or order.[36]

If the last day of the time "within" which proceedings must be begun be a Sunday, an appeal on the succeeding day will be timely.[37]

"Fast" or accelerated procedure.—No judgment in mandamus can be brought up except by "fast" bill.[38] A writ of error from a judgment is ordinary, and not "fast," though a writ of prohibition has been previously vacated in the case.[39] In Georgia, a prayer for an injunction, not acted on, affords no reason for allowing a fast writ to review a vacation appointment of trustees.[40] Neither does it lie to bring up a motion to dissolve an injunction.[41]

Delays and extensions.[42]—Delay attributable to neglect of officer is not usually imputed to an appellant;[43] but in Tennessee failure of the clerk to mark the oath as filed in time renders it a nullity, though seasonably made.[44]

The appellate court cannot enlarge the statutory time.[45] Reinstating a cause after its determination, and the instituting of proceedings for an appeal, extend the time for filing it;[46] but an abortive attempt to appeal does not extend the time for suing out the concurrent remedy by error.[47] Stipulating to extend the time for filing briefs is not a waiver in writing of the timely giving of an undertaking for appeal.[48] Defects in proceedings cannot ordinarily be amended after time.[49] When the opposite party is dead, and his representative does not appear, a stay results until a substitution can be made;[50] but if not perfected before the death of a party, proceedings thereafter cannot be had and filed nunc pro tunc.[51]

C. Affidavits and oaths.[52]—Affidavit of interest may be dispensed with if all parties admit the interest.[53] An attorney is not an agent who may file an affidavit stating his belief that the appellant is aggrieved.[54] If they are jurisdictional,

ruled on until after judgment is rendered—City of Lincoln v. First Nat. Bank (Neb.) 90 N. W. 874.

33. Hall v. Moore (Neb.) 92 N. W. 294.

34. Appeal waived by delaying judgment on original bill—Smith v. Pyrites Min. Co. (Va.) 43 S. E. 564.

35. Service by an appealing co-party insufficient—Prescott v. Brooks (N. D.) 90 N. W. 129.

36. Under Code Civ. Proc. § 1351, copy varied from the original as to date and name of clerk and did not with certainty refer to the entry—Gaday v. Doane (N. Y.) 38 Misc. 661. Under Code Civ. Proc. § 1724, an appeal bond must be filed within five days of serving notice, not within five days from filing notice with the clerk—Johnson County Bank v. Joe Klaffki Co., 26 Mont. 384, 68 Pac. 410.

37. Writ of error under Rev. St. 1899, § 837—Jordan v. Chicago & A. R. Co., 92 Mo. App. 84.

38. Holder v. Jelks (Ga.) 42 S. E. 400.

39. Bacon v. Jones (Ga.) 42 S. E. 401.

40. Loyd v. Webster (Ga.) 42 S. E. 1013.

41. Hanson v. Stephens (Ga.) 42 S. E. 1028.

42. **Statutory extensions.** Since no act is to be done by the party served, the time of filing the bond is not extended merely because the service of notice is to be by mail. Code Civ. Proc. § 1833, provides for extensions when service is by mail only when some act is to be done by the adverse party—Johnson County Bank v. Joe Klaffki Co., 26 Mont. 384, 68 Pac. 410.

43. Failure to serve the notice—Martin Mach. Works v. Miller, 132 Ala. 629. Failure to settle bill of exceptions—Crooks v. Crooks, 136 Cal. xix., 68 Pac. 101.

44. Jones v. Ducktown Sulphur Co. (Tenn.) 71 S. W. 821.

45. Hall v. City of N. Y., 79 App. Div. 102.

46. Until pending motions for reargument and reinstatement be determined (Gen. St. 1902, §§ 791, 793)—Sanford v. Bacon (Conn.) 54 Atl. 204.

47. Judgment not suspended by appeal—McCollum v. Ulen, 92 Mo. App. 384.

48. Mitchell v. Board of Education, 137 Cal. 372, 70 Pac. 180.

49. Defective bond—Koutnik v. Koutnik, 196 Ill. 162; David v. Guich, 30 Wash. 266, 70 Pac. 497.

50. Barton v. New Haven, 74 Conn. 729.

51. Barton v. New Haven, 74 Conn. 729.

52. Affidavit of good faith under R. S. § 808, is jurisdictional—Sehested v. Kansas City (Mo. App.) 68 S. W. 1068.

53. Appeal from order appointing receiver—Davies v. Monroe, W. & L. Co., 107 La. 145.

54. Rev. Sts. 1899, § 808—Schnabel v. Thomas, 92 Mo. App. 180.

affidavits must be seasonably presented.[55] An affidavit for appeal should, if necessary, be amended before decision on motion to dismiss for its defectiveness;[56] but irregularity in amending after a ruling may be waived by going to trial.[57]

D. Notice, citation, summons.—Statutes giving right to appeal imply that notice must be given,[58] unless otherwise provided.[59] When appeal is taken in open court, citation or notice is not usually necessary.[60] In Louisiana, unless waived in writing by appellant or his counsel, the clerks must issue citation,[61] and, if the appeal be taken at a term subsequent to judgment term, a citation is necessary.[62] The clerk's failure to issue a citation does not prejudice the proceeding unless appellant was at fault.[63]

The notice or summons cannot be required to state matters which the statute does not require;[64] but notice of appeal must be explicit and particular.[65] The process must name the court of review.[66] As against plaintiff, one notice is sufficient, though the judgments were entered separately against each of several defendants;[67] but orders in special proceedings collateral to a cause cannot be covered by a single notice.[68] Referring to a judgment on affirmance as for a certain amount equal to the costs is not a defect if the notice otherwise shows that the appeal is not limited to the matter of costs.[69] A misrecital of the date is not material.[70] In Washington, a notice need be directed only to the prevailing party or parties.[71]

All persons who are necessary parties respondent must be, and those who are proper parties may be, cited.[72] Service on a firm is not good where the members were held as individuals.[73] Service on attorneys usually suffices,[74] and it is not necessary to serve each one of associated counsel.[75] Attorneys representing two parties may accept service on an appeal of one of them if the interests do not conflict.[76] Notice of appeal should be served on the substituted personal representative when an appeal is taken after a party has died.[77]

55. In Jones v. Ducktown Sulphur Co. (Tenn.) 71 S. W. 821, the failure to make a filing as in time, though seasonably made, defeated the appeal.

56. Moston v. Stow, 91 Mo. App. 554.

57. Moston v. Stow, 91 Mo. App. 554.

58. Shannon's Code, § 1984, condemnation proceedings—Woolard v. Nashville, 108 Tenn. 353.

59. In Illinois notice to executor of appeal from disallowance of claim is not necessary (Administration Act, § 68)—Ford v. First Nat. Bank, 201 Ill. 120.

60. Not necessary if taken by motion in open court at the time of judgment—Vallee v. Hunsberry, 108 La. 136.

61. Gagneaux v. Desonier (La.) 33 So. 561.

62. Gagneaux v. Desonier (La.) 33 So. 561.

63. Gagneaux v. Desonier (La.) 33 So. 561.

64. Mauldin v. Greenville, 64 S. C. 444. A summons in error need not contain the name of the attorney of record on whom it is served (Code Civ. Proc. § 544)—Mechanics' Bank v. Harding, 65 Kan. 655, 70 Pac. 655.

65. Since it is jurisdictional in its office—State v. Hammond, 92 Mo. App. 231.

66. Citation—Gagneaux v. Desonier (La.) 33 So. 561.

67. Clark v. Eltinge, 29 Wash. 215, 69 Pac. 736.

68. Order allowing fees to counsel for person accused and order taxing costs to county from which change of venue was taken—Green Lake County v. Waupaca County, 113 Wis. 425. A notice held to describe an order refusing to vacate and not the judgment itself, which therefore was not brought up—Norris v. Campbell, 27 Wash. 654, 68 Pac. 339.

69. Engel-Heller Co. v. Henry Elias Brewing Co. (N. Y.) 37 Misc. 480.

70. People v. County Board of Canvassers (N. Y.) 75 App. Div. 110.

71. The statute requires it to be served on all parties, but permits other than the appellant to join in it if similarly situated—Smalley v. Laugenour, 30 Wash. 307, 70 Pac. 786.

72. See ante, § 3-B. Disclaiming parties should not be—Smalley v. Laugenour, 30 Wash. 307, 70 Pac. 786.

73. State Nat. Bank v. Dallas (Tex. Civ. App.) 68 S. W. 334.

74. Personal service on attorney sufficient for a stay (Rev. St. 1898, § 2820)—Harris v. Snyder, 113 Wis. 451. The attorney may be cited if the appellee cannot be found and has no domicile and delay will be granted until regular service can be made.—Levy v. Levy, 107 La. 576.

75. Timely service on one only of respondent's attorneys suffices—Burnes' Estate v. American Brewing Co. (Mo. App.) 70 S. W. 512.

76. Smalley v. Laugenour, 30 Wash. 307, 70 Pac. 786. An attorney for three defendants cannot acknowledge service on behalf of one, where the other two appeal adversely—Hayes v. Union Merc. Co., 27 Mont. 264, 70 Pac. 975.

Notice must be served within the time for taking the appeal,[78] but an extension is sometimes allowed.[79] When appeal is to be taken within a time "from" entry of judgment, the notice must be given after entry.[80] Under an act permitting an omission to serve either the clerk or the adverse parties to be supplied, parties cannot be afterwards served if neither they nor the clerk had been served,[81] but a co-defendant may be so served.[82] Laches defeating relief will not necessarily defeat an extension of time for service.[83]

Filing notice is a jurisdictional requisite to take an appeal in Oregon;[84] hence cannot be allowed out of time as an omission to do an "act necessary to perfect" it.[85]

The assignment of errors should be filed or served on the adverse party if it is taken as a guide to making up the transcript.[86]

Notice of application for writ of error is not waived by serving an answering brief after the time for giving notice.[87] The notice of application should specify the time when it will be made.[88]

E. Application for leave to appeal, petition in error, assignments, and statements of appeal.[89]—Objections that an appeal is frivolous and dilatory must be addressed only to the appellate court;[90] nor can an appeal be refused because the decree is entered on a mandate from a former review.[91] If the lower court vacates an order on the ground that it suspends the final judgment of the supreme court, applicant for appeal should be refused and sent to the supreme court to apply for relief.[92] If an appeal be predicated solely upon leave granted in Louisiana, the propriety of granting the order is solely for the court to which application is made.[93] If writ of error be issued by the clerk below on filing assignment of errors, and the supersedeas bond be approved by the circuit court of appeals, which issues citation that is duly served, the mere omission to formally petition for the writ, as required by court rules, is a formal defect.[94] A statute requiring leave to appeal in mortgage foreclosure does not include cases where the character of the instrument is disputed.[95]

Defendants who do not join in a term-time appeal in Indiana need not be named.[96] Parties should be properly named.[97] The use of "etc.," or the like,

77. Western Union Tel. Co. v. Adams, 28 Ind. App. 420.

78. Bryan v. Bryan, 137 Cal. xix., 70 Pac. 304.

79. Citation may be made after time when everything else is done if it has been prevented by inability to find the appellee—Levy v. Levy, 107 La. 576.

80. Code Civ. Proc. § 939—Bell v. Staacke, 137 Cal. 307, 70 Pac. 171.

81. Code Civ. Proc. § 1303, part of defendants only were served; nunc pro tunc service was held null as to other defendants—Hall v. New York, 79 App. Div. 102.

82. Notice after time may be given to a co-defendant to whom the judgment was to be paid, where the appealing defendant had notified the clerk and plaintiff (Code Civ. Proc. § 1303)—Cooper v. Cooper (N. Y.) 76 App. Div. 221.

83. Spindler v. Gibson (N. Y.) 72 App. Div. 150.

84. Session Laws 1901, p. 78, § 5, provides, shall be taken by serving and "filing"—Taylor v. Lapham, 41 Or. 479, 69 Pac. 439.

85. Taylor v. Lapham, 41 Or. 479, 69 Pac. 439.

86. Florida C. & P. R. Co. v. Peacock (Fla.) 33 So. 247.

87. Biles v. Beadle, 93 Mo. App. 628

88. Burns' Ann. Pr. Code 1901, § 715. Biles v. Beadle, 93 Mo. App. 628.

89. Superior court cannot allow appeal from commissioners of estate—Swain v. Knapp, 71 N. H. 620.

90. Southern B. & L. Ass'n v. Carey, 117 Fed. 325.

91. Southern B. & L. Ass'n v. Carey, 117 Fed. 325.

92. Appeal from order setting aside injunction against judgment of supreme court—New Orleans v. Bilgery, 108 La. 191.

93. If it acts illegally, a mandamus will issue—State v. King (La.) 33 So. 121.

94. Alaska United Min. Co. v. Keating (C. C. A.) 116 Fed. 561.

95. V. S. § 981—Herrick's Adm'r v. Teachout. 74 Vt. 196.

96. In assignment of errors (Burns' Rev. St. 1901, § 647a)—Gunn v. Haworth (Ind.) 64 N. E. 911.

97. "Gunn" for "Gwinn," and the use of initials, make an assignment bad, under Sup. Ct. Rule 6—Gunn v. Haworth (Ind.) 64 N. E. 911. Failure to amend name which was in the record identical with that below held unimportant—Conyers v. Commissioners (Ga.) 42 S. E. 419.

following the name of some of co-parties in a statement of appeal, brings in as appellees only those named.[98] If a writ joins all the defendants, they are brought before the court, though the petition in error did not join them.[99]

The refusal of a co-party to appeal should be shown.[1] On appeal from an order not inter partes appellant should in some way show an appealable interest.[2]

It must appear that the cause is at an appealable or reviewable stage.[3] A petition does not describe the cause and the judgment sought to be reviewed, where it refers to them as exhibits, and no exhibits are filed.[4] Appellant must show that a ground of jurisdiction exists, if the reviewability depends on it,[5] and jurisdictional allegations must be direct and special.[6] An application for writ of error founded on an allegation of a conflict between the decision and a decision of the highest court must show that the questions were identical.[7] It must either appear that the requisite amount is in controversy, or that the case is within the exceptions to the requirement.[8] Averments of the existence of a federal question must be distinct and positive beyond question.[9] Two separate applications may be granted if one of them discloses error.[10]

A petition or application should be in the party's name.[11] It is not fatally defective because in the name of plaintiff in error by attorney, both being in typewriting.[12] An assignment should be signed by the party or his attorney.[13]

Where the statute regulating petitions in error was amended only a short time before the filing of the petition, appellant was allowed to amend his petition to conform to the new act.[14]

Where the transcript is to be made up according to the assignments, the adversary should be apprised by service or by filing.[15]

F. Allocatur, order for appeal, certificate.—The appellate court is not designated by a recital that the appeal is allowed "as prayed for."[16] If the order is insufficient to give jurisdiction, taking up the record accomplishes nothing.[17] The order of a circuit court in Kentucky granting a cross appeal is of no force.[18] De-

98. Brodie v. Parsons, 23 Ky. Law Rep. 831. The character "&c." in a statement of parties does not bring any others than those expressly named—Chinn v. Curtis, 24 Ky. Law Rep. 1563. The words "et al." do not describe parties not expressly named in the petition in error—Brabham v. Custer Co. (Neb.) 92 N. W. 989. In a special proceeding it is not sufficient to say that the appeal is in behalf of others not named—In re Park Ave. Viaduct Assessment, 112 N. Y. St. Rep. 1030.

99. An attempt on the part of the trial court to amend the writ by striking the names of some of the defendants from it, is null—Fitzpatrick v. Graham (C. C. A.) 119 Fed. 353.

1. Appeal by licensee without patentee—Excelsior Co. v. Seattle (C. C. A.) 117 Fed. 140.

2. Probate appeal—People v. McCormick, 104 Ill. App. 650.

3. A bill of exceptions should show that a final judgment was entered—Bell v. Stewart (Ga.) 43 S. E. 70.

4. Board of Com'rs v. Shaffner (Wyo.) 68 Pac. 14.

5. Valley Turnpike Co. v. Moore (Va.) 42 S. E. 675.

6. State v. Pollock, 108 La. 594.

7. Admissibility of original petition under amended petition not same as that of admissibility of amended petition to rebut original petition—Watson v. First Nat. Bank (Tex.) 67 S. W. 314.

8. Crouse v. Brown, 65 Kan. 858, 69 Pac. 165; Moore v. Richardson, 197 Ill. 437.

9. Michigan Sugar Co. v. Michigan, 185 U. S. 112, 46 Law. Ed. 829.

10. Rilling v. Schultze, 95 Tex. 352.

11. Application for writ of error in the name of a corporation which does not appear as party is not sufficient by reason of a recital without proof that applicant and the plaintiff below were the same corporation, all other pleadings being in the name of the original party—State Nat. Bank v. Dallas (Tex. Civ. App.) 68 S. W. 334.

12. Moore v. Moran (Neb.) 89 N. W. 629.

13. H. B. Smith Co. v. Williams (Ind. App.) 63 N. E. 318.

14. Board of Com'rs v. Shaffner (Wyo.) 68 Pac. 14.

15. Presenting assignments to the judge at the settling of bill of exceptions is not alone sufficient in Florida—Florida Cent. & P. R. Co. v. Peacock (Fla.) 33 So. 247.

16. Sehested v. Kansas City (Mo. App.) 68 S. W. 1068.

17. Sehested v. Kansas City (Mo. App.) 68 S. W. 1068.

18. Hancock v. Hancock's Adm'r, 24 Ky. Law Rep. 664.

fects may be waived by proceeding with the case.[19] An order for an appeal may be vacated at any time before it is perfected in the higher court.[20]

Federal practice.—In the ninth circuit, an allocatur is needless if the clerk issues the writ which is lodged with the trial clerk.[21] The writ should issue to that state court wherein the case is,[22] or to the state appellate court having final jurisdiction.[23] Mistakes in the teste of the writ as to date and omission of the court seal are amendable.[24] Defendant in error, by opposing a motion to withdraw a writ, and to allow filing of a new petition, writ, and bond, waives the objection that the writ issued and was filed before the assignment of error.[25] The trial court cannot amend a writ of error.[26]

Certifications and reservations.—There must be a certificate of importance to the supreme court if the record shows no other ground.[27] The certification must state sufficient to present the question.[28] The certificate of the circuit court of appeals to the supreme court should state the facts on which the questions arise, and not send up the whole record.[29] Merely allowing exceptions to an opinion, and with them a transcript, does not reserve the case for the decision of three justices.[30] An order allowing appeal may be such as to certify questions.[31]

G. Bonds, security, payment of costs; necessity.[32]—Security is necessary on error from the supreme to a state court.[33] Fiduciaries[34] and public representatives are usually exempted from giving bond.[35] An executor is a trustee who may appeal without bond,[36] but he must have given an executorial bond, and must give the statutory notice in time.[37] The executor of an executor appealing against the administrator d. b. n. is such a trustee;[38] but an executor who appeals in his individual right as against a co-executor does not come within the statutes allowing appeal without an undertaking.[39] And where a guardian ad litem can be appointed only for de-

19. Order granting appeal to appellants by firm instead of individual names is not defective if they proceeded under it—Pugh v. Wallace, 198 Ill. 422.

20. Appeal to circuit court on filing a bond vacated before filing—Vallee v. Hunsberry, 108 La. 136.

21. Alaska United Min. Co. v. Keating (C. C. A.) 116 Fed. 561.

22. Superior court of Massachusetts after decision and re-script from supreme court—Rothschild v. Knight, 184 U. S. 334, 46 Law. Ed. 573.

23. Court of appeals where supreme court had disavowed jurisdiction—Missouri, K. & T. R. Co. v. Elliott, 184 U. S. 530, 46 Law. Ed. 673.

24.—Alaska United Min. Co. v. Keating (C. C. A.) 116 Fed. 561.

25. Alaska United Min. Co. v. Muset (C. C. A.) 114 Fed. 66.

26. Fitzpatrick v. Graham (C. C. A.) 119 Fed. 353.

27. Pick v. Mutual Life Ins. Co., 192 Ill. 157. There must be a certificate of jurisdictional facts if the sum involved is otherwise too small—Douglass v. Frazier, 64 Kan. 886, 67 Pac. 1102.

28. Sufficiency of the findings only will be reviewed when the judge's report omits the evidence—Cleveland v. Hampden Sav. Bank, 182 Mass. 110. On a question whether reference was proper it was not shown whether any question of long accounts was involved —Malone v. St. Peter & P. Church, 172 N. Y. 269.

29. Emsheimer v. New Orleans, 186 U. S. 33, 46 Law. Ed. 1042.

30. First Nat. Bank v. Greene, 23 R. I. 238.

31. Order allowing appeal from a dismissal "for want of jurisdiction," sufficiently certifies question of circuit court's jurisdiction—Excelsior Wooden Pipe Co. v. Pac. Bridge Co., 185 U. S. 282, 46 Law. Ed. 910.

32. Code March 16, 1895, providing that a new "appeal bond" may be ordered, in default of which execution may issue, means a new stay bond, and the failure to provide one is not ground for dismissal—Mersfelder v. Spring, 136 Cal. 619, 69 Pac. 251.

33. Act. Cong. July 20, 1892, does not authorize supreme court to allow a writ of error to a state court without security—Gallaway v. Ft. Worth Bank, 186 U. S. 177, 46 Law. Ed. 1111.

34. Supersedeas bond is unnecessary when executor appeals from order annulling a will, since estate must pay costs in any event —State v. Superior Ct., 28 Wash. 677, 69 Pac. 375.

35. Head of an executive department of a city—People v. Sturgis, 38 Misc. (N. Y.) 596.

36. An appeal from an accounting—In re Sidwell's Estate (Ohio) 66 N. E. 521.

37. Rev. St. § 6408—In re Sidwell's Estate (Ohio) 66 N. E. 521.

38. In re Sidwell's Estate (Ohio) 66 N. E. 521.

39. Rev. St. §§ 6101, 6408—Downing v. Downing, 23 Ohio Cir. Ct. 389.

fendant, one who is styled "guardian ad litem for plaintiff" is not within such exemption.[40]

A statute exempting a city from giving a bond makes the mere appeal operate as a supersedeas;[41] and the like results from laws exempting bonded executors and trustees.[42] In New York, if the head of an executive department of the municipality appeals, it is in effect by the municipality, so that service of the notice works a supersedeas.[43] An order for receivership of property pending foreclosure will not be superseded without a stay bond, when no possession is taken under it, and the possession of the estate is not interfered with.[44] Judgments for money and for the foreclosure of liens described in the complaint on personal property are judgments for the sale of personal property on foreclosure, which require stay bonds in California.[45]

Payment of costs.—A statutory direction to an officer to send up transcript on payment of his fees does not make payment of fees jurisdictional.[46]

Diverse parties or orders appealed from.—One undertaking will suffice where a judgment and an order denying a new trial are appealed.[47] Though a statute require "appellant" to give bond, yet several appellants may unite in one bond.[48]

Fixing, taking, and approving.[49]—The court allowing a supersedeas bond should fix the conditions as well as the amount, and it is the duty of the parties seeking it to see that such conditions are fixed.[50] Mandamus will lie against a court which refuses to fix a supersedeas.[51] The clerk or judge of the court to which a cause has been removed should take the bond.[52] In Illinois the clerk of the circuit court cannot approve a bond except when directed by the court;[53] but if the statute provides for an approval by the clerk, an approval by the court is not sufficient.[54] In Colorado, a deputy clerk may approve the bond.[55] In the District of Columbia, court rules do not require approval of an appeal bond by the lower court to be on notice.[56] It is not necessary that the federal judge who allows the writ or signs a citation shall approve the appeal bond.[57]

Sureties.—Under statutes authorizing exceptions to sufficiency of sureties, the bond will be void if they fail to appear upon notice and justify.[58] A surety company must have become qualified to do business in the state before it can go

40. Rev. St. arts. 1011, 1406—Duke v. Wheeler (Tex. Civ. App.) 87 S. W. 409.

41. Jordan v. Seattle, 29 Wash. 581, 70 Pac. 54.

42. Comp. St. 1901, c. 20, § 395—Kerr v. Lowenstein (Neb.) 90 N. W. 921.

43. Code Civ. Proc. § 1314—People v. Sturgis, 38 Misc. (N. Y.) 598.

44. Receiver was to take rents and profits only—Bank of Woodland v. Stephens, 137 Cal. 458, 70 Pac. 293.

45. Code Civ. Proc. § 942—Tolle v. Heydenfeldt, 138 Cal. 55, 70 Pac. 1013. A stay bond is also necessary if the property be perishable and sale be directed (Code Civ. Proc. § 949)—Tolle v. Heydenfeldt, 138 Cal. 55, 70 Pac. 1013.

46. Drexel v. Rochester L. & B. Co. (Neb.) 91 N. W. 254.

47. Bell v. Staacke, 137 Cal. 397, 70 Pac. 171.

48. Downing v. Rademacher, 136 Cal. 673, 69 Pac. 415.

49. Appeals in private road proceedings proceed specially under Ky. St. § 4003 (applied to execution of bonds)—Freeman v. Cook (Ky.) 68 S. W. 410. In Kentucky, to appeal from an election contest, the supersedeas bond must be filed in the circuit court, and not in the court of appeal—Patterson v. Davis, 24 Ky. Law Rep. 842.

50. Carson v. Jansen (Neb.) 91 N. W. 398. The lower court will hear objections and determine competency of sureties—McSweeney v. Blank, 107 La. 292; Davies v. Monroe W. & L. Co., 107 La. 145.

51. State v. Superior Ct., 28 Wash. 590, 68 Pac. 1051.

52. Code, § 3318, provides that upon removal, all orders, papers, etc., shall be sent over and the cause shall proceed as if brought in that court—Smith v. Pyrites M. & C. Co., 4 Va. Sup. Ct. R. 170, 49 S. E. 918.

53. Kontnik v. Kontnik, 196 Ill. 162.

54. Rev. St. c. 22, § 52—Harding v. Harding Incandescent Co., 98 Ill. App. 141.

55. Colburn v. Seymour, 29 Colo. 292, 68 Pac. 218.

56. Richards Brick Co. v. Rothwell, 18 App. D. C. 516.

57. Brown v. Northwestern Life Ins. Co. (C. C. A.) 119 Fed. 145.

58. Starling v. Burdette, 28 Wash. 261, 68 Pac. 733.

on the bond.[59] A bond is fatally defective which is signed by sureties who, independently of it, were bound by the judgment.[60]

The amount of the bond is usually regulated by statute at double the judgment if it be in money.[61] If not a money judgment, then in an amount sufficient to afford protection.[62] If the judgment be for a partially secured debt, the bond should cover the unsecured part only.[63] If an injunction order be appealable, the court should, on request, fix the amount of a supersedeas bond to stay proceedings pending appeal.[64] In Texas, the bond must show that the amount was properly fixed.[65]

Terms and conditions.[66]—The bond need only identify, and need not recite, the judgment in detail.[67] On appeal from probate it should, in the absence of statute, run to the estate.[68] An undertaking for costs on appeal from an order to pay legacies without the additional undertaking to stay execution leaves the order open to enforcement by any means,—by execution, or otherwise.[69] A judgment may be enforced by the appellee pending an appeal from a suit to set aside an assignment of the judgment if the bond be conditioned only to pay costs and abide the result.[70] An execution is stayed, though it be improvidently issued.[71] An appeal is suspensive in Louisiana if the money is in possession of the court abiding judgment, though the bond be for costs only.[72]

Irregularities and defects.—A bond allowed and given where none is warranted is a nullity for all purposes.[73] A bond is not objectionable to appellee if so worded that he can enforce it to the full extent of the law.[74] A mere variance in stating the term in a bond otherwise particularly describing the judgment is surplusage.[75] If the identity of parties appellant is otherwise made certain, it is immaterial that words of description following counsel's signature are uncertain.[76] It is no vice that it runs to appellant's sureties for costs, as well as to the respondent.[77] A signing by an obligee does not affect a bond which is sufficient without him.[78] The bond is valid, though it does not state to whom it shall

59. Dodge v. Corliss, 27 Wash. 685, 68 Pac. 177.

60. They add nothing to the security—David v. Guich, 30 Wash. 266, 70 Pac. 497.

61. An appeal and supersedeas bond should be double the judgment and two hundred dollars besides—Graham v. American Surety Co., 28 Wash. 735, 69 Pac. 365.

62. **In Washington** if a judgment be only in part for the recovery of money, the bond should be in double the amount of the judgment, also such further sum as the court shall prescribe sufficient to protect the respondent—Title G. & T. Co. v. McDonnell, 28 Wash, 359, 68 Pac. 890. The bond, in order to stay receivership, must be in such penalty as to save appellee harmless and two hundred dollars besides (Ball. Codes, § 6506)—State v. Superior Ct., 30 Wash. 232, 70 Pac. 484.

63. Reid v. Donovan (Mich.) 93 N. W. 914.

64. State v. Superior Ct., 30 Wash. 177, 70 Pac. 256.

65. The bond must be in the statutory amount and must show that the amount was fixed by the clerk as prescribed—Crouch v. Crouch (Tex. Civ. App.) 68 S. W. 515.

66. Names of partners need not be in bond for an appeal taken by firm in Louisiana—McSweeney v. Blank, 107 La. 292. A supersedeas bond in the terms of a statute should be construed as the statute—Campbell v. Harrington, 93 Mo. App. 315. Conditions to prosecute and to pay money adjudged are separate and independent—Campbell v. Harrington, 93 Mo. App. 315. Supersedeas bond of foreclosure decree must provide for use and occupation—Collins v. Brown (Neb.) 89 N. W. 754. Character of bond required in Washington on appeal from procedure to enforce tax certificates—Meagher v. Hand, 28 Wash. 332, 68 Pac. 892.

67. Number and style of the case, date of judgment and name of court suffice—Frerie v. Cloudt (Tex. Civ. App.) 67 S. W. 890.

68. Blackman v. Edsall (Colo. App.) 68 Pac. 790.

69. In re Holmes' Estate, 79 App. Div. (N. Y.) 267.

70. Carson v. Jansen (Neb.) 91 N. W. 398.

71. Campbell v. Harrington, 93 Mo. App. 315.

72. Metropolitan Bank v. Blaise (La.) 33 So. 95.

73. Appeal instead of error in mandamus—Jabine v. Oates, 115 Fed. 861.

74. McSweeney v. Blank, 107 La. 292.

75. White v. Boreing, 24 Ky. Law Rep. 738.

76. They signed as attorneys for "plaintiff" when there were several represented by them—Bendich v. Scobel, 107 La. 242.

77. White Crest Canning Co. v. Sims, 29 Wash. 389, 69 Pac. 1094.

78. White Crest Canning Co. v. Sims, 29 Wash. 389, 69 Pac. 1094.

be payable,[79] or runs to the state, instead of a prescribed officer.[80] A bond otherwise joint and several by each of the defendants does not lose that character, though it refers to the "appeal," and the notice recites that each "appeals."[81] In Louisiana, if the bond be in an amount fixed, though insufficient for a suspensive appeal, it may serve for a devolutive one.[82] In Texas, a bond may suffice to transfer jurisdiction though it lack a penalty.[83]

The bond may, unless wholly null, be amended,[84] but defects cannot be cured by filing a new bond after time.[85] If timely given, a bond may be amended by striking out an improper reference to another order than that appealed from.[86] A failure of sureties to sign a justification may be cured by the clerk's certification that they made the proper oath, in the absence of a statute requiring their signature to it.[87] Correction of a recital in the bond to show the district to which an appeal was actually taken is a proper amendment.[88] In Montana, the bond may be amended by substituting several undertakings for a joint one before hearing of motion to dismiss;[89] and in Texas, one may be amended by adding a penalty which was lacking.[90] The failure of one appellant to sign a bond is waived by appellees who proceed to go into the merits of the case.[91]

H. Entry below.—There must be an entry of appeal or error below, and an appearance above, under Florida practice.[92] The appeal should be made returnable to a day certain,[93] and entry must be in the proper book,[94] and state to what court and term the cause has gone.[95] Failure to enter an appeal is immaterial if notice was served and the fact of taking it admitted.[96]

§ 7. *Transfer of jurisdiction, supersedeas and stay.*—The appeal must be perfected to transfer jurisdiction.[97] An allowance of appeal which is null does not oust it;[98] and similarly, an appeal erroneously taken in a law action,[99] or proceedings prematurely brought, do not transfer jurisdiction.[1]

Supersedeas by operation of appeal or error.—Generally speaking, the trial court's power ceases for all purposes on the transfer of jurisdiction;[2] hence the

79. Downing v. Rademacher, 136 Cal. 673, 69 Pac. 415.

80. A bond in a probate proceeding is not void because it runs to the state instead of the judge of probate as required (Comp. St. c. 23, § 311)—In re Gannon's Estate (Neb.) 89 N. W. 1028.

81. Hayes v. Union Merc. Co., 27 Mont. 264, 70 Pac. 975.

82. McSweeney v. Blank, 107 La. 292; L. J. Mestier & Co. v. Chevalier Pavement Co., 108 La. 562.

83. It is amendable—Williams v. Wiley (Tex.) 71 S. W. 12.

84. Motion should be made above for a new bond before dismissing—In re Gannon's Estate (Neb.) 89 N. W. 1028.

85. Koutnik v. Koutnik, 196 Ill. 162.

86. Johnson v. Manning, 75 App. Div. (N. Y.) 288.

87. Colburn v. Seymour, 29 Colo. 292, 68 Pac. 219.

88. Nations v. Lovejoy, 80 Miss. 401.

89. Hayes v. Union Merc. Co., 27 Mont. 264, 70 Pac. 975.

90. Rev. St. 1895, art. 1025, permits amendments in form or substance—Williams v. Wiley (Tex.) 71 S. W. 12.

91. Engel v. Atkinson (Colo. App.) 71 Pac. 683.

92. Ropes v. Kemps (Fla.) 33 So. 244; Florida Cent. & P. R. Co. v. Peacock (Fla.) 33 So. 247.

93. An entry in the minutes instead of the chancery order book and not naming a return day or term is no notice to appellee—Cotter v. Holmes (Fla.) 33 So. 246; L'Engle v. Holmes (Fla.) 33 So. 247.

94. Appeal must be on chancery order book and not on minutes—Cotter v. Holmes (Fla.) 33 So. 246.

95. L'Engle v. Holmes (Fla.) 33 So. 247.

96. Barden v. Stickney, 130 N. C. 62.

97. Mere filing of the notice does not fix the time when jurisdiction is transferred—Barton v. New Haven, 74 Conn. 729.

98. If allowed to the wrong court, can afterwards be allowed to the right one—Vallee v. Hunsberry, 108 La. 136. Jurisdiction not transferred if there is no appealable decision—Morgan v. McCausland, 96 Me. 449.

99. As in Nebraska—Ewings v. Hoffine (Neb.) 93 N. W. 186.

1. Final judgment not yet entered below—Bell v. Stewart (Ga.) 43 S. E. 70.

2. If a suspensive appeal be granted lower court should not disturb it by sequestration or injunction—New Orleans v. Bilgery, 108 La. 191. Setting aside judgment, the trial, etc., after appeal taken, are invalid—Story & Clark Piano Co. v. Gibbons (Mo. App.) 70 S. W. 168. The court of claims loses jurisdiction when the record goes up on appeal—Monroe v. U. S., 37 Ct. of Cl. 79.

Pendency of appeal does not bar motion below to amend record—Birnbaum v. May,

lower court cannot grant a supersedeas thereafter,[3] or divest jurisdiction,[4] but may during term request the return of the record if proper grounds for a new trial have arisen.[5] The trial court has no control over the cause to enter a dismissal.[6] If the appeal is not yet perfected, the trial court has control for ancillary proceedings.[7] It is very doubtful if a court can enforce a decree, though entered upon mandate, if it has been appealed, and a supersedeas bond tendered.[8] The estoppel of the judgment is destroyed if the review is de novo, or if there is a supersedeas, but not if error is brought.[9] A suspension of limitations may result.[10] Execution on a judgment is stayed, but its validity remains unchanged.[11] Where a receivership for a firm is not appealed from, but judgment is appealed from and supersedeas taken, the receivership and custody of the property remain in the lower court.[12] Appeals from collateral orders do not oust the trial court's jurisdiction as to further proceedings in the cause,[13] and an appeal by one party has no such effect on independent questions litigated between other parties;[14] nor need it follow that a provisional order is stayed by appeal from the judgment.[15] Under statutes working a supersedeas, the trial court, though ordinarily empowered to modify a divorce decree as respects the custody of children, cannot do so when that is the matter appealed from.[16] In Montana, the district court has exclusive power pending appeal to allow temporary alimony.[17] On an appeal from probate, the probate court cannot grant general letters, testamentary or of administration.[18] Appealing and superseding an order annulling a will reinstates the executor only so far as to enable him to maintain the appeal.[19] The statute in Montana stays a mandatory injunction;[20] but ordinarily it can be done only by special allowance.[21] Appeal from a denial of habeas corpus to an applicant charged with crime does not stay the prosecution, and no stay is authorized.[22] Supersedeas will not serve the office of a restitution.[23] Superseding a decree for specific performance within a certain time extends that time from the day of the return of the mandate of affirmance.[24] Appealing from part of an inseparable decision vacates all.[25]

170 N. Y. 314. Appeal by intervenor in quo warranto does not stay judgment for relator, (statute excepts judgments determining right to office from stay)—People v. Campbell, 138 Cal. 11, 70 Pac. 918.

3. Johnson v. Turner (Fla.) 33 So. 238.

4. Appeal from final settlement by probate court—In re Hutton's Estate, 92 Mo. App. 132.

5. New evidence—Nutter v. Mossberg, 118 Fed. 168.

6. Spindler v. Gibson, 72 App. Div. (N. Y.) 150. Clerk of trial court cannot; it must be done on application or motion above—Da Costa v. Dibble (Fla.) 33 So. 466.

7. Crawford v. Chicago, R. I. & P. R. Co. (Mo.) 66 S. W. 350.

8. Southern B. & L. Ass'n v. Carey, 117 Fed. 325.

9. Reese v. Damato (Fla.) 33 So. 462. Appeal suspends conclusiveness of judgment—Boucher v. Barsalou (Mont.) 69 Pac. 555.

10. Lien of judgment is extended—Ebel v. Stringer (Neb.) 93 N. W. 142. On right of action for deficiency on mortgage—Brand v. Garneau (Neb.) 93 N. W. 219.

11. Hence an action may be brought on it and garnishee proceedings instituted—Salem-Bedford Stone Co. v. Hobbs, 28 Ind. App. 520.

12. Lamb v. Rowan (Miss.) 33 So. 4.

13. Later proceedings in settlement of trustee's account—Gardner v. Stare, 136 Cal. xix, 69 Pac. 426. A plea of pendency of an appeal from the vacation of an attachment is no defense to an action on the attachment bond unless coupled with an allegation that there was also a stay of proceedings—Powell v. Bursky, 39 Misc. (N. Y.) 533.

14. Appeals from a judgment setting aside conveyances to a son before reserving those to a wife—Perrine v. Perrine, 63 N. J. Eq. 483.

15. Appealing from an order setting aside an absolute divorce does not merge a prior judgment for maintenance against the husband—Smith v. Superior Ct., 136 Cal. 17, 68 Pac. 100.

16. Vosburg v. Vosburg, 137 Cal. 493, 70 Pac. 473.

17. Bordeaux v. Bordeaux, 26 Mont. 533, 69 Pac. 103.

18. Ex parte Wessinger, 63 S. C. 130.

19. State v. Superior Ct., 28 Wash. 677, 69 Pac. 375.

20. Code Civ. Proc. § 1733—Maloney v. King, 26 Mont. 492, 68 Pac. 1014.

21. See post, this section, "Supersedeas by special order."

22. State v. Fenton, 30 Wash. 325, 70 Pac. 741.

23. Adverse party had already taken possession under judgment—Thompson v. Thompson, 24 Ky. Law Rep. 645.

24. Southern Oil Co. v. Scales (Tex. Civ. App.) 69 S. W. 1033.

25. Appeal from partial disallowance of

In equity, appeal places the parties as they were at the beginning of the action.[26]

The appellate court cannot vacate a statutory supersedeas on the ground that an appeal is frivolous.[27]

Supersedeas by special order or allowance.—If a decree be self-executing, a stay cannot be taken.[28] A suspensive appeal is not given to one who treated the judgment as binding,[29] or against one who is not party or subject to the control of the court.[30]

As to what matters.—Judgments in extraordinary proceedings,[31] and temporary injunctions, but not mere ex parte restraining orders, are often made supersedable.[32] It will not be done if a vacation of the order is the practical result of a stay.[33] A statute excepting judgments granting, modifying, continuing, or dissolving injunctions from the supersedeas statutes, and committing the superseding of such matters to the discretion of the court, does not authorize the continuation of a temporary restraining order issued by the clerk, when the court dissolves it and an appeal is taken.[34] A statute providing that an appeal from contempt shall not stay any other action does not forbid a supersedeas of the contempt order itself.[35] If a will be annulled, and another one admitted to probate with a grant of administration and authority to distribute, notwithstanding an appeal from the annulment, the appellate court, to protect its jurisdiction, will stop distribution.[36] No law in Montana authorizes the staying of a perpetual injunction, since the statutes apply only to interlocutory injunctions.[37] In Nebraska, it is discretionary with the district, and, after taking up the cause, with the supreme court, to allow supersedeas in cases not enumerated by statute.[38]

Procedure, order, or writ, and its effect.—Under the laws of Kentucky, the trial court cannot continue a temporary restraining order after an appeal is taken. The authority lies in the higher court.[39] In Florida, circuit judges cannot grant supersedeas on appeal from final decree.[40] On a motion for stay, an objection that a perpetual injunction is void will not be heard.[41] A special order to supersede an injunctional order is always necessary in Florida.[42] A federal supersedeas

claim by county board—Dakota County v. Borowsky (Neb.) 93 N. W. 686.

26. An appeal in equity, with the filing and approving of a supersedeas bond, suspends decree—Riley v. Melia (Neb.) 92 N. W. 913.

27. Johnson v. Turner (Fla.) 33 So. 238.

28. Decree declaring a mulct law proceeding to be insufficient—Whitlock v. Wade (Iowa) 90 N. W. 587.

29. Husband who remarried after decree of divorce—State v. King (La.) 33 So. 121.

30. The railroad company had under its franchise entered on a highway, pending appeal from proceedings to establish the highway—Madera County v. Raymond Granite Co., 138 Cal. 244, 71 Pac. 112.

31. Judgment in quo warranto is supersedable by virtue of Rev. St. § 1272—Simonton v. State (Fla.) 32 So. 809.

32. An order to show cause against a permanent injunction made returnable to another district and directing the issuance of a temporary restraining order was held a mere restraining order, not supersedable after dissolution, the return day not being at the term at which the cause was triable—Riggins v. Thompson (Tex.) 71 S. W. 14. An order made on hearing that an obstruction by an adjoining owner be removed held a temporary injunction, susceptible of continuance by supersedeas—State v. Superior Ct., 30 Wash. 197, 70 Pac. 233. Temporary mandatory injunction to deliver property is supersedable—State v. Superior Ct., 28 Wash. 403, 68 Pac. 865.

33. Under the laws and constitution of Montana an order of injunction against working a mine of which appellants were in possession is mandatory in effect, hence cannot be stayed by special order, since Code Civ. Proc. § 1733, stays proceedings, and since an order for a stay would operate as a vacation, which the supreme court could not do as incidental to its appellate powers—Maloney v. King, 26 Mont. 487, 68 Pac. 1012.

34. Jones v. Walter, 24 Ky. Law Rep. 878.

35. State v. Superior Ct., 28 Wash. 590, 68 Pac. 1051.

36. State v. Superior Ct., 28 Wash. 677, 69 Pac. 375.

37. Maloney v. King, 26 Mont. 487, 68 Pac. 1012.

38. Carson v. Jansen (Neb.) 91 N. W. 398.

39. Jones v. Walter, 24 Ky. Law Rep. 878.

40. Johnson v. Turner (Fla.) 33 So. 238.

41. Maloney v. King, 26 Mont. 492, 68 Pac. 1014.

42. Under the laws of Florida, whether the supersedeas be by operation of law or

bond ordinarily given does not suspend an injunction granted by the decree appealed from unless the trial judge so specifies.[43] An order for an appeal containing an allowance of a supersedeas granted to an order dissolving an injunction continues it in force on the giving of the proper bond.[44] A supersedeas in quo warranto suspends only further action, leaving the judgment stand.[45] If a stay be allowed from a self-executing decree, it will be a nullity.[46] If the undertaking for supersedeas be regularly filed, and the amount properly fixed, it is immaterial that the record showed no determination on the subject of motion for a stay;[47] but the mere allowance of a suspensive appeal in Louisiana does not alone operate suspensively on the jurisdiction below.[48]

§ 8. *Appearance, entry, and docketing above.*—Appellant should make an appearance above.[49] A special appearance below is not enlarged to a general one by taking an appeal and filing an appeal bond.[50] A motion to docket and dismiss for delay may be made at any time while the defect remains unremedied.[51] If a case has not been settled in time to prepare and docket a transcript, so much of one as is available should be made up and docketed, and the remainder then brought up by proper proceedings.[52] A mistaken appeal may, in Colorado, be redocketed as error;[53] e. g., a cause reviewable by error which it is too late to appeal.[54] When a dismissed appeal is redocketed as on error, it should be without prejudice to renewal of motion to dismiss, if there is doubt as to the appropriateness of error.[55]

§ 9. *Perpetuation of proceedings and evidence for the reviewing court. A. The record proper and what it must show.*—The rule that error must be made to affirmatively appear, and that particular matters must be shown by the record, to authorize a review of particular alleged errors, is elsewhere treated.[56] But in addition to this it is usually held that certain matters must be shown in order to sustain the appeal generally.

Jurisdiction of the court below is ordinarily presumed, but, where absence of jurisdictional steps appears, the presumption does not obtain;[57] and where the existence of a constitutional[58] or federal question,[59] or a minimum amount in

by order of the supreme judges, if the granting or dissolving of an injunction is provided for among other things, the supersedeas will not be effective as to the injunction unless a special application and order of the supreme court or a judge thereof be had to that end—Johnson v. Turner (Fla.) 33 So. 238.

43. Violation of the injunction should be redressed against the injunction but not against the supersedeas bond—Green Bay & M. Canal Co. v. Norrie, 118 Fed. 923.

44. New River Mineral Co. v. Seeley, 117 Fed. 981.

45. Hence contempt cannot be brought against an ousted party who refuses to surrender office—Simonton v. State (Fla.) 32 So. 809.

46. Whitlock v. Wade (Iowa) 90 N. W. 587.

47. Harris v. Snyder, 113 Wis. 451.

48. Upton v. Adeline Sugar Factory Co. (La.) 33 So. 725.

49. Florida practice—Ropes v. Kemps (Fla.) 33 So. 244; see, also, Florida C. & P. R. Co. v. Peacock (Fla.) 33 So. 247.

50. White House Mountain G. M. Co. v. Powell (Colo.) 70 Pac. 679.

51. Worth v. Wilmington, 131 N. C. 532.

52. Worth v. Wilmington, 131 N. C. 532.

53. Appeal from county court; Mills' A. C. § 388a, expressly permits it—Denver & R. G. R. Co. v. Peterson (Colo.) 69 Pac. 578.

Appeal from judgment of county court dismissed and redocketed on error—Bailey v. O'Fallon (Colo.) 70 Pac. 755; Colorado F. & I. Co. v. Knudson (Colo. App.) 70 Pac. 698.

54. Mills' Ann. Code, § 388a; Roseberry v. Valley B. & L. Ass'n (Colo. App.) 68 Pac. 1063.

55. Taylor v. Colorado Iron Works, 29 Colo. 372, 68 Pac. 218.

56. See post, § 13. Limitation by contents of record.

57. Biart v. Myers (Neb.) 91 N. W. 573.

58. Unless it does, the court of appeals cannot transfer the cause to the supreme court—Dawson v. Waldheim, 91 Mo. App. 117.

59. A certificate of the judge will not suffice—Home for Incurables v. New York, 187 U. S. 155. Thus if it be raised by assertion of title under act of congress, the record must show that such claim of title was made in the state courts—Sweringen v. St. Louis, 185 U. S. 38, 46 Law. Ed. 795. It must appear that the constitutional provision offended was in the federal and not in the state constitution—New York C. & H. R. R. Co. v. New York, 186 U. S. 269, 46 Law. Ed. 1158. In order to raise the question, the pleadings should specify what constitutional provision is violated—Ash v. Independence, 169 Mo. 77.

controversy,[60] is essential to the jurisdiction of the appellate court, the facts giving jurisdiction must appear by the record, though it is sometimes held that jurisdictional facts may be ascertained from outside the record.[61]

The ruling complained of,[62] and the judgment or order of the court below must appear,[63] and a record entry thereof is essential.[64] On appeal from an intermediate court, the judgment of the trial court must be in the record,[65] as must that of the intermediate court.[66]

The making of objections,[67] filing of instructions objected to,[68] and the taking of exceptions,[69] and by which party exceptions were taken, must appear.[70] Rulings not excepted to cannot be reviewed,[71] and a bill showing no exceptions cannot be considered.[72]

Proceedings for new trial and to obtain review.—The record must show the timely filing of the motion for new trial,[73] the notice of appeal,[74] the taking of the appeal,[75] and grant thereof,[76] the proper settlement and signing of the bill of

60. Marx & Haas Co. v. Watson, 168 Mo. 133, 56 L. R. A. 991. Under Gen. St. 1901, § 5019, the record must show that the water right in controversy was worth over $100 or the trial judge must have certified that title to land was involved, in order to give supreme court jurisdiction—Grant v. Robb, 64 Kan. 886, 67 Pac. 552. A vendor suing for his interest, which is limited to unpaid purchase money, does not show jurisdiction by allegations that the property was worth more than the statutory amount—Gottfred v. Woodruff, 193 Ill. 491. A record showing judgment for $2088, and affidavit in garnishment stating that the garnishee was indebted to the debtor, but not stating how much, does not show that garnishees were indebted in $1000 so as to make dismissal of the process appealable—Pick v. Mutual Life Ins. Co., 192 Ill. 157.

61. Towle v. Weise, 64 Kan. 760, 68 Pac. 637.

62. Stuart v. Mitchum, 135 Ala. 546; Western Union Tel. Co. v. Crocker, 135 Ala. 492. The convening order under which the court sat need not be inserted—Com'rs of Natrona Co. v. Shaffner (Wyo.) 66 Pac. 14.

63. Campbell v. City of Stanberry (Mo. App.) 68 S. W. 887; O'Donnell v. Quinn, 100 Ill. App. 5; In re Pina's Estate, 136 Cal. xix, 71 Pac. 171; Young v. Hatch (Colo.) 70 Pac. 693; Lucas v. Huff, 92 Mo. App. 359.

The bill of exceptions must show that a judgment was entered or the case tried after setting aside a judgment and opening a default—Bell v. Stewart (Ga.) 43 S. E. 70. On appeal from the probate court, the transcript must show a judgment identifiable as that appealed from—Barker v. Thompson's Estate, 98 Ill. App. 78.

64. Mikesell v. South Bend Electric Co., 29 Ind. App. 586.

Docket entries in brief form held sufficient to show that judgment was entered on a master's report in divorce—English v. English, 19 Pa. Super. Ct. 586.

A recital in the record (Reese v. Fuller, 132 Ala. 282); or in the bill of exceptions (O'Donnell v. Quinn, 100 Ill. App. 5); or in the abstract is insufficient (Mattair v. Furchgott [Fla.] 32 So. 925).

The bill of exceptions may be looked at to see if there was a finding in response to a request therefor, and if there was evidence to require it—Hinton v. Sun Life Ins. Co. (Tenn.) 72 S. W. 115.

65. Saussay v. Lemp Brewing Co. (Neb.) 89 N. W. 1048.

66. Bram v. Miller (Mo. App.) 67 S. W. 714. The judgment of an intermediate court where that is complained of must be included—Kummer v. Dubuque Mills Co. (Neb.) 93 N. W. 938.

67. Corrigan v. Kansas City, 93 Mo. App. 173; Cox v. Cohn, 29 Ind. App. 559; Nickerson v. Leader Mercantile Co., 90 Mo. App. 336. Ground of objections—Lovejoy v. Campbell (S. D.) 92 N. W. 24.

68. Payne v. Moore (Ind. App.) 66 N. E. 488.

It was sought to bring in the instructions by special exceptions written on the margin of each, under Burns' Rev. St. 1901, § 542—Williams v. Chapman (Ind.) 66 N. E. 460.

69. Gillett v. Burns (Mich.) 92 N. W. 104; Nickerson v. Leader Mercantile Co., 90 Mo. App. 336; Hoffman v. Molloy, 91 Mo. App. 367.

70. City of Greenfield v. Johnson (Ind. App.) 65 N. E. 542.

71. See "Saving Questions for Review."

72. Moulton Agency v. W. F. McLaughlin Co., 100 Ill. App. 272; Frederick v. Louisville & N. R. Co., 135 Ala. 486.

73. Recital in bill of exceptions insufficient—Greenwood v. Parlin & Orendorff Co. (Mo. App.) 72 S. W. 138; Parry v. Gordon Coffee & Spice Co. (Mo. App.) 72 S. W. 130. Continuance of the motion to the term when it was denied need not be shown—Hugumin v. Hinds (Mo. App.) 71 S. W. 479. A showing that on the day the motion was set for argument sufficiently discloses that it was presented to the court—Chicago, I. & L. R. Co. v. Martin, 28 Ind. App. 468.

74. Browne v. Wallace, 66 Ohio St. 57, a recital thereof in the journal being insufficient.

75. Greenwood v. Parlin & Orendorff Co. (Mo. App.) 72 S. W. 138. Under Code Civ. Proc. § 953, a clerk's certificate that "good and sufficient undertaking * * * in due form was given is sufficient—Downing v. Rademacher, 136 Cal. 573, 69 Pac. 415.

76. Welty v. Gibson (Mo. App.) 71 S. W. 704. In Missouri, since county court judgments are appealed like those of a justice, an allowance of the appeal will by analogy

exceptions,[77] and these must be shown by the record and not by recitals in the bill.[78] Proceedings after supersedeas resulting from an appeal need not be included in the record.[79] Evidence of facts outside the record is occasionally received.[80]

B. What is part of record proper; necessity of bill of exceptions or its equivalent.—The record proper, which the appellate court can consider without its being authenticated by a bill of exceptions, comprehends pleadings and amendments thereto,[81] including demurrers,[82] a stipulation for submission on the pleadings, made part of the judgment entry,[83] but not a consent to the entry of judgment,[84] also a bill of exceptions taken on a former trial and read at the second trial, is part of the record.[85] Grounds for a ruling are not necessarily recorded.[86] Documents will not go up unless they were in court below.[87] Proceedings on application for a rehearing are not of the record of the determination concerning which rehearing is sought.[88]

Bringing matters into the record.—Prevailing plaintiff, as against an appealing defendant, must see that material evidence is in the record.[89] A bill of exceptions is the usual procedure for bringing matters into the record. Where the bill of exceptions is quashed, the court will consider the case as if there had been no bill.[90] Where the statute allows proceedings to be made of record by order, its provisions must be strictly complied with;[91] and without such a statute an order to make proceedings of record is ineffectual.[92] Grounds for appellate jurisdiction not apparent of record should be certified.[93] The record in another cause between

be considered to have been made though not shown by the record—Williams v. Kirby, 169 Mo. 622.

77. Filing of the bill—Jaco v. Southern Missouri & A. R. Co., 94 Mo. App. 567; Edmondson v. South Georgia R. Co., 115 Ga. 790; Biles v. Beadle (Mo. App.) 71 S. W. 465; Upton v. Castleman (Mo. App.) 67 S. W. 707; Lucas v. Huff, 92 Mo. App. 369. Filing of case made—Johnson v. Johnson (Kan.) 71 Pac. 518. Extension of time to file—Knight v. Bergmann (Mo. App.) 68 S. W. 237; Thompkins v. Muntzell, Id. 240; Andrews v. Meadow, 133 Ala. 442; Mikesell v. South Bend Elec. Co., 29 Ind. App. 689; Thompson v. Dampskibsaktieselskabet Habil, 135 Ala. 249; Tinsley v. Kemry (Mo.) 70 S. W. 691; Lindsey v. Kenan, 133 Ala. 532; Robertson v. Boyd (Mo. App.) 68 S. W. 976; Samuel v. Nashville, C. & St. L. R. Co., 135 Ala. 501. The order was not dated and the time of making did not appear. Filing within extension granted—Hinton v. Sun Life Ins. Co. (Tenn.) 72 S. W. 118. And leave to file in vacation—Dantzler v. Swift Creek Mill Co., 128 Ala. 410; Massillon Engine & Thresher Co. v. Arnold, 133 Ala. 368; Zion Fountain Lodge v. Folkes, 132 Ala. 609. A record reciting the filing of a bill of exceptions, such recital being followed by the bill and a certificate to the transcript that it contained "all orders and motions" affecting the judgment and appeal is sufficient to show filing.

78. Welty v. Gibson (Mo. App.) 71 S. W. 704. Recitals in the bill are insufficient to excuse delay—Smith v. Baer, 166 Mo. 392; and see, Haydon v. Alkire Grocery Co., 88 Mo. App. 241; but service may appear otherwise than by the acknowledgment thereof—Southern R. Co. v. Barfield, 115 Ga. 724. A record entry of the filing of a bill of exceptions "as follows" followed by a bill to which the judge's signature was affixed shows that the bill was signed before filing—State v. Rockwood (Ind.) 64 N. E. 592.

79. They are a nullity—Story & Clark Piano Co. v. Gibbons (Mo. App.) 70 S. W. 168.

80. Bankruptcy of party—Scruby v. Norman, 91 Mo. App. 517.

81. McCall v. Herring (Ga.) 42 S. E. 468.

82. Mallinckrodt Chemical Works v. Nemnich, 169 Mo. 388.

83. Board of Com'rs v. Shaffner (Wyo.) 68 Pac. 14.

84. Grant v. McArthur, 137 Cal. 270, 70 Pac. 88.

85. Hill v. American Surety Co., 112 Wis. 627.

86. A board of equalization should certify legal grounds for its rulings; and evidence other than the record will be had only when they refuse to do so—Newark v. North Jersey St. R. Co. (N. J. Sup.) 53 Atl. 219.

87. Ballots will not be brought up as part of the record of an election case, unless they were in some manner placed in proof or brought into court—Edwards v. Logan, 24 Ky. Law Rep. 678.

88. Record on granting liquor license does not include affidavits on application for rehearing—In re Chuya's License, 20 Pa. Super. Ct. 410.

89. O'Connall v. Thompson-Starrett Co., 72 App. Div. (N. Y.) 47.

90. Nester's Estate v. Carney, 98 Ill. App. 630; Gonzales Mandlebaum Co. v. Broghamer (Neb.) 89 N. W. 621; Helm v. Byfield (Neb.) 91 N. W. 511; Janoska v. Pickard (Neb.) 91 N. W. 521.

91. Proceedings not set out in order—Fredericksburg v. Wilcoxen, 158 Ind. 359. Motion ordered to be included not spread on order book and not showing that order was on motion (Burns' Rev. St. 1901, § 662)—Board of Com'rs v. Gibson, 158 Ind. 471.

92. Wood v. Tattnall County, 115 Ga. 1000.

93. If record did not show proper jurisdictional amount, other ground of jurisdiction must have been certified—Grant v. Robb, 64 Kan. 886, 67 Pac. 852.

the same parties and in the same court, merely certified to the supreme court by the clerk, cannot be considered on appeal, since judicial notice cannot be taken of it below.[94]

The matters which are not part of the record, but must be brought in by a bill of exceptions or its equivalent, include proceedings at a former trial,[95] errors occurring at the trial generally,[96] papers filed in the cause generally,[97] refusal to "sanction" petition for certiorari,[98] or summons in mandamus as to which there had been an appearance and answer,[99] or petition or motion for change of venue,[1] or continuance,[2] motions and rulings thereon,[3] bench notes, memoranda, and recitals of rulings,[4] the exceptions taken at the trial,[5] settlement of bill of exceptions,[6] rules of court,[7] the evidence,[8] affidavits,[9] argument of counsel,[10] motion for new trial[11]

94. The record must be introduced in evidence and brought up by statement of facts or bill of exceptions—Plumley v. Simpson (Wash.) 71 Pac. 710.

95. McDonald v. People, 28 Colo. 573, 66 Pac. 703.

96. Bolton v. Missouri Pac. R. Co. (Mo.) 72 S. W. 830; Staunton Coal Co. v. Menk, 99 Ill. App. 254; Malott v. Scanlon, 101 Ill. App. 142; Richmond Passenger Co. v. Robinson (Va.) 41 S. E. 719.

97. Florida Cent. & P. R. Co. v. Luffman (Fla.) 33 So. 710.

98. Wood v. Tattnall Co., 115 Ga. 1000.

99. Hart v. State (Ind.) 64 N. E. 854.

1. Salomon v. Wincox's Estate, 104 Ill. App. 277.

2. In Texas the rule of court requiring a bill of exceptions to review the overruling of motion for continuance is valid—St. Louis S. W. R. Co. v. Bowles (Tex. Civ. App.) 72 S. W. 451.

3. Radeke Brewing Co. v. Granger, 101 Ill. App. 549. Order striking out pleas—Logan v. Adams Mach. Co., 135 Ala. 473. Motion to revoke appointment of receiver—Bank of Dexter v. Stoddard County Bank, 169 Mo. 74. Denial of motion to open default—Hartford L. & A. Ins. Co. v. Rossiter, 98 Ill. App. 11. Motion on trial of remonstrance in highway proceedings to reject viewer's report—Pifer v. Ritter (Ind.) 64 N. E. 463. Motion to make pleading more specific—Pittsburgh, C., C. & St. L. R. Co. v. Greb, 29 Ind. App. 704. Rulings and exceptions—Trigger v. Drainage Dist., 199 Ill. 230. Motion to strike plea from file and ruling thereon—Cottingham v. Greely-Barnham Grocery Co., 129 Ala. 160; Randall v. Wadsworth, 130 Ala. 443; Deiterman v. Ruppel, 200 Ill. 199. The recital of motions and orders in the clerk's journal does not make them part of the record—Malott v. Scanlon, 101 Ill. App. 142.

4. Memphis & C. R. Co. v. Martin, 131 Ala. 249.

5. Flowers v. Raupp, 97 Mo. App. 454; Wells v. Fetner (Neb.) 89 N. W. 596; Scaggs v. Western Home Ins. Co., 94 Mo. App. 98; Henline v. Popejoy, 101 Ill. App. 153. Minute entries insufficient—Evans v. Southern R. Co., 133 Ala. 482. Recital in record insufficient—Aden v. Road Dist., 197 Ill. 224. Exceptions to the judgment—Mathews v. Kimball, 103 Ill. App. 28; Lord v. Guyot (Colo.) 70 Pac. 683; People v. Chicago & N. W. R. Co., 200 Ill. 389. Notwithstanding Code Civ. Proc. providing that a new trial order is deemed excepted to—Carr, Ryder & Adams Co. v. Closser, 27 Mont. 94, 69 Pac. 560.

6. Pepperdine v. Hymes, 92 Mo. App. 464. Refusal to settle bill must be shown by a bill of exceptions if such refusal is appealed from—Williamson v. Joyce, 127 Cal. 151, 69 Pac. 950. But see Hamilton Brown Shoe Co. v. Williams, 91 Mo. App. 511, where it is said that a bill of exceptions only becomes of record by record entry. A judgment entry stating that judgment was rendered on an agreed statement of facts makes the statement of record—In re Glenn's Estate, 23 Ohio Cir. Ct. 397.

7. Carnahan v. Connolly (Colo. App.) 68 Pac. 536; Dyniewicz v. Benziger, 99 Ill. App. 572.

8. Garth v. Arnold (C. C. A.) 115 Fed. 468; Tanner v. Mishawaka Woolen Mfg. Co., 28 Ind. App. 536. Acts 1899, p. 384, § 6, relating to transcripts, being invalid—Case v. Bennett (Ind.) 64 N. E. 594. Evidence of want of prosecution—Carnahan v. Connolly (Colo. App.) 68 Pac. 536. Evidence excluded—Curlee v. Rose, 27 Tex. Civ. App. 259; Caplen v. Hawkins, 27 Tex. Civ. App. 608. Testimony taken by a master commissioner is part of his report, though not filed till after judgment—Midland R. Co. v. Trissal (Ind. App.) 65 N. E. 543. The mere filing of the evidence with a certificate that it is correct is insufficient to make it part of the record—J. I. Case Threshing Mach. Co. v. Millikan, 28 Ind. App. 686. Certification by the clerk of papers showing rulings will not take the place of a bill—Roach v. Moss Tie Co. (Ky.) 71 S. W. 2. Evidence must be preserved by bill of exceptions—Heald v. Wallace (Tenn.) 71 S. W. 80; Heil v. Martin (Tex. Civ. App.) 70 S. W. 430. A stipulation of facts will not take the place of a bill of exceptions—Frizzell v. Murphy, 19 App. D. C. 440. The insertion of the original manuscript of the evidence in the transcript does not make it part of the record—South Chicago City R. Co. v. Zerler (Ind. App.) 65 N. E. 599. Proceedings under the invalid act of 1899 held to be substantially a bill of exceptions—Howard v. Indianapolis St. R. Co., 29 Ind. App. 514.

9. Phoenix Life Ins. Co. v. Williams (Neb.) 90 N. W. 756; State v. Wolski (Wis.) 92 N. W. 344. An order reciting that it was made on affidavits does not identify affidavits found in the transcript—F. Chevalier & Co. v. Wilson, 30 Wash. 227, 70 Pac. 497; Fidelity & Casualty Co. v. Brown (Ind. Ter.) 69 S. W. 915; Salomon v. Wincox's Estate, 104 Ill. App. 277; Staunton Coal Co. v. Menk, 99 Ill. App. 254; Sterling v. Self (Tex. Civ. App.)

or in arrest of judgment,[12] the opinion of the trial court,[13] instructions,[14] and requests for findings.[15]

C. The bill of exceptions. 1. *Form and requisites.*[16]—All instructions objected to may be joined in one bill.[17] The sustaining of separate demurrers by several defendants may be presented in one bill;[18] but a joint bill cannot be made on the overruling of two demurrers argued together without consolidation of the causes.[19]

The general rule is that the bill must state the ground of objection.[20] Where several exceptions are saved by the same bill, each must show the ground of objection.[21] The findings and judgment, and exceptions thereto, must appear;[22] but matters extrinsic to the proceeding and adjudication brought up should be excluded.[23] Matters occurring in the presence of the court and matters judicially noticed may be included.[24]

Redundant matter must be eliminated.[25] The fact that the bill contains other matters than the evidence does not invalidate it.[26] The evidence should never be given in the form of question and answer;[27] and the fact that the trial judge so desired does not justify such a presentation.[28] A bill containing 500 pages, and without the marginal notes required by the rule, will not be considered.[29]

A paper referred to in the bill must be annexed or identified beyond all doubt.[30] Reference in bill to evidence in transcript,[31] to instructions in record,[32]

70 S. W. 238; Gretsch v. Maxfield (Neb.) 93 N. W. 934; Esert v. Glock, 137 Cal. 533, 70 Pac. 479; Timmonds v. Twomey (Ind.) 66 N. E. 446; F. Chevalier & Co. v. Wilson, 30 Wash. 227, 70 Pac. 487. Affidavit on motion for new trial—Creamery Pckg. Mfg. Co. v. Hotsenpiller (Ind.) 64 N. E. 600; People v. Smith, 201 Ill. 454; Shuey v. Holmes, 27 Wash. 489, 67 Pac. 1096. Affidavit as to remarks of counsel—Ryans v. Hospes, 167 Mo. 342. Affidavit of clerk to loss of papers—Memphis L. & T. Co. v. Board of Directors, 70 Ark. 409.

10. Frick v. Kabaker, 116 Iowa, 494. And see Ryans v. Hospes, 167 Mo. 342.

11. Galveston, H. & S. A. R. Co. v. Pendleton (Tex. Civ. App.) 70 S. W. 996; Board of Com'rs v. Shaffner (Wyo.) 68 Pac. 14; Kansas City v. Mastin, 169 Mo. 80; Leforce v. Andrews (Ind. Ter.) 69 S. W. 812; Bryson v. Wallace (Ind. Ter.) 69 S. W. 814; Salomon v. Ellison, 102 Ill. App. 419. Errors urged for new trial—Gregory v. Leavitt (Neb.) 89 N. W. 764; Gandy v. Cummins (Neb.) 89 N. W. 777. Notice of motion for new trial is not sent up, but should be included in statement or bill of exceptions—Madigan v. Harrington, 26 Mont. 358, 67 Pac. 1121. In Missouri the rule is otherwise—Turney v. Ewins (Mo. App.) 71 S. W. 543.

12. Johnson v. Bedford, 90 Mo. App. 43.

13. Aachen & M. Fire Ins. Co. v. Crawford, 199 Ill. 367; Jenkinson v. Koester, 86 Minn. 155; Harrington v. Butte & B. Min. Co., 27 Mont. 1, 69 Pac. 102. But see Beasley v. Ridout, 94 Md. 641, where statements in the opinion as to admission of facts were considered admissions of record.

14. Savannah, F. & W. R. Co. v. Brink (Fla.) 33 So. 245, when not indorsed and signed by the judge as required by Rev. St. §§ 1090, 1091, but when so indorsed they are part of the record, or, under the Kentucky practice, identified by the judge—Beavers v. Bowen, 24 Ky. Law Rep. 882.

15. Recital in motion for new trial insufficient to show request for findings—First Nat. Bank v. Citizens' State Bank (Wyo.) 70 Pac. 726.

16. It is a rule that assignments or specifications should not combine distinct or diverse errors. See post, § 11.

17. Richmond Passenger & Power Co. v. Robinson (Va.) 41 S. E. 719.

18. Butler v. Lewman, 115 Ga. 752.

19. Purvis v. Ferst, 114 Ga. 689.

20. Though the contrary is held in Texas—Gunnels v. Cartledge (Tex.) 64 S. W. 806.

21. Richmond Passenger & Power Co. v. Robinson (Va.) 41 S. E. 719.

22. Colson v. Linn, 101 Ill. App. 194.

23. Comp. Laws, § 10,504, allowing, on writ of error where new trial is refused, the incorporation into the bill of all proceedings had on the motion for new trial, means that error will lie to such an order and that in that case the bill of exceptions should contain only proceedings on the motion—Walker v. Newton (Mich.) 90 N. W. 328.

24. State v. Fawcett (Neb.) 90 N. W. 250.

25. Whipple v. Preece, 24 Utah, 364, 67 Pac. 1072.

26. Town of Lewisville v. Batson, 29 Ind. App. 21.

27. Louisville & N. R. Co. v. Hall, 131 Ala. 161. Code, § 33, authorizes evidence to be set out "in extenso" in certain cases, but this was held to authorize only a statement in narrative form. A bill containing remarks of counsel and judge, unanswered questions, rulings not excepted to, etc., will be stricken from the files—Southern R. Co. v. Jackson, 133 Ala. 384. A bill containing the complete stenographic report of the testimony, being in violation of Code, p. 1201, § 33, will be stricken—Louisville & N. R. Co. v. Hall, 131 Ala. 161.

28. Louisville & N. R. Co. v. Hall, 131 Ala. 161.

29. City of Lafayette v. Wabash R. Co., 28 Ind. App. 497.

30. McKendree v. Shelton, 51 W. Va. 516.

to the transcript for the exceptions,[33] or to papers filed on a motion,[34] is insufficient. A motion to strike out a pleading cannot be incorporated by reference.[35] A statement in the bill that a deed attached to interrogatories was the original is sufficient to show that the original was shown to the witness.[36]

The bill is to be construed against the exceptant.[37]

2. *Settlement, signing, and filing.*—The bill must ordinarily be settled by the judge who heard the case, if not disabled or disqualified,[38] but it is sometimes provided that the clerk may sign the bill if stipulated to be correct.[39] Stipulation will not supply want of this signature.[40] If several judges hear different proceedings therein, several bills must be obtained from the respective judges.[41] The chairman of an official board should sign, settle and allow bills of exceptions to proceedings before the board.[42]

A bill will not be considered if not presented within the time limited by statute;[43] but there may be a nunc pro tunc order authorizing the filing of a bill properly settled;[44] and a federal judge may, under extraordinary circumstances, allow a bill after the term, though there has been no extension.[45] Inadvertent failure to file an exception is not ground for leave to file nunc pro tunc.[46] A bill filed within an extension allowed by the court is valid;[47] but one filed after the expiration of the time allowed by an order is of no effect.[48] An extension may

Reference in a bill to "other ballots" objected to, etc., "but not mentioned herein" held not sufficient—People v. Campbell, 138 Cal. 11, 70 Pac. 918.

31. N. Y. Life Ins. Co. v. Brown's Adm'r, 23 Ky. Law Rep. 2070.

32. Southern R. Co. v. Jones, 132 Ala. 437; C. B. & Q. R. Co. v. Haselwood, 194 Ill. 69.

33. County Ct. Rule 29 provides that the transcript is to be referred to only to test accuracy of statement or review whole evidence—Carrow v. Barre R. Co., 74 Vt. 176.

34. San Diego Sav. Bank v. Goodsell, 137 Cal. 420, 70 Pac. 299. Sup. Ct. Rule 29 provides that they must be incorporated in the bill. Matter must be copied into the bill or referred to as provided by the statute allowing skeleton bills (Burns' Rev. St. 1901, § 638)—Tilden v. Louisville & J. Ferry Co., 157 Ind. 532. Matter not filed until after skeleton bill is settled cannot be incorporated by reference—Ellis v. School Dist. No. 3, 89 Mo. App. 258.

35. Midland R. Co. v. Trissal (Ind. App.) 65 N. E. 543.

36. Harper v. Reaves, 132 Ala. 625. The deposition stated that the witness was shown the deed attached to the interrogatories.

37. Fisher v. Bertram, 100 Ill App. 542; Jones v. Glothart, Id. 630. Ruling is not supposed to have been made unless one appears—Chicago, etc., R. Co. v. Lawrence, 96 Ill. App. 635.

38. Death, sickness or "other disability" (Act Cong. June 5, 1900) does not include "absence" of trial judge—Western Dredging Co. v. Heldmaier (C. C. A.) 111 Fed. 123.

Where a statute changing county lines provides that the former judge shall settle exceptions in pending cases, a settlement by the new judge is ineffectual—Carr v. Noah, 28 Ind. App. 105.

39. Mutual stipulations that no amendments were to be made suffices—Williams v. Miles, 62 Neb. 566.

40. The judge was dead, but it was considered that the statutory method of establishing in such case was exclusive—Nashville, C. & St. L. R. Co. v. Bates, 133 Ala. 447.

41. Staunton Coal Co. v. Menk, 99 Ill. App. 254.

42. Union Stock Yards Bank v. Board (Neb.) 91 N. W. 286.

43. Hershberger v. Kerr (Ind.) 65 N. E. 4; American Tin Plate Co. v. Williams (Ind. App.) 65 N. E. 304; City of Elwood v. Laughlin, 29 Ind. App. 667. Not presented within 20 days after the ruling complained of —Regopoulas v. State, 115 Ga. 232; Goodrich v. Ga. R. & B. Co., Id. 340. Not presented within 10 days after service of proposed amendments—Burns v. Napton, 26 Mont. 360, 68 Pac. 17. Tendered more than thirty days after adjournment of term —American Freehold Land Mtg. Co. v. Walker, 115 Ga. 737; McDaniel v. Allison, Id. 751; Alabama Mineral R. Co. v. Marcus, 128 Ala. 355; Richter v. Koopman, 131 Ala. 399. Must be presented at same term unless extension granted—McDonald v. Algeo, 96 Ill. App. 79; City of Covington v. Wilson, 23 Ky. Law Rep. 1722.

44. Haydon v. Alkire Grocery Co., 88 Mo. App. 241.

45. Western Dredging & Imp. Co. v. Heldmaier (C. C. A.) 116 Fed. 179. In this case a nunc pro tunc settlement was allowed where the trial judge was absent from the circuit and the bill, being settled by another judge, was quashed because of his lack of authority.

46. Berliner v. Piqua Club Ass'n, 73 App. Div. 622. Leave to renew the motion on an affidavit stating further cause was allowed on payment of costs.

47. Gorringe v. Read, 24 Utah, 455; Olson v. Oregon Short Line R. Co., Id. 460.

48. Girdner v. Bryan, 94 Mo. App. 27. Presentation after the time allowed though within 30 days ineffectual—Bullock v. Cordele Sash, Door & Lumber Co., 114 Ga. 627.

be made ex parte,[49] or in vacation.[50] The extension must be made before the time allowed has expired;[51] but time for filing may be extended on stipulation even after the time originally limited has expired.[52] Statutory limitation of the extent to which time may be enlarged by stipulation cannot be waived.[53] An extension of time to settle bill on a motion for a new trial by one defendant will not operate in favor of his co-defendant, who appeals, not from the denial of the motion, but from the judgment.[54] A postponement of the hearing on proposed amendment works an extension of the time for presentation of the bill for settlement.[55] The taking of an appeal within the time allowed for settlement does not bar the right to settle the bill.[56] Where a motion for a new trial was not made in time, a bill of exceptions 30 days after its denial is too late.[57] Plaintiff cannot preserve his exceptions to the sustaining of a demurrer by one defendant by exceptions pendente lite.[58] A bill of exceptions to a judgment cannot include exceptions to an interlocutory ruling at a previous term, and not then settled.[59] An indorsement on the bill, of an extension of time for "filing," is ineffectual under an act authorizing extension of "signing" only; hence a tardy signing is void; and a journal entry not authorized does not aid it, though reciting an extension as to signing as well as filing.[60]

A curative act for the making of a bill of exceptions, to supply one made under an unconstitutional law, is itself unconstitutional, if rights already vested by failure to seasonably perfect the appeal by preparing a bill of exceptions are in any way impaired so as to violate contract rights.[61]

The death of a party does not prevent the settlement of exceptions taken by him.[62] A certificate that certain matters stated in the bill were "probably correct" has been held sufficient.[63] A certificate by the court reporter conflicting with that of the judge is of no effect.[64] The bill must be signed by the judge as such.[65] The bill must be filed[66] after signature,[67] and a filing before signature is insufficient;[68] but failure of the clerk to attach a file mark does not prejudice the exceptant.[69] No leave to file the bill is necessary unless an allowance of

49. City of Chicago v. Rustin, 99 Ill. App. 47.

50. Louisville & N. R. Co. v. McDonald, 79 Miss. 641. The statute authorizes an extension by "the court."

51. Lewellyn v. Lewellyn, 87 Mo. App. 9; Ward v. Sumner, Id. 624; and see Alabama Mineral R. Co. v. Marcus, 128 Ala. 355; Cooley v. United States Sav. & Loan Co., 132 Ala. 590.

52. Loeff v. Taussig, 102 Ill. App. 398.

53. Cooley v. United States Sav. and Loan Co., 132 Ala. 590. Practice rule 30 (Code p. 1200) provides that time may be extended by consent to the next term of court and no longer. It was also held in this case that the rule did not conflict with Code, § 620, providing that the time shall not be extended "by the court" more than six months. It was further held that after the period to which the parties could lawfully extend had expired the court had no power to make a further extension.

Code, § 616, providing that time for settlement may be extended by consent is limited by section 618, providing that time for filing may be fixed by stipulation in term time or extended in vacation—Tisdale v. Alabama & G. Lumber Co., 131 Ala. 456.

54. Henry v. Couch, 132 Ala. 570.

55. Boyer v. Burnett, 134 Cal. 481.

56. Capital City Ins. Co. v. Cofield, 131 Ala. 198.

57. Cleveland, C., C. & St. L. R. Co. v. Ohio Postal Tel. Co., 22 O. Cir. Ct. R. 555, 12 O. C. D. 522.

58. Holland v. Saul, 115 Ga. 511.

59. Guyer v. Davenport, R. I. & N. W. R. Co., 196 Ill. 370.

60. National Union v. Stoll, 65 Ohio St. 547.

61. Johnson v. Gehbauer (Ind.) 64 N. E. 855.

62. Haydon v. Alkire Grocery Co., 88 Mo. App. 241.

63. Atwood v. Walker, 179 Mass. 514. The matter in question was a list of authorities offered to show the law of a foreign state and excluded.

64. Saussay v. Lemp Brewing Co. (Neb.) 89 N. W. 1048.

65. Nestor's Estate v. Carney Bros. Co., 98 Ill. App. 630.

66. Union Cent. Life Ins. Co. v. Evans, 28 Ind. App. 518.

67. Wilson v. St. Louis & S. F. R. Co., 167 Mo. 323; Ayres v. Blevins, 28 Ind. App. 101; Tretheway v. Peek, Id. 81; Trittipo v. Trittipo, Id. 80; Allen v. Hamilton, 157 Ind. 621; City of Indianapolis v. Tansell, Id. 463.

68. Acme Cycle Co. v. Clarke, 157 Ind. 271; Hershberger v. Kerr (Ind.) 65 N. E. 4.

69. June v. Falkinburg, 89 Mo. App. 563. A stipulation that the bill may be incorporated into the transcript waives a failure of the clerk to attach a file mark—Chi-

time is desired.[70] The bill must be under seal.[71] The amendments should be incorporated and a clean copy made, and an allowance of the proposed bill and amendments is insufficient.[72]

Duty and enforcement.—The judge need not sign a second bill.[73] Refusal to settle a bill on a question of fact will not be controlled by mandamus, where the evidence is conflicting;[74] but where the judge refuses to sign unless matters resting in his own mind, and forming no part of the proceedings, are inserted, mandamus will issue.[75] The remedy for improper refusal to sign is by mandamus, not appeal or error, unless there is a statutory remedy.[76] Unsigned bill not accompanied by affidavits of bystanders is of no effect.[77]

Amendment and vacation.—The bill may be amended, but only from a matter of record.[78] The fact that an amendment will require the incorporation of additional matter in the interest of the other party is no ground for denial of the motion.[79] Delay in moving to correct the bill is excusable if resulting from technical objections by the other party to the procedure to correct.[80]

In the note are shown grounds for striking out or retaining a bill.[81] Denial of a motion for leave to present a new bill on grounds not going to the merits does not bar a motion to amend the bill.[82] A motion to strike out for incorrectness must be accompanied by a correct bill.[83]

D. The settled case or statement of facts.—This being in the nature of a statutory substitute for a bill of exceptions, the procedure in respect to it varies in different jurisdictions.[84]

All extrinsic matters should be excluded.[85] An agreed statement of facts designed for use below cannot be considered as a case on appeal, where the record fails to show whether additional evidence was introduced below.[86] A "here insert," not followed by the insertion of the document referred to, is ineffectual.[87]

A statement filed after the time limited,[88] or after the adjournment of court,[89]

cago City R. Co. v. Martensen, 100 Ill. App. 366.

70. Hartford Life & Annuity Ins. Co. v. Rossiter, 98 Ill. App. 11.

71. Vosseler v. Wheeler, 99 Ill. App. 21.

72. Dyea Elec. Light Co. v. Easton, 15 S. D. 572. A delay of seven months in correcting a bill after it has been returned by the judge for that purpose under Civ. Code § 5545 is fatal—Sutton v. Valdosta Guano Co., 115 Ga. 794.

73. People v. Perdue, 99 Ill. App. 289.

74. Kowalsky v. Kerrigan, 134 Cal. 590, 66 Pac. 850. Proof against a trial judge's finding of laches in presenting the bill must be clear—State v. Holmes (Neb.) 91 N. W. 175.

75. State v. Fawcett, 63 Neb. 523; Hartford Life & Annuity Ins. Co. v. Rossiter, 196 Ill. 277. Where the judge refused to settle a bill on appeal from an order adjusting a guardian's accounts until a certain book was included and it appeared that the book had been destroyed without fault of the guardian, mandamus was issued—Crooks v. Superior Court of San Francisco, 136 Cal. 23, 68 Pac. 96.

76. Code Civ. Proc. § 645; State v. Fawcett (Neb.) 90 N. W. 250.

77. Gulf, C. & S. F. R. Co. v. Holt (Tex. Civ. App.) 70 S. W. 591.

78. Jackson v. Fulton, 87 Mo. App. 228.

79. Platt v. Schmitt (Wis.) 91 N. W. 992. Insertion of such matters may be ordered as a condition.

80. Platt v. Schmitt (Wis.) 91 N. W. 992.

81. A bill purporting to have been filed in time will not be stricken out on affidavits—Keller v. Kettner (Tex. Civ. App.) 67 S. W. 997. A bill will not be stricken because not served in time—Kranich v. Helena Consol. Water Co., 26 Mont. 378, 68 Pac. 408, 71 Pac. 672. A bill will not be stricken because it is unnecessary—Board of Com'rs of Natrona County v. Shaffner (Wyo.) 68 Pac. 14. 81 days' delay in court above in moving to strike out is fatal—Board of Com'rs of San Juan County v. Tulley (Colo. App.) 67 Pac. 346.

82. Platt v. Schmitt (Wis.) 91 N. W. 992.

83. Chicago Cottage Organ Co. v. Biggs, 22 Ohio Cir. Ct. R. 392, 12 O. C. D. 497.

84. The formal statement of facts may be waived—Bernhardt v. Curtis (La.) 33 So. 125.

85. Territory v. Cooper, 11 Okl. 699, 69 Pac. 813.

86. Scott v. Cox (Tex. Civ. App.) 70 S. W. 992.

87. Bowden v. Davis (Tex. Civ. App.) 71 S. W. 47.

88. Anderson v. Walker (Tex. Civ. App.) 67 S. W. 432; reversed 95 Tex. 596, on the ground that a good excuse was shown for the delay. And appellant has the burden of proof if he seeks to excuse his delay under (Rev. St. 1895, art. 1352)—Sisk v. Joyce (Tex. Civ. App.) 68 S. W. 50.

89. Hollywood v. Wellhausen (Tex. Civ.

will not be considered; and refusal to allow filing after expiration of time is discretionary.[90] Application for extension need not be made during the time originally allowed.[91] It is immaterial that the case was signed at a different time and place than that named in the notice, if no objection was made.[92] The court cannot allow an ex parte amendment after a stipulation for settlement.[93] A certificate attached to the statements proposed by each party treating them as a single statement, is a sufficient settlement.[94]

E. Abstracts.—These are of two classes,—abstracts of the record proper and abstracts of the evidence,—though both are sometimes combined in a single abstract, and the practice in different states overlaps to an extent which renders impossible the separate treatment of each class. There is also an abstract, so called, which in many jurisdictions is required as part of the brief. It summarizes the matters in contention like an opening statement to the jury.[95]

Necessary contents.—All matters which counsel wish to urge must be abstracted.[96] The sufficiency of the evidence will not be considered where there is no brief of the evidence.[97] The abstract should contain a recital of all that pertains to the record proper,[98] including the filing of a motion for a new trial,[99] the filing of the bill of exceptions,[1] and the taking of the appeal;[2] and an abstract not complying with the rules of court will not be considered.[3] The abstract must identify the part of a pleading to which an exception is taken.[4] Instructions must be numbered.[5]

Proceedings not to be stated in extenso.—Documents should be abstracted, and

App.) 68 S. W. 329; Wilcox v. League (Tex. Civ. App.) 71 S. W. 414; Dennis v. Neal (Tex. Civ. App.) 71 S. W. 387, though no motion to strike out is made.

90. The excuse alleged was misunderstanding of code provision—Ingrim v. Epperson, 137 Cal. 370, 70 Pac. 165.

91. But must be made within 60 days after such expiration, the statute providing that not more than 60 additional days shall be allowed—Crowley v. McDonough (Wash.) 70 Pac. 261.

92. Comstock v. Eagleton, 11 Okl. 487, 69 Pac. 955.

93. Watkins v. La Mar, 10 Kan. App. 226, 69 Pac. 730.

94. Herrman v. Great Northern R. Co., 27 Wash. 472, 68 Pac. 82.

95. See post, § 11, "Briefs."

96. Hughes v. Humphreys, 102 Ill. App. 194; Douglass v. Miller, 102 Ill. App. 345; Crawford-Adsit Co. v. Bell, 100 Ill. App. 366; Van Meter v. Lambert, 104 Ill. App. 243.

97. Equitable Mortg. Co. v. Bell, 115 Ga. 651; Atlanta & W. P. R. Co. v. Upshaw, 115 Ga. 688; Indiana, D. & W. R. Co. v. Ditto, 158 Ind. 669; Hancock v. McNatt (Ga.) 42 S. E. 525; Gerspach v. Barhyte (Colo. App.) 68 Pac. 1057. An auditor's report of the evidence brought up in the bill will take the place of a brief of the evidence—Schmidt v. Mitchell (Ga.) 43 S. E. 371. And where abstracts of evidence are not ordinarily used it has been said that when the testimony is voluminous counsel should agree on a selection—Carrow v. Barre R. Co., 74 Vt. 176.

98. The abstract should show the filing and contents of the pleadings, the judgment, the motion for a new trial and ruling thereon, the proceedings for appeal and the filing of the bill of exceptions—Jordan v. Chicago & A. R. Co., 92 Mo. App. 81. People's Sav. Bank v. Gordon (Mo. App.) 71 S. W. 470.

99. McCormick Harvesting Mach. Co. v. Crawford (Mo. App.) 72 S. W. 491; Kirk v. Kane (Mo. App.) 71 S. W. 463; Opp v. Kohler (Mo. App.) 72 S. W. 128; Roberts v. Modern W. of A. (Mo. App.) 71 S. W. 1075.

1. Nold Lumber Co. v. Easton (Mo. App.) 67 S. W. 934; Kirk v. Kane (Mo. App.) 71 S. W. 463; Baumeister v. Toomey (Mo. App.) 71 S. W. 1070; Roberts v. Modern W. of A. (Mo. App.) 71 S. W. 1075.

Including the extension of time to file—Greenwood v. Parlin, etc., Co. (Mo. App.) 72 S. W. 138; Roberts v. Modern W. of A. (Mo. App.) 71 S. W. 1075; order for filing—Hughes v. Henderson, 95 Mo. App. 312. And this must appear by the original and not by an amended abstract—Western W. S. Co. v. Kolkmeyer, 91 Mo. App. 286. See, also, Albin v. Chicago, R. I. & P. R. Co. (Mo. App.) 67 S. W. 934.

2. A statement that the notice of appeal was "issued" instead of "served" on defendant is insufficient—Oskaloosa Cigar Co. v. Iowa Cent. R. Co. (Iowa) 89 N. W. 1065. And a statement that within statutory time a due and sufficient notice of appeal was served states only a conclusion of law and is insufficient—Jaroszewski v. Allen (Iowa) 91 N. W. 941.

3. The transcript may be referred to (Brassfield v. Knights of Maccabees, 92 Mo. App. 102) but where the abstract does not authorize a review of any question, the court will not look to the transcript—Dixon v. Thomas, 91 Mo. App. 364.

4. Robertson v. Dunne (Fla.) 33 So. 530.

5. Trimble v. Terril, 99 Ill. App. 349.

not set out in full,[6] and the evidence must be properly abridged.[7] The record entries need only be recited.[8]

Supplemental and counter abstracts.—A supplemental abstract may be filed before submission of the cause,[9] or before joinder in issue.[10] Omissions should be urged by the filing of an additional abstract.[11]

§ 10. *Transmission of proceedings and evidence to reviewing court. A. Form and contents of transcript or return.*—The transcript should contain only such papers as are necessary to an understanding of questions raised;[12] but an incomplete transcript made under the instructions of appellant's counsel will not be considered.[13] The transcript must show the pleadings.[14] The court below cannot direct that testimony not in the bill of exceptions be included in the transcript.[15]

The original files will not take the place of a transcript.[16]

The evidence will not be examined if the transcript is not indexed;[17] and, if there are no marginal notes, the clerk will be instructed to insert them.[18]

Defects or omissions.—The appeal will be dismissed for failure to file a transcript.[19] The inadvertent omission of a rule of court will be overlooked where it is given in one of the briefs.[20] An informal statement of the date and entry of orders included in the transcript is sufficient.[21] If the transcript is illegible, a new one will be required.[22]

B. Certification and authentication.—The transcript must be duly certified by the clerk.[23] The clerk's certificate to the transcript must be under seal.[24] Docu-

6. Graham v. Baxley (Ga.) 43 S. E. 405. Where pleadings and irrelevant documents are set out at length, the abstract will not be considered—Thoma v. Hecker (Iowa) 90 N. W. 598.

7. Hurley v. Hurley (Iowa) 91 N. W. 895.

8. Scott v. Black (Mo. App.) 70 S. W. 523.

9. Turney v. Ewins (Mo. App.) 71 S. W. 543. Though one filed on leave obtained on the day of submission without consent of respondent is improper—Welty v. Gibson (Mo. App.) 71 S. W. 704. And omission of the judgment motion for new trial and record of filing bill of exceptions cannot be supplied without consent—Albin v. Chicago, R. I. & P. R. Co. (Mo. App.) 67 S. W. 934. See. also, Western W. S. Co. v. Kolkmeyer, 91 Mo. App. 286, in which it was said that the filing of a bill of exceptions must be shown by the original, not by an amended abstract.

10. And the filing of briefs is a joinder in issue under this rule—Hoffman v. Loudon (Mo. App.) 70 S. W. 162.

11. Roe v. Bank of Versailles, 167 Mo. 406; Taylor v. Vandenberg, 15 S. D. 480; Tufts v. Morris, 92 Mo. App. 389. A denial of an amended abstract must be supported by the transcript—Foley v. Cudahy Packing Co. (Iowa) 93 N. W. 284.

12. An amended affidavit for attachment and the traverse thereof are sufficient to show jurisdiction without the original affidavit—Reese v. Damato (Fla.) 33 So. 459. The transcript is sufficient, if, though not complete, it fully presents all questions involved—Brown v. Schintz, 98 Ill. App. 452.

13. Charter Oak S. & R. Co. v. Rice, 108 La. 699. The withdrawal of the long hand manuscript from the files in an attempt to comply with the invalid act of 1899 will not be treated as a mutilation of the record, and questions not depending on the evidence will be reviewed—Johnson v. Gehbauer (Ind.) 64 N. E. 855. Where an appeal is abandoned and a new one taken a new schedule for a partial transcript must be filed—Hackney v. Hoover (Ky.) 67 S. W. 48.

14. O'Brien Lumber Co. v. Shoot, 104 Ill. App. 348.

15. West v. East Coast Cedar Co. (C. C. A.) 113 Fed. 737.

16. Brabham v. Custer County (Neb.) 92 N. W. 989; Chappell v. Jasper County O. & G. Co. (Ind. App.) 66 N. E. 515; Marcy Mfg. Co. v. Flint & W. Mfg. Co., 158 Ind. 173. And Laws 1887, p. 182, allowing the original bill of exceptions to be included does not justify the incorporation of the original of a master's report and the evidence taken before him (Beth Hammidrash, etc., v. Oakwoods Cemetery Ass'n, 200 Ill. 480) and where the practice is to send up only what is specified by counsel, a praecipe for a "transcript" is not satisfied by the original—Drew v. Geneva (Ind.) 65 N. E. 9. But in Wisconsin Rev. St. § 3050 requires the original papers used on application for an order to be transmitted on appeal therefrom—Schomberg H. L. Co. v. Engel, 114 Wis. 273.

17. Indiana, D. & W. R. Co. v. Ditto, 158 Ind. 669; Peterson v. Union Trust Co. (Ind.) 65 N. E. 1025. Paper book must have index with a statement of question and pleadings in full in appendix (Sailor v. Reamer, 20 Pa. Super. Ct. 597) and in Kansas a transcript without an index will not be admitted to the files—Emporia v. Kowalski, 65 Kan. 772, 70 Pac. 863.

18. Brinkley v. Smith, 130 N. C. 224.

19. Burdett v. Dale, 95 Mo. App. 509.

20. Griffith v. Adams, 95 Md. 170.

21. The court indicates the proper introductory form—Board of Com'rs v. Shaffner (Wyo.) 68 Pac. 14.

22. Singer Mfg. Co. v. Rogers, 70 Ark. 385.

23. Sone v. Grant Oaks (Mo. App.) 70 S.

ments accompanying the transcript must be certified by the clerk.[25] A bill of exceptions included in a transcript must precede the certificate.[26] Where the certificate to the transcript states the title of the case differently from the papers in the transcript the appeal will be dismissed.[27] It is immaterial that the certificate to a bill of exceptions refers to it as a "transcript."[28] A certificate that a "recital" of all papers is included is insufficient.[29]

C. Transmission and filing.—The appeal will be dismissed if the transcript is not filed within the time prescribed by law or rule of court,[30] though jurisdiction is not lost by failure to file in time,[31] and may be excused.[32] It is usually provided by rule that the time may be extended.[33]

W. 266. A certificate by the judge being insufficient—Duston v. Foster, 64 Kan. 886, 67 Pac. 1102. But in Illinois the certificate of the judge to the statement of facts is sufficient—Brown v. Schintz, 98 Ill. App. 452; Heberlein v. Wendt, 99 Ill. App. 506. Where the case has been transferred the clerk of the court to which it is transferred should certify the record—Smith v. Pyrites M. & C. Co. (Va.) 40 S. E. 918. The successor of the judge who tried the case may certify the statement of facts—Graton & K. Mfg. Co. v. Redelsheimer, 28 Wash. 370, 68 Pac. 879.

In Florida habeas corpus transcripts in error must be certified according to Cir. Ct. Rule 103—Hart v. Cotten (Fla.) 31 So. 817.

24. Comstock v. Stoner (Ind. App.) 66 N. E. 501; Hesch v. Bolin (Ind. App.) 64 N. E. 39.

25. Holstein v. Klein (Neb.) 93 N. W. 214. Where the judge by way of amendment files a statement showing that the bill is partly untrue, and the clerk certifies that the bill "as amended" is true, the bill will not be considered—Jarriel v. Jarriel, 115 Ga. 23. Where the clerk certifies that the papers, including the bill of exceptions, sent up are the originals, the omission of a signature to the indorsement of filing on the bill is immaterial—Board of Com'rs v. Shaffner (Wyo.) 68 Pac. 14. A certificate relating to the filing of the longhand manuscript of evidence held to show that the original manuscript was transmitted—Payne v. Moore (Ind. App.) 66 N. E. 483. The judge's certificate is not necessary to make proceedings in chancery part of the record—Hopper v. Mather, 104 Ill. App. 309.

26. Butt v. Lake Shore & M. S. R. Co. (Ind.) 65 N. E. 529.

27. Florida Cent. & P. R. Co. v. Peacock (Fla.) 33 So. 247.

28. Oster v. Broe (Ind.) 64 N. E. 918. Unnecessary recitals of fact in the certificate are immaterial—Scott v. Whipple (Ga.) 42 S. E. 519.

29. It should be stated that there is "a copy of" the same—Burnham v. Driggers (Fla.) 32 So. 796. The certificate should show that all papers used on a hearing are included, not that all "on file" are there—Madden v. Kinney, 114 Wis. 528.

30. Gagneaux v. Desonier (La.) 33 So. 561; In re Wegmann (La.) 33 So. 192; Da Costa v. Dibble (Fla.) 33 So. 466. **The statutory limitation of time** is mandatory in Ohio (Downing v. Downing, 23 Ohio Cir. Ct. 389) but in Washington it is said to be directory—Prescott v. Puget Sound B. & D. Co., 30 Wash. 158, 70 Pac. 252. Fifteen days before the opening of the term—Lucas v. Heuston, 168 Mo. 658. Within 40 days after settlement of bill of exceptions—Bell v. Southern Pac. R. Co., 137 Cal. 77, 69 Pac. 692. Third day of next term convening more than thirty days after taking of appeal—Taylor v. Colorado Iron Wks., 29 Colo. 372, 68 Pac. 218. Ten days after appeal is perfected on appeal from probate court—Drexel v. Rochester L. & B. Co. (Neb.) 91 N. W. 254. Where the supreme court would not be in session 10 days after the order for filing transcript an order for filing at the first day of the next session is proper.—Posner v. Southern E. & B. Pipe Co. (La.) 33 So. 641. The 40 days from the time the appeal is entered and perfected runs from the entry of the appeal, not from the approval of the bond, in case of an appeal by the District—District of Columbia v. Roth, 18 App. D. C. 547.

31. Drexel v. Rochester L. & B. Co. (Neb.) 91 N. W. 254; Crichton v. Webb Press Co., 107 La. 86. Appeal not defeated if transcript filed before motion to dismiss for delay—Johnson v. San Juan Fish Co., 30 Wash. 162, 70 Pac. 254.

32. But there must be good reason for the delay—Bell v. Southern Pac. R. Co., 137 Cal. 77, 69 Pac. 692. As may delay in filing a counter abstract where no prejudice resulted—Foley v. Cudahy Packing Co. (Iowa) 93 N. W. 284. The fact that a motion for a new trial was pending and the bill of exceptions was not settled is no excuse for delay in filing the transcript—Bell v. Southern Pac. R. Co., 137 Cal. 77, 69 Pac. 692. Nor is mistake as to the court where the record should be filed—Carleton v. State (Tex. Cr. App.) 68 S. W. 511. And an agreement with opposing counsel has been held not to excuse delay (Keller v. Kettner [Tex. Civ. App.] 67 S. W. 907) but delay caused by acts of the court or of opposing counsel will be excused—Anderson v. Walker (Tex. Civ. App.) 70 S. W. 1003; District of Columbia v. Roth, 18 App. D. C. 547. Affidavits showing excuse for delay cannot be considered—Keller v. Kettner (Tex. Civ. App.) 67 S. W. 907. Failure to procure a return from the municipal court in New York is not excused by appellant's contention that he was not responsible for the payment of fees, which were demanded in advance—King v. Norton, 36 Misc. Rep. (N. Y.) 53.

33. The court is not limited to one extension—Macfarland v. Byrnes, 19 App. D. C. 531. But the extension must be granted before the expiration of the time limited—District of Columbia v. Roth, 18 App. D. C. 547.

Transmission of transcripts in two different cases under one cover is sufficient.[34]

D. Amendment and correction.[35] *In trial court.*—Leave may be granted to apply to the trial court for an amendment.[36] And in some jurisdictions no leave is necessary.[37] Exceptions not actually taken at the trial may be stricken out on application to the trial court.[38]

In the reviewing court.—In some states the reviewing court will order a correction of the record.[39] The appellate court will not inquire into the genuineness of the signature to the settled case.[40] After the record is made up, a suggestion of diminution cannot be made except by consent;[41] and an application made after the cause had been pending two years in the appellate court will not be granted.[42] A suggestion of error made by counsel in argument will not be regarded.[43] An amendment will not be allowed to bring up testimony not affecting the result,[44] or a motion not decided.[45] The parties may stipulate for corrections.[46] An admission of error in the answer to the petition for correction cures the error.[47] Certiorari will be allowed to bring up corrections made below.[48]

E. Conclusiveness of record, and effect of conflict therein.—Review is confined to matters in the record, in examining which certain presumptions are applied as to facts not shown.[49] The record is conclusive, and cannot be contradicted, except by proceedings in due form for an amendment.[50] And it will prevail over the original papers in the transcript,[51] and over notations by the clerk on the margin of

34. Hall v. Moore (Neb.) 92 N. W. 294.

35. Omitted parts of record in liquor license case may be brought up—Persinger v. Miller (Neb.) 90 N. W. 242. In Ohio a transcript from an administrator's accounting, if seasonably filed to perfect an appeal, may be amended by supplying omissions—Falconer v. Martin, 66 Ohio St. 352.

36. McKenzie v. Murphy, 29 Colo. 485, 68 Pac. 838. And see Brenham v. Rankin (Tex. Civ. App.) 70 S. W. 321, where it was suggested that the signature to the settled case was not genuine.

37. Birnbaum v. May, 170 N. Y. 314; Campbell v. Campbell (Iowa) 91 N. W. 894. And a duly certified amendment cures an apparent error—Carrington v. People, 195 Ill. 484.

38. Lincoln v. Sager (Neb.) 89 N. W. 617.

39. Even on its own motion—Turman v. Whaley (Fla.) 32 So. 811. In Connecticut by Pub. Acts, c. 194, an application must first have been made to the trial court—Griswold v. Guilford (Conn.) 52 Atl. 742.

40. Time will be allowed to apply below—Brenham v. Rankin (Tex. Civ. App.) 70 S. W. 321.

41. Ortt v. Leonhardt (Mo. App.) 68 S. W. 577. Before the cause is called for argument—Western W. S. Co. v. Kolkmeyer, 91 Mo. App. 286. Sup. Ct. Rule 4 provides that no suggestion of diminution shall be made after joinder in error—Hoffman v. Loudon (Mo. App.) 70 S. W. 162.

42. Carnahan v. Connolly (Colo. App.) 68 Pac. 836. An application made after decision on appeal was granted in Tennessee—Hinton v. Sun Life Ins. Co. (Tenn.) 72 S. W. 118.

43. Oskaloosa Cigar Co. v. Iowa Cent. R. Co. (Iowa) 89 N. W. 1065.

44. Hyde v. Mendel (Conn.) 52 Atl. 744.

45. Sullivan v. King (Tex. Civ. App.) 72 S. W. 207.

46. Camp v. Wabash R. Co., 94 Mo. App. 272.

47. Hinton v. Sun Life Ins. Co. (Tenn.) 72 S. W. 118.

48. Johnston v. Arrendale (Tex. Civ. App.) 71 S. W. 44.

49. See post, § 13 "Restriction to record."

50. State v. Berger, 92 Mo. App. 631; Davies v. Cheadle (Wash.) 71 Pac. 728; Purple v. Union Pac. R. Co. (C. C. A.) 114 Fed. 123; New York, N. H. & H. R. Co. v. Hungerford (Conn.) 52 Atl. 487; Washington Liquor Co. v. Alladio Cafe Co., 28 Wash. 176, 68 Pac. 444; Turner v. Adams, 75 Conn. 28; Board of Com'rs v. Shaffner (Wyo.) 68 Pac. 14; Weeks v. Texas Midland R. Co. (Tex. Civ. App.) 67 S. W. 1071; Justice v. Gallert, 131 N. C. 393. And this applies to recitals in an order contained in the record (Brown v. Schintz, 98 Ill. App. 452) and to recitals in an order of facts shown on the application therefor—Allen v. Richardson (S. D.) 92 N. W. 1075. And to amendments to the record —Carrington v. People, 195 Ill. 484.

51. Signing of the verdict—Seal Lock Co. v Chicago Mfg. Co., 98 Ill. App. 637. Time of filing papers—Central Coal Co. v. Texas Produce Co., 70 Ark. 479. References to depositions which do not appear will not prevail over a statement that all the evidence is included—Louisville & N. R. Co. v. Hull, 24 Ky. Law Rep. 375. But a justice's return as to the date when his judgment was rendered was held to prevail over a statement in the case on appeal from the intermediate court—Erdman v. Upham, 70 App. Div. (N. Y.) 315. Facts shown in the record on which appellate jurisdiction rests prevail over findings—Schreiner v. Emel, 26 Wash. 555, 67 Pac. 228; and under the Illinois appellate court act unless the record shows facts the pleadings cannot be examined—Pick v. Mut. Life Ins. Co., 192 Ill. 157; Murray Iron Wks. v. De Kalb Elec. Co., 200 Ill. 186.

the minute book.[52] The agreed statement of facts will control the bill of exceptions.[53]

§ 11. *Practice and proceedings in appellate court before hearing. A. Joint and several appeals; consolidation; severance.*—It will be supposed that both defendants joined in an appeal from an order affecting them alike, and wherein they tried their claims together, represented by the same counsel.[54] Appeal from judgment, also from denial of a new trial, is not double;[55] nor is one from a motion and a petition for new trial.[56] Several feigned issues with different plaintiffs should be severed.[57] The parties cannot, without action of court, effect a consolidation by merely treating actions so,[58] and the trial court cannot do so after judgment;[59] hence causes tried together by agreement cannot be joined in a single appeal.[60] Appeals from separate judgments are not consolidated merely because the cases were tried together by order of the court below; hence the parties cannot join.[61] If an erroneous consolidation be attempted, the examination will be limited to the original cause.[62]

B. Original and cross proceedings.—One who is not a party cannot bring a cross bill of exceptions.[63]

An original proceeding is necessary to institute review proceedings; hence a "cross bill of exceptions" will not lie to review the omission of the court to act on a petition of intervention;[64] but, if another party has appealed, a cross proceeding is generally necessary if an appellee or respondent would review errors,[65] and a cross proceeding in error, and not an independent proceeding, should be brought to obtain affirmative relief.[66] A cross bill will not be treated as a main bill unless filed in time for that purpose.[67]

C. Amendments of parties.—If an appeal be taken in the names of parties, one of whom is already dead, it may be amended to show that the survivors take it.[68] If administration is unnecessary, and the heirs are brought in, failure to substitute an administrator of a deceased party does not vitiate jurisdiction.[69] On the death of a ward pending appeal, administrators may be substituted for guardians.[70] Substitutions should be promptly made.[71] A stipulation that the administrator shall continue the appeal is equivalent to a revival in his name.[72] After revival in the trial court, it need not be again done in the reviewing court.[73]

D. Calendars; trial dockets; terms.—The term is usually determined under statutes, by the time when the appeal or review proceeding is perfected or reaches

52. In re Pichoir's Estate (Cal.) 70 Pac. 214.

53. Gulf, C. & S. F. R. Co. v. Moore (Tex. Civ. App.) 68 S. W. 559. But see Ellis v. Lee Bow (Tex. Civ. App.) 71 S. W. 576, where it was said that in case of conflict between the bill and the statement of facts the presumption against the existence of error obtains.

54. Charles D. Koier Co. v. O'Brien, 202 Pa. 153.

55. Kountz v. Kountz, 15 S. D. 66.

56. German Nat. Bank v. Edwards, 63 Neb. 604.

57. Kimmel v. Johnson, 18 Pa. Super. Ct. 429.

58. Hidy v. Hanson, 116 Iowa, 8.

59. Prinz v. Moses (Kan.) 66 Pac. 1009.

60. Judgment on demurrer entered separately in each—Brown v. Louisville & N. R. Co. (Ga.) 43 S. E. 498.

61. Cases were consolidated and separate judgment of nonsuit entered—Center v. R. N. Fickett Paper Co. (Ga.) 43 S. E. 498.

62. Prinz v. Moses (Kan.) 66 Pac. 1009.

63. Unsuccessful petitioner to intervene—Turnbull v. Foster (Ga.) 43 S. E. 42.

64. Turnbull v. Foster (Ga.) 43 S. E. 42.

65. See post, this section, "Forming Issues, Cross-Errors."

66. Scully v. Smith (Kan.) 71 Pac. 519.

67. Turnbull v. Foster (Ga.) 43 S. E. 42.

68. Death after judgment before appeal—Griswold v. Thornton, 129 Ala. 454.

69. Applied where guardian died pending appeal from settlement of his account—Magness v. Berry (Tex. Civ. App.) 69 S. W. 987.

70. If the guardians have fully accounted—Brown v. Lambe (Iowa) 93 N. W. 486.

71. Delay of six months after expiration of the year to bring in the successor of a trustee party held fatal—Hays v. Pugh, 158 Ind. 500.

72. Crawford v. Chicago, R. I. & P. R. Co. (Mo.) 66 S. W. 350.

73. Crawford v. Chicago, R. I. & P. R. Co. (Mo.) 66 S. W. 350.

an issue of error, as is shown in the footnote;[74] but it may depend on the return day of the appeal or writ of error. Special cases which it is prescribed shall be heard and determined as speedily as possible may be advanced and docketed, though not filed within requisite time to go on the docket.[75]

E. Forming issues; pleading, assigning, and specifying error.—The term "assignment of errors" is now used in two general senses: First, as indicating averments made to obtain a writ of error or allowance of an appeal; second, as referring to specifications, sometimes with the argument or brief, but often separate therefrom, made to advise and inform the reviewing court what errors are relied on to work a reversal. In many states a review is of right, and only as used in the latter sense is there any assignment of errors, the appeal being a statutory one instituted by a notice or other monitory act. The procedure by petition containing averments of error often requires that, in addition, the "briefs" shall specify the particular errors to which argument is directed. These distinctions should be noted carefully. It is the object of assignments in any case to define and develop the issues on review.[76] The assignment or statement of errors, as an act or proceeding operating to bring up the cause, is elsewhere treated.[77]

1. *Proper parties to assign errors.*—The objector must have an appealable interest.[78] Errors cannot be urged which affect other parties, but not the objector;[79] or which are favorable to him[80] or his co-defendant;[81] or which his position and the case require him to uphold,[82] as where he invites or assents to the action of the court.[83] He cannot complain of an erroneous submission which he requested, or of

74. In Kentucky (Civ. Code. Pr. §§ 738, 753), an appeal does not come on at a term unless the transcript is filed twenty days before the beginning of the term, unless the parties otherwise consent—Meacham v. Democratic Com., 24 Ky. Law Rep. 1340.

75. Election cases under Act of 1900—Graham v. Graham, 24 Ky. Law Rep. 20.

76. Consult general treatises on practice; also the various statutes.

"Petitions in error" contain averments of errors which limit the review. A corresponding function is served by what is elsewhere called the "assignment of errors."

77. See ante, § 6.—"Application, etc., Assignments and Statements."

Such function is often performed by a paper separate from the specifying averments.

78. See ante, § 3a, and the cases there cited.

79. French v. Commercial Nat. Bank, 199 Ill. 213; Richards v. Minster (Tex. Civ. App.) 70 S. W. 98; Wm. E. Peck & Co. v. Kansas City Roofing Co. (Mo. App.) 70 S. W. 169; McCardle v. Aultman Co. (Ind. App.) 66 N. E. 507; McDavid v. McLean, 104 Ill. App. 627. Allegations against a dismissed defendant which were multifarious as to others now objecting—Missouri Broom Mfg. Co. v. Guymon (C. C. A.) 115 Fed. 112. Failure to separately find as against co-defendant—Dobbs v. Purington, 136 Cal. 70, 68 Pac. 323. Failure to serve a co-defendant—Storey v. Kerr (Neb.) 89 N. W. 601. Debtor's assignee cannot complain of errors between creditor and garnishee—Norton v. Maddox (Tex. Civ. App.) 66 S. W. 319. Objector's claim of interest had already been decided adversely by the court—Scott v. Farmers' & Merchants' Nat. Bank (Tex. Civ. App.) 66 S. W. 485. Ruling correct as to defendant husband and not affecting wife is assignable by neither—Rogers v. Hopper, 94 Mo. App. 437. Defendant cannot complain of errors between plaintiff and intervenor—People v. Campbell (Cal.) 70 Pac. 918.

80. See "Harmless Error"—Fitzgerald v. Alma Furniture Co., 131 N. C. 636; Citizens' Bank v. Rung Furniture Co. (N. Y.) 76 App. Div. 471; Garretson v. Kinkead (Iowa) 92 N. W. 55; Kinney v. Murray (Mo.) 71 S. W. 197. Committee of habitual drunkard cannot complain that an order of release was probationary instead of absolute—In re Larner, 79 App. Div. (N. Y.) 134. Objector had requested a more unfavorable instruction than the one objected to—Padelford v. Eagle Grove (Iowa) 91 N. W. 899.

81. George v. St. Joseph (Mo. App.) 71 S. W. 110; Cleland v. Anderson (Neb.) 92 N. W. 306.

82. Trustees v. Hoffman, 95 Mo. App. 488; Krup v. Corley, Id. 640; Oneill v. Blase, 94 Mo. App. 648; Sappington v. C. & A. R. Co., 95 Mo. App. 387; Krebs v. Zumwalt, 91 Mo. App. 404.

Trial on a particular theory—Ryan v. Pacific Axle Co., 136 Cal. xx., 68 Pac. 498. Refused request substantially covered—Missouri, K. & T. R. Co. v. Eyer (Tex. Civ. App.) 69 S. W. 453.

83. Dixon v. McDonnell, 92 Mo. App. 479; City of San Antonio v. Potter (Tex. Civ. App.) 71 S. W. 764; Galveston, etc., R. Co. v. Baumgarten (Tex. Civ. App.) 72 S. W. 78; Parkins v. Mo. Pac. R. Co. (Neb.) 93 N. W. 197; Gregg v. Roaring Springs Co. (Mo. App.) 70 S. W. 920; MacDonald v. Tittmann (Mo. App.) 70 S. W. 502; Summers v. Metropolitan Life Ins. Co., 90 Mo. App. 691; Eberly v. Chicago, B. & Q. R. Co. (Mo. App.) 70 S. W. 381.

Correct ruling on but erroneous grounds for which he was responsible—McDonald v. People, 29 Colo. 503, 69 Pac. 703.

Refusal to direct verdict when he proffered

its consequences;[84] but he does not assail his own act by merely attacking the

instructions—Hopkins v. Modern Woodmen, 94 Mo. App. 402.

Findings on a point agreed to be immaterial—Kent v. Richardson (Idaho) 71 Pac. 117.

Assent to judge's entering jury room—Griffith v. Mosley, 70 Ark. 244. Trial in absence of one juror—Rehm v. Halverson, 197 Ill. 378. Proceeding with trial after refusal to dismiss and not renewing motion—Greenspan v. Newman (N. Y.) 37 Misc. 784. Introducing evidence after being refused a directed verdict—Greenfield v. Johnson (Ind. App.) 65 N. E. 542. Ruling to which he assented by proving in accordance—Pittsburg, etc., R. Co. v. Crothersville (Ind.) 64 N. E. 914. Instrument admitted by agreement without proof of binding execution by agent—Kaufman v. Simon, 80 Miss. 189. Defending suit to quiet title without objecting to plaintiff's want of possession—Bates v. Drake, 28 Wash. 447, 68 Pac. 961. Failure to correct a submitted draft of a hypothetical question afterwards put by and admitted for the adverse party—Allen v. Voje, 114 Wis. 1. Cannot assail finality of judgment because of subsequent amendment of findings on consent and after he had appealed—United States v. St. Louis Transp. Co., 184 U. S. 247, 46 Law. Ed. 520.

Essential facts conceded to have been proven—Sexton v. Union Stock Yds. Co., 200 Ill. 244; People v. Smith, 201 Ill. 454. Failure to explicity allege a fact tacitly admitted by the theory of trial—McHale v. Maloney (Neb.) 93 N. W. 677.

Refusing to take a continuance granted on allowing adversary to reopen and amend —Jaroszewski v. Allen (Iowa) 91 N. W. 941.

Erroneous evidence introduced by himself —Continental Nat. Bank v. First Nat. Bank, 108 Tenn. 374; Marsden Co. v. Bullitt, 24 Ky. Law Rep. 1697; or developed by him—Early's Adm'r v. Louisville, etc., R. Co., 24 Ky. Law Rep. 1807; Jarrell v. Crow (Tex. Civ. App.) 71 S. W. 397; on his own cross-examination —O'Banion v. Mo. Pac. R. Co., 65 Kan. 352, 69 Pac. 353; Davis v. Streeter (Vt.) 54 Atl. 185; Hicks v. Galveston, etc., R. Co. (Tex. Civ. App.) 71 S. W. 322; or the repetition of it—Tufts v. Morris, 92 Mo. App. 389. Admission of a mutilated instrument afterward introduced by objector—Pope v. Anthony (Tex. Civ. App.) 68 S. W. 521. Discrediting a witness whom the objector also called—Hardin v. Jones (Tex. Civ. App.) 68 S. W. 836.

Want of evidence caused by his own erroneous objection—Sachs v. American Surety Co. (N. Y.) 72 App. Div. 60; Hagey v. Schroeder (Ind. App.) 65 N. E. 598.

Exclusion of evidence on his own objection—Harp v. Harp, 136 Cal. 421, 69 Pac. 28. Exclusion of what related to a different issue than the sole one submitted at objector's request—Thompson v. Rosenstein (Tex. Civ. App.) 67 S. W. 439. Exclusion from jury of evidence on one cause of action as to which defendant procured a charge in his own favor—Murphy v. St. Louis Transit Co. (Mo. App.) 70 S. W. 159. Mode of proof due to objector's evidence—Seattle & M. R. Co. v. Roeder, 30 Wash. 244, 70 Pac. 498. Answer which may have been a conclusion was not followed by cross-examination to develop that objection—Shaefer v. Mo. Pac. R. Co. (Mo. App.) 72 S. W. 154.

Instructions requested or like those requested by him or containing similar language—Stowers v. Singer, 24 Ky. Law Rep. 395; Gregg v. Roaring Springs Co. (Mo. App.) 70 S. W. 920; Little Dorrit G. M. Co. v. Arapahoe Co. (Colo.) 71 Pac. 389; Weigley v. Kneeland, 172 N. Y. 625; Dady v. Condit, 104 Ill. App. 507; Strother v. De Witt (Mo. App.) 71 S. W. 1129; Farmers' Ins. Co. v. Cole (Neb.) 93 N. W. 730; Davidson v. Chicago & A. R. Co. (Mo. App.) 71 S. W. 1069; Kansas City v. Madsen, 93 Mo. App. 143; Republic Iron Works v. Gregg, 24 Ky. Law Rep. 1627; Missouri, K. & T. R. Co. v. Eyer (Tex.) 70 S. W. 529; Sibley Warehouse Co. v. Durand & Kasper Co., 200 Ill. 354; Murphy v. Century Bldg. Co., 90 Mo. App. 621; Hunt v. Searcy, 167 Mo. 158; Buck v. Hogeboom (Neb.) 90 N. W. 635; Clapp v. Royer (Tex. Civ. App.) 67 S. W. 345; Beaver v. Eagle Grove, 116 Iowa, 485; Gulf, etc., R. Co. v. Shelton (Tex. Civ. App.) 69 S. W. 653; Frost Mfg. Co. v. Smith, 98 Ill. App. 308; Rock Island Sash Works v. Pohlman, 99 Ill. App. 670; Galveston, etc., R. Co. v. Jenkins (Tex. Civ. App.) 69 S. W. 233; Denver R. Co. v. Peterson (Colo.) 69 Pac. 578; Ryans v. Hospes, 167 Mo. 342; Galveston, etc., R. Co. v. Sherwood (Tex. Civ. App.) 67 S. W. 776; West Chicago R. Co. v. Buckley, 200 Ill. 260; Ward v. Bass (Ind. T.) 69 S. W. 879; Springfield R. Co. v. Puntenney, 200 Ill. 9; Slack v. Harris, 200 Ill. 96; or covered by his own—Standard Starch Co. v. McMullen, 100 Ill. App. 82; Krejci v. C. & N. W. R. Co. (Iowa) 90 N. W. 708; even though conflicting—Roe v. Bank, 167 Mo. 406. But if it is modified and given he may object—Maxey v. Metropolitan St. Ry. Co., 95 Mo. App. 303.

Error in giving one of two inconsistent requests—Chicago House Wrecking Co. v. Stewart Lumber Co. (Neb.) 92 N. W. 1009. His request was refused but the same issue was submitted—Kennard v. Grossman (Neb.) 89 N. W. 1025. Failure to charge on a point which he had insisted was covered by the general charge—Young v. Illinois Cent. R. Co., 24 Ky. Law Rep. 789. Failure to instruct on a theory abandoned and departed from in making proof—Peacock v. Gleason (Iowa) 90 N. W. 610. Failure to explain words like he requested—State v. Fidelity Co., 94 Mo. App. 184. Submission of issues developed by objector—Houston & T. C. R. Co. v. Trammell (Tex. Civ. App.) 68 S. W. 716. Failure to instruct more strongly than requested instruction—Bishop v. People, 200 Ill. 33.

Wrong Theory—Pantall v. Rochester C. & I. Co. (Pa.) 53 Atl. 751. As where he introduced evidence consistent only with the theory on which the case was erroneously tried —Hollister v. Donahoe (S. D.) 92 N. W. 12. Trying case on a theory which excluded a presumption of negligence from the character of the accident—Galligan v. Old Colony St. R. Co., 182 Mass. 211. Advancing theory which resulted in instruction of incorrect measure of damages—Heisch v. Bell (N. M.) 70 Pac. 572.

84. St. Louis, etc., R. Co. v. Jacobs, 70 Ark. 401; James Clark Co. v. Cumberland, 95 Md. 468; Miles v. Walker (Neb.) 92 N. W. 1014. Procuring submission of negligence precludes question that it existed as matter of law—Chicago, etc., R. Co. v. Schmelling,

correctness of the finding as matter of fact.[85] There is no estoppel to assert a want of jurisdiction which appears on the face of the record.[86] He is not precluded from saying that pleadings sufficient for a particular relief warrant a judgment without proof of a fact essential to a different remedy to which his theory on trial pointed.[87] Nor can one who sues in two capacities object in his representative capacity to errors which affect him as an individual.[88] A party secondarily liable may complain of an error against the party first liable,[89] but the converse is not true; but the pleadings must admit of an adjustment of their mutual liabilities.[90]

A party not brought into the reviewing court,[91] and, except as to fundamental or jurisdictional defects, a defaulted one,[92] will not be heard.

Aside from the foregoing rules, it is necessary that the question shall have been properly saved for review, to do which the party must ordinarily object and except, lest he be deemed to waive the question.[93] By allowing a preceding order to go unappealed, subsequent errors involving it may be waived.[94] The question of right to a remedy may be reversed for appeal if the failure to claim such remedy was caused by conflict and uncertainty in authorities.[95]

2. *Cross errors.*—An appellee may go beyond the errors assigned,[96] but can urge errors only when he has cross appealed, or cross assigned errors,[97] and sometimes only when he has appealed or brought error independently.[98] They may be assigned by an appellee who was refused an appeal.[99] A prevailing defendant must assign cross errors in order to bring up errors in the plaintiff's pleadings;[1] but he cannot

197 Ill. 619. Improper allowance of damages—Stephens v. Quigley (Ind. T.) 69 S. W. 828. Improper direction at his request to specially find—Steele v. Johnson (Mo. App.) 69 S. W. 1065; Hayes v. Bunch, 91 Mo. App. 467.

85. Benton Co. Bank v. Boddicker (Iowa) 90 N. W. 822.

86. But libelant cannot make technical objections to averment of residence in divorce suit—English v. English, 19 Pa. Super. Ct. 586.

87. Proof of forcible detainer in landlord's summary proceeding—Marvin v. Hartz (Mich.) 89 N. W. 557.

88. Ferguson v. Slater (Tex. Civ. App.) 72 S. W. 422.

89. Landowner and contractor against whom mechanic's lien suit was brought—Christopher & S. Foundry Co. v. Kelly, 91 Mo. App. 93. City and abutting owner sued for injuries from a defective sidewalk—George v. St. Joseph (Mo. App.) 71 S. W. 1110.

90. Town of Central Covington v. Bellonby, 24 Ky. Law Rep. 1092.

91. Worthington v. Miller, 134 Ala. 420; Chavez v. Myers (N. M.) 68 Pac. 917. He is not a party for this purpose where his name is merely used by another co-party to perfect the appeal—Norris v. Downing, 195 Ill. 91.

92. In such case defaulted party may appeal—ante, §§ 1, 3. Jurisdictional omissions (from writ of attachment) are appealable by a defaulted party—Cline v. Patterson, 191 Ill. 248.

93. See the article "Saving Questions for Review" which will appear in a later number.

94. In re Trinity Ave., 114 N. Y. State Rep. 732; Hereford v. Hereford, 134 Ala. 321, and many other cases cited in "Saving Questions for Review."

95. MacFarland v. Byrnes, 19 App. D. C. 531.

96. Yazoo & M. V. R. Co. v. Adams (Miss.) 32 So. 937.

97. Jones v. Peebles, 133 Ala. 290; Long v. Campbell, 133 Ala. 353; Powell v. Canaday, 96 Mo. App. 27; Arizona & N. M. R. Co. v. Nevitt (Ariz.) 68 Pac. 550; Sappington v. Chicago & A. R. Co., 95 Mo. App. 387. Compare Bradley, etc., Co. v. Perkins (La.) 33 So. 351. Refusal to non-suit the appealing plaintiff—Fritz v. Southern R. Co., 130 N. C. 279. An incomplete appeal is of no effect—Ritt v. True Tag Co., 108 Tenn. 646. Error affecting co-defendant appellee—National Bank v. Carper (Tex. Civ. App.) 67 S. W. 188; Kaukauna Elec. Light Co. v. Kaukauna, 114 Wis 327. He should bring error—Bates Mach. Co. v. Cookson, 104 Ill. App. 457. Cross-error is proper procedure—Scully v. Smith (Kan.) 71 Pac. 519.

98. Co-defendant—Southwestern Tel. Co. v. Priest (Tex. Civ. App.) 72 S. W. 241. He filed a bond after time, not preceded by any motion for new trial or notice of appeal (Rev. St. art. 1387)—National Bank v. Carper (Tex. Civ. App.) 67 S. W. 188. Unless the proceeding is in equity—Jones v. Ducktown, etc., Co. (Tenn.) 71 S. W. 821.

In error in Florida a defendant cannot allege error—Reese v. Damato (Fla.) 33 So. 462. A tendered cross-bill of exceptions cannot be treated as a main bill unless filed seasonably for that purpose—Turnbull v. Foster (Ga.) 43 S. E. 42.

Cross-assignments going to orders taxing costs in a will contest which orders were in the record, should not be stricken—Schmidt v. Schmidt, 201 Ill. 191.

99. Pugh v. Wallace, 198 Ill. 422.

1. Amendment of declarations and refusal to strike—Pierson v. Linn, 101 Ill. App. 624.

assign the dismissal of his own cross bill unless there has been an appeal from it.[2] Assuming an office does not waive the right to assign errors against ousted party's appeal in quo warranto.[3]

3. *Specifications and averments.*—Generally speaking, errors must be specified[4] by sufficient assignments,[5] or equivalent specifications in other papers,[6] subject to a usual exception in favor of fundamental errors or such as are plainly apparent on the face of the record.[7] If it chooses, the court may hear errors not specified.[8] Advanced causes are sometimes made an exception.[9] Especially will an assignment of errors in the federal courts be ignored which violates the rule requiring each error to be specified, when the brief also fails to refer by page to the record where support for such objections is to be found.[10] Denial of a change of venue is an error of law which must be assigned, though it was in an equity action.[11] Assignment in a court of primary appeal is not required of an appellee in order to save questions for the event of a further appeal.[12]

Error must be positively averred.[13] Mere statements of reasons for a new trial are insufficient.[14] The appellant must, in his brief, controvert appellee's statements denying facts material to the cause which do not affirmatively appear in the record.[15]

The rulings or errors must be identifiable with reasonable certainty.[16] The

2. Vanderpoel v. Knight, 102 Ill. App. 596.

3. People v. Campbell, 138 Cal. 11, 70 Pac. 918.

4. Aetna Life Ins. Co. v. Sanford, 197 Ill. 310; Kelly v. Strouse (Ga.) 43 S. E. 280; Lambert v. Marcuse, 137 Cal. 44, 69 Pac. 620; Medano Ditch Co. v. Adams, 29 Colo. 317, 68 Pac. 431; Herriman Irr. Co. v. Keel, 25 Utah, 96, 69 Pac. 719.

In petition in error—Bosserman v. Larson (Neb.) 93 N. W. 411; Kennard v. Grossman (Neb.) 89 N. W. 1025. Errors which would otherwise be presented on motion for new trial must be specifically alleged—Gregory v. Leavitt (Neb.) 89 N. W. 764; Gandy v. Cummins (Neb.) 89 N. W. 777. Petition in error must aver error in ruling on motion for new trial—Orcutt v. McNair (Neb.) 92 N. W. 200.

On appeal—Cessna v. Benedict, 98 Ill. App. 440.

Arugments on rulings not assigned will be ignored—Hoyt v. Chicago, M. & St. P. R. Co. (Iowa) 90 N. W. 724. Reasons for appeal must be set out—Stevens v. Stevens, 71 N. H. 579. Rulings on demurrer—Harris v. Nye (Neb.) 91 N. W. 250. Objection to striking of evidence must be assigned—Mahoney v. People, 98 Ill. App. 241; Cessna v. Benedict, 98 Ill. App. 440; Pennsylvania Co. v. Bond, 99 Ill. App. 535. Sufficiency of evidence must be assigned—Nordin v. Berner, 15 S. D. 611. Objection to instructions must be assigned—Western Union Tel. Co. v. Hays (Tex. Civ. App.) 67 S. W. 1072; Braegger v. Oregon S. L. R. Co., 24 Utah, 391, 68 Pac. 140. Refusal of instructions must be assigned—Sinclair v. Waddill, 200 Ill. 17. Amount of a verdict for personal injuries must be assigned—Palmer v. Kinloch Tel. Co., 91 Mo. App. 106. Election cases being appealable as civil cases require assignment of error—Brumback v. McAuley (Mo. App.) 68 S. W. 240.

5. Chichester v. New Hampshire Fire Ins. Co., 74 Conn. 510.

6. Rulings not appearing erroneous by bill of exceptions should be assigned—Southerland v. Sandlin (Fla.) 32 So. 786. Either in abstract of assignment or at least in argument—Hanon v. Jones, 100 Ill. App. 583. Either the record or assignments must disclose objection to sufficiency of evidence in support of findings—State v. Pierre, 15 S. D. 559.

7. United States v. Lee Yen Tai (C. C. A.) 113 Fed. 465. Absence of jurisdictional amount in controversy need not be—Land Mortg. Bank v. Voss (Tex. Civ. App.) 68 S. W. 732. Refusal to submit question whether notes in suit were obtained by threats held not fundamental, hence must be assigned—Clapp v. Royer (Tex. Civ. App.) 67 S. W. 345. Deficiencies in pleadings must be specially assigned unless they make the judgment palpably erroneous—New York, N. H. & H. R. Co. v. Hungerford (Conn.) 52 Atl. 487. Wrong instruction—Harper v. Dodd (Tex. Civ. App.) 70 S. W. 223.

8. Not error to hear matters not specified but which parties argue—Lynch v. Syracuse, L. & B. R. Co., 73 App. Div. (N. Y.) 95.

9. Not necessary in Texas where cause is advanced on a suggestion of dilatory appeal—Continental F. Ass'n v. Bearden (Tex. Civ. App.) 69 S. W. 982.

10. Mitchell Transp. Co. v. Green (C. C. A.) 120 Fed. 49.

11. Lessenich v. Sellers (Iowa) 93 N. W. 348.

12. Iroquois Furnace Co. v. Elphicke, 200 Ill. 411.

13. "Excepted, excepts, assigned and now assigns" error, to a ruling recited in bill of exceptions sufficient—Johnson v. Porter, 115 Ga. 401.

14. Standish v. Bridgewater (Ind.) 65 N. E. 189.

15. Replevin suit under a chattel mortgage for a debt not yet due appellee claiming in his brief that there was no proof of breach of condition or identity of the property taken—Hart v. Peet (Colo. App.) 71 Pac. 400.

16. Ketelman v. Chicago Brush Co. (Neb.) 91 N. W. 282.

objectionable part of the record must be indicated.[17] General statements are insufficient.[18] If the bill of exceptions recites grounds for a ruling, an assignment may be good by merely referring to it.[19] In Texas the assignment must contain a legal proposition, or one must be stated under it,[20] and must be followed by an explanatory statement.[21]

The assignment must be as broad as the objections urged,[22] and must conform to the objections urged;[23] and a general objection will not raise special matters.[24]

Distinct errors may not be combined in one assignment,[25] or in explanatory

17. Civ. App. Rule 25—Swift v. Bruce (Tex. Civ. App.) 71 S. W. 321. An assignment so worded as to refer to a petition which has been stricken out and supplemented by an amended petition presents nothing—Guthrie v. Howland (Ind. App.) 65 N. E. 1040.

18. Error assigned as failure to construe a contract and determine rights of a foreign corporation—Field v. Eastern B. & L. Ass'n (Iowa) 90 N. W. 717. A reference to exceptions to pleadings by number held too general—Henry v. McNew (Tex. Civ. App.) 69 S. W. 213. Assignments held too general to specify defective description in petition on trespass to try title—Henry v. McNew (Tex. Civ. App.) 69 S. W. 213. Specifications, that instructions do not state the law, are confusing, conflicting and present false issues, held too general—Shoemaker v. Bryant Mill Co., 27 Wash. 637, 68 Pac. 380. Errors should be particularized—United States v. Lee Yen Tai (C. C. A.) 113 Fed. 465. An objection to a statement for mechanic's lien that it is not sufficiently itemized or dated must specify the dates and items—Williams v. Stroub, 168 Mo. 346. Assignments that an act is unconstitutional, held insufficient—Standish v. Bridgewater (Ind.) 65 N. E. 189. General assignments of error in refusing judgment non obstante and in overruling motion for new trial, and motion to direct a verdict held too general—Copeland v. Ferris (Iowa) 92 N. W. 699. Averments that verdict was contrary to charge and to evidence and based on erroneous evidence, etc., held too general—Cline v. Hackbarth (Tex. Civ. App.) 71 S. W. 48. Rulings on evidence—Parkins v. Missouri Pac. R. Co. (Neb.) 93 N. W. 197. Averment that the court erred in that a motion set out good cause for a new trial—Hughey v. Mosby (Tex. Civ. App.) 71 S. W. 395. The statement that a rejection of a report "is not sufficient," fails to set forth reasons for appealing—Stevens v. Stevens, 71 N. H. 579.

19. Judgments on demurrers—Linder v. Whitehead (Ga.) 42 S. E. 358.

20. Ash v. Beck (Tex. Civ. App.) 68 S. W. 53; Gwaltney v. Searcy (Tex. Civ. App.) 68 S. W. 384; Wells v. Houston (Tex. Civ. App.) 69 S. W. 183. Held sufficient to assign priority of a mortgage to state that certain contracts exhibited to a mortgagee before the mortgage did not put him on inquiry, and that the court erred in holding that they did—Belcher Mortg. Co. v. Norris (Tex. Civ. App.) 68 S. W. 548. Either as part of the assignment or otherwise there must be a proposition—Dennison & S. R. Co. v. Carter (Tex. Civ. App.) 70 S. W. 322, 71 S. W. 292. Under an assignment to the admission of two matters in evidence there should be a proposition on each—Yarbrough v. De Martin (Tex. Civ. App.) 67 S. W. 177.

21. Civ. App. Ct. Rule 31—Galveston, H. & S. A. R. Co. v. Puente (Tex. Civ. App.) 70 S. W. 362; Pinkard v. Willis (Tex. Civ. App.) 67 S. W. 135; Tarrant County v. Reid (Tex. Civ. App.) 67 S. W. 785. Must point out specific errors followed by a sufficient statement—Butler v. Holmes (Tex. Civ. App.) 68 S. W. 52. An assignment of instruction as error held insufficient in merely specifying a number of errors and stating that they were not warranted by evidence but without referring to the record and subjoining no statement to the proposition—Holton v. Galveston, H. & S. A. R. Co. (Tex. Civ. App.) 71 S. W. 408. Averments of a refusal to allow interest in a judgment on contract must have statements showing contract rate or time when money became due—Hipp v. Houston (Tex. Civ. App.) 71 S. W. 39.

22. Matters not germane will be disregarded—Weeks v. Texas M. P. Co. (Tex. Civ. App.) 67 S. W. 1071.

23. Objection to sufficiency of findings—Tarrant County v. Reid (Tex. Civ. App.) 67 S. W. 785. Objections to evidence—Louisville & N. R. Co. v. Banks, 132 Ala. 471; Meyer v. Standard Tel. Co. (Iowa) 92 N. W. 720. Included errors may be examined—San Antonio & A. P. R. Co. v. Addison (Tex.) 70 S. W. 200. Assignment of the overruling of a demurrer for want of certain allegations and objection that corresponding facts were not proved—Hughey v. Mosby (Tex. Civ. App.) 71 S. W. 395. Error in assessing recovery and specification of insufficiency of evidence—Southwestern Oil Co. v. Bank (Okl.) 70 Pac. 295.

24. Assigning error in overruling general demurrer does not raise special exceptions—Galveston, H. & S. A. R. Co. v. Sherwood (Tex. Civ. App.) 67 S. W. 776.

25. A letter acknowledging the correctness of an account was objected to and the admission of the account itself was objected to—Robinson v. Chamberlain (Tex. Civ. App.) 68 S. W. 209. Assignment in admitting evidence and in refusal of new trial raises more than one question—Ruddy v. Repp, 19 Pa. Super. Ct. 437. Single assignment is bad if any instructions are correct—Greenfield v. Johnson (Ind. App.) 65 N. E. 542. Single assignment held bad because directed against an instruction relating to defective appliances and to one directed against duty to keep appliance in repair—Copeland v. Ferris (Iowa) 92 N. W. 699. Single assignment to demurrers to separate paragraphs presents only pleading as a whole—Chicago & S. E. R. Co. v. Woodard (Ind.) 65 N. E. 577. Error assigned in several instructions—Younglove v. Knox (Fla.) 33 So. 427. One assignment to single instructions embracing several propositions is bad—Bennett v. Marion (Iowa) 93 N. W. 555. One assignment to rulings on demurrers against separate paragraphs, one of them good—Hague v. First Nat. Bank (Ind.) 65 N. E. 907.

words following it;[26] for an assignment is good or bad as a whole.[27] Instructions are not separately indicated by referring to instructions contained in specified paragraphs of the charge;[28] but an assignment otherwise double may be considered if vices are urged against each of the matters assigned as error.[29] It is not an improper grouping of charges to contrast those which are objected to as conflicting.[30] One assignment lodged against several matters is insufficient, if any of them are correct,[31] or if the error affect only one of them;[32] but a single assignment may reach one ruling which disposes of two matters.[33]

Joining in assignments.—Appellants should not join in assignment if the ruling may be good as to one of them.[34] They must join if the exception was joint.[35] If there was but one defendant, the use of the plural is a clerical error, and does not make an assignment joint.[36]

Amendments and additional assignments.—Insufficiency in assignments is disregarded if proper amendments are made, and the questions are specifically disclosed in the argument and brief.[37] The appellate court in Illinois has discretion to allow additional assignments on higher appeal.[38]

Defects or errors in pleadings.—The complaint or declaration as a whole should be assigned for insufficiency to state a cause of action.[39] Single assignments to the overruling of demurrers against a mechanic's lien complaint in twelve paragraphs present only sufficiency of the pleading as a whole.[40] A material omission from a petition or complaint is fundamental.[41] The reason why it was error to overrule a demurrer should be stated.[42]

Rulings on evidence.—Assignments of error in rulings on evidence should conform to the objection made.[43] In Texas the principle making exclusion of evidence erroneous should be stated.[44] What the evidence was which the court excluded should appear, at least in substance.[45] That evidence of unnamed witness was refused and rejected is not sufficient.[46] Particular evidence which is objectionable

26. An appended proposition, so called, is bad which merely refers to the assignment wherein several propositions are combined —Driver v. Wilson (Tex. Civ. App.) 68 S. W. 290.

27. Hennessy v. Anstock, 19 Pa. Super. Ct. 644.

28. Assignments held too general—Falvre v. Manderschied (Iowa) 90 N. W. 76.

29. Assignments designating certain instructions by number and stating that each was either erroneous or inapplicable held sufficient—Denver & R. G. R. Co. v. Young (Colo.) 70 Pac. 688.

30. Shoemaker v. Turner (Iowa) 90 N. W. 709.

31. Chicago, I. & L. R. Co. v. State, 158 Ind. 189.

32. Renard v. Grande (Ind. App.) 64 N. E. 644.

33. If a single ruling sustains separate demurrers to separate paragraphs, one assignment reaches error in sustaining either demurrer—Farmers' Ins. Co. v. Yetter (Ind. App.) 65 N. E. 762.

34. Niehaus v. Cooke, 134 Ala. 223; Killian v. Cox, 132 Ala. 664. If a complaint be sufficient as to any defendant, a joint assignment of error in overruling demurrer is bad—Bush v. McBride (Ind.) 65 N. E. 1026.

35. Chappell v. Jasper Gas Co. (Ind. App.) 66 N. E. 515.

36. Ohio Farmers' Ins. Co. v. Vogel (Ind. App.) 65 N. E. 1056.

37. Roberts v. Parker (Iowa) 90 N. W. 744.

38. Refusal to allow additional assignments seven days after judgment in appellate court is proper discretion—Off v. Finkelstein, 200 Ill. 40.

39. A single paragraph cannot be separately assigned but must be questioned by assigning the whole complaint as insufficient —Case Threshing Mach. Co. v. Millikan, 28 Ind. App. 686; Van Horn v. Mercer (Ind. App.) 64 N. E. 531.

40. Chicago & S. E. R. Co. v. Woodard (Ind.) 65 N. E. 577.

41. Allegation of fact necessary to give petitioner the right to purchase school land —Sterling v. Self (Tex. Civ. App.) 70 S. W. 238.

42. Interstate S. & L. Ass'n v. Benson, 28 Wash. 578, 68 Pac. 1038.

43. Objection was general and assignment special—Louisville & N. R. Co. v. Banks, 132 Ala. 471.

44. Yarbrough v. De Martin (Tex. Civ. App.) 67 S. W. 177.

45. Russell v. Mohr-Weil Lumber Co., 115 Ga. 35. Merely specifying the question without the expected answer will not suffice—Bigby v. Warnock, 115 Ga. 385. Admission of "all testimony" relevant to a stated matter is bad; should show what was admitted —Wright v. Roberts (Ga.) 42 S. E. 369.

46. Tourtellotte v. Brown (Colo. App.) 71 Pac. 638.

should be specified.[47] Specific references to the witness' name and the pages of the abstract do not indicate the very error complained of, if various questions and numerous objections appear on those pages.[48]

Instructions.—Error in charging should be assigned to the particular error.[49]

If charges were refused, it should be shown what they were.[50] An instruction affirmatively stating an erroneous rule of law is fundamental error which need not be assigned.[51] A distinct statement of the error complained of is not made by objecting to a refusal of an instruction which does not clearly raise the question.[52] An assignment of error in charging abstractly does not present the question whether it applies to the evidence.[53] Nor does its correctness arise on an averment that the instruction was inapplicable.[54] Merely identifying an instruction without specifying wherein it is erroneous is bad.[55]

Error in directing a verdict should be so assigned as to point out wherein error lies.[56] A general assignment against a directed verdict raises only the sufficiency of evidence.[57]

Verdicts and findings of fact.—If the verdict be assailed for deficiency of evidence, particulars in which it is unsupported should be indicated.[58] Sufficiency to support findings must be specified with particularity.[59] The particular in which a finding lacks proof should be stated.[60] It is sufficient to indicate each probative fact.[61] Want of evidence is not presented by an objection that findings are contrary to evidence.[62] If the verdict is excessive or unconscionable, there must be

47. Not the entire examination—Logansport & W. Gas Co. v. Coate (Ind. App.) 64 N. E. 638. Reference to subject-matter insufficient—Chicago, St. P., M. & O. R. Co. v. Lagerkrans (Neb.) 91 N. W. 358. Inadmissibility of a lease is not raised by questioning its right to be recorded without stating that it was not proved by evidence other than itself—Yarbrough v. De Martin (Tex. Civ. App.) 67 S. W. 177.

48. Grapes v. Sheldon (Iowa) 93 N. W. 57.

49. If error in a group of instructions is assigned, the reason should be pointed out—Albion Milling Co. v. First Nat. Bank (Neb.) 89 N. W. 638. Assignments should specify objectionable parts of charge in exact words—Sailor v. Reamer, 20 Pa. Super. Ct. 597.

50. Butler v. Holmes (Tex. Civ. App.) 68 S. W. 52. Refused instructions should be set out—Gulf, C. & S. F. R. Co. v. Co[illegible]l (Tex. Civ. App.) 69 S. W. 980. Not sufficient to say that refused instructions covered principles applicable to case—Illinois Cent. R. Co. v. Jernigan, 198 Ill. 297.

51. Harper v. Dodd (Tex. Civ. App.) 70 S. W. 223.

52. Constitutionality of statute—Griswold v. Guilford (Conn.) 52 Atl. 742.

53. Brown v. Latham, 115 Ga. 666.

54. Averment that evidence did not warrant instruction on measure of damages insufficient to present correctness of the rule stated—Meyer v. Standard Tel. Co. (Iowa) 92 N. W. 720.

55. "No. 5 in Abs folios 450"—Hedlun v. Holy Terror Min. Co. (S. D.) 92 N. W. 31.

56. An assignment against a directed verdict for plaintiff for the reason that the evidence supported defenses held too general—Liner v. Watkins Mortg. Co. (Tex. Civ. App.) 68 S. W. 311. On assigning a peremptory instruction, the statement should show that there was an issue raised on a question which it was urged should have been sent to the jury—Swift v. Bruce (Tex. Civ. App.) 71 S. W. 321. Averment that directed verdict was wrong under pleadings and evidence is special and presents both the sufficiency of the facts pleaded and those proved; also whether the successful party was entitled to verdict—Kelly v. Strouse (Ga.) 43 S. E. 280.

57. Kelly v. Strouse (Ga.) 43 S. E. 280.

58. King v. Henderson (Tex. Civ. App.) 69 S. W. 487. Objection for insufficiency of evidence held not sufficiently specified in an action for killing a person on a railroad bridge—Texas & P. R. Co. v. Harby (Tex. Civ. App.) 67 S. W. 541. Insufficiency of evidence must be specified—Hollister v. State (Idaho) 71 Pac. 541. Failure to prove material facts cannot be raised under an assignment of the overruling of a demurrer based on the omission of allegations from the pleadings—Hughey v. Mosby (Tex. Civ. App.) 71 S. W. 395.

59. State v. Pierre, 15 S. D. 559. Averment that special findings are inconsistent with general verdict and that facts showed, etc., held insufficient—Copeland v. Ferris (Iowa) 92 N. W. 699. Assignments of error in finding in favor of the adverse party and not in favor of appellant and in not giving judgment for appellant, present questions of fact—Coverdale v. Royal Arcanum, 199 Ill. 649. A material finding must be specified and its lack of support clearly shown—Silveira v. Reese, 138 Cal. xix., 71 Pac. 515.

60. Code Civ. Pr. §§ 657-659—Swift v. Occidental Min. Co. (Cal.) 70 Pac. 470. General averment of insufficiency is bad—Bell v. Staacke (Cal.) 70 Pac. 472.

61. Laidlaw v. Pacific Bank, 137 Cal. 392, 70 Pac. 277.

62. Record v. Chickasaw Cooperage Co., 108 Tenn. 657.

an assignment of the court's refusal to set it aside.[63] In Texas, assignments otherwise presenting the sufficiency of the evidence to sustain the verdict need not be accompanied by an assignment of error in overruling motion for a new trial.[64] Inclusion of interest in a verdict for damages for a tort should be particularized.[65] Error in assessing recovery is not specified by an objection to verdict as unsupported.[66]

Judgments and findings of law.—It should be specified wherein a judgment is contrary to law, else the court will consider only whether it follows the pleadings.[67] A general assignment is, however, sufficient, where error appears on the face of the record.[68] Averment that judgment for damages is not authorized by pleading raises the propriety of allowance of interest.[69] A refusal to reform a judgment by striking out should be particularly assigned.[70] A finding which is in reality one of law should be averred as such, though it purports to be, and is included among, findings of fact.[71]

Motion for new trial.—In some jurisdictions, error assigned in ruling on a motion for new trial must specify the particular error or ground urged,[72] but not in Indiana;[73] and in Nebraska the ruling must be assigned in addition to those errors assigned on the motion itself, if they are to be considered.[74]

Rulings by a lower court of appeal should be assigned error in "sustaining" or "not sustaining" the action of the trial court.[75]

4. *Demurrers, pleas, and replications.*—Replication to a plea of release of errors must deny or confess and avoid; and if it does not answer the plea, and is demurred to, the demurrer will be heard as though to the plea.[76]

F. Briefs and arguments.—Briefs are necessary if the court insists,[77] and for

63. International & G. N. R. Co. v. Branch (Tex. Civ. App.) 68 S. W. 338.

64. St. Louis & S. W. R. Co. v. McArthur (Tex.) 70 S. W. 317.

65. General objection that the verdict was contrary to law insufficient—Southern R. Co. v. Horner, 115 Ga. 381.

66. Whether a verdict was exact in amount does not come upon an averment that it is unsupported—Southwestern Oil Co. v. Bank of Stroud (Okl.) 70 Pac. 205.

67. De Mund Lumber Co. v. Stilwell (Ariz.) 68 Pac. 543. General assignment of error in entering judgment on verdict is bad unless a question of law has been saved or there is error on the record—Wills v. Hardcastle, 19 Pa. Super. Ct. 525. "Findings unsupported by evidence" does not present judgment unsupported by findings—Tarrant County v. Reid (Tex. Civ. App.) 67 S. W. 785. That it was error to pass any decree for complainant, held too general—Clerks' Inv. Co. v. Sydnor, 19 App. D. C. 89. Allowance for moneys due after the time pleaded must be assigned—Morin v. Robarge (Mich.) 93 N. W. 886. That judgment is contrary to law too indefinite—Bosserman v. Larson (Neb.) 93 N. W. 411.

68. Waterbury L. & C. Co. v. Hinckley (Conn.) 52 Atl. 739. Assigned error in finding of judgment for plaintiff, presents the sufficiency of findings to support the judgment—White v. Schaberg (Mich.) 91 N. W. 168.

69. San Antonio & A. P. R. Co. v. Addison (Tex.) 70 S. W. 200.

70. No proposition was appended—Robinson v. Chamberlain (Tex. Civ. App.) 68 S. W. 209.

71. Findings that a lien was valid was objected to as being against the law and unsupported—Petaluma Pav. Co. v. Singley, 136 Cal. 616, 69 Pac. 426.

72. If more than one ground is urged—Case Threshing Mach. Co. v. Huffman, 86 Minn. 30. An assignment is bad if it does not state the ground on which the motion was made—De Mund Lumber Co. v. Stilwell (Ariz.) 68 Pac. 543. General assignments of error in refusing a new trial and overruling motion for it, not sufficient—Stephenville v. Bower (Tex. Civ. App.) 68 S. W. 833. General assignment against overruling a new trial is bad—Shoemaker v. Turner (Iowa) 90 N. W. 709. Insufficiency of evidence must be specified on appeal from new trial—Pickering L. & W. Co. v. Savage, 137 Cal. xix., 69 Pac. 846. Error must be assigned besides being specified in motion for new trial—Southwestern Oil Co. v. Bank of Stroud (Okl.) 70 Pac. 205.

73. Error assigned in overruling motion for new trial is sufficient in form—Standish v. Bridgewater (Ind.) 65 N. E. 189.

74. Achenbach v. Pollock (Neb.) 90 N. W. 304; Sharp v. Call (Neb.) 90 N. W. 765; German Fire Ins. Co. v. Palmer (Neb.) 92 N. W. 624; Cole v. Adams County (Neb.) 93 N. W. 701. Denial of new trial must be assigned in order to present sufficiency of evidence—Moores v. Jones (Neb.) 93 N. W. 1016; Zimmerman v. Kearney County Bank (Neb.) 91 N. W. 497.

75. In Pennsylvania, "not sustaining" the (designated) "assignment of error" specifying what it was—Mellick v. Pennsylvania R. Co., 203 Pa. 457.

76. Trapp v. Off, 194 Ill. 287.

77. Brevaldo v. Rogers (Fla.) 33 So. 455. Should not be dispensed with—3 Enc. Pl. &

want of the proper brief a decision may be rendered,[78] but is not a matter of right.[79] The right to open may be waived by delay in filing briefs or arguments.[80]

Time for filing briefs by appellees will not be shortened where the service on them was so tardy that they are not obliged to appear until a later term.[81] Filing briefs after an abortive motion to dismiss for want of them is equivalent to a filing before motion.[82] Additional briefs allowed must be filed within time given.[83] Tardy filing may be waived by delay to object.[84] It is not excused by pendency of a motion to dismiss for insufficiency of the bond.[85] A failure to file is not excused by the fact that all the errors are fundamental and are presented by assignments.[86] A delay in filing briefs in reliance upon the oral promise of the opposing counsel below is not excused where the statute and rules of the court provide for an extension of time by agreement or by the court or judge for good cause shown before the expiration of the time allowed, the attorney not being admitted in the supreme court.[87]

The brief should be answered or it may be taken as confessed.[88] Under the Indiana rules, statements concerning the record are accepted, unless denied or corrected by an answering brief.[89] Facts may be admitted by adopting words of the opinion which assume their existence.[90] If appellee's brief sets up a defense or avoidance not touched on by appellant, he must reply to prevent an affirmance.[91] Points not properly made or presented in the brief cannot be urged in the reply briefs[92] or on rehearing.[93]

Statutes and court rules prescribing the form and contents of briefs should be insisted on.[94] A common requirement is a summary of the record and evidence.[95] Under the supreme court rule of Indiana, one who omits to briefly recite

Pr. "Briefs." In Georgia tardiness is a contempt and not a ground for dismissal—Roberts v. Roberts, 115 Ga. 259. Failure to file briefs necessitates dismissal in Texas—Bowman v. Hoffman (Tex. Civ. App.) 67 S. W. 152.

78. Pro forma affirmance or dismissal—Pavey v. Pavey, 103 Ill. App. 589; Ball v. Dignowity (Tex. Civ. App.) 68 S. W. 800; Warren v. Humble, 26 Mont. 495, 68 Pac. 851.

79. Striking a brief does not entitle opposite party to decision—Davis v. Huber Mfg. Co. (Iowa) 93 N. W. 78.

80. Under the Iowa rules in case where appellee had the burden in a trial de novo, his failure to file arguments thirty days before hearing was held equivalent to thirty days' notice of waiver of the right to open—Busch v. Hall (Iowa) 93 N. W. 356.

81. Rule 18 allows time to be shortened for good cause—State Board v. People, 29 Colo. 353, 68 Pac. 236.

82. Sup. Ct. Rule 5 construed—Swortfiguer v. White, 137 Cal. 391, 70 Pac. 214.

83. If not decision will be made on arguments already submitted—Nicholas v. Nicholas (Va.) 42 S. E. 866.

84. Gipson v. Morris (Tex. Civ. App.) 67 S. W. 425.

85. Headstrom v. Hellieson, 136 Cal. 498, 69 Pac. 148.

86. R. S. 1895, art. 1417, and the supreme court rules 22, 34, require it—Bowman v. Hoffman (Tex. Civ. App.) 67 S. W. 152.

87. Robertson v. Shorow (Wyo.) 69 Pac. 1.

88. Delay of 200 days in failing to file answering brief taken as confession of errors—People's Nat. Bank v. State (Ind.) 65 N. E. 6.

89. McElwaine-Richards Co. v. Wall (Ind.) 65 N. E. 753.

90. That there was any evidence on a certain point was so admitted—Pitcairn v. Hiss (C. C. A.) 113 Fed. 492.

91. Appeal was based on a disallowed counter-claim for charges; appellee asserted that he had paid them—Bartholomew v. Yankee (Colo.) 70 Pac. 405.

92. Sufficiency of application for mandamus—Malott v. State, 158 Ind. 678.

93. Indiana Power Co. v. St. Joseph Power Co. (Ind.) 64 N. E. 468.

94. Kranich v. Helena Water Co., 26 Mont. 379, 68 Pac. 408, 71 Pac. 672.

95. Indiana Sup. Ct. Rules provide if the record be not summarized so as to present error in ruling on a demurrer, it will be disregarded—Huston v. Fatka (Ind. App.) 66 N. E. 74. Findings substantially the same as allegations need not be printed in appellant's brief in Washington, when no evidence was taken and no error in findings is urged—Payette v. Ferrier (Wash.) 71 Pac. 546. A parenthetical reference to the petition and evidence in the case is not a statement of the case and points to be insisted on by the pleadings and facts shown by the record—Southwick v. Southwick (Mo. App.) 72 S. W. 477. Appellant must conform in every respect to the rule requiring an abstract of the case presenting the questions and the manner in which they are raised and page reference to the transcript—Kranich v. Helena Water Co., 26 Mont. 379, 68 Pac. 408, 71 Pac. 672. Findings and conclusions need be printed in a brief only when a question is raised thereon—Cathcart v. Bryant, 28 Wash. 31, 68 Pac. 171. If they are omitted without excuse and no correction is offered, the sufficiency of the evidence will not be examined—Interstate S. & L. Ass'n v. Benson, 28 Wash. 578, 68 Pac. 1038. Under rule 10 the

the evidence cannot object to its sufficiency.[96] If errors be not presented and argued properly[97] in briefs or orally,[98] they are waived, though the trial is de novo.[99] One of several points is lost if not presented.[1]

The argument must go into the error discursively,[2] and must treat all the grounds on which a ruling is lodged.[3] The "points" or errors should be specified and authorities cited,[4] and the place where the record contains the matter referred to;[5] but though defective it may be retained if the court can see the errors relied on.[6] It is not sufficient to refer to the case or bill of exceptions by number of the folio if the place referred to does not clearly present the question.[7]

statement must refer to and present the order denying a new trial which is appealed from—Warren v. Humble, 26 Mont. 495, 68 Pac. 851. Affirmed for failure to include statements of case and reference to order appealed from in brief—Warren v. Humble, 26 Mont. 495, 68 Pac. 851. In many states there must be an abstract or the like and index, etc., made up as part of the memorial of the transmitted proceedings; see ante, § 9. A brief should state the cause af action, the assignments, so that the significance of all can be ascertained without inspecting the entire record, and should support assignments by propositions—Maldonado v. Arthur (Tex. Civ. App.) 70 S. W. 562.

96. Boseker v. Chamberlain (Ind.) 66 N. E. 448; Indiana, D. & W. R. Co. v. Ditto, 158 Ind. 669.

97. Clem v. Wise, 133 Ala. 403; Beyer v. Fields, 134 Ala. 236; Kearney v. Nicholson (Tex. Civ. App.) 67 S. W. 361; Falke v. Brule (Colo. App.) 68 Pac. 1054; Trimble v. Terril, 99 Ill. App. 349; Chicago & E. R. Co. v. Lee (Ind. App.) 64 N. E. 675; Hoyt v. Chicago, M. & St. P. Ry. Co. (Iowa) 90 N. W. 724; Mayhew v. Knittle (Neb.) 89 N. W. 1037; Western Union Tel. Co. v. Church (Neb.) 90 N. W. 878; Commonwealth Roofing Co. v. Palmer Leather Co., 67 N. J. Law, 566; Nordin v. Berner, 15 S. D. 611; Nix v. Reiss Coal Co., 114 Wis. 493; Chicago Transf. R. Co. v. Gruss, 102 Ill. App. 439; Dolan v. Mutual Reserve Life Ass'n, 182 Mass. 413; Anderson v. Anderson (Neb.) 92 N. W. 151; Pearce v. Miller, 201 Ill. 188; Payne v. Moore (Ind. App.) 66 N. E. 483; Greenfield v. Johnson (Ind. App.) 65 N. E. 542; Baltimore & O. R. Co. v. Daegling (Ind. App.) 65 N. E. 761; Southerland v. Sandlin (Fla.) 32 So. 786; Jaraszewski v. Allen (Iowa) 91 N. W. 941; Scott v. Gage (S. D.) 92 N. W. 37; Seattle & M. R. Co. v. Roeder, 30 Wash. 244, 70 Pac. 498; Doherty v. Rice, 182 Mass. 182; Carroll v. New York, N. H. & H. R. Co., 182 Mass. 237; Barrett v. Bruffee (Mass.) 65 N. E. 44. Cross-errors—Moore v. Hooker Co., 101 Ill. App. 177. Objections to an account appealed from—Cogswell's Heirs v. Freudenau, 93 Mo. App. 482. Where brief does not point out insufficiency of evidence an assignment thereon will not be noticed—Brovelli v. Bianchi, 136 Cal. 612, 69 Pac. 416.

98. Corrigan v. Kansas City, 93 Mo. App. 173; Portsmouth Bank v. Omaha (Neb.) 93 N. W. 231.

99. Thoma v. Hecker (Iowa) 90 N. W. 598.

1. Several grounds for new trial—Logansport Gas Co. v. Coate, 29 Ind. App. 299. Several grounds for demurrer—Bell v. Stevens, 116 Iowa, 451. Appeal from two adjudications—Rauer's Coll'n Co. v. Gilleran, 138 Cal. 352.

2. Himrod Coal Co. v. Clark, 197 Ill. 514; Frick v. Kabaker, 116 Iowa, 494; Zimmerman v. Kearney County Bank (Neb.) 91 N. W. 497.

3. Motion for new trial—Boyd v. W. U. Tel. Co. (Iowa) 90 N. W. 711.

4. Brief held bad for failure to specify errors or cite authorities as required by rules—McAlester Coal Co. v. Patterson (Ind. Ter.) 69 S. W. 840. Refusal of instructions must be specified—Trompen v. Yates (Neb.) 92 N. W. 647. On a long account by an administrator, individual items not specified will not be inspected to discover error in apportioning income and principal—In re Hart's Estate, 203 Pa. 492. A statement held sufficient to present the propriety of a charge relating to the good faith of community debts, the charge and the evidence being given by reference to the assignment and the record.—Cage v. Tucker's Heirs (Tex. Civ. App.) 69 S. W. 425. Appeal may be dismissed for failure to specify number and particularize errors in the briefs—Driscoll v. Shields, 26 Mont. 494, 68 Pac. 851. Assignments must be briefed separately—Wells v. Houston (Tex. Civ. App.) 69 S. W. 183. Unless errors are fundamental, the assignment must be copied into the brief—Hollywood v. Wellhausen (Tex. Civ. App.) 68 S. W. 329.

5. Objectionable evidence should be referred to by page of the record if not stated under the assignment—Westinghouse Co. v. Troell (Tex. Civ. App.) 70 S. W. 324. A statement of the case that recites that there are other questions is substantially a "clear statement of the case, so far as deemed material"—Drumheller v. American Surety Co., 30 Wash. 530, 71 Pac. 25; Crowley v. McDonough, 30 Wash. 57, 70 Pac. 261. Objections that plaintiff's franchise was defective held bad, they not referring to the record where the fact appeared—Los Angeles Traction Co. v. Wilshire, 135 Cal. 654, 67 Pac. 1086. Must definitely refer to evidence in 1300 page transcript, complained of as being cross examination on new matters—Board of Com'rs v. Gibson, 158 Ind. 471. Rulings on evidence must under rule 22 be referred to by page and line of transcript—Indiana, D. & W. R. Co. v. Ditto, 158 Ind. 669. Under rule 10 ruling on motion for nonsuit must be referred to and also the proper page of the transcript showing it—Power v. Stocking, 26 Mont. 478, 68 Pac. 857; Baltimore & O. R. Co. v. Daegling (Ind. App.) 65 N. E. 761.

6. Record not referred to and rulings on motions to dismiss as to one party were not specified (Statutes and Court Rules construed)—Crowley v. McDonough, 30 Wash. 57, 70 Pac. 261.

7. It presented a colloquy as to instructions—Devaney v. Degon, etc., Co., 79 App. Div. (N. Y.) 62.

Malign and scandalous words may subject a brief to striking out.[8] It may be stricken for failure to properly specify errors.[9] A brief should be stricken when the excuse for filing out of time is press of business in the trial court.[10] An appellee's brief and assignment of cross errors is not to be stricken merely because appellee was denied an appeal.[11] Leave may be given to file new briefs in place of those stricken as being scandalous.[12]

It is scandalous to refer to the trial judge as "arrogant,"[13] so is an attack on a co-ordinate branch of government which exceeds criticism of a particular action and becomes general denunciation,[14] or a statement attributing extraordinary ignorance and usurpation of power to the trial judge.[15] It is not objectionable for opposing counsel to refer to such language as "coarse and brutal aspersions."[16] A brief cannot be regarded as misleading, if a misstatement regarding the record is made merely by way of disagreement of counsel.[17]

Refiling briefs from other courts.—In Illinois where facts are not reviewed in the supreme court and the appellate court brief can be used only to determine what was there decided, copies of such briefs commingling questions of law and fact and entitled in the supreme court will be ignored.[18]

G. Grounds for dismissing, quashing, or striking out appeal.—*Nonexistence of any litigable right* is good cause, e. g., that the appeal is frivolous or futile.[19] or the judgment purely moot,[20] or the cause of action extinguished.[21] Judgment on a cross proceeding requires a dismissal of the main writ of error.[22] An appeal from judgment on demurrer is moot if appellants have since pleaded over.[23] A settlement by acceptance only of what was undisputed leaves the issue pending and not

8. Spoken of the trial court—Schleissner v. Schleissner, 72 App. Div. (N. Y.) 492; Sawdey v. Spokane Falls & N. R. Co., 27 Wash. 536, 67 Pac. 1094. Spoken of the U. S. Land Office—United States v. Peuschel, 116 Fed. 649.

9. Assignments were not copied into brief—Hollywood v. Wellhausen (Tex. Civ. App.) 68 S. W. 329.

10. Davis v. Huber Mfg. Co. (Iowa) 93 N. W. 78.

11. Pugh Co. v. Wallace, 198 Ill. 422.

12. Schleissner v. Schleissner, 72 App. Div. (N. Y.) 492.

13. Schleissner v. Schleissner, 72 App. Div. (N. Y.) 492.

14. United States v. Peuschel, 116 Fed. 649.

15. Sawdey v. Spokane Falls & N. R. Co., 27 Wash. 536, 67 Pac. 1094.

16. Sawdey v. Spokane Falls & N. R. Co., 27 Wash. 536, 67 Pac. 1094.

17. Sawdey v. Spokane Falls & N. R. Co., 27 Wash. 536, 67 Pac. 1094.

18. Daum v. Cooper, 200 Ill. 538.

19. Appeal from an order for judgment notwithstanding exceptions is so when no new points other than the frivolous exceptions are raised—Williams v. Clarke, 182 Mass. 316. Appeal from order releasing bond for an injunction which appellant consented should be dissolved—Kraeger v. Warnock, 114 N. Y. St. Rep. 687. Appellant had been party in another appeal which he allowed to become conclusive against him so that in any event an affirmance would have been made—Ledebuhr v. Krueger (Wis.) 91 N. W. 1012. Election held before review of mandamus to place name on official ballot—State v. Lambert (W. Va.) 43 S. E. 176. Refusal of mandamus to compel taking of forthcoming bond in replevin which was decided for plaintiff on the main issue—Alabama Coal Co. v. Bowden (Fla.) 31 So. 820. Second appeal rested on tax deed declared void by first appeal—Winborne v. Hughey (Fla.) 33 So. 248. Appeal from interlocutory judgment which has become merged in final judgment not appealed from—Wallace v. Deane (Idaho) 69 Pac. 62. Reversal of judgment on which the appealed controversy was founded—McGill v. Bartman (Ky.) 68 S. W. 1100. On appeal from a remand in habeas corpus it appeared that relator was no longer in custody—Ex parte Wolston (Tex. Crim.) 68 S. W. 679.

20. Repeal of the act assailed by appeal on which judgment was based (General Revenue Law)—State Board v. People (Colo.) 70 Pac. 416. Refusal to issue license for a period since elapsed—State v. Martin (Fla.) 32 So. 926. Expiration of term of tenancy sought to be enforced—Sullivan v. Garvey (Iowa) 92 N. W. 672. Obedience to writ of mandamus appealed from—Crouse v. Nixon, 65 Kan. 843, 70 Pac. 885. Expiration of official term of parties before submission of appeal from impeachment proceedings—King v. Tilford, 24 Ky. Law Rep. 1270. Questions become moot by delay—Conn v. Desha, 24 Ky. Law Rep. 1400.

21. Settlement of controversy—Thomson-Houston Elec. Co. v. Nassau Elec. R. Co. (C. C. A.) 119 Fed. 354; Wedekind v. Bell, 26 Nev. 395, 69 Pac. 612.

22. Harwell v. Martin, 115 Ga. 156.

23. Further specifications after demurrer to petition for removal of an administrator—Wirth v. Wirth, 181 Mass. 541.

dismissible,[24] and the doing of an act commanded but without intent to obey a mandamus is not necessarily cause for dismissal.[25]

Abandonment or failure of prosecution.[26]—Failure to file the record,[27] or taking a second appeal,[28] is not an abandonment.

Any substantial defect in or want of jurisdiction,[29] or in the remedy for review,[30] or prematurity,[31] or undue delay,[32] as in bringing up the record or transcript case, etc.,[33] or in assigning errors,[34] or presenting briefs;[35] also any failure in respect to the bond, if it be jurisdictional,[36] or any error of substance in the

24. In re Hutton's Estate, 92 Mo. App. 132.

25. Act was done in ordinary course of business—State v. Sunset Tel. Co., 30 Wash. 676, 71 Pac. 198.

26. An affirmance may result from want of prosecution or delay in perfecting appeal—Burnes v. American Brg. Co. (Mo. App.) 70 S. W. 512; Alexander v. Wilson (Mo. App.) 69 S. W. 602. See, also, the paragraph following, "Any substantial defect," etc.

27. Burdett v. Dale, 95 Mo. App. 511.

28. Drexel v. Rochester L. & B. Co. (Neb.) 91 N. W. 254. But see ante, § 10, to the effect that tardy bringing up of the transcript or "record" may entail a dismissal.

29. Fitch v. Long, 29 Ind. App. 463; Hobson v. Hobson (Va.) 40 S. E. 899; Nobles v. Bernet (La.) 33 So. 313. **Want of finality in judgment:** Writs of error to the supreme court from two decisions of the circuit court, one affirming and the other reversing and remanding, on a cross writ of error, the same judgment of the circut court will be dismissed because there is no finality in either decision of the circuit court of appeals—Montana Min. Co. v. St. Louis M. & M. Co., 186 U. S. 24, 46 Law. Ed. 1039. Direct appeal from order reviewable only with final judgment—Mahoney v. Elliott (Idaho) 69 Pac. 108.

A writ of error will not be dismissed because one has brought two orders, one of which cannot be reviewed. Interlocutory ruling and ruling on order for new trial—Dodson, etc., Co. v. Harris, 114 Ga. 966.

See, also, ante, § 4, as to what judgments are final. **Lack of jurisdictional amount**—Booher v. Wisner, 65 Kan. 860, 70 Pac. 581. Jurisdictional amount made up of partly fictitious items—Johnson v. Hosmer, 108 La. 697. Claim of damages obviously inflated to reach jurisdictional amount—Marshall v. Schneider (La.) 33 So. 572. Mandamus dismissed where amount did not appear—State v. Police Jury (La.) 33 So. 308. **Defect of parties**—Booher v. Wisner, 65 Kan. 860, 70 Pac. 581; Anderson v. Laurent (Fla.) 33 So. 237. Purchasers at sale, confirmation of which was appealed from, not made parties—Phillips v. Keel, 24 Ky. Law Rep. 1752. Failure to bring in as parties to appeal those who appeared and pleaded below without objection, though not entitled to do so—Small v. Edwards, 65 Kan. 858, 69 Pac. 165.

If another appeal be already pending, the latter one will be dismissed—Da Costa v. Dibble (Fla.) 33 So. 466. Error after appeal taken but not perfected dismissed—Burdett v. Dale, 95 Mo. App. 511. **Defective process or procedure to transfer cause:** Defective order for appeal—Hughes v. Henderson, 95 Mo. App. 312. Delay in issuing scire facias to defendants in error—Solary v. Weed (Fla.) 32 So 779. It is sufficient if one only of respondent's attorneys be served in time—Sherman v. Luckhardt (Mo. App.) 70 S. W. 388.

No entry below nor appearance above—Ropes v. Kemps (Fla.) 33 So. 244. Want of formal petition for writ of error is not substantial if the issuance of the writ has been necessarily approved by later orders—Alaska United Min. Co. v. Keating (C. C. A.) 116 Fed. 561. Notice not given within statutory time—Southern Cal. R. Co. v. Slauson (Cal.) 68 Pac. 107. Irregularities not causing uncertainty not sufficient—Bendich v. Scobel, 107 La. 242.

30. See ante, § 2. Bringing appeal instead of error—Bailey v. O'Fallon (Colo.) 70 Pac. 755; Colorado F. & I. Co. v. Knudson (Colo. App.) 70 Pac. 698.

31. McVey v. Barker, 92 Mo. App. 498.

32. Hatton v. Hatton, 136 Cal. 353, 68 Pac. 1016; Schatzlein Paint Co. v. Passmore, 26 Mont. 500, 68 Pac. 113. Tardy filing of oath for appeal is ground unless appeal be perfected by proper proceedings on leave of court—Jones v. Ducktown S. C. & I. Co. (Tenn.) 71 S. W. 821. Tardy recording of writ of error—Florida Cent. & P. R. Co. v. Peacock (Fla.) 33 So. 247. Six months' unnecessary delay to procure a substitute for a deceased trustee party and to bring in the substituted trustee after his appointment was held inexcusable, and dismissal ordered for want of parties—Hays v. Pugh, 158 Ind. 500, Affirmed for failure to properly perfect or prosecute an appeal—Burnes v. American Brg. Co. (Mo. App.) 70 S. W. 512; Alexander v. Wilson (Mo. App.) 69 S. W. 602.

33. Record not brought up at the return term of writ of error—Rush v. Connor (Fla.) 32 So. 796. No transcript filed within 90 days—Potts v. Watkins (Ind. Ter.) 69 S. W. 820. Delay may be waived by submitting on the merits—Edwards v. Logan, 24 Ky. Law Rep. 678; Taylor v. Colorado Iron W'ks, 29 Colo. 372, 68 Pac. 218.

34. Aetna Life Ins. Co. v. Sanford, 197 Ill. 310. Fifteen days' delay in filing amended asignments after motion to affirm for insufficient assignments and until the day of submission is unreasonable—Stienblock v. Johns (Iowa) 93 N. W. 595.

35. Headstrom v. Hellieson, 136 Cal. 498, 69 Pac. 148; Robertson v. Shorow (Wyo.) 69 Pac. 1. In Georgia tardiness in filing briefs is contempt but not ground for dismissal—Roberts v. Roberts, 115 Ga. 259. Failure to file briefs—Brevaldo v. Rogers Co. (Fla.) 33 So. 455; Pavey v. Pavey, 103 Ill. App. 589; Bowman v. Hoffman (Tex. Civ. App.) 67 S. W. 152. Defects in briefs, see ante, this section,—"Briefs and Arguments."

36. Patterson v. Davis, 24 Ky. Law Rep. 842. Want of good sureties—David v. Guich, 30 Wash. 266, 70 Pac. 497. Not of the statutory penalty—Loy v. Coey (Wash.) 71 Pac. 552. Deficiency in amount—Loy v. Coey

"record," "transcript," "assignment," "briefs," or the like,[37]—will ordinarily warrant and often necessitate a dismissal.

The United States supreme court will dismiss proceedings based on federal questions only when such questions are frivolous or trifling.[38]

Matters prior to the order appealed are not cause for dismissal.[39]

Omission of that which it is an officer's duty to supply is not chargeable to appellant,[40] nor is an amendable defect,[41] or an excusable delay,[42] or condition due to the opposite party's action,[43] good cause. If a bond be such that appellant could

(Wash.) 71 Pac. 552. Appeal is good if bond suffices to bring up though not to suspend judgment—Mestier & Co. v. Chevalier Pav. Co., 108 La. 562.

The want of a supersedeas to a judgment containing an injunctional order is not important unless that order is complained of—Linder v. Whitehead (Ga.) 42 S. E. 358.

Code March 16, 1895, providing that a new "appeal bond" may be ordered in default of which execution may issue, means a new stay bond, and the failure to provide one is not ground for dismissal—Mersfelder v. Spring, 136 Cal. 619, 69 Pac. 251. Mere irregularities not impairing security not sufficient—Colburn v. Seymour, 29 Colo. 292, 68 Pac. 219.

37. Omission to page and index a record containing numerous alleged errors—Emporia v. Kowalski, 65 Kan. 772, 70 Pac. 863. No index or statement of question, incomplete appendix, and improper certification and assignments—Sailor v. Reamer, 20 Pa. Super Ct. 597. Want of marginal notes—Brinkley v. Smith, 130 N. C. 224. There is no substantial variance between the name of a corporation party and the same name omitting the word "Limited" with the name of the corporate domicile—Palatine Ins. Co. v. Dickerson (Ga.) 43 S. E. 52. Failure to file notice of schedule of record for appeal—McHargue v. Reams, 24 Ky. Law Rep. 1385. Failure to assign errors in briefs as required by court rules—Driscoll v. Shields, 26 Mont. 494, 68 Pac. 851.

Want of abstract—Brumback v. McAuley (Mo. App.) 68 S. W. 240. No abstract or record except a book so styled but not verified—Westheimer v. McInerny (Mo. App.) 67 S. W. 725. Failure to file abstract containing pleadings or the substance thereof, or statement of case, or showing that a bill of exceptions had been filed—Ladd v. Williams (Mo. App.) 72 S. W. 475. **Omissions from transcript record or paper book:** Pleadings and record entries were in bill of exceptions only—Faulkner v. Hutchins (Ind. Ter.) 69 S. W. 867. Certificate to evidence, statement of question, and evidence itself were lacking—Herlehy v. Shrader, 20 Pa. Super. Ct. 438. Paper book contained no statement of question, assignment, or exceptions—Manley v. Okell, 19 Pa. Super. Ct. 240. Failure in any way to preserve ruling on evidence and the evidence itself in the record—Richardson v. McConanghey (W. Va.) 43 S. E. 124. Failure to show filing of bill of exceptions—Westheimer v. McInerny (Mo. App.) 67 S. W. 725. Omission of evidence not fatal, when findings can be supported by presumption in favor of its sufficiency—Casey v. Gibbons, 136 Cal. 368, 68 Pac. 1032. Omissions must be such as to influence decision—Bendich v. Scobel, 107 La. 242. Failure to include notice of motion for new trial not cause to dismiss—Madigan v. Harrington, 26 Mont. 358, 67 Pac. 1121. Matters omitted from transcript at appellant's instance after court's direction to include them—Finch v. Strickland, 130 N. C. 44. Insufficient certificate of evidence—Madden v. Kinney, 114 Wis. 528. Improper certification of transcript—Hart v. Cotten (Fla.) 31 So. 817. **Omission to show the judgment** complained of—Biles v. Beadle (Mo. App.) 71 S. W. 465; Jones v. Miller (Neb.) 89 N. W. 598. Of two interlocutory orders one was not taken in time and the other was not in the transcript—Mattair v. Furchgott (Fla.) 32 So. 925.

Omission of order on contested application for leave to appeal without paying costs—Majors v. Goodrich (Tex. Civ. App.) 68 S. W. 290.

38. Claim of title under Spanish grant confirmed by treaty and patent not frivolous—Mobile Transp. Co. v. Mobile, 187 U. S. 479. Will be dismissed if question is settled—Equitable Life Soc. v. Brown, 187 U. S. 308, or if case was decided on other grounds—New York Cent. R. Co. v. New York, 186 U. S. 269, 46 Law. Ed. 1158.

39. Premature notice of motion for new trial—Bell v. Staacke, 137 Cal. 307, 70 Pac. 171.

40. Certificate to bill of exceptions was not in legal form (Civ. Code, § 5534)—Scott v. Whipple (Ga.) 42 S. E. 519. Delay in giving notice of appeal attributable to officers and not to appellant—Martin Mach. Works v. Miller, 132 Ala. 629.

41. In appeal bond, unless appellant was in bad faith—Watier v. Buth, 87 Minn. 205. Under laws permitting amendment of the bond, omission of a co-appellant to sign it is not ground to dismiss, if they promptly move to file a new bond—Engel v. Atkinson (Colo. App.) 71 Pac. 683.

42. Court of Appeals Rules 11 and 12 in Colorado do not require a dismissal for delay in filing assignments if there is an excuse and no prejudice has resulted—Moynahan v. Perkins (Colo. App.) 68 Pac. 1062. Tardy filing of assignment not ground for dismissal in Colorado, if there was an excuse—Moynahan v. Perkins (Colo. App.) 68 Pac. 1062. Pendency of application for rehearing of order extending time for citation is no excuse since rehearing does not lie—Gagneaux v. Desonier (La.) 33 So. 561. Appellant not at fault for failure to settle bill of exceptions—Crooks v. Crooks, 136 Cal. xix., 68 Pac. 101. Excuses for tardiness in filing briefs—State Board v. People, 29 Colo. 353, 68 Pac. 236; Gipson v. Morris (Tex. Civ. App.) 67 S. W. 433; Headstrom v. Hellieson, 136 Cal. 498, 69 Pac. 148; Bowman v. Hoffman (Tex. Civ. App.) 67 S. W. 152; Robertson v. Shorow (Wyo.) 69 Pac. 1.

43. It is not a failure to perfect when the

not escape liability because of its defects, it is not so defective in form or substance as to render the appeal ineffectual and therefore dismissible.[44] Failure to except to findings is not important unless contentions are based on them.[45] The appellee cannot complain that no evidence is in the record to support findings in his favor.[46]

H. Raising and waiver of defects in appellate procedure; motions and pleas.— The appellate court alone may hear objections and dismiss a regular appeal;[47] for example, that an appeal is frivolous and dilatory.[48]

An objection is premature when before the time to bring up the record a non-appealing party complains of alleged failure to serve him.[49] Objections must be raised before even a qualified submission on the merits,[50] and are defeated when the error is cured before moving;[51] but a motion to dismiss cannot be defeated by doing a jurisdictional act after the time has expired,[52] and an abortive motion is ineffectual to cut off the time for doing any requisite thing.[53] A settlement will be cause for dismissal even after submission.[54] Under a rule permitting appellee to move to docket and dismiss if the transcript be tardy, such motion may be at any time before the transcript is docketed,[55] and if no case has been settled so as to permit a timely docketing, a dismissal can be averted by docketing so much as is obtainable and by making affidavit and moving for certiorari.[56]

A general appearance does not waive delay in applying for leave to appeal, but such objection is too late after submission.[57]

One who has opposed a motion for leave to correct an irregularity should not be heard on a motion to dismiss for such irregularity.[58] Plaintiff cannot say that a defendant whom he sued lacks an appealable interest.[59]

Defective assignments may be waived by proceeding to argument,[60] or omitting to raise the question.[61] Filing briefs does not waive an objection that a former appeal is pending.[62] Failure to provide copies of abstract may be waived

failure of a surety to justify is attributable to exceptions filed by the objecting party—Klingler v. Henderson, 137 Cal. 561, 70 Pac. 617. If the duty is peremptory (to bring up a transcript) it is of no moment that appellant would have been obliged to advance fees chargeable to the opposite party—King v. Norton, 36 Misc. Rep. (N. Y.) 53.

44. Bond signed only by the surety was joint and several in form and principal held estopped to deny it—Bloomingdale v. Weil, 29 Wash. 611, 70 Pac. 94.

45. Cathcart v. Bryant, 28 Wash. 31, 68 Pac. 171. Exceptions not necessary unless error is urged—Cathcart v. Bryant, 28 Wash. 31, 68 Pac. 171.

46. Berry v. Rood, 168 Mo. 316.

47. Spindler v. Gibson, 72 App. Div. (N. Y.) 150.

48. Southern B. & L. Ass'n v. Carey, 117 Fed. 325.

49. First Nat. Bank v. Gordon Hdw. Co., 30 Wash. 127, 70 Pac. 251.

50. Leave was reserved to file briefs—Edwards v. Logan, 24 Ky. Law Rep. 678.

51. Transcript, not filed before briefs, was filed before motion—Johnson v. San Juan Fish Co., 30 Wash. 162, 70 Pac. 254. Filed before motion and no prejudice resulted—Perkins v. Boyd (Colo. App.) 68 Pac. 1062. In North Carolina, under the rules, a transcript, though not in time, will prevent a dismissal if docketed before a certificate and motion to dismiss—Benedict v. Jones, 131 N. C. 473. If a defect in the abstract has been supplied by a certification of record, dismissal will be refused—Beale v. Patterson (Iowa) 93 N. W. 594. In Montana (Code Civ. Proc. § 1740) an objection to an appeal bond as being joint is averted by filing a proper undertaking before hearing of motion to dismiss—Hayes v. Union Merc. Co. (Mont.) 70 Pac. 975.

52. Filing new bond for appeal—David v. Guich, 30 Wash. 266, 70 Pac. 497.

53. Filing briefs—Swortfiguer v. White, 137 Cal. 391, 70 Pac. 214.

54. Wedekind v. Bell, 26 Nev. 395, 69 Pac. 612.

55. Worth v. Wilmington, 131 N. C. 532.

56. Worth v. Wilmington, 131 N. C. 532.

57. Roseberry v. Valley B. & L. Ass'n (Colo. App.) 68 Pac. 1063; Wabash R. Co. v. People, 196 Ill. 606.

58. Issuing writ of error before assignments are filed—Alaska United Min. Co. v. Muset (C. C. A.) 114 Fed. 66.

59. State v. Cranney, 30 Wash. 594, 71 Pac. 50.

60. Not ground for dismissal if amended and questions specifically argued by both sides—Roberts v. Parker (Iowa) 90 N. W. 744.

61. Orcutt v. McNair (Neb.) 92 N. W. 200.

62. Burdett v. Dale, 95 Mo. App. 511.

by proceeding to reply to the brief.[63] Want of citation cannot be raised after other grounds are urged.[64]

The same grounds should not be urged on a second motion,[65] but a motion may be renewed to a cause reinstated as on error after dismissal on appeal.[66]

How presented.—When a defect is amendable, motion should be made in the appellate court for a rule to amend before moving for dismissal.[67] The destruction or extinguishment of the subject-matter of an appealed action should be presented by a proper plea in Kentucky.[68] The court will dismiss of its own motion for want of jurisdiction.[69]

A plea in abatement for facts of record or not in dispute should be so made as to raise an issue of law.[70]

Motion should be on notice,[71] and in time.[72] Grounds should be specific.[73] Only necessary matters will be heard;[74] appealability and sufficiency of the proceedings for appeal being the usual questions.[75]

The court may judicially notice want of jurisdiction and dismiss the appeal.[76] The rules differ as to whether information outside the record may be taken by the court on such a motion.[77] An assignment shown by the record to be sufficient will be sustained as against affidavits of fraud.[78] If an omitted proceeding is necessary only in certain circumstances, those circumstances must be shown.[79]

Proper mode of disposing of cause; dismissal or pro forma decree.—An appeal will be stricken for want of jurisdiction.[80] If there is a want of jurisdiction, a co-plaintiff in error cannot obtain a dismissal leaving the cause stand in the other one's name.[81] If satisfied that an appeal is frivolous, it will be dismissed rather than to grant a supersedeas or extend the time to file briefs.[82]

An affirmance may result from defects of the record not sufficient for dismissal,[83] or defects of the brief.[84]

63. Carter v. Dilley, 167 Mo. 564.

64. It was last in order of the objections—Vallee v. Hunsberry, 108 La. 136.

65. Levy v. Levy, 107 La. 576.

66. Taylor v. Colorado Iron Works, 29 Colo. 372, 68 Pac. 218.

67. Defective bond—In re Gannon's Estate (Neb.) 89 N. W. 1028.

68. McGill v. Bartman (Ky.) 68 S. W. 1100.

69. Fitch v. Long, 29 Ind. App. 463; Hobson v. Hobson (Va.) 40 S. E. 899.

70. Sanford v. Bacon (Conn.) 54 Atl. 204.

71. Rule 23 of Court of Appeals—Shannon v. Padgett, 24 Ky. Law Rep. 1281; Carr v. General Inc. Light Co., 37 Misc. Rep. (N. Y.) 837. Notice referring to other papers held to sufficiently state grounds—Bell v. Southern Pacific R. Co., 137 Cal. 77, 69 Pac. 692.

72. In Alabama motion to dismiss for delay in filing transcript must be made before Thursday following the default—Martin Mach. Works v. Miller (Ala.) 32 So. 305. For defect in order of appeal within three days after filing transcript—Vallee v. Hunsberry, 108 La. 136.

73. Objections to bond—McSweeney v. Blank, 107 La. 292.

74. Unnecessary question of waiving assignment of error—Board of Com'rs v. Shaffner (Wyo.) 68 Pac. 14.

75. In re Davis' Estate, 27 Mont. 235, 70 Pac. 721.

76. Less than $2000 in dispute—Salles v. Jacquet, 108 La. 107.

77. Jurisdictional amount in controversy cannot be proved by affidavit—Smith v. American Monument Co. (Ind.) 65 N. E. 524. Affidavits receivable to show whether moving party who had disclaimed and been defaulted was necessary to the appeal—First Nat. Bank v. Gordon Hdw. Co., 30 Wash. 127, 70 Pac. 251. A statute authorizing a disposition of a cause on appeal does not include dismissal for settlement after appeal not shown by the record—In re Hutton's Estate, 92 Mo. App. 132. The fact that the controversy has ceased since appeal must appear on the record—White Crest Canning Co. v. Sims, 29 Wash. 389, 69 Pac. 1094.

78. Smith Co. v. Williams, 29 Ind. App. 336.

79. If decision was made in September and appeal taken in February, party must show that it was at a subsequent term of court in order to dismiss for want of citation—Succession of Hoyle (La.) 33 So. 625.

Dismissal not made when fact of waiver of citation is certified by clerk and denied by counsel's affidavit—Gagneaux v. Desonier (La.) 33 So. 561.

80. Defective order for appeal—Hughes v. Henderson, 95 Mo. App. 312.

81. Center v. Fickett Paper Co. (Ga.) 43 S. E. 498.

82. Knight v. West Coast N. S. Co. (Fla.) 33 So. 450.

83. Mere incomplete record works affirmance but not dismissal—Poage v. Smith, 101 Ill. App. 261. Failure to include notice of motion for new trial—Madigan v. Harrington, 26 Mont. 358, 67 Pac. 1121.

84. Warren v. Humble, 26 Mont. 495, 68 Pac. 851; Pavey v. Pavey, 103 Ill. App. 589.

A dismissal will not be allowed as to one party, where others have appealed and an examination of the entire record would be necessary on the motion.[85]

Rehearing.—Refusal to dismiss and allowance of extension of time in which to cite parties is interlocutory and hence not open to a rehearing under the Louisiana practice.[86]

§ 12. *Hearing.*—The regulation of hearings is largely discretionary and according to rules of court. If the hearing be de novo, preliminary issues may be first determined.[87] An appellee in divorce who remarries pending appeal will not be heard.[88]

§ 13. *Review. A. Mode of review; review proper or trial de novo.*[89]—An equity appeal brings the case up for trial de novo.[90] An action transferred without cause from the law to the equity side of the court must, nevertheless, be tried de novo.[91] Whether a cause is legal or equitable depends on the theory used at trial.[92] It will be assumed that an action was tried at law, where it appears that it was for recovery of money only and was brought for trial and tried at the law term.[93] Divorce cases are reviewed as equity causes.[94] Appeals from surrogates and courts of probate are usually de novo,[95] though defenses below may in some states be disregarded.[96] A party may be concluded by failure to appeal as to certain issues.[97] On appeal from a surrogate to the appellate court, a reference may be had to settle a particular issue of fact, especially where it appears that new and important testimony may be produced.[98] Summary proceedings by a landlord,[99] appeals in eminent domain proceedings to the court of general jurisdiction,[1] and appeals from county boards to the court of general jurisdiction,[2] are also usually de novo. Review of applications for liquor license in Pennsylvania is confined to the record.[3] Ferry proceedings in West Virginia are reviewed in the cir-

In Texas the civil appeals may, where the appellee has filed a brief on the failure of the appellant to do so, affirm upon the examination of the record merely to see if the judgment can be sustained according to appellee's view—Ball v. Dignowity (Tex. Civ. App.) 68 S. W. 800.

85. Mestier & Co. v. Chevalier Pav. Co., 108 La. 562.

86. Gagneaux v. Desonier (La.) 33 So. 561.

87. Question of heirship to determine litigant's interest preliminary to appeal from distribution—Goff v. Britton, 182 Mass. 293.

88. Branch v. Branch (Colo.) 71 Pac. 632.

89. See, also, ante, § 2, as to whether appeal or error lies.

90. Riley Bros. v. Melia (Neb.) 92 N. W. 913. Erroneous evidence let in will be ignored—Washougal & L. Transp. Co. v. Dalles P. & A. Nav. Co., 27 Wash. 490, 68 Pac. 74. Bill cannot be amended to state new matter known to party—Jackson v. Thomson, 203 Pa. 622.

91. Loetscher v. Dillon (Iowa) 93 N. W. 98.

92. Highland Boy Gold Min. Co. v. Strickley (C. C. A.) 116 Fed. 852; see also, Hooven, Owens & Rentschler Co. v. John Featherstone's Sons (C. C. A.) 111 Fed. 81. Case should be reviewed as one at law, if in that form and tried as such—O'Melia v. Hoffmeyer (Iowa) 93 N. W. 497.

93. German-American Provision Co. v. Garronne (N. Y.) 73 App. Div. 409.

94. Schuman v. Schuman, 93 Mo. App. 99; McCann v. McCann, 91 Mo. App. 1.

95. In re Wicke (N. Y.) 74 App. Div. 221; In re Cartright's Will (N. J. Eq.) 51 Atl. 713; Ansley v. Richardson, 95 Mo. App. 332; Springfield Grocer Co. v. Walton, Id. 526. Hearing on claims—Wencker v. Thompson's Adm'r (Mo. App.) 69 S. W. 743.

On appeal from refusal of probate, testimony other than that of subscribing witnesses may be heard—In re Kohley's Estate, 200 Ill. 189, following many cases. On appeal from settlement of administrator's account common pleas may either take new testimony or refer anew—James v. West (Ohio) 65 N. E. 156. Excluded evidence is received—Buie's Estate v. White, 94 Mo. App. 367. New issues excluded on appeal from disallowance of claim against decedent's estate—Fitzgerald's Estate v. Union Sav. Bank (Neb.) 90 N. W. 994.

96. Thomson v. Black, 200 Ill. 465.

97. By failure to appeal from allowance of a set-off a claimant may be concluded on appeal as to that much—Thorpe v. Thorpe's Estate (Vt.) 52 Atl. 1051.

98. Under Code Civ. Proc. N. Y. § 2586—In re Pfarr's Estate (N. Y.) 79 App. Div. 634.

99. An affidavit of defense may be made on appeal—Harvey v. Clark (Miss.) 32 So. 906.

1. Northern Pac. R. Co. v. Duncan, 87 Minn. 91.

2. Mahoney v. Board (Idaho) 69 Pac. 108.

3. In re Weaver's License, 20 Pa. Super. Ct. 95.

4. Ferry proceedings under Code 1899, c. 39, §§ 47, 48, and § 14, c. 112—Sistersville Ferry Co. v. Russell (W. Va.) 43 S. E. 107.

cuit court only on the record and not tried by jury.[4] Titles treating of special proceedings should be consulted.[5]

An attempted appeal where none will lie may be regarded as a certiorari and the review restricted accordingly.[6]

B. Scope in general.—Nothing is reviewed, in the strict sense distinguished from trial de novo, unless properly saved by objection and exception, or unless apparent on the record itself.[7] Assignments and specifications sufficient to define issues of error are also necessary,[8] but the court may hear questions outside the assignments if argued.[9] In considering reserved questions, the court will confine itself to objections urged in the briefs and arguments of counsel where the record does not disclose particular matters objected to.[10] The decision should be confined to the issues,[11] and questions incident to them are not withdrawn from consideration by mere admissions as to matters of law.[12] An order in equity, the record of which was admitted in evidence in a suit at law, cannot be reviewed on appeal from the judgment.[13]

Moot questions will not be decided.[14] Unnecessary points will not be considered. Demurrers will not be separately considered where the conclusions of law present the same questions.[15] On appeal from a verdict given defendant because a defense of res judicata was determined a bar by the jury, no other questions need be considered.[16]

Error reaches only matter of law.[17]—In some states, sufficiency of evidence as ground for reversal is examined on writs of error as well as appeal,[18] but only the sufficiency of facts to support special findings will be reviewed together with the questions of law.[19] In Nebraska, rulings on evidence cannot be reviewed on appeal, but only by petition in error, and the supreme court will pass upon the competency of evidence in determining the weight as supporting the decree.[20] The appellate court of Missouri will not pass on the weight of evidence in action for recovery of money.[21] Where a verdict is rendered by a jury without objection of either party as to the mode of trial, an objection cannot be urged on appeal in Missouri that it was against the weight of evidence.[22] A defect apparent on the

5. See Eminent Domain, Estates of Decedents, Taxes, Wills. Trial de novo on appeal from opening or vacation of highways, see Highways and Streets.

6. In habeas corpus—Commonwealth v. McDougall, 203 Pa. 291.

7. See Saving Questions for Review.

8. See ante, § 11.

9. Lynch v. Syracuse R. Co. (N. Y.) 73 App. Div. 95.

10. Thompson v. Betts, 74 Conn. 576.

11. Hence on the question whether there was a vendor's lien it is proper to find no sale though not pleaded—People v. Court of Appeals (Colo.) 69 Pac. 606. If he bases his right to recover on one count of his petition, his rights under the other cannot be considered—Overshiner v. Britton, 169 Mo. 341.

12. Thus that a contract was one of sale —People v. Court of Appeals (Colo.) 69 Pac. 606, holding also that there was no practical construction of it.

13. Partlow v. Lickliter (Va.) 42 S. E. 671.

14. Pennsylvania Co. v. Walker, 25 Ind. App. 285. Speculative and academic questions not answered—New Idea Pattern Co. v. Whelan (Conn.) 53 Atl. 953. Whether a city had an easement by which it was empowered to construct a sewer where it appeared that the construction was by statute —Gas Light & Coke Co. v. New Albany, 158 Ind. 268. Where a demurrer was sustained to a petition for mandamus seeking to compel an election board to treat a certificate of nomination as evidence, the election law will not be construed on appeal after election—Duvall v. Swann, 94 Md. 608. See also Harmless Error.

15. Gas Light & Coke Co. v. New Albany, 158 Ind. 268.

16. Werner v. Cincinnati, 23 Ohio Cir. Ct. R. 475.

17. See ante, § 2. It must be of record, § 13-E.

18. Tyree v. Harrison (Va.) 42 S. E. 295.

19. Empire State-Idaho Min. & Devel. Co. v. Bunker Hill & S. Min. & C. Co. (C. C. A.) 114 Fed. 417.

20. Cheston v. Wilson (Neb.) 89 N. W. 764.

21. Carr v. Ubsdell (Mo. App.) 71 S. W. 112.

22. Stephan v. Metzger, 95 Mo. App. 609.

face of the declaration will always be noticed on writ of error.[23] On a writ of error in Georgia, a ruling which results in a final judgment inconsistent with the law may be reviewed, the whole case being open for inspection; the writ will also lie on the ground that the petition does not set out a cause of action, the supreme court thereon having the powers possessed by the common law courts in reviewing judgments of other courts.[24] Error brings up only rulings against the plaintiff in error,[25] and by analogy, if an appeal is not from an action of an equitable nature, only errors affecting appellant can be considered.[26]

Particular courts of appeal.—The appellate division of the supreme court of New York will pass upon the sufficiency of the evidence to sustain the verdict, the same as any other question.[27] The appellate court in Illinois may properly consider the sufficiency of the evidence to support the judgment, and reverse if found insufficient,[28] and the verdict must be set aside if so clearly against the evidence as to indicate passion or prejudice.[29] In Indiana, the sufficiency of the evidence will be reviewed by the appellate court.[30]

Review as dependent on parties appealing.—Error cannot be alleged by a party neither appealing nor joining an appeal.[31] A decision by the trial judge of a material matter of fact which the evidence properly put in issue cannot be questioned by the successful party to sustain a judgment in his favor entered upon the verdict of the jury.[32] An appellee wishing to have rulings of the trial court against him reviewed must take a cross appeal or cross assign errors.[33] Defendant below cannot complain on appeal that the relief granted against him was not all that was asked for in the bill.[34] One appealing cannot complain of instructions more favorable to the losing party than is justified by law.[35] Error which affects only one of several defendants cannot be urged on appeal by the others,[36] unless his

23. Kelly v. Strouse (Ga.) 43 S. E. 280.

24. Kelly v. Strouse (Ga.) 43 S. E. 280.

25. Not against defendant in error—Reese v. Damato (Fla.) 33 So. 462. But he may cross-assign. See ante, § 11.

26. Jones v. Ducktown Sulphur, Copper & Iron Co. (Tenn.) 71 S. W. 821; Stuart v. Same, Id.; Southwestern Telegraph and Telephone Co. v. Priest (Tex. Civ. App.) 72 S. W. 241.

27. Schooler v. New York Cent. & H. R. R. Co., 114 N. Y. State Rep. 800; Kellogg v. Albany & H. R. & Power Co. (N. Y.) 72 App. Div. 321, 11 N. Y. Ann. Cas. 50.

28. Chicago City R. Co. v. Biederman, 102 Ill. App. 617.

29. Illinois Cent. R. Co. v. Cunningham, 102 Ill. App. 206.

30. Baltimore & O. S. W. R. Co. v. Sims, 28 Ind. App. 544.

31. Plaintiff cannot complain of error affecting an intervenor where their interests are adverse—Richards v. Minster (Tex. Civ. App.) 70 S. W. 98; William E. Peck & Co. v. Kansas City Metal Roofing & Corrugating Co. (Mo. App.) 70 S. W. 169; Chavez v. Myers (N. M.) 68 Pac. 917; Powell v. Canaday, 96 Mo. App. 27; Worthington v. Miller, 134 Ala. 420. Filing assignments of error is insufficient to have error considered—Ritt v. True Tag Paint Co., 108 Tenn. 646. A party who does not appeal cannot complain of the conditions imposed upon him by the judgment below—Kaukauna Electric Light Co. v. Kaukauna, 114 Wis. 327. A law enabling one of several losing parties to appeal and use the names of all the parties for that purpose will not enable him to appeal in behalf of all, and errors as to him only will be considered, under Prac. Act Ill. § 71—Norris v. Downing, 196 Ill. 91. On appeal by plaintiff making both defendants appellees, a defendant who failed to perfect an appeal from a judgment against him in favor of his co-defendant cannot assign error as against the co-defendant—National Bank of Cleburne v. Carper (Tex. Civ. App.) 67 S. W. 188. A defendant who did not appeal after his motion for a nonsuit was overruled could not have the motion reviewed on appeal by plaintiff from an order setting aside the verdict, though the nonsuit should have been granted—Fritz v. Southern R. Co., 130 N. C. 279. Whether instructions were too favorable to defendant will not be reviewed where plaintiff did not appeal—Fitzgerald v. Alma Furniture Co., 131 N. C. 636; Bradley-Ramsey Lumber Co. v. Perkins (La.) 33 So. 351; Kinney v. Murray (Mo.) 71 S. W. 197.

32. Citizens' Bank v. Rung Furniture Co. (N. Y.) 76 App. Div. 471.

33. Long v. Campbell, 133 Ala. 353; Arizona & N. M. R. Co. v. Nevitt (Ariz.) 68 Pac. 550. Consent must be indorsed if they cross-assign—Jones v. Peebles, 133 Ala. 290.

34. Brown v. Schintz, 98 Ill. App. 452.

35. Sappington v. Chicago & A. R. Co., 95 Mo. App. 387.

36. French v. Commercial Nat. Bank, 199 Ill. 213. Where a bill is dismissed as to one defendant as to whom it is prejudicial, the others cannot raise such prejudice as ground for reversal on appeal—Missouri Broom Mfg. Co. v. Guymon (C. C. A.) 115 Fed. 112. Where two co-defendants answer separately,

interests are thereby injured.[37] Error against either party to the appeal will be corrected by reversal of proceedings in whole or in part, where the whole record is before the appellate court.[38] Error in direction of a verdict in favor of part of certain defendants sued in tort cannot be raised by other co-defendants.[39] Where a city and an abutting owner are jointly sued, the city cannot on appeal ask for reversal of the judgment against it because of errors in favor of the abutting owner, though it may raise such errors as between itself and the abutting owner.[40] Plaintiff on reversal of a judgment as to him has no interest in the division of costs taxed against the other parties on a rule for that purpose.[41] One who is sued below both in his individual and representative capacities as guardian for certain minors cannot complain of errors below in regard to one of such capacities, where no recovery was had against him in such capacity.[42]

Waiver of errors in appellate court.—Errors,[43] cross errors,[44] exceptions,[45] grounds in support of a motion for a new trial,[46] or in support of a demurrer,[47] objections to a petition in error,[48] or objections to allowances in an administrator's settlement,[49] though assigned, will be deemed abandoned where not argued or discussed in the briefs. The rule applies to an appeal in equity tried de novo.[50] A mere statement of error is not argument.[51] The particular facts of the error must be pointed out.[52] An instruction is law of the case unless assailed by motion for new trial or petition in error.[53]

the failure of the court to make separate findings upon the issues made by the answer of one cannot affect the other so as to constitute error to be considered on his appeal, under Code Civ. Proc. Cal. §§ 452, 469, 475, providing for liberal construction of pleadings—Dobbs v. Purington, 136 Cal. 70, 68 Pac. 329. Where one of two defendants is served and tries the case, he cannot complain of entry of an irregular judgment against the other if the action will permit of a several judgment—Storey v. Kerr (Neb.) 89 N. W. 601; McCardle v. Aultman Co. (Ind. App.) 66 N. E. 507; McDavid v. McLean, 104 Ill. App. 627; Christopher & Simpson Architectural Iron & Foundry Co. v. Kelly, 91 Mo. App. 93.

37. A landlord may complain of a judgment against a contractor in a mechanic's lien proceeding, as it affects his land—Christopher & Simpson Architectural Iron & Foundry Co. v. Kelly, 91 Mo. App. 93; Town of Central Covington v. Bellonby, 24 Ky. Law Rep. 1092.

38. Childers v. Loudin (W. Va.) 42 S. E. 637.

39. Cleland v. Anderson (Neb.) 92 N. W. 396.

40. George v. St. Joseph (Mo. App.) 71 S. W. 110.

41. Johnson v. New Orleans (La.) 33 So. 735.

42. Ferguson v. Slater, McMahon & Co. (Tex. Civ. App.) 72 S. W. 422.

43. Clem v. Wise, 133 Ala. 443; Falke v. Brule (Colo. App.) 68 Pac. 1054; Beyer v. Fields, 134 Ala. 236; Trimble v. Terril, 99 Ill. App. 349; Hoyt v. Chicago, M. & St. P. R. Co. (Iowa) 90 N. W. 724; Chicago & E. R. Co. v. Lee, 29 Ind. App. 480; Western Union Tel. Co. v. Church (Neb.) 90 N. W. 878; Mayhew v. Knittle (Neb.) 89 N. W. 1037; Nordin v. Berner, 15 S. D. 611; Commonwealth Roofing Co. v. Palmer Leather Co., 67 N. J. Law, 566; Nix v. C. Reiss Coal Co., 114 Wis. 443; Zimmerman v. Bank (Neb.) 91 N. W. 497; Scott v. Gage (S. D.) 92 N. W. 37; Jaroszewski v. Allen (Iowa) 91 N. W. 941; Seattle & M. R. Co. v. Roeder, 30 Wash. 244, 70 Pac. 495; Southerland v. Sandlin (Fla.) 32 So. 786; City of Greenfield v. Johnson (Ind. App.) 65 N. E. 542; Anderson v. Anderson (Neb.) 92 N. W. 151; Payne v. Moore (Ind. App.) 66 N. E. 483; Pearce v. Miller, 201 Ill. 188; Portsmouth Sav. Bank v. Omaha (Neb.) 93 N. W. 231; Corrigan v. Kansas City, 93 Mo. App. 173; Landt v. McCullough, 103 Ill. App. 668. Error in excessive damages—Chicago Terminal Transfer R. Co. v. Gruss, 102 Ill. App. 439. An assignment of error in admission of a lease and deposition in evidence discussed only as to the lease is waived as to the deposition—Yarbrough v. De Martin (Tex. Civ. App.) 67 S. W. 177. Failure, on appeal from default and order to set aside default, to urge the error in the judgment in the brief is a waiver thereof—Rauer's Law & Collection Co. v. Gilleran, 188 Cal. 352, 71 Pac. 445.

44. Moore v. H. M. Hooker Co., 101 Ill. App. 177.

45. Carroll v. New York, N. H. & H. R. Co., 182 Mass. 287; Doherty v. Rice, Id. 182; Dolan v. Mutual Reserve Fund Life Ass'n, Id. 413. To admission of evidence—Barrett v. Bruffee, 182 Mass. 229; Baltimore & O. R. Co. v. Daegling (Ind. App.) 65 N. E. 761.

46. Logansport & W. Val. Gas Co. v. Coate, 29 Ind. App. 299. Argument of only one of several grounds assigned is insufficient—Boyd v. Western Union Tel. Co. (Iowa) 90 N. W. 711.

47. Bell v. Stevens, 116 Iowa, 451.

48. Failure to allege that the court erred in overruling a motion for new trial—Orcutt v. McNair (Neb.) 92 N. W. 200.

49. Cogswell's Heirs v. Freudenau, 93 Mo. App. 482.

50. Thoma v. Hecker (Iowa) 90 N. W. 598.

51. Error alleged in overruling demurrer—Frick v. Kaboker, 116 Iowa, 494.

Procedure de novo.—A requirement that all causes removed on appeal to the district court shall be tried anew does not affect the nature of a case appealed, so as to confer right to a jury in cases in which jury trial is not a matter of right.[54] The rule that all cases appealed and tried de novo should be tried on the same issues raised below does not require the pleadings to be in the precise language of that filed below;[55] hence it is proper to plead anew, but more fully;[56] but an amendment to the petition cannot be made to pray a larger recovery than the limit of jurisdiction below.[57] If the petition on appeal be assailed as tendering new issues, the question must be determined by comparison of the petitions.[58] On appeal from a judgment in foreclosure, appellee may amend his complaint to aver that no proceedings have been had at law, that it may conform to proofs after submission of the cause.[59]

C. Restriction to rulings below.—Questions presented may be reviewed, though not ruled upon formally, if the effect of other rulings was such as to decide the questions.[60] Facts on which there is no finding will be passed by,[61] and what was said at a subsequent ruling is not decisive on review of an earlier one.[62] Review will not be made on issues differing from those raised at the trial.[63] A defendant for whom the court has directed a verdict on a particular ground may defend the verdict on any ground fairly presented by his motion below.[64] Unless a motion for a new trial on several grounds is expressly overruled as to the other grounds than the one on which it was granted, such grounds will not be considered on appeal from the order granting it.[65] Judgment on general grounds of demurrer will not admit review of special grounds.[66] The appellate court cannot pass on the merits of a case where the trial court sustained a demurrer to the whole declaration, which contained one good count.[67]

Reasons not reviewed.—If a correct result is reached by the trial court, the reasons therefor will not be reviewed.[68] That the lower court gave a wrong reason for a proper judgment will not prevent affirmance,[69] and reasons in a written opinion will not be reviewed where the case is submitted to the court with an agreement that he shall decide all questions of law and fact.[70] A judgment correct on other grounds than that on which it was rendered below will not be reversed.[71]

52. Error in refusal of instructions—Himrod Coal Co. v. Clark, 197 Ill. 514.

53. Iowa Sav. Bank v. Frink (Neb.) 92 N. W. 916.

54. In probate trials the right to trial by jury is not given—In re Roarke's Estate (Ariz.) 68 Pac. 527.

55. Coleman v. Spearman, Snodgrass & Co. (Neb.) 93 N. W. 983.

56. Martens v. Pittock (Neb.) 92 N. W. 1038.

57. Spargur v. Prentiss (Neb.) 92 N. W. 300; Prentiss v. Spargur, Id.

58. Coleman v. Spearman, Snodgrass & Co. (Neb.) 93 N. W. 983.

59. Ure v. Bunn (Neb.) 90 N. W. 904.

60. Demurrer to a co-defendant's answer was carried back to the bill, which was dismissed as to all parties—Coleman v. O'Leary's Ex'r, 24 Ky. Law Rep. 1248.

61. Hunt v. Hunt, 171 N. Y. 396.

62. Statements made in ruling afterwards on motion for new trial—Lauer v. Palms (Mich.) 89 N. W. 694.

63. Defenses not pleaded — Richey v. Haley, 138 Cal. 441, 71 Pac. 499; Taylor v. Hall (Idaho) 71 Pac. 116; Whalen v. Billings, 104 Ill. App. 281. Demurrer will not raise question that a third person secondarily liable should contribute—Fleener v. Litsey (Ind. App.) 66 N. E. 82. On appeal from a replevin judgment wrongful seizure of property in addition to that pleaded is not reviewed—Pease v. Trench, 197 Ill. 101.

Instructions not requested—Kansas City v. Madsen, 93 Mo. App. 143; Edwards v. Barber Asph. Pav. Co., 92 Mo. App. 221; Corrigan v. Kansas City, 93 Mo. App. 173. Hence consult the title Saving Questions for Review, wherein cases are collected showing necessity of raising question by objection.

64. Whitney v. N. Y., N. H. & H. R. Co. (C. C. A.) 102 Fed. 850; Currier v. Trustees (C. C. A.) 117 Fed. 44.

65. Boyd v. Western Union Tel. Co. (Iowa) 90 N. W. 711.

66. Linder v. Whitehead (Ga.) 42 S. E. 358, limiting former decisions.

67. Wolf v. Alton, 103 Ill. App. 587.

68. Palmer v. Crisle, 92 Mo. App. 510; Denny v. Stokes (Tex. Civ. App.) 72 S. W. 209.

69. Davison v. Johnson, 24 Ky. Law Rep. 27.

70. Griffith v. Finger, 115 Ga. 592.

71. Le Mond v. Harrison (Colo. App.) 70 Pac. 956.

On review of a case, an instruction held void below will not be held valid where void on its face, though no objection was ever made on that ground.[72]

D. Restriction by character of order or judgment; matters brought up with final judgment.—Rulings on practice[73] and intermediate orders[74] go up with the judgment. The denial of a motion for a settlement of certain issues and for a jury trial can be reviewed on appeal from final judgment.[75] Judgment on a plea to the jurisdiction is reviewable with the final judgment on the main issue,[76] but the matter so to be reviewed must be such as is involved by the judgment.[77] Denial of motion to set aside a nonsuit for failure to appear and prosecute cannot be reviewed on appeal from the judgment of nonsuit, nor from an order refusing to set aside the nonsuit ordered for failure of proof.[78] Rulings of a referee cannot be considered on appeal from a judgment sustaining a motion to confirm his report.[79] An interlocutory judgment as to the form of a partnership between the parties, dissolving it and directing an accounting, cannot be reviewed on appeal from a final judgment.[80] On review of a dismissal of the complaint on motion, a motion for a new trial is not to be considered, since the case is left without a verdict.[81]

Matters reviewable on appeal from interlocutory orders.—Proceedings subsequent to an interlocutory order are not considered.[82] On appeal from a ruling on a demurrer, subsequent proceedings will be considered if they result in a finding according to the facts alleged or within the issue, without placing improper burdens on defendant.[83] An order allowing amendment will not bring up the sufficiency of the allegations.[84] Nonsuit or refusal to take one off involves no rulings on evidence.[85] A second order reaches facts or rights involved in a former one not appealed.[86]

On appeal from grant or refusal of a new trial.—Generally appeals from a grant or denial of a motion for a new trial are confined to the motion,[87] and the suffi-

72. Thompson v. Roberts (S. D.) 92 N. W. 1079.

73. Insurance Co. v. Parker (Neb.) 89 N. W. 1040; Lau v. Blomberg (Neb.) 91 N. W. 206. Denial of leave to amend—Ayers v. Makely, 131 N. C. 60. Refusal to dismiss—Jester v. Baltimore Packet Co., 131 N. C. 54. Denial of motion for judgment on pleadings—Duffy v. Meadows Co., 131 N. C. 31. Omission to make findings is reviewable with the judgment—Mantel v. Mantel, 135 Cal. 315, 67 Pac. 758. Erroneous reception or rejection of ballots by court in quo warranto may be reviewed—People v. Campbell, 138 Cal. 11, 70 Pac. 918. An order sustaining a motion to strike out parts of an amended complaint is reviewable on final appeal—Corcoran v. Sonora Min. Co. (Idaho) 71 Pac. 127.

74. Where the return of the clerk contains the judgment roll properly certified (Rev. St. 1898, §§ 3050, 3070)—Garvin v. Martin (Wis.) 93 N. W. 470. Intermediate orders specified in the notice of appeal (Code Civ. Proc. § 1301)—New York, L. & W. R. Co. v. Erie R. Co., 170 N. Y. 448.

75. Under Code Civ. Proc. N. Y. §§ 190, 1316, 1324, providing for the manner of appeals from the appellate division to the supreme court—Herb v. Metropolitan Hospital, 114 N. Y. St. Rep. 552.

76. State L. & A. Ass'n v. Kemp, 115 Ga. 355; Gambrill v. Schooley, 95 Md. 260.

77. Order to receiver of mining company to purchase cyanide plant to work tailings is reviewable with final adjudication (Code Civ. Pr. § 936)—Free Gold M. Co. v. Spiers, 135 Cal. 130, 67 Pac. 61. Exceptions to guardian's final report bring up all former reports—Peterson v. Erwin, 28 Ind. App. 330. Allowance of alimony will not be reviewed upon the question whether marriage de jure or marriage de facto existed—Eickhoff v. Eickhoff, 29 Colo. 295, 68 Pac. 237.

78. The two latter appeals are allowed by Gen. St. Conn. §§ 1110, 1129—Appeal of White (Conn.) 53 Atl. 582.

79. Reed v. Jugenheimer (Iowa) 92 N. W. 859.

80. Under Code Civ. Proc. N. Y. § 1316—Aronson v. Greenberg, 78 App. Div. (N. Y.) 639.

81. Bessenger v. Metropolitan St. R. Co., 79 App. Div. (N. Y.) 32.

82. Subsequent amendments — Smith v. Lamping, 27 Wash. 624, 68 Pac. 195.

83. The appeal court is not to rule upon the demurrer as the close of the pleadings (Pub. Acts Conn. 1897, p. 892, § 15)—Mechanics' Bank v. Woodward, 74 Conn. 689.

84. Thilemann v. New York, 71 App. Div. (N. Y.) 595.

85. Forrest v. Buchanan, 203 Pa. 454; Lewis v. Hinson, 64 S. C. 571.

86. Cost orders—Horn v. Bohn, 96 Md. 8. But not the former order itself—State v. Superior Ct., 30 Wash. 43, 70 Pac. 102.

87. On appeal from denial of new trial in divorce support of children cannot be adjudicated—Bryan v. Bryan, 137 Cal. xix.,

ciency of the complaint cannot be considered,[88] but only on an appeal from the judgment.[89] The sufficiency of the findings will not be noticed on appeal from denial of a new trial,[90] nor error appearing on the judgment roll,[91] nor the sufficiency of the evidence to support the findings and judgment on appeal from an order granting a new trial for newly discovered evidence.[92] A failure to find on a material issue amounts to a decision against law which may be reviewed on appeal from an order granting or refusing a new trial.[93] An order of dismissal as to other defendants will not be considered on appeal from an order denying a new trial in a suit in which judgment was rendered in favor of only the defendants who appeared.[94] An exception to a nonsuit, properly saved on a motion for a new trial, may be reviewed on appeal from denial of the motion.[95] A motion for a new trial for insufficiency of evidence raises the same questions as a previous request for a peremptory instruction and submission of specific issues to the jury so that both rulings need not be reviewed on appeal.[96]

Equitable, provisional, and special decrees and orders.—It must be presumed that the court sitting without a jury,[97] or in equity, considered only competent evidence.[98] An appeal in an equitable action will not bring up for review a ruling as to the admission of evidence.[99] On appeal from a portion of a decree, other matters cannot be reviewed.[1] On appeal from a decree entered after answer and hearing, a decree overruling a demurrer to the bill is not reviewable, a direct appeal from the latter decree being necessary.[2] The equity of the bill on which an interlocutory order is based may be reviewed on appeal therefrom.[3] The inclusion of an unappealable interlocutory decree in an appealable decree will not enable its review.[4] A former interlocutory decree overruling a motion to dismiss the bill for want of equity will not be reviewed on appeal from an order denying a motion to discharge a receiver.[5] If no appeal is taken from the part of an equity judgment which awards money to one of the parties, it cannot be claimed that as to that issue the losing party had a right to a jury trial.[6] An appeal from an order in execution of or ancillary to a decree will not bring up the decree,[7] except as to whether it supports the latter; thus on appeal from an order of sale of commun-

70 Pac. 304. Error to review denial of a new trial when brought after a year from judgment, will review only the errors presented on the motion for new trial—Mechanics' Bank v. Harding, 65 Kan. 655, 70 Pac. 655. Where the court below erroneously determined a motion for new trial raising questions of law and fact only on specific questions of law, the merits of the motion on the other grounds will not be determined—Gray v. Washington W. P. Co., 27 Wash. 713, 68 Pac. 360.

88. Sutter County v. Tisdale, 136 Cal. 474, 69 Pac. 141; Swift v. Occidental Min. Co. (Cal.) 70 Pac. 470.

89. Lambert v. Marcuse, 137 Cal. 44, 69 Pac. 620.

90. Walker v. Lillingston, 137 Cal. 401, 70 Pac. 282. On appeal from an order denying a motion for new trial in a suit to quiet title, the question whether the findings sustain a judgment of restitution will not be considered—Southern Cal. R. Co. v. Slauson (Cal.) 68 Pac. 107.

91. This can only be considered on appeal from the judgment—Swift v. Occidental Min. Co. (Cal.) 70 Pac. 470.

92. Bridenbecker v. Bridenbecker, 75 App. Div. (N. Y.) 6.

93. Clark v. Hewitt, 136 Cal. 77, 68 Pac. 303.

94. United Land Ass'n v. Pacific Imp. Co. (Cal.) 69 Pac. 1064.

95. Converse v. Scott, 137 Cal. 239, 70 Pac. 13.

96. St. Joseph & G. I. R. Co. v. McCarty (Neb.) 92 N. W. 750.

97. Mullin v. Johnson, 98 Ill. App. 621.

98. Oliver v. McDowell, 100 Ill. App. 45.

99. Under Code Civ. Proc. Neb. § 675—Leavitt v. Bartholomew (Neb.) 93 N. W. 856.

1. Bates Mach. Co. v. Cookson, 104 Ill. App. 457.

2. Code Maryland, art. 5, §§ 24, 26, construed—Gardiner v. Baltimore, 96 Md. 361.

3. Order appointing receiver—Cabaniss v. Reco Min. Co. (C. C. A.) 116 Fed. 318.

4. Interlocutory decree on motion to strike parts of bill contained in decree on demurrer to bill—Hood v. Southern R. Co., 133 Ala. 374.

5. Hereford v. Hereford, 134 Ala. 321.

6. Lord v. Murchison, 114 N. Y. St. Rep. 321.

7. Errors in preliminary orders allowed to become conclusive cannot be raised—New Milford Water Co. v. Watson (Conn.) 52 Atl. 947, 53 Atl. 57. Appeal from confirmation of sale in foreclosure—Omaha L. & T. Co. v. Walenz (Neb.) 89 N. W. 623. On appeal from confirmation order in highway proceedings, errors prior to original decree will be ignored unless they go to the jurisdic-

ity property under a power in a husband's will, the court can review error in including the wife's interest.[8] The proof as to the allowance of expenses in an order discharging a receiver will be reviewed though it may incidentally involve the propriety of his appointment which is not ordinarily reviewable.[9] Infringement will not be determined on appeal from a patent injunction granted on full hearing for special reasons, but only the propriety of the injunction will be questioned.[10] The constitutionality of certain laws, the effect of a final judgment in another proceeding and the right of a taxpayer to relief by injunction will not be reviewed on appeal from order denying injunction, where the motion was based on affidavits merely.[11] On appeal from a refusal to reform a deed that such relief was improper under the evidence will not be considered.[12] The propriety of the appointment of a receiver for a trust estate cannot be reviewed on appeal from an order overruling exceptions to a special register's report and adjusting the claim of a creditor.[13] Proceedings after judgment, such as vacation or modification, are often by statute made reviewable with the judgment as shown in the note.[14] An appeal from a judgment will not bring up an accompanying appeal from an order refusing to set aside the judgment and render a different judgment on the findings.[15] An appeal from a second order denying a motion to open a default will not bring the first order up for review.[16]

E. Restriction by contents of record.—The errors alleged must clearly appear,[17] the burden of showing error being always on the party alleging it,[18] and in the absence of an affirmative showing of error, it is assumed that the rulings below are correct.[19] The reviewing court is confined to the record, and will consider only such error as is there presented,[20] but when a proceeding has been once re-

tion—Hector Township Road, 19 Pa. Super. Ct. 120.

8. Under Code Civ. Proc. Cal. §§ 153, 940, 956—In re Wickersham's Estate (Cal.) 70 Pac. 1079.

9. Horn v. Bohn, 96 Md. 8.

10. American Fur Co. v. Cimiotti, etc., Co. (C. C. A.) 118 Fed. 838; Thomson-Houston Elec. Co. v. Nassau Elec. R. Co. (C. C. A.) 119 Fed. 354; Stearns-Roger Mfg. Co. v. Brown, 114 Fed. 939, 52 C. C. A. 559.

11. Knowles v. Conklin, 77 App. Div. (N. Y.) 633.

12. Bossingham v. Syck (Iowa) 91 N. W. 1047.

13. Campbell v. Claflin Co., 135 Ala. 527.

14. Under 2 Ball. Ann. Codes & Sts. §§ 5153, 5156, 5157, though entitled and docketed as a separate action—State v. Superior Ct. (Wash.) 71 Pac. 740. Opening of judgment entered on judgment note may be reviewed with final judgment—Schomaker v. Dean, 201 Pa. 439.

15. Birch v. Cooper, 136 Cal. 636, 69 Pac. 420.

16. Not within 2 Ball. Ann. Codes & St. § 6500, subd. 7—State v. Superior Ct., 30 Wash. 43, 70 Pac. 102.

17. Kelly v. Strouse (Ga.) 43 S. E. 280; McMillan v. Conat (N. D.) 91 N. W. 67; Parker v. Moore (C. C. A.) 115 Fed. 799; Dunscomb v. Patterson, 101 Ill. App. 69; Cooper v. Ward (Tex. Civ. App.) 68 S. W. 297; Stevenson v. Henkle (Va.) 42 S. E. 672. Ruling complained of not appearing—Kelly v. Morris, 101 Ill. App. 102. The fact that a judgment held to be an estoppel had been reversed must appear—Reese v. Damato (Fla.) 33 So. 462. Where the special verdict is not in the record the case will be reviewed as if there were none—O'Sullivan v. Knox, 114 N. Y. 848.

18. Tradewater Coal Co. v. Lee, 24 Ky. Law Rep. 215; McGeary v. McGeary, 181 Mass. 539; Jaco v. Southern Mo. & A. R. Co., 94 Mo. App. 567; Holland v Cunliff (Mo. App.) 69 S. W. 737; Ortt v. Leonhardt (Mo. App.) 68 S. W. 577; Roberts v. Central Lead Co., 95 Mo. App. 581; Tapana v. Shaffray (Mo. App.) 71 S. W. 119; Stewart v. Rosengren (Neb.) 92 N. W. 586.

19. McGeary v. McGeary, 181 Mass. 539; Ortt v. Leonhardt (Mo. App.) 68 S. W. 577; Springfield Grocer Co. v. Walton, 95 Mo. App. 526; International Soc. v. Dennis, 76 App. Div. (N. Y.) 327; Southern R. Co. v. Hill (Ga.) 42 S. E. 728; Chicago & E. I. R. Co. v. Lawrence, 96 Ill. App. 635. No ruling appeared; objection presumed to have been withdrawn—Adams v. Hopkins (Cal.) 69 Pac. 228.

20. Gardner v. Lake (C. C. A.) 114 Fed. 306; Newton v. Fain, 114 Ga. 833; Moultham v. Apking (Neb.) 89 N. W. 1051; Hoyt v. Chicago, M. & St. P. R. Co. (Iowa) 90 N. W. 724; Dyea Elec. Light Co. v. Easton, 15 S. D. 572; Fidelity & D. Co. v. West Chicago St. R. Co., 99 Ill. App. 486; Kansas City S. R. Co. v. Billingslea (C. C. A.) 116 Fed. 335; State v. St. Louis, 169 Mo. 31; Roberts v. Central Lead Co., 95 Mo. App. 581; Bush v. Tecumseh Nat. Bank (Neb.) 90 N. W. 236; Manthey v. Rauenbuehler, 71 App. Div. (N. Y.) 173; Stevens v. Hill, 74 Vt. 164; Anderson v. Mossy Creek Mills Co. (Va.) 41 S. E. 854; Ashland v. Whitcomb, 114 Wis. 99; Creamery Pckg. Mfg. Co. v. Hotsenpiller (Ind.) 64 N. E. 600; Lyon v. Bray (Iowa) 90 N. W.

versed and additional evidence received, the evidence on both hearings should be considered,[21] and the state of the record the day the appeal was taken controls.[22] Exceptions are presumed to have been made at the time of the action with which they are set out.[23] Where it does not appear from the record when the bill of exceptions was filed, it cannot be presumed that the term had been adjourned so that the time was extended for the filing.[24] It cannot be presumed that a certificate by the judge to the effect that greater damages should have been awarded in an action for tort was made, where there is no recital of the fact in the record.[25] Matters extrinsic to the record are not regarded.[26] Even if the record might admit, it will not be examined to make new findings of fact in order to support a decree below.[27] A judgment in tort as to one defendant on separate verdicts will be considered on its own merits apart from the fact that the judgment as to the other has been affirmed or reversed.[28] Though the evidence below would warrant a certain finding, where such finding was not made it cannot be resorted to on appeal in order to support the judgment.[29] The appeal court cannot presume that defendant would not have tendered the amount recovered in an action for a balance on contract if plaintiff had not claimed more.[30] Where a ruling depends on evidence, it cannot be reviewed unless all the evidence relating thereto is in the record,[31] and where it is based on a rule of court that rule must be shown.[32] In order that the supreme court may try an accounting had before a referee below

827; Hester v. Frary, 99 Ill. App. 51. And judicial notice will not be taken of the records of the court below—Bush v. Tecumseh Nat. Bank (Neb.) 90 N. W. 236. If properly preserved, poll books may be examined, though but for the appeal they would have already been destroyed by virtue of statute—Reed v. Jugenheimer (Iowa) 92 N. W. 859. Indorsement on a recognizance sent up as part of record may be considered as to time of forfeiture—Commonwealth v. Meeser, 19 Pa. Super. Ct. 1.

21. McConkie v. District Ct. (Iowa) 90 N. W. 716.

22. Hinson v. Ralston, 100 Ill. App. 214.

23. It will be presumed that the dates of giving and excepting to an instruction were the same where the record shows the date of filing and the exception—Skow v. Locks (Neb.) 91 N. W. 204.

24. Hugumin v. Hinds (Mo. App.) 71 S. W. 479.

25. Under Code Ala. § 1326, requiring such certificate in order that plaintiff may recover more costs than damages—Guttery v. Boshell, 132 Ala. 596.

26. Expenditures by a purchaser after sale in foreclosure and before reversal—Hunt v. Whitehead, 19 App. D. C. 116.

27. Appeal to United States supreme court from decree refusing to demand compliance with interstate commerce commissioners' order—Interstate Commission v. Chicago, B. & Q. R. Co., 186 U. S. 320, 46 Law. Ed. 1182.

28. Connor v. General Fire Extg. C., 73 App. Div. (N. Y.) 624.

29. Spier v. Hyde, 78 App. Div. (N. Y.) 151.

30. Niemeyer v. Woods, 72 App. Div. (N. Y.) 630.

31. Carnahan v. Connolly (Colo. App.) 68 Pac. 836; Griffith v. Finger, 115 Ga. 592; Carpenter v. Carpenter (Mich.) 89 N. W. 717; Rhodes v. Rhodes, 95 Mo. App. 327; Wills v. Hardcastle, 19 Pa. Super. Ct. 525; Lone Tree Ditch Co. v. Cyclone Ditch Co., 15 S. D. 519; Carrow v. Barre R. Co., 74 Vt. 176; Standish v. Bridgewater (Ind.) 65 N. E. 189; Eklund v. Martin, 87 Minn. 441; In re Eckhart's Estate (Wis.) 92 N. W. 363; Kansas City v. Parker, 65 Kan. 734, 70 Pac. 867. But see St. Paul Trust Co. v. Kittson (Minn.) 92 N. W. 500, in which it was said that where findings of ultimate facts are stated by the court to be based on certain conditions the evidence thereof as well as findings of the particular facts should be in the record. Refusal to stay or set aside execution will not be reviewed if facts not in record—Stephens v. Addis, 19 Pa. Super. Ct. 185. There must be a sufficient statement of evidence to show impropriety of rulings or an assignment of the errors—Southerland v. Sandlin (Fla.) 32 So. 786. Refusal of nonsuit not ordinarily exceptionable where evidence is not preserved—Cavanaugh v. Grady (R. I.) 52 Atl. 1027. Allowance to assignee for creditors not disturbed where facts were not in record—Woodcock v. Reilly (S. D.) 92 N. W. 10. Presumption from the record is that a refusal of liquor license resulting from disagreement was not arbitrary—In re Foreman's License, 20 Pa. Super. Ct. 98. Taxation of cost of harvesting distrained crops against the tenant is aided by presumption, in absence of evidence of a different arrangement—Gore v. Gardner (Tex. Civ. App.) 68 S. W. 520. Denial of a motion to suppress a notary's certificate of a witness' refusal to testify and refusal to allow the witness to testify will be presumed to have been justified by the character of the evidence where none of the evidence on the motion to suppress was given in the record—Weinert v. Simmang (Tex. Civ. App.) 68 S. W. 1011.

32. Carnahan v. Connolly (Colo. App.) 68 Pac. 836; Anaconda Min. Co. v. Heinze, 27 Mont. 161, 69 Pac. 909.

de novo, the evidence must be certified by the court.[33] Errors on the face of the record may be reviewed though there is no bill of exceptions.[34] The bill must show that the alleged error was prejudicial.[35]

Jurisdiction and venue.—Want of jurisdiction must be shown in the record to review a motion to dismiss on that ground,[36] and the same rule applies to an alleged disqualification of the judge,[37] or to a motion for change of venue.[38] An order reciting that a cause was stricken from the calendar because removed to the federal court and that court had taken jurisdiction will not show sufficiently the assumption of such jurisdiction where the whole order certified shows no fact in proof thereof though it might be assumed that it was shown by oral admission or stipulation.[39] An order reciting a motion to strike the cause from the calendar because of pendency of another action in the federal court on the same issues will not show that jurisdiction had been taken by the latter court where the files and record merely recite an answer raising the pendency of the prior action and that a motion to strike the cause was made on the same ground at trial but do not show that any proof was taken on the answer or any reply had or the answer admitted.[40] All reasonable presumptions will be indulged in favor of the jurisdiction[41] of a court of superior general jurisdiction.[42] The manner in which a special judge was secured to try a cause cannot be presumed to affect his jurisdiction where the record does not disclose it and it appears that no objection was taken to his action.[43] Where the record shows substitution of his personal representative on the death of a party plaintiff, it will be presumed that the appointment was made by a court of competent jurisdiction, and that the order of substitution was regular.[44]

Facts conferring appellate jurisdiction should appear in the record.[45] Where it appears that an appeal to the circuit from the justice court was not perfected within six days, but it is not shown that the appeal was taken from the justice during term time, it will be presumed on appeal to the appellate court that since the circuit court retained jurisdiction, the appeal was not taken during term time.[46]

33. Boone Hdw. Co. v. Lee (Iowa) 92 N. W. 69.

34. Hughes v. Henderson, 95 Mo. App. 312; Cornelius v. Ferguson (S. D.) 91 N. W. 460.

35. Littlefield v. Gray, 96 Me. 422. And see "Harmless Error" for presumptions as to the effect of error.

36. Meyer v. Phoenix Ins. Co., 95 Mo. App. 721. A case transferred down is presumed to be within the lower court's jurisdiction—Frank Bird Trf. Co. v. Krug (Ind. App.) 65 N. E. 309. Presumption on a silent record favors jurisdictional facts though not in complaint—Whittenberger v. Bower, 158 Ind. 673. Presumption will not aid absence of finding of jurisdictional facts—In re Snow, 96 Me. 570.

37. State v. Mack, 26 Nev. 430, 69 Pac. 862.

38. Duncan v. Thomas (Colo. App.) 69 Pac. 310.

39. Ashland v. Whitcomb, 114 Wis. 99.

40. The answer and motion were put in issue without a reply under Rev. St. Wis. 1898, § 2667—Ashland v. Wisconsin Cent. R. Co., 114 Wis. 104.

41. If the record fails to disclose any error in the jurisdiction of the subject-matter and parties or power of court to enter the judgment, it will be presumed regular in every respect—Carnahan v. Connolly (Colo. App.) 68 Pac. 836. It will be presumed in favor of the correctness of a judgment appealed from the probate court, that that court had jurisdiction for appointment of an administrator de bonis non and not that the jurisdiction still remained in the chancery court, though it appears that former administration was in the latter court—Henley v. Johnston, 134 Ala. 646.

42. Tapana v. Shaffray (Mo. App.) 71 S. W. 119; Von Hermann v. Berry, 102 Ill. App. 658; Stewart v. Rosengren (Neb.) 92 N. W. 586; Holland v. Cunliff (Mo. App.) 69 S. W. 737.

43. Nickerson v. Leader Mercantile Co., 90 Mo. App. 336.

44. Under Rev. St. Utah, § 2920, providing for revival of an action on death of a party—Warren v. Robison (Utah) 70 Pac. 989.

45. Findings below of the amount will control if there be no allegations or evidence in the record—Schreiner v. Emel, 26 Wash. 555, 67 Pac. 228.

In Illinois the pleadings may be examined to determine the amount involved in ex contractu actions only when there was no trial of fact; otherwise the supreme court decides solely on the evidence preserved in the record (1 Starr & C. 1896, c. 37, par. 28)—Pick v. Mutual Life Ins. Co., 192 Ill. 157; Murray Iron W'ks v. De Kalb Elec. Co., 200 Ill. 136.

46. Hadley v. Bernero (Mo. App.) 71 S. W. 451.

Process and pleading.—An amendment of process cannot be reviewed unless the original process and the amendment are in the record.[47] Sufficiency of a complaint cannot be reviewed unless all the pleadings are in the record.[48] The sufficiency of a bill of particulars cannot be determined in the absence of an inventory referred to.[49] The judgment overruling a demurrer must be in the record.[50] An admission of allegations is not presumed,[51] but where pleadings in a suit for taxes state that tax bills are filed therewith, which is not denied, it must be presumed on appeal that they were filed.[52] If the fact does not appear, it will not be presumed that titles were put in issue.[53] Issue will be presumed to have been taken on pleas to which objection had been entered, but not urged, and on which the case was submitted for final decree.[54] Where facts established by a verdict are not within issues made by the pleadings, it will be presumed, in the absence of statements in the record and settled case or bill of exceptions, that they were litigated by consent, so that the sufficiency of the pleadings will not be reviewed.[55] It may be supposed that a proper amendment of a petition was made to conform to proof.[56] Rulings on matters of process will be presumed correct.[57] If it does not appear otherwise, it will be presumed that a mother had notice of the appointment of a third person as guardian for her children.[58] Pleadings which have been treated by the trial court as filed will be so treated though not marked by the clerk.[59] An amended petition, filed and acted upon, will be presumed, nothing appearing to the contrary, to have been filed with the permission of the court.[60] It will be presumed that a motion for leave to amend which was denied was decided in the court's discretion and not because the court had no power to allow it.[61] It must be assumed that leave to plead was obtained on appeal from an order sustaining a demurrer to partial defenses, since the court can only pass on the sufficiency of partial defenses.[62] Where after three actions brought by a city were consolidated an order was entered overruling demurrers to the petition, the order will be regarded on appeal as made in all the consolidated actions.[63] A presumption that leave to amend an answer was refused as a matter of discretion when the order is silent as to ground is rebutted by a statement of the judge in the case on appeal that the ground was the insufficiency of the amendment offered.[64] Where an answer denying authority to sign a corporate note, in a suit thereon, is said in the

47. Saussay v. Lemp Brew. Co. (Neb.) 89 N. W. 1048.

48. Gerspach v. Barhyte (Colo. App.) 68 Pac. 1057.

49. Handy v. Powers, 70 App. Div. (N. Y.) 618.

50. A record recital being insufficient—Randall v. Wadsworth, 130 Ala. 633; Speer v. Crowder (Ala.) 32 So. 658.

51. If return to a mandamus is not in record, allegation of the petition will not be deemed to have been admitted—United States v. Hitchcock, 19 App. D. C. 347. A finding, that an affidavit was not seasonably filed in order to make allegations by way of replication or supplement conclusive unless denied by counter affidavit, will be sustained upon a silent record—In re Kunkle's Estate, 21 Pa. Super. Ct. 200.

52. Woolley v. Louisville, 24 Ky. Law Rep. 1357.

53. In partition—Sauer v. Schenck (Ind.) 64 N. E. 84.

54. Adair v. Feder, 133 Ala. 620.

55. Peach v. Reed, 87 Minn. 375.

56. Under 2 Ball. Ann. Codes & Sts. § 6535—Richardson v. Moore, 30 Wash. 406, 71 Pac. 18.

57. Refusal to quash service of summons will be held to be on sufficient evidence where the evidence on the motion was not in the bill of exceptions—Haskell v. Dutton (Neb.) 91 N. W. 395.

58. Beardsley v. Thomas (Tex. Civ. App.) 72 S. W. 411.

59. Jolliffe v. Maxwell (Neb.) 91 N. W. 563.

A recital that a paper was filed presupposes that it was delivered to the officer and served on him—Jarvis v. Chase Company (Neb.) 89 N. W. 624.

60. Reeves v. Pierce, 64 Kan. 502, 67 Pac. 1108.

61. Kelly v. New Haven Steamboat Co. (Conn.) 52 Atl. 261.

62. Gabay v. Doane, 77 App. Div. (N. Y.) 413.

63. Woolley v. Louisville, 24 Ky. Law Rep. 1357.

64. Ayers v. Makely, 131 N. C. 60.

65. Marshall Field Co. v. Oren Ruffcorn Co. (Iowa) 90 N. W. 618.

abstract to have been duly verified without setting out the verification, the latter will be presumed sufficient.[65]

Motions and affidavits.—To review the ruling on a motion, the record must show the motion itself,[66] the grounds thereof,[67] the affidavits on which motion is based,[68] and the ruling thereon.[69] Where there is a difference in the date of an affidavit mentioned in the bill of exceptions and the one filed in the transcript, it cannot be presumed that the one filed was the one read on the hearing.[70]

Proceedings at trial in general.—Improper remarks of counsel,[71] or of court,[72] questions asked of a juror,[73] a demand for a jury trial,[74] must appear in the record to review alleged error therein. The reasons for a request to peremptorily challenge after a juror has been accepted must appear.[75] The absence of the judge from the room during argument of counsel will be presumed to have been with consent of the parties and will not alone be ground for reversal.[76] Defendant will be presumed to have consented to the manner of trial and to the waiver of findings on a certain equitable defense offered, where it does not appear by the bill of exceptions that he requested the trial of such defense or that findings were refused thereon.[77] Where it appears that a juror was excused and another appointed, it must be presumed that the jury box was exhausted.[78] It will be presumed that the members of the jury board were competent though it is alleged that one of the three was incompetent where it is not shown that the other two members were disqualified.[79]

Admission or exclusion of evidence.—Rulings on the admissibility of evidence cannot be reviewed unless the record shows the evidence admitted,[80] or excluded.[81] A ruling on evidence will not be considered unless there is a showing as to its

66. Hamilton v. Maxwell, 133 Ala. 233; Chicago & S. E. R. Co. v. Woodard (Ind.) 65 N. E. 577; Craggs v. Bohart (Ind. Ter.) 69 S. W. 931; Muncie Gas Co. v. Muncie (Ind.) 66 N. E. 436. To strike out petition—Corrigan v. Kansas City, 93 Mo. 173. To review denial of motion for change of venue because not filed in time, the day when the cause was set for trial must appear—Goodwin v. Bentley (Ind. App.) 66 N. E. 496.

67. Terrill v. Tillison (Vt.) 54 Atl. 187. The record or transcript must show errors urged on motion for a new trial—Gregory v. Leavitt (Neb.) 89 N. W. 764; Gandy v. Cummins (Neb.) 89 N. W. 777.

68. Hamilton v. Maxwell, 133 Ala. 233; Kinney v. Bittinger (Neb.) 92 N. W. 1005. Judgment collaterally attacked for want of jurisdiction—Haupt v. Simington, 27 Mont. 480, 71 Pac. 672.

69. Striking out of plea—Moore v. Crosthwait, 135 Ala. 272; Chicago & S. E. R. Co. v. Woodard (Ind.) 65 N. E. 577; Wickes v. Pulfrey (Mich.) 91 N. W. 633; Kelly v. Morris, 101 Ill. App. 102. But where a new trial was granted, the court will examine the record to see if any ground therefor existed, the ground not being stated—Bernier v. Anderson (Idaho) 70 Pac. 1027. Counter affidavits presumed to have been ignored or not objected to where order on the motion does not refer to them—People v. Shea, 73 App. Div. (N. Y.) 237.

70. San Diego Sav. Bank v. Goodsell, 137 Cal. 420, 70 Pac. 229.

71. Groh's Sons v. Groh, 114 N. Y. 438; Shoemaker v. Bryant Mill Co., 27 Wash. 637, 68 Pac. 380; Warren v. Nash (Ky.) 67 S. W. 274. In Warren v. Nash, 24 Ky. Law Rep. 479, it was held that affidavits on motion for new trial sufficiently showed the error—Murphy v. Hopper, 75 App. Div. (N. Y.) 606; Guckavan v. Lehigh Traction Co., 203 Pa. 521.

72. Reamer v. Morrison Exp. Co., 93 Mo. App. 501.

73. It was claimed that false answers had been made—Elgin v. Nofs, 103 Ill. App. 11.

74. Southern R. Co. v. Beach (Ga.) 43 S. E. 413.

75. Allen v. State, 70 Ark. 22, 337.

76. Gorham v. Sioux City S. Y. Co. (Iowa) 92 N. W. 698.

77. Horwege v. Sage, 137 Cal. 539, 70 Pac. 621.

78. Under Acts Tenn. 1901, c. 124, §§ 4, 5, 8, requiring a substitute juror to be drawn from the box unless exhausted—Turner v. State (Tenn.) 69 S. W. 774.

79. Turner v. State (Tenn.) 69 S. W. 774.

80. Wells, etc., Co. v. Williams (Tex. Civ. App.) 71 S. W. 314; Brown v. Woodward (Conn.) 53 Atl. 112; Dubois v. Decker (C. C. A.) 114 Fed. 267; Freeman, etc., News Co. v. Mencken, 115 Ga. 1017; State v. Thompson, 91 Mo. App. 329. A finding that a writing did not express the intent of the parties is not sufficient to show that oral evidence was admitted to contradict it—Wallace v. Hendee (N. J. Sup.) 53 Atl. 694.

81. Grand Lodge v. Bunkers, 23 Ohio Cir. Ct. 487; Hunt v. Northwestern Mortg. Trust Co. (S. D.) 92 N. W. 23; Dresser v. Canadian Pac. R. Co. (C. C. A.) 116 Fed. 281; Supreme Lodge v. Robbins, 70 Ark. 364; Crane v. Blackman, 100 Ill. App. 565; Blackwell v. Mayfield (Tex. Civ. App.) 69 S. W. 659; O'Malley v. Com., 182 Mass. 196; Emory Mfg. Co. v. Rood, 182 Mass. 166; Carwile v. Carwile, 131 Ala. 603; Stevens v. Walton (Colo. App.) 68 Pac. 834.

relevancy,[82] and accordingly, the pleadings must be in the record.[83] Where a question does not clearly disclose the expected answer, an offer of proof must be made,[84] and the record must show such offer.[85] Where, on a trial of mental capacity, one of the parties was refused permission to introduce certain witnesses, it will not be presumed, on appeal from an order finding mental capacity restored, that such witnesses would have given evidence against the conclusion.[86] Exclusion of answers to certain questions cannot be held error unless the answers are set out in the bill of exceptions and error affirmatively appears.[87] Rulings as to the admissibility of evidence will be presumed to have been correct in the absence of contrary showing.[88] It will be presumed that a collateral attack on a judgment for want of jurisdiction of the person made in the court below was tried there by inspection of the judgment roll alone.[89]

Sufficiency of evidence.—If the sufficiency of the evidence is questioned, all the evidence must be presented.[90] The chancery rule is otherwise, appellee being

82. Volusia County Bank v. Bertola (Fla.) 33 So. 448; Taft v. Little, 78 App. Div. (N. Y.) 74.

83. Florida Cent. & P. R. Co. v. Seymour (Fla.) 33 So. 424; Consumers' Ice Co. v. Jennings (Va.) 42 S. E. 879.

84. See Saving Questions for Review.

85. Sesler v. Coal Co., 51 W. Va. 318; Freeman etc., News Co. v. Mencken, 115 Ga. 1017; Anthony Ittner Brick Co. v. Ashby, 198 Ill. 562; Broek v. Bear (Va.) 42 S. E. 307; Colson v. Linn, 101 Ill. App. 194. No offer of further proof is necessary where the exclusion was based on an erroneous view of the pleadings—Maugh v. Hornbeck (Mo. App.) 72 S. W. 153.

86. In re Lovern's Estate, 137 Cal. 680, 70 Pac. 783.

87. Carwile v. Carwile, 131 Ala. 603.

88. If the bill of exceptions fails to show when certain evidence was offered or for what purpose or the reason of objections thereto, an error therein will not be presumed—Volusia County Bank v. Bigelow (Fla.) 33 So. 704. Where it appears from the record that testimony in the bill of exceptions in another case was read on the trial, the appeal court will presume that the bill was properly authenticated and correctly read—Woodworth v. Gorsline (Colo.) 69 Pac. 705. Exclusion of a printed circular which it appears was used simply to advertise defendant's business without setting forth its contents in an action for services will be presumed to have been correct—Stevens v. Walton (Colo. App.) 68 Pac. 834. Where the reason for the exclusion of an answer is not given and it appears that the party objecting had the benefit of the testimony given, the supreme court cannot say that the exclusion was not because of mere repetition—Harp v. Harp, 136 Cal. 421, 69 Pac. 28. Admission of secondary evidence of corporate records—Missouri, K. & T. R. Co. v. Dilworth, 95 Tex. 327.

89. Haupt v. Simington, 27 Mont. 480, 71 Pac. 672.

90. People's Sav. Bank v. Gordon (Mo. App.) 71 S. W. 470; Speirs Fish Co. v. Robbins, 182 Mass. 128; Woodcock v. Reilly (S. D.) 92 N. W. 10; Mankameyer v. Egelhoff, 93 Mo. App. 183; Henderson v. Foster, 182 Mass. 447; Johnson v. Gehbauer (Ind.) 64 N. E. 855; State v. Lusk, 93 Mo. App. 680; Richardson v. Pennington (Ind. T.) 69 S. W. 838; Dixon v. Thomas, 91 Mo. App. 364; Heller v. Beal, 23 Ohio Cir. Ct. 540; Leavitt v. Bolton, 102 Ill. App. 582; Leicher v. Keeney (Mo. App.) 72 S. W. 145; Reder v. Bellemore (S. D.) 92 N. W. 1065; Peach v. Reed, 87 Minn. 375; Hopper v. Mather, 104 Ill. App. 309; Gay v. Havermale, 30 Wash. 622, 71 Pac. 190; Dauel v. Arnold, 103 Ill. App. 298; Louisville & N. R. Co. v. Collinsworth (Fla.) 33 So. 513; Chicago Horseshoe Co. v. Gostlin (Ind. App.) 66 N. E. 514. By evidentiary bill of exceptions and properly abstracted—Florida Cent. & P. R. Co. v. Seymour (Fla.) 33 So. 424; Younglove v. Knox (Fla.) 33 So. 427. Unless the special findings are inconsistent with any tenable theory under the issues—Kansas City L. R. Co. v. Frey (Kan.) 71 Pac. 525; American Tin Plate Co. v. Williams (Ind. App.) 65 N. E. 304; Uhlefelder v. Mt. Vernon, 76 App. Div. (N. Y.) 349; Spargur v. Prentiss (Neb.) 92 N. W. 300; Allen v. Henn, 197 Ill. 486; Metzger v. Morley, 99 Ill. App. 280; Rinehardt v. Reifers, 158 Ind. 675; Rush v. Landers, 107 La. 549; Fields v. Daisy Min. Co., 25 Utah, 76; United States Mortg. Co. v. Marquam, 41 Or. 391, 69 Pac. 37, 41; Pinkard v. Willis (Tex. Civ. App.) 67 S. W. 135; Tarrant County v. Reid (Tex. Civ. App.) 67 S W. 785; Allen v. Henn, 197 Ill. 486; Berry v. Rood, 168 Mo. 316; Thacker Mfg. Co. v. Mallory, 27 Wash. 670, 68 Pac. 199. By abstract—Gerspach v. Barhyte (Colo. App.) 68 Pac. 1057; Dennis v. Spence, 80 Miss. 396; Morton v. Clark, 181 Mass. 134; Leonard v. Harkleroad (Tex. Civ. App.) 67 S. W. 127; Clipper Min. Co. v. Eli Min. Co., 29 Colo. 377, 68 Pac. 286; Harris County v. Brady, 115 Ga. 767; Lange v. Heyer, 195 Ill. 420; Aldag v. Ott, 28 Ind. App. 542; Stadel v. Aikins, 65 Kan. 82, 68 Pac. 1088; Rumney v. Detroit, etc., Cattle Co. (Mich.) 89 N. W. 573; Williams v. Stroub, 168 Mo. 346; Clark v. Chicago & A. R. Co., 93 Mo. App. 456; Edwards v. Chicago & A. R. Co., 94 Mo. App. 36; Rutledge v. Tarr, 95 Mo. App. 265; Dittman Shoe Co. v. Graff (Neb.) 91 N. W. 188. Where all the evidence relating to the particular question on which a nonsuit was ordered is preserved it is sufficient—Goodale Lbr. Co. v. Shaw, 41 Or. 544, 69 Pac. 546. Case heard on agreed statement and certain papers, and only agreed statement included in record—Scott v. Cox (Tex. Civ. App.) 70

required to show in the record evidence sustaining the decree.[91] The record must affirmatively show that it contains all the evidence,[92] and a statement that the record contains all that is "necessary to a full presentation of the errors complained of" is not sufficient,[93] nor is a statement that the "substance" is included,[94] nor that the record contains all the "testimony."[95] It has been held that the showing that all evidence is included need not be express but only by a fair implication,[96] and where it appears on the face of the bill that its statement that all evidence is included is incorrect, the evidence cannot be reviewed.[97] A bill stating evidence and that thereupon both parties rested shows that it contains all the evidence.[98] In Michigan there must be findings of fact to authorize a review of the evidence.[99] Existence of a stipulated fact will be referred to the time of commencing suit rather than the time of trial.[1] A plaintiff appellee must see that the record sustains his judgment by including material facts.[2]

Instructions.—The instructions given or refused must appear properly in the record.[3] The giving or refusal of instructions cannot be reviewed unless the record contains the entire charge,[4] the evidence to which they relate,[5] the issues to which they relate;[6] and this applies particularly to instructions withdrawing part or all of the issues,[7] and the record must show that it contains the entire charge.[8] Modification of charges asked must be shown if complained of.[9]

S. W. 802. All evidence in condemnation proceedings must be in record to review it—Benton Harbor T. R. Co. v. King (Mich.) 91 N. W. 641; In re Rostraver Road, 21 Pa. Super. Ct. 195. In absence of evidence from record order of court confirming condemnation award over exceptions to the verdict will be favored by presumption—Macfarland v. Byrnes, 19 App. D. C. 531.

91. Jenkinson v. Koester, 86 Minn. 155; Owen v. Palmour, 115 Ga. 683; Home Sav. Ass'n v. Noblesville Church (Ind. App.) 64 N. E. 478; Glos v. Cratty, 196 Ill. 193.

92. United States v. Copper Queen Min. Co., 185 U. S. 495; Randall v. Wadsworth, 130 Ala. 633; Miller v. Dailey, 136 Cal. 212, 68 Pac. 1029; Power v. Stocking, 26 Mont. 478; 68 Pac. 857; Ramsey v. Burns, 27 Mont. 154, 69 Pac. 711; Adkins v. Monmouth, 41 Or. 266, 68 Pac. 737; Olson v. Oregon Short Line R. Co., 24 Utah, 460, 68 Pac. 148; Young v. Hatch (Colo.) 70 Pac. 693; Craggs v. Bohart (Ind. Ter.) 69 S. W. 931. There being no presumption that the record contains all the evidence—Watkins v. La Mar, 10 Kan. App. 226, 69 Pac. 730. But see Bush v. Tecumseh Nat. Bank (Neb.) 90 N. W. 236.

93. Lange v. Heyer, 195 Ill. 420.

94. Hancock v. Shockman (Ind. T.) 69 S. W. 826.

95. Craggs v. Bohart (Ind. T.) 69 S. W. 931.

96. Cincinnati, H. & D. R. Co. v. Thiebaud (C. C. A.) 114 Fed. 918.

97. Greenfield v. Johnson (Ind. App.) 65 N. E. 542.

98. Mullin v. Johnson, 98 Ill. App. 621.

99. Wickes v. Pulfrey (Mich.) 91 N. W. 633.

1. Glos v. Patterson, 195 Ill. 530.

2. O'Connall v. Thompson etc., Co., 72 App. Div. (N. Y.) 47.

3. Andrysiak v. Satkowski (Ind.) 63 N. E. 854, 65 N. E. 286; McCord v. Southern R. Co., 130 N. C. 491; Green v. Tate (Tex. Civ. App.) 69 S. W. 486.

4. **Instructions refused**—Garr v. Cranney (Utah) 70 Pac. 853; Beavers v. Bowen, 24 Ky. Law Rep. 882; Hancock v. Shockman (Ind. T.) 69 S. W. 826; Freeman, etc., News Co. v. Mencken, 115 Ga. 1017; Craggs v. Bohart (Ind. T.) 69 S. W. 931; Northern Pac. R. Co. v. Tynan (C. C. A.) 119 Fed. 288; Younglove v. Knox (Fla.) 33 So. 427. **Instructions given**—Rice v. Williams (Colo. App.) 71 Pac. 433; Ball v. Marquis (Iowa) 92 N. W. 691; Crossen v. Grandy (Or.) 70 Pac. 906; Florida Cent. & P. R. Co. v. Seymour (Fla.) 33 So. 424; Meyer v. Standard Tel. Co. (Iowa) 92 N. W. 720; Lord v. Guyot (Colo.) 70 Pac. 683; Timmonds v. Twomey (Ind.) 66 N. E. 446; Godfrey v. Hutchinson Grocer Co. (Okl.) 71 Pac. 627; Lesser Cotton Co. v. St. Louis, etc., R. Co. (C. C. A.) 114 Fed. 133.

5. **Instructions refused**—Florida Cent. & P. R. Co. v. Seymour (Fla.) 33 So. 424; Younglove v. Knox (Fla.) 33 So. 427; Volusia County Bank v. Bigelow (Fla.) 33 So. 704; Mexican Cent. R. Co. v. Wilder (C. C. A.) 114 Fed. 708; Sherwin v. Rutland R. Co., 74 Vt. 1. **Instructions given**—Rice v. Williams (Colo. App.) 71 Pac. 433; Ball v. Marquis (Iowa) 92 N. W. 691; Crossen v. Grandy (Or.) 70 Pac. 906; Meyer v. Standard Tel. Co. (Iowa) 92 N. W. 720; Lord v. Guyot (Colo.) 70 Pac. 683; Timmonds v. Twomey (Ind.) 66 N. E. 446; Lesser Cotton Co. v. St. Louis, etc., R. Co. (C. C. A.) 114 Fed. 133. But it is otherwise where the instructions could not have been good under any state of the evidence—Downing v. State (Wyo.) 69 Pac. 264.

6. Hutchins v. Missouri Pac. R. Co. (Mo. App.) 71 S. W. 473.

7. Deering & Co. v. Hannah, 93 Mo. App. 618; Advance Thresher Co. v. Esteb, 41 Or. 469, 69 Pac. 447. Plaintiff had dismissed two counts and filed another and it did not appear what change if any was thereby made. It was objected that the instructions did not call attention to the dismissal of the two counts—Malott v. Hood, 201 Ill. 202.

An exception to an instruction must show prejudice to the party making it in order to show error in the instruction.[10] If an appellant alleges error in the refusal of an instruction that he had complied with his contract, in an action to enforce it, his abstract must show such compliance.[11] Instructions not given in the bill of exceptions will be presumed to have been properly given or refused,[12] but it cannot be presumed that the judge below performed his duty or that the instructions in the record constitute all that were given or refused, where they were neither signed by the judge nor indorsed.[13] It will be presumed that sufficient instructions were given for proper submission of a question.[14] If it can be presumed consistently with the statement in the record of the effect of instructions offered in evidence, where only the general effect is given, it will be presumed that they supported the conclusions of the court.[15] Where no instructions appeared to have been given or refused, it must be presumed that the court gave the correct rule for the measure of damages.[16] It will not be presumed that the attention of the court was not called to the omission of a word from an instruction by mistake, but rather that errors in instructions as to which exceptions are taken were pointed out to the court by counsel.[17] An exception for "defendant" will be presumed to have been taken for the defendant which the attorney represented, where it appears that he was authorized only to act for one of two defendants.[18] Where there are exceptions to instructions in the transcript, after the charge and before the record of submission to the jury and entry of the verdict, with an entry which shows them to have been filed with the instructions, and a certificate by the clerk that they are a part of the record, the same presumption will obtain as when notation is made by counsel on the written charges,[19] unless necessity is shown for an instruction that it was properly refused.[20]

Verdict or findings and judgment.—Necessary findings must be made and must appear.[21] Propositions which the court below of its own motion held to be law are of the record though not requested and will be reviewed like instructions given by the court on its own motion.[22] If no propositions of law are submitted to the court below, it will be presumed that all questions of law arising are properly decided.[23] The conclusions of law cannot be reviewed when the findings of fact are not in the record.[24] The relevancy of questions submitted to the jury cannot be reviewed in the absence of the evidence,[25] nor can the amount of the verdict.[26] A general verdict, together with answers to specific questions, though the latter are not sufficiently complete to authorize a judgment, will be presumed to cover all facts necessary to a judgment on the special findings, where no inconsistency is shown between the general verdict and the special findings.[27] It will be presumed that the jury followed the instructions of the court.[28] The authority of the judge will

8. Dubois v. Decker (C. C. A.) 114 Fed. 267; Danville v. Schultz, 99 Ill. App. 287; Board of Com'rs v. Gibson, 158 Ind. 471. But it need not directly appear that no other instructions were given—Warren v. Nash, 24 Ky. Law Rep. 479.

9. Grand Lodge v. Bunkers, 23 Ohio Cir. Ct. 487.

10. Copeland v. Hewett, 96 Me. 525.

11. Way v. Miller, 91 Mo. App. 53.

12. Corey v. Havener, 182 Mass. 250.

13. Under Code, Colo. § 187. subds. 6, 7—Lord v. Guyot (Colo.) 70 Pac. 683.

14. Lee v. Tarplin (Mass.) 66 N. E. 431.

15. Holland v. Cunliff (Mo. App.) 69 S. W. 737.

16. Ottofy v. Keyes, 91 Mo. App. 146.

17. Carleton Min. Co. v. Ryan, 29 Colo. 401, 68 Pac. 279.

18. Bowen v. O'Hair, 29 Ind. App. 466.

19. Lincoln v. Sager (Neb.) 89 N. W. 617.

20. Glanz v. Chicago, etc., R. Co. (Iowa) 93 N. W. 575.

21. Necessary findings to support decision not presumed though recited by decree—In re Sherwood's Estate, 75 App. Div. (N. Y.) 342.

22. London G. & A. Co. v. Mosness, 98 Ill. App. 651.

23. Hercules C. & M. Co. v. Frazer, 102 Ill. App. 307.

24. Lillard v. Mather, 28 Ind. App. 583.

25. Atchison, T. & S. F. R. Co. v. Scaggs, 64 Kan. 561, 67 Pac. 1103.

26. Huff v. Parker (Miss.) 31 So. 833.

27. Eklund v. Martin, 87 Minn. 441.

28. Rosser v. Western Union Tel. Co., 130 N. C. 251. Where in an action brought

be presumed to have been given to the act of the clerk in making a record of the refiling of the finding.[29] It will be presumed that a default entered by the court on the same day on which defendant filed a general demurrer was entered before the filing of the demurrer where it does not appear that the demurrer was on file at time of entry.[30] A decree of dismissal on general demurrer will be presumed to have been upon the merits and not for want of jurisdiction unless it appears otherwise from the decree.[31]

F. Rulings peculiar to province of trial court. 1. *Discretionary rulings in general; interlocutory and provisional orders.*—The discretion of the lower court is not an unlimited power, and its rulings and judgments during the progress of the cause are open to review,[32] but discretionary acts and rulings will never be disturbed unless abuse of the discretion is shown.[33] The rule applies to the refusal of a presiding judge to remove a proceeding for mandamus to a court of equity,[34] and grant or refusal of a change of venue,[35] and to allowance or refusal of an order for examination of a party or corporate officer to obtain facts on which to found an action against a corporation,[36] and if it does not appear that irreparable injury will result, to an order for the production of books and papers,[37] and the reference of a case where there is a conflict in the evidence as to whether the issue involves the examination of an account,[38] and the overruling of a motion to recommit a referee's report.[39] The granting or denial of a motion for a continuance[40] or an ancillary order appointing a receiver,[41] or grant or refusal of a temporary injunction,[42] or the vacation or dissolution of a preliminary injunction[43] and a ruling on an application for additional temporary alimony,[44] will not be reviewed except where clear abuse of discretion is shown. After final judgment, the discretion of the trial court in assuming jurisdiction of an action by the public administrator for the

on two counts, one of the counts was abandoned and the jury disregarded the instruction as to the amount of verdict to be found for plaintiff, it cannot be presumed that the verdict was based on the count which had been abandoned contrary to the instructions of the court—McClung v. Moore, 136 Cal. 181, 71 Pac. 88.

29. Verzier v. Conrard, 75 Conn. 1.

30. Grant v. Commercial Nat. Bank (Neb.) 93 N. W. 185.

31. Bradford Belting Co. v. Kisinger-Ison Co., 113 Fed. 811, 51 C. C. A. 483.

32. Cabanne v. Macadaras, 91 Mo. App. 70.

33. Discretion in relieving party from effects of order or other proceeding because of excusable default—Moore v. Thompson, 138 Cal. 28, 70 Pac. 930; Hollister v. Donahoe (S. D.) 92 N. W. 12.

34. Under Act 1896, c. 229, providing for removal of causes from courts of law to equity in the discretion of the judge presiding—Summerson v. Schilling, 94 Md. 581.

35. Doll v. Stewart (Colo.) 70 Pac. 226; Heinl v. Terre Haute (Ind.) 66 N. E. 450. After two trials and the consideration of counter-affidavits on the motion by the trial court—Faivre v. Manderschied (Iowa) 90 N. W. 76.

36. The supreme court will not interfere on the ground that his answers may tend to incriminate him, as that objection may be made below—In re Porter Screen Mfg. Co. (N. Y.) 70 App. Div. 329.

37. Succession of Marks, 108 La. 494.

38. Salem Traction Co. v. Anson, 41 Or. 562, 67 Pac. 1015; 69 Pac. 675.

39. Jeffers v. Pease, 74 Vt. 215.

40. Hannum v. Hill, 52 W. Va. 166; Miles v. Ballantine (Neb.) 93 N. W. 705; Scott v. Boyd (Va.) 42 S. E. 915. On appeal from a final decree—United States v. Rio Grande Irr. Co., 184 U. S. 416; Empire Coal Co. v. Hull Coal Co., 51 W. Va. 474. Where no objections have been filed—Ida Co. Sav. Bank v. Seidensticker (Iowa) 92 N. W. 862.

41. St. Louis, V. & T. H. R. Co. v. Vandalia, 103 Ill. App. 363.

42. Stearns-Roger Mfg. Co. v. Brown, 114 Fed. 939, 52 C. C. A. 559. Temporary injunction in patent case on giving bond will stand if infringement cannot be determined until final hearing—Stearns-Rogers Mfg. Co. v. Brown (C. C. A.) 114 Fed. 939. In ancillary suit followed by a similar order of another court in the principal case—United States Gramophone Co. v. Seaman, 113 Fed. 745, 51 C. C. A. 419.

43. Dickson v. Dows (N. D.) 92 N. W. 797. Vacating temporary injunction restraining the laying of a railroad on a street during the pendency of an action to determine rights to the street—Rochester & E. R. R. Co. v. Monroe County Elec. Belt Line Co., 78 App. Div. (N. Y.) 38. Applied for on bill, answer and affidavits—Baya v. Lake City (Fla.) 33 So. 400. Where ex parte proofs on hearing of a motion for preliminary injunction are conflicting—Chickering v. Chickering (C. C. A.) 120 Fed. 69.

44. Motley v. Motley, 97 Mo. App. 473.

death of a nonresident killed in a foreign state will not be disturbed.[45] Whether an injunction shall be made perpetual leaving defendant to another remedy or whether it shall be made on terms adjusting the rights of the parties is discretionary and will not be reviewed.[46] Where it appears that a preliminary restraining order was granted before answer filed and that the opposition to the motion was made on affidavits only, the discretion of the court will not be disturbed by a review of the merits of the case, where the bill shows a right to preliminary relief.[47] On the question whether discretion was abused in granting an injunctional order, the protection afforded defendant will be considered.[48] An award of alimony,[49] or of a share of the community property to a divorced person when evidently the result of a proper discretion, will be sustained.[50]

Dismissal and nonsuit.—Ruling on an application for dismissal,[51] without prejudice for failure of proof,[52] will not be reviewed, but will be presumed to have been proper where neither the record nor the statement of facts filed show the grounds thereof.[53] All facts warranted by the evidence must be presumed as having been settled for plaintiff, where the verdict was directed for him on a certain part of the claim and dismissed as to other items without evidence.[54] Failure of the court to dismiss on its own motion an action to enforce a contract against public policy may be reviewed, since the determination of the question of public policy is not discretionary, but involves a decision of law.[55] Allegations of fact are taken as true on appeal from dismissal on complaint and opening,[56] or review of a nonsuit,[57] and on appeal from a judgment dismissing an action for want of evidence plaintiff is entitled to the most favorable inferences that may be drawn from the evidence,[58] and will be entitled to have disputed facts treated as found in his favor.[59]

Orders relating to pleadings.—Unless a gross abuse of discretion is shown, the granting or refusal of leave to file an amended and supplemental bill,[60] or a supplemental answer,[61] denial of a motion to strike a paragraph from a complaint as surplusage,[62] refusal of the lower court after reversal to allow an amendment by plaintiff pending the rendition of a judgment following the mandate,[63] refusal of leave to further plead after one amendment after successful demurrer,[64] to allow the filing of a supplemental answer which does not set forth facts constituting, if true, a bar to the action,[65] to permit defendant an amendment to his answer to a bill at the hearing,[66] or allowance of answer or reply or other act after the time limited,[67] or during the trial, will not be reviewed.[68] The rule must be otherwise

45. Hoes v. New York, N. H. & H. R. Co., 73 App. Div. (N. Y.) 363.
46. Peck v. Schenectady R. Co., 170 N. Y. 298.
47. Whitson v. Columbia Phonograph Co., 18 App. D. C. 565.
48. Amount of bond and privilege of dissolving on giving counter security—American Co. v. Cimiotti Co. (C. C. A.) 118 Fed. 838.
49. Breedlove v. Breedlove, 27 Ind. App. 560.
50. Gorman v. Gorman, 134 Cal. 378, 66 Pac. 313.
51. Bee Building Co. v. Dalton (Neb.) 93 N. W. 930; Friedrich v. Fergen, 15 S. D. 541.
52. Especially where none of the evidence appears in the record—Ebner v. Zimmerly (C. C. A.) 118 Fed. 818.
53. Johnson v. Spokane, 29 Wash. 730, 70 Pac. 122.
54. Becker v. New York, 170 N. Y. 219.
55. Cullison v. Downing (Or.) 71 Pac. 70.
56. Montgomery v. Boyd, 78 App. Div. (N. Y.) 64.
57. Veazey v. Allen, 173 N. Y. 359.
58. Dismissal of action for negligence in placing an obstruction in street because of insufficient evidence to connect the defendant with the act—Parkes v. Metropolitan St. R. Co., 37 Misc. Rep. (N. Y.) 844.
59. Whitaker v. Staten Island Midland R. Co., 72 App. Div. (N. Y.) 468.
60. Berliner Gramophone Co. v. Seaman, 113 Fed. 750, 51 C. C. A. 440; Berliner Gramophone Co. v. Same (C. C. A.) 115 Fed. 806.
61. Balk v. Harris, 130 N. C. 381.
62. Marx v. Miller, 134 Ala. 347.
63. Kelly v. New Haven Steamboat Co. (Conn.) 52 Atl. 261.
64. Under Mills' Ann. Code, §§ 73, 75—King v. Mecklenburg (Colo. App.) 68 Pac. 984.
65. Balk v. Harris, 130 N. C. 381.
66. Tufts v. Waxman, 181 Mass. 120.
67. Under Code, § 274—White v. Lokey, 131 N. C. 72; Best v. British, etc., Mortg. Co., 131 N. C. 70.
68. Hubenka v. Vach (Neb.) 89 N. W. 789.

if the facts stated in the supplemental answer, if true, would constitute a bar to the action.[69] Refusal to allow a complaint to be amended, if on erroneous grounds, will be reviewed though generally such acts are discretionary.[70]

Rulings relating to trial or evidence.—Rulings relating to the order and sequence of proofs offered,[71] the admission of evidence of a witness who has disobeyed an order for exclusion of witnesses,[72] the allowance of an interpreter for witness,[73] the determination by the court as to what transactions are properly considered by the jury as connected with the matter in dispute,[74] the exclusion of remote evidence,[75] the decision as to the qualifications of a witness offered as an expert,[76] the ruling on the right to cross-examine persons whose affidavits were offered,[77] the latitude allowed on cross-examination of a witness,[78] are all matters of discretion for the lower court. Though the suspension or enforcement of the rule limiting cross-examinations to evidence in chief to the order in which the evidence is introduced is discretionary, the judgment may be reversed on appeal for the action of the lower court in this regard, that serious injury may not result therefrom to the rights of a party.[79]

The trial of cases outside of their regular order by direction of the court will be presumed to have been for sufficient cause in the absence of a contrary showing.[80] The control of the argument of counsel,[81] or the rebuke for improper argument,[82] or the allowance of a motion to withdraw a juror because of improper remarks of counsel in summing up,[83] the action of the court regarding improper comment by an attorney during cross-examination,[84] and the limit of time for argument,[85] are all discretionary matters and will not be reviewed unless the restrictions are unjust.

Refusal to direct a verdict will not be disturbed.[86] The evidence of the moving party only will be considered, in so far as it supports the case of the other party, in determining the correctness of a directed verdict.[87] Each party will be given the benefit of all inferences to be drawn from the evidence, where all the evidence

69. Balk v. Harris, 130 N. C. 381.

70. Martin v. Bank of Fayetteville, 131 N. C. 121.

71. The refusal of the trial court to allow defendant to introduce proofs of death made by plaintiff in an action on a life policy as claimed in connection with plaintiff's cross-examination—Hennessy v. Metropolitan Life Ins. Co., 74 Conn. 699. The admission of testimony on re-examination of a witness which should have been introduced on his examination in chief—Williams v. Stroub, 166 Mo. 346. The admission of further evidence after the closing argument and submission of the case—Stivers v. Conklin, 103 Ill. App. 288. Refusal to reopen issues on appeal from highway proceedings to circuit court is discretionary—Fifer v. Ritter (Ind.) 54 N. E. 463. The allowance of testimony out of time—Ulysses Elgin Butter Co. v. Hartford Fire Ins. Co., 20 Pa. Super. Ct. 384.

72. Murray v. Allerton (Neb.) 91 N. W. 518.

73. Braunowski v. National Box Co., 104 Ill. App. 338.

74. Buck v. Hogeboom (Neb.) 90 N. W. 835.

75. Spalding v. New Hampshire Fire Ins. Co., 71 N. H. 441.

76. Watriss v. Trendall, 74 Vt. 54.

77. For injunction—Union Terminal Co. v. Wilmar & S. F. R. Co., 116 Iowa, 392.

78. Yingling v. Redwine (Okl.) 69 Pac. 519.

79. O'Connell v. Pennsylvania Co. (C. C. A.) 116 Fed. 989.

80. Under Rev. St. Ill. c. 110, § 17, allowing cases to be tried out of their order for sufficient cause—Staunton Coal Co. v. Menk, 99 Ill. App. 254.

81. Sinclair Co. v. Waddill, 99 Ill. App. 334.

82. Obuchon v. Boyd, 92 Mo. App. 412.

83. Cattano v. Metropolitan St. R. Co., 173 N. Y. 565.

84. Davis v. Streeter (Vt.) 54 Atl. 185.

85. Schrandt v. Young (Neb.) 89 N. W. 607.

86. Kelly v. Strouse (Ga.) 43 S. E. 280; Woodson v. Holmes (Ga.) 43 S. E. 467. Though Civ. Code Ga. § 5331, gives the trial judge power to direct a verdict—Owen v. Palmour, 115 Ga. 683. Refusal below to direct a verdict for defendant because of improbability of plaintiff's testimony will not be ground for reversal where the matter properly belongs to the jury as concerning the credibility of a witness and can be reviewed only by the court below on motion for a new trial—Texas & P. R. Co. v. Gardner, 114 Fed. 186, 52 C. C. C. A. 142. The refusal to direct a verdict for defendant at the close of all the evidence will not be reviewed to determine the weight of the evidence, but only whether there was any evidence tending to support plaintiff's claims—Chicago City R. Co. v. Loomis, 201 Ill. 118.

87. Merchants' Nat. Bank v. Stebbins, 15 S. D. 280.

offered by one was rejected by the court and a verdict directed for the other.[88] The allowance of a demurrer to the evidence may be reviewed on writ of error.[89]

Grant of new trial or rehearing or settlement of exceptions.—An order granting or refusing a new trial will not be reviewed unless the discretion of the court has been abused,[90] where there is a substantial conflict in the evidence,[91] or the evidence is partly parol,[92] though the verdict was rendered in the absence of either party,[93] and though the judgment might have been affirmed,[94] and this is especially true on an award of a first new trial where the evidence is conflicting,[95] or where based solely on a question of law,[96] or where the defeated party made no motion for judgment or nonsuit on the trial,[97] or where it does not appear that the verdict was absolutely required by the evidence,[98] and in reviewing such case, the court will only consider the evidence so far as necessary to determine whether the trial court properly exercised its discretion,[99] but the review of an allowance of a new trial cannot be refused merely on the ground that the trial court was in a better position to understand the situation than the appeal court.[1] A finding on motion for a new trial that both parties consented to the presence of exhibits in the jury room is conclusive.[2] A judgment will not be reversed for refusal to grant a new trial on account of excessive damages, unless the evidence shows passion or prejudice on the part of the jury.[3] The grant of a new trial conditioned on payment of costs,[4] or be-

88. Horbach v. Boyd (Neb.) 89 N. W. 644.

89. University of Va. v. Snyder (Va.) 42 S. E. 337.

90. Walker v. Moser (C. C. A.) 117 Fed. 230; Chancey v. County Court, 51 W. Va. 252; Baker v. Branan, 115 Ga. 670; Jones v. Spence, 115 Ga. 794; Bevering v. Smith (Iowa) 90 N. W. 840; Ortt v. Leonhardt (Mo. App.) 68 S. W. 577; Laclede Power Co. v. Nash-Smith Tea Co., 95 Mo. App. 412; Manzigian v. Boyajian (Mass.) 66 N. E. 413; Hanson v. Diamond Iron Min. Co., 87 Minn. 505; Ward v. Joslin, 186 U. S. 142; Jordan v. Parsons, 115 Ga. 455; Hayward v. Langmaid, 181 Mass. 426; Slattery v. Supreme Tent, 19 Pa. Super. Ct. 108; Alabama G. S. R. Co. v. Hamilton, 135 Ala. 343; Harloe v. Berwick, 138 Cal. xix., 70 Pac. 1060; St. Louis Trust Co. v. Murmann, 90 Mo. App. 555; Merrill v. Brantley, 133 Ala. 537; McCormick Harvesting Mach. Co. v. Calta, 86 Minn. 287; Copeland v. Copeland, 64 S. C. 251. On ground of insufficiency of evidence—Burr v. Harty (Conn.) 52 Atl. 724; Lammers v. Butler-Ryan Co. (Minn.) 92 N. W. 523; Vastine v. Rex, 93 Mo. App. 93; State v. Todd, 92 Mo. App. 1; Jangraw v. Mee (Vt.) 54 Atl. 189; Southern R. Co. v. Lollar, 135 Ala. 375. There must be a clear showing of prejudice—Tradewater Coal Co. v. Lee, 24 Ky. Law Rep. 215. It is sufficient that there was some evidence supporting the verdict—Atlanta v. Milam, 115 Ga. 15; Haltiwanger v. Columbia, N. & L. R. Co., 64 S. C. 7; Manhattan Oil Co. v. Richardson Lubricating Co. (C. C. A.) 113 Fed. 923. Insufficiency of evidence as shown by character thereof and of the witnesses, would justify setting aside a verdict after denial of a new trial for insufficiency of evidence—Cole v. Detroit Elec. R. Co. (Mich.) 92 N. W. 935. Sufficiency of evidence to show that the trial judge exceeded his discretion in overruling a motion for a new trial in a civil case for undue influence on the jury—Hall-Moody Inst. v. Copass, 108 Tenn. 582. Where it appears from the record on denial of defendant's motion for a new trial that plaintiff's evidence does not sustain the theory set up in the declaration—Western & A. R. Co. v. Hunt (Ga.) 42 S. E. 785. Where contributory negligence is plainly shown by evidence in action for personal injuries and no negligence is shown on part of defendant, refusal of his motion for new trial after verdict for plaintiff, will be ground for reversal—Birmingham R., L. & P. Co. v. Owens, 135 Ala. 154. Motion for new trial on the ground of newly discovered evidence, the facts being contradictory—Culp v. Mulvane (Kan.) 71 Pac. 273; Anderson v. Medbery (S. D.) 92 N. W. 1087; San Antonio & A. P. R. Co. v. Moore (Tex. Civ. App.) 72 S. W. 226.

91. Sullivan v. Market St. R. Co., 136 Cal. 479, 69 Pac. 143; Campbell v. Great Falls, 27 Mont. 37, 69 Pac. 114; Rand v. Kipp, 27 Mont. 138, 69 Pac. 714.

92. Ottumwa Nat. Bank v. Totten, 94 Mo. App. 596.

93. White v. Hoster Brew. Co., 51 W. Va. 259.

94. Louisville v. Johnson, 24 Ky. Law Rep. 685.

95. Seifert v. Freeman, 115 Ga. 353; Allen v. Lumpkin (Ga.) 43 S. E. 54.

96. Macon Consol. St. R. Co. v. Jones (Ga.) 42 S. E. 468.

97. Ruckman v. Dormond (Or.) 70 Pac. 707; Knox v. Ward, 38 Misc. Rep. (N. Y.) 801.

98. Cox v. Atkinson, 115 Ga. 723; Fenn v. Maddox, 115 Ga. 795; Thornton v. Travellers' Ins. Co., 116 Ga. 121.

99. Pengilly v. Case Threshing Mach. Co. (N. D.) 91 N. W. 63.

1. Reeder v. Traders' Nat. Bank, 28 Wash. 139, 68 Pac. 461.

2. Walker v. Newton, 9 Detroit Leg. N. 151, 90 N. W. 328.

3. Morton v. Moran, 30 Wash. 362, 70 Pac. 968. Damages for unlawful appropriation of telegraph right of way over plaintiff's lands—Phillips v. Postal Tel. Cable Co., 130 N. C. 513.

cause the verdict is against the weight of evidence, without imposing payment of costs as a condition, will not be disturbed where the verdict appears unsupported by the evidence.[5] The grant of a new trial will be sustained for error in directing a verdict where the evidence will warrant recovery on any ground within plaintiff's pleadings,[6] or where it appears that the jury after long deliberation received the impression from the court's instructions that they would not be discharged until they agreed.[7] The reasons given by the lower court in its opinion for granting a new trial will not limit the action of the court of appeal where the order was general,[8] but if the order can be sustained on any ground assigned, it will be affirmed though the trial court specified a particular ground for allowance,[9] or where the order was general and one of the grounds was insufficiency of evidence,[10] for the reason that defendant was deprived of the testimony of a certain witness though the witness properly refused to testify,[11] and the appeal court will not determine whether the judgment is the proper legal conclusion from the facts.[12] An order granting a new trial based only on the legal conclusion that the special verdict was inconsistent and evasive may be reviewed as not within the court's discretion.[13] If a failure to prosecute a motion for a new trial is not sufficiently excused, refusal to reinstate the motion after dismissal will not be disturbed.[14] A determination as to the sufficiency and diligence necessary to obtain a new trial for newly discovered evidence will not be disturbed except on the most convincing grounds.[15] The action below in setting aside a judgment and granting a new trial will be presumed to have been regularly taken on sufficient evidence,[16] and if the motion is made on several grounds and allowed, it will be presumed that it was allowed for the one showing an error, if the ground is not shown on the record;[17] but it cannot be presumed that the motion was filed within the statutory time,[18] nor that the court heard evidence outside the affidavits on a motion for a new trial where no such evidence appears by the record,[19] nor, if the exceptions taken by defendant at the trial are not in the record, that a new trial was not properly ordered as against the weight of the evidence.[20] If an order for a new trial is general in its terms, it will be presumed that evidence was held insufficient by the court below in that it was against the findings of the jury,[21] but it cannot be assumed that it was based on any particular ground, and the court will look into the correctness of the rulings on the admission or rejection of evidence and the giving of instructions.[22] Where it does not appear from the order what was the ground upon which a new trial was granted, but the record shows that it might have been made because of insufficiency of the evidence,[23] or that evidence

4. Under Code W. Va. c. 138, § 5—Garber v. Blatchley, 51 W. Va. 147.

5. Lashaway v. Young, 76 App. Div. (N. Y.) 177.

6. Veatch v. Norman, 95 Mo. App. 500.

7. Rodgers v. Farmers' Nat. Bank (Iowa) 91 N. W. 773.

8. Ben Lomond Wine Co. v. Sladky (Cal.) 71 Pac. 178.

9. Dundon v. McDonald, 137 Cal. 1, 69 Pac. 498.

10. Ben Lomond Wine Co. v. Sladky (Cal.) 71 Pac. 178.

11. Reno M. & L. Co. v. Westerfield (Nev.) 69 Pac. 899.

12. Bryan v. Bryan, 137 Cal. xix., 70 Pac. 304.

13. Miller v. Casco (Wis.) 93 N. W. 447.

14. Fulton Grocery Co. v. Maddox, 114 Ga. 913.

15. German Nat. Bank v. Atherton (Neb.) 90 N. W. 550; Pengilly v. Case Threshing Mach. Co. (N. D.) 91 N. W. 63.

16. Presumption invoked to reconcile apparently conflicting statements in bill of exceptions as to hearing of motion and settlement of bill—Pendo v. Beakey, 15 S. D. 344. Under Code Neb. § 602—Grand Lodge v. Scott (Neb.) 93 N. W. 190.

17. Insurance Co. v. Evans, 64 Kan. 770, 68 Pac. 623.

18. Pound's Estate v. Cassity, 91 Mo. App. 424. However see—Schallehn v. Hibbard, 64 Kan. 601, 68 Pac. 61.

19. Head v. Ayer & L. Tie Co., 24 Ky. Law Rep. 728.

20. Serwer v. Serwer, 71 App. Div. (N. Y.) 415.

21. Harrington v. Butte & B. Min. Co., 27 Mont. 1, 69 Pac. 102.

22. Under Rev. St. § 901, requiring the order for a new trial to specify the ground on which it was based—Roe v. Bank of Versailles, 167 Mo. 406.

23. Harloe v. Berwick, 138 Cal. xix., 70 Pac. 1060.

was improperly admitted, it will be presumed that the court exercised discretion in granting a new trial on that ground.[24] Where a motion for a new trial regularly made is overruled after the term and at a time when, under the law, a term of court might be in session in another county in the district, and no objections are made that it was considered in vacation, it will be presumed that it was overruled at an adjourned day of the regular term.[25] Where a new trial may have been granted either for insufficiency of evidence or error of law at the trial, it will be presumed that the order was made on the latter ground.[26] Where no reason is assigned therefor, it will be presumed that a new trial was granted because of the court's disapproval of the verdict either as against the weight of the evidence or because inconsistent, if special, especially where costs are imposed as a condition of the grant.[27] It will be presumed that denial of a motion for retrial was made in the court's discretion and not because of lack of power to allow it.[28] If a statement certified by the judge does not purport to contain all the evidence but is stipulated to be correct, it will be presumed that only sufficient evidence has been included to explain the ground specified in the notice of the motion for a new trial for insufficiency of evidence.[29] A final decree will not be reversed because of error in denying application for a rehearing.[30]

It will be presumed that the time for filing was extended by the court for good cause or by consent of the other party, where the bill is not filed until after expiration of the statutory period, though no recital appears in the record as to such extension.[31] Where a motion to dismiss an appeal is made because an order extending the time for a bond and bill of exceptions was made ex parte, it will be presumed that notice of the order was given, where there is no recital in the record.[32]

Matters relating to judgments or costs.—Allowance of a motion to set aside a default[33] entered for want of an affidavit of defense where the ground alleged was technical and defendant delayed for four months after entry and issuance of execution before seeking to have the judgment set aside,[34] or for failure to file an amended complaint within the time granted,[35] or where the court directs a trial anew on the merits,[36] is discretionary though excusable neglect as ground for setting aside was clearly shown.[37] So, also, rulings on an application to set aside[38] or amend a judgment,[39] to admit evidence on a technical issue,[40] or to open a judgment of nonsuit, though it appears severe,[41] are sustained as being discretionary. A finding of fact on a motion by defendant to open a judgment taken on excusable default will not be reviewed unless abuse of discretion is shown.[42] The overruling of a motion during term to vacate for an unauthorized appearance by an attorney will not be disturbed except on the strongest evidence where it appears that there was a general

24. Rembt v. Roehr Pub. Co., 71 App. Div. (N. Y.) 459.
25. State Ins. Co. v. School Dist. (Kan.) 71 Pac. 272.
26. Berg v. Olson (Minn.) 93 N. W. 309.
27. Giese v. Milwaukee Elec. R. & L. Co. (Wis.) 92 N. W. 356.
28. Kelly v. New Haven Steamboat Co. (Conn.) 52 Atl. 261.
29. Code Civ. Proc. Cal. § 659, subd. 3, providing for the sufficiency of notice of a motion for a new trial—Cahill v. Baird (Cal.) 70 Pac. 1061.
30. United States v. Rio Grande D. & I. Co., 184 U. S. 416.
31. Coler v. Sterling, 15 S. D. 415.
32. McKenzie v. Murphy, 29 Colo. 485, 68 Pac. 838.
33. Watts v. Bruce (Tex. Civ. App.) 72 S. W. 258; Woodard v. Norris (Iowa) 91 N. W. 1064; Wheeler v. Castor (N. D.) 92 N. W. 381; Fargo v. Keeney (N. D.) 92 N. W. 836; Sibley v. Weinberg (Wis.) 92 N. W. 427.
34. Whitecar v. Supreme Castle, 18 Pa. Super. Ct. 631.
35. Davis v. Huber Mfg. Co., (Iowa) 93 N. W. 78.
36. Wheeler v. Castor (N. D.) 92 N. W. 381.
37. Under Code 1902, § 274, making such acts discretionary—Morris v. Liverpool, L. & G. Ins. Co., 131 N. C. 212.
38. Whitecar v. Supreme Castle, 18 Pa. Super. Ct. 631; Brunswick-Balke-Collender Co. v. O'Donnell, 101 Ill. App. 533.
39. Becher v. Deuser, 169 Mo. 159.
40. Enyart v. Moran (Neb.) 89 N. W. 1045.
41. Sibley v. Weinberg (Wis.) 92 N. W. 427.
42. McMahon v. Pugh, 62 S. C. 506.

appearance in the case at former terms by the attorney.[43] An order vacating a judgment in absence of contrary showing will be presumed to have been made within time.[44] The allowance of costs[45] accruing in the case before a prior appeal,[46] or the discretion of the court in fixing compensation of receivers and their counsel,[47] will not be reviewed if no abuse is shown. On the hearing of exceptions sent to a review court, questions of costs which should have been determined before taxation will not be passed upon.[48]

2. *Questions of fact.*—In a forthcoming number will be discussed the rules for distinguishing matters of law from those of fact. Applications of the rules will be found in nearly all the titles treating of substantive law.[49] Generally speaking, questions of fact will not be reviewed on appeal.[50] A verdict directed for plaintiff subject to the court's decision on all the issues is however not conclusive on an issue of fact though the evidence in regard thereto is conflicting.[51] A judgment will not be disturbed unless so unjust as to indicate prejudice, partiality, or corruption,[52] whether on findings of the court or jury,[53] if the record shows jurisdiction of the subject-matter.[54] In the federal courts, an appeal, unlike a writ of error, opens the facts as well as the questions of law to inquiry.[55] An erroneous assumption or finding of preliminary fact essential to the jurisdiction is reviewable by writ of error.[56] A trial in equity is before the court though issues of fact have been referred to a master, and special findings by reason of the court's action upon the master's report made without request from either party amount to a general finding only and cannot be reviewed as a special finding.[57] A special finding stating ultimate facts

43. Chilhowie Lumber Co. v. Lance, 50 W. Va. 536.

44. Under Rev. St. Idaho, § 4228—Kerns v. McAulay (Idaho) 68 Pac. 503.

45. Bowring v. Wabash R. Co., 90 Mo. App. 324. Granting costs against an executor personally—Webb v. Peck (Mich.) 92 N. W. 104.

46. United Security Life Ins. Co. v. Larner, 18 App. D. C. 147.

47. Braman v. Farmers' L. & T. Co., 114 Fed. 18, 51 C. C. A. 644.

48. Motion for extra allowance—Riverside Bank v. Jones, 75 App. Div. (N. Y.) 531.

49. See Questions of Law and Fact, also Negligence and like titles.

50. Whether misconduct was provoked is fact—Shuster v. Shuster (Neb.) 92 N. W. 993. Whether father acting as guardian was entitled to be paid for child's support is a question of fact—McGeary v. McGeary, 181 Mass. 530. The amount of damages is a pure question of fact in Utah—Braegger v. Oregon S. L. R. Co., 24 Utah, 391, 68 Pac. 140. Decision that a commodity is or is not a substance or article specified in customs laws—United States v. Jackson, 113 Fed. 1009; Page v. United States, 113 Fed. 1006; Gabriel v. United States, 114 Fed. 491; Weil v. United States, 115 Fed. 592. Whether a statement by counsel in his argument, as to what a witness would have said if called, is one of fact or a request for an inference is a question for the trial court—Walker v. Boston & M. R. Co., 71 N. H. 271. Whether facts alleged amount to an excuse for negligence may be reviewed as a conclusion of law—Morris v. Liverpool, L. & G. Ins. Co., 131 N. C. 212.

Surrogate's assumption of a material fact will not be supported by presumption when the record contains no evidence either way, even though counsel did not dispute him—In re Raymond, 73 App. Div. (N. Y.) 11.

51. Fraser v. Aetna Life Ins. Co., 114 Wis. 510.

52. Cincinnati, H. & I. R. Co. v. Worthington (Ind. App.) 65 N. E. 557; Golibart v. Sullivan (Ind. App.) 66 N. E. 188. If the measure of damages is uncertain an award will be disturbed only when so great as to indicate passion—Welch v. Greene (R. I.) 54 Atl. 54. Material injury must be made apparent—Wills v. Hardcastle, 19 Pa. Super Ct. 525. Trial court's action in reducing damages does not alone show passion and prejudice—Doran v. Cedar Rapids & M. C. R. Co. (Iowa) 90 N. W. 815; Knowlton v. Des Moines E. L. Co. (Iowa) 90 N. W. 918. Misconduct of counsel ground for reversal—Spalding v. Grundy, 23 Ky. Law Rep. 1759. It will be presumed that the jury were free from passion or improper motives unless there is proof to the contrary—Sutton Exch Bank v. Grosshans (Neb.) 90 N. W. 640.

53. Fullerton v. Carpenter (Mo. App.) 71 S. W. 98; South Omaha v. Meyers (Neb.) 95 N. W. 743; State v. Hill (W. Va.) 43 S. E. 160; Palmquist v. Mine & Smelter Supply Co. (Utah) 70 Pac. 994; Lake Street El. R. Co. v. Shaw, 103 Ill. App. 662.

54. Jaco v. Southern Missouri & A. R. Co., 94 Mo. App. 587.

55. United States v. Diamond Match Co. (C. C. A.) 115 Fed. 286.

56. This though a writ of error lies generally only for errors of law apparent in the record, and it applies where there is a failure to proceed properly to bring a party into court and make him a party to the record—Chilhowie Lumber Co. v. Lance, 50 W. Va. 536.

57. Under Burns' Rev. St. Ind. 1901, §§ 349, 412, providing for abolition of distinction between actions at law and suits in

will not be disturbed though it contains also statements of evidence and inferences therefrom.[58] That no propositions of law were presented to the trial court will not prevent consideration of the evidence as sufficient to support the judgment, though the appeal court may assume that all questions of law were determined correctly.[59] Controverted facts and inferences will not be reviewed where both parties below move for direction of verdict.[60] Where there has been a view by the jury their finding is conclusive.[61] If the jury has drawn wrong conclusions from the facts, their verdict can be set aside.[62] If the trial court, after finding all the issues for plaintiff, erroneously dismissed the bill and granted a new trial to correct errors in its own rulings, the evidence will not be considered on appeal to determine the necessity of reversal.[63] A judgment on a directed verdict cannot be sustained because of a defense neither established nor considered by the court below.[64] A finding of fact by the court on an issue not submitted nor requested will be reviewed to determine the sufficiency of evidence supporting it.[65]

Findings of fact in general.[66]—A verdict or findings of fact will only be set aside when not supported by evidence,[67] if properly submitted,[68] since the appeal court cannot pass on the credibility of witnesses or the peculiar weight to be given their testimony;[69] there being sufficient to carry the issues to the jury,[70] and no

equity and for the manner of trial of issues of law and fact formerly of exclusive equitable cognizance—Terre Haute & I. R. Co. v. State (Ind.) 65 N. E. 401.

58. American Nat. Bank v. Watkins (C. C. A.) 119 Fed. 545.

59. Mullin v. Johnson, 98 Ill. App. 621.

60. German American Bank v. Schwinger, 75 App. Div. (N. Y.) 393.

61. Finding as to defects in machinery—Choctaw, O. & G. R. Co. v. Holloway, 114 Fed. 458, 52 C. C. A. 260.

62. Jeffrey v. United Order of Golden Cross, 97 Me. 176.

63. Action by judgment creditor to set aside fraudulent conveyance by debtor—St. Francis Mill Co. v. Sugg, 169 Mo. 130.

64. Defense of contributory negligence in action for personal injuries—Kaiser v. Detroit & N. W. R. (Mich.) 91 N. W. 752.

65. Under Sales' Civ. St. Tex. art. 1331—Hardin v. Jones (Tex. Civ. App.) 68 S. W. 836.

66. Decisions of fact by state board of taxation not reviewable—Newark v. North Jersey St. R. Co. (N. J. Law) 53 Atl. 219. Divorce facts are reviewable only when all the evidence is sent up—Rhodes v. Rhodes, 95 Mo. App. 327.

67. Montz v. Roberts, 103 Ill. App. 270; English v. English, 19 Pa. Super. Ct. 586; Dillon v. Watson (Neb.) 92 N. W. 156; Upton v. Windham (Conn.) 53 Atl. 660; McDonald v. Stitt (Iowa) 91 N. W. 1031; Lake St. El. R. Co. v. Shaw, 103 Ill. App. 662; Taylor v. Hall (Idaho) 71 Pac. 116; Lindell v. Deere-Wells Co. (Neb.) 92 N. W. 164; Seyfer v. Otoe County (Neb.) 92 N. W. 756; Garr v. Cranney (Utah) 70 Pac. 853; State v. Mansfield (Mo. App.) 72 S. W. 471; Stiewel v. Am. Surety Co., 70 Ark. 512; Farmers' Mut. Fire Ins. Co. v. Stewart (Colo. App.) 68 Pac. 1057; Stout v. Stout, 28 Ind. App. 502; Logansport & W. Val. Gas Co. v. Coate, 29 Ind. App. 299; D. M. Osborne & Co. v. Case (Okl.) 69 Pac. 263; Bryce v. Cayce, 62 S. C. 546; Jensen v. N. P. R. Co. (Idaho) 70 Pac. 790; City of Omaha v. Doty (Neb.) 89 N. W. 992; Petrie v. New York Cent. & H. R. R. Co., 171 N. Y. 638; Long v. McWilliams (Okl.) 69 Pac. 882. The preponderance must be clearly against the decree—Van Vleet v. DeWitt, 200 Ill. 153. Verdict in will contest—Crossan v. Crossan, 169 Mo. 631. The testimony must fairly show the verdict to be excessive—Village of Plainview v. Mendelson (Neb.) 90 N. W. 956. Findings of viewers in eminent domain—Lanquist v. Chicago, 200 Ill. 69; Texas & P. R. Co. v. Wilson, 108 La. 1; Manhattan R. Co. v. Comstock (N. Y.) 74 App. Div. 341. Error in assessing damages in eminent domain must be palpable—In re Brookfield (N. Y.) 78 App. Div. 520. Finding as to the settlement of a cause of action—Stanley v. Stanley, 27 Wash. 570. 68 Pac. 187. Findings of fact are binding on appeal from order for temporary alimony—Moore v. Moore, 130 N. C. 333. Verdict of jury as to the duty of a railroad company to fence its tracks in an action for damages for the killing of domestic animals—Downey v. Miss. River & B. T. R. Co., 94 Mo. App. 137. Finding as to whether a warranty of good health furnished by one asking for reinstatement in a benefit association was forged—Creighton v. Modern Woodmen of America, 90 Mo. App. 378. Findings of the trial court as to negligence on specific facts may be reviewed where the inferences of facts are unreasonable or one or more of the facts inconsistent with the conclusions—Hyde v. Mendel (Conn.) 52 Atl. 744.

68. Truworthy v. French, 97 Me. 143; Gunther Bros. & Co. v. Aylor, 92 Mo. App. 161. Submission without instructions is not necessarily error—Costley v. Seward, 93 Mo. App. 108.

69. Richey v. Haley, 138 Cal. 441, 71 Pac. 499; Silveira v. Reese, 138 Cal. xix., 71 Pac. 515; Peck v. Gelski (Iowa) 93 N. W. 581; Mountain City Mill Co. v. Link Milling Co., 92 Mo. App. 474; Corrigan v. Kansas City, 93 Mo. App. 173; Haslack v. Wolf (Neb.) 93 N. W. 996; Bedwell v. Bedwell (Tex. Civ. App.) 71 S. W. 983; Ricaud v. Alderman & Flanner (N. C.) 43 S. E. 543; Romero v. Coleman (N. M.) 70 Pac. 559. The lack of opportunity on the part of the supreme

prejudicial error of law being shown.[71] The presence of substantial evidence in support is sufficient,[72] though a different conclusion might have been reached,[73] unless injustice has been done without regard to the weight of evidence,[74] and the rule applies to an action presenting no equitable issues though tried by the court as an equity action.[75] A finding dependent on many facts must be supported by the detailed facts.[76] A finding of the trial court on conflicting evidence will not be disturbed,[77] unless clearly unsupported by the evidence.[78] Inferences drawn by the court from facts will not be reviewed,[79] if they have reasonable foundation in the facts.[80] A verdict for damages for personal injuries will not be set aside as ex-

court to see the plaintiff in an action for personal injuries sustained from his master's machinery, on the stand, will not prevent a holding under the evidence that he was not so stupid as to preclude an instruction below that he had assumed the risk—Chmiel v. Thorndike Co., 182 Mass. 112. Unless unworthy witnesses have been believed—Goothye v. DeLatour, 108 La. 286.

70. Vermillion v. Parsons (Mo. App.) 71 S. W. 1092.

71. Inhabitants of Atkinson v. Orneville, 96 Me. 311. Finding on contributory negligence where submitted under proper instructions cannot be reviewed on writ of error—Kansas City S. R. Co. v. Billingslea (C. C. A.) 116 Fed. 335.

72. Waters v. White (Conn.) 52 Atl. 401; Roskilly v. Steigers (Mo. App.) 70 S. W. 909; Fidelity Mut. Fire Ins. Co. v. Lowe (Neb.) 93 N. W. 749; Taussig v. Wind (Mo. App.) 71 S. W. 1095; Van Wagoner v. Paterson, 67 N. J. Law, 455; West Chicago St. R. Co. v. Lieserowitz, 197 Ill. 607; Clark v. Shannon & Mott Co. (Iowa) 91 N. W. 923; Wilbur v. Berry, 71 N. H. 619; Bradshaw v. Cochran, 91 Mo. App. 294; Bowles Live Stock Commission Co. v. Hunter, Id. 436; Fullerton v. Carpenter (Mo. App.) 71 S. W. 98; City of South Omaha v. Meyers (Neb.) 92 N. W. 743; State v. Hill, 52 W. Va. 296; Palmquist v. Mine & Smelter Supply Co. (Utah) 70 Pac. 994; Lake St. El. R. Co. v. Shaw, 103 Ill. App. 662. Finding upon verbal evidence—Wallrath v. Bohnenkamp (Mo. App.) 70 S. W. 1112. The testimony can only be examined to ascertain whether there was any competent evidence tending to support the findings—Salem Light & Traction Co. v. Anson, 41 Or. 562, 69 Pac. 675. A mere possible inference from the evidence, contrary to the judgment rendered, will not warrant its reversal—Sanitary Dist. of Chicago v. Ray, 199 Ill. 63. Finding that one's name appeared on the back of notes sued on, signed as maker, not as indorser, will not be disturbed—Olansky v. Berlin (N. Y.) 37 Misc. 775. Questions of fact put in issue by the pleadings and submitted under a proper charge as to which no exceptions are taken—Liberty Wall Paper Co. v. Stoner Wall Paper Mfg. Co., 170 N. Y. 582. Evidence of mental capacity to understand the nature of a conveyance on which reasonable minds might differ will be held to sustain a finding of incompetency—Smith v. Smith (Neb.) 89 N. W. 799. The order below refusing to set aside the verdict on special finding will not be disturbed except in the absence of evidence in support, or overwhelming weight of evidence against it—Bannon v. Ins. Co. of N. A. (Wis.) 91 N. W. 666. Though after overruling a demurrer to plaintiff's evidence, in which he joined, the case is submitted to the jury on the evidence as it stands and the verdict is for plaintiff—Coleman v. Bennett (Tenn.) 69 S. W. 734. Where the evidence of either side as given in the record would alone suffice to sustain a verdict for its party a verdict for either will not be disturbed if no prejudicial rulings appear—Walker v. Montgomery, 104 Ill. App. 659. A verdict in favor of plaintiff suing for injuries caused by negligence will not be set aside where, as a matter of law, the evidence does not show conclusively that she was guilty of contributory negligence—Coonan v. American House Furnishing Co., 86 Minn. 12. If there is evidence to sustain the general verdict and the material findings on interrogatories submitted, the judgment will not be disturbed, though the evidence as to some features of the case cannot be said to be of great weight—Creamery Package Mfg. Co. v. Hotsenpiller (Ind.) 64 N. E. 600.

73. National Exch. Bank v. Wiley (Neb.) 92 N. W. 582; Demary v. Burtenshaw's Estate (Mich.) 91 N. W. 647.

74. Aetna Ins. Co. v. Eastman (Tex. Civ. App.) 72 S. W. 431.

75. Phipps v. Norton (Iowa) 93 N. W. 562.

76. Chester v. Buffalo Car Mfg. Co. (N. Y.) 70 App. Div. 443.

77. Royal Remedy & Extract Co. v. Gregory Grocer Co., 90 Mo. App. 53; Morrison v. Sohon, Id. 76; Greditzer v. Continental Ins. Co., 91 Mo. App. 534. On testimony of two witnesses contradicting each other—Jordan v. Coulter, 30 Wash. 116, 70 Pac. 257. In action at law in federal court tried by stipulation without a jury—American Sales Book Co. v. Bullivant (C. C. A.) 117 Fed. 255.

78. Payne v. Liebee (Neb.) 91 N. W. 851; Morris v. Liverpool, L. & G. Ins. Co., 131 N. C. 212; Annie Laurie Min. Co. v. Ross Min. & Mill. Co. (Utah) 70 Pac. 465.

79. Stocker v. Coddington (Minn.) 93 N. W. 680. If the court below is given power to draw inferences in a case submitted on an agreed statement of facts, the appellate court will review the findings only to decide whether the facts warrant the conclusions drawn, but if no inference can be drawn by the trial court, it can add to the statement of facts only the conclusions implied by the law and the appellate court can review them no further—Norton v. Brookline, 181 Mass. 360.

80. Northdruft v. Lincoln (Neb.) 92 N. W. 628.

cessive unless the amount is such as to show passion or prejudice of the jury.[81] All fair and reasonable inferences will be made as to the facts to sustain a verdict,[82] and to uphold the judgment as to matters in which the record is silent,[83] and the rule applies to findings by the court.[84] It will be presumed, in support of a general verdict, that all issues of fact necessary for its support were found by the jury in favor of the party for whom it was rendered,[85] and in the absence of a particular

81. McLean v. Lewiston (Idaho) 69 Pac. 478.

82. Sappington v. Chicago & A. R. Co., 95 Mo. App. 387; Arnold v. Cason, Id. 426; Sheehan v. Osborn, 138 Cal. 512, 71 Pac. 622. Presumption in favor of findings—In re Young's Estate (Pa.) 53 Atl. 511.

If the bill of exceptions or certificate of evidence does not purport to contain the substance of all evidence produced, sufficiency thereof to support the findings will be presumed—Fields v. Daisy Gold Min. Co., 25 Utah, 76, 69 Pac. 528; Allen v. Henn, 197 Ill. 486. Unless a contrary statement is made in the bill of exceptions—Metzger v. Morley (Ill.) 64 N. E. 280; Metzger v. Wooldridge, 99 Ill. App. 283. Where plaintiff's case fails entirely, the verdict of the jury as to the value of defendant's rights will be presumed to be correct on failure in replevin of evidence to show interest of plaintiff in the property—Kingman Imp. Co. v. Strong (Neb.) 89 N. W. 993. If the damages in an action for libel are not excessive, it will not be presumed that the jury allowed exemplary damages—Danville Press Co. v. Harrison, 99 Ill. App. 244. If rights of a defendant under a counter claim are given in the declaration of law by the court, they will be presumed to have been considered in rendering judgment—Williams v. Stroub, 168 Mo. 346; Long-Bell Lumber Co. v. Same, Id. Where a husband complained of the action of the court in refusing to make him a party defendant in partition proceedings against his wife, it will be presumed, in favor of the ruling, that the husband and wife had separated, where his petition did not state that they lived together, and the evidence was not in the record (Burns' Rev. Sts. 1894, § 6974)—Littell v. Burns, 29 Ind. App. 572. Where both parties moved for a verdict on the evidence and a verdict was directed for defendant, an issue on conflicting evidence will be presumed to have been found in his favor.—Raegner v. Brockway, 171 N. Y. 629. In a proceeding to foreclose a mortgage on community property, the legal title to which is in the husband and on which a mortgage has been executed by the husband and second wife after the first wife's death, it will be presumed that the court found that the mortgagee had notice of the first marriage, the wife's interest and that children were left, where the mortgage is held void as to the children of the first marriage.—American Freehold Land Mortgage Co. v. Dulock (Tex. Civ. App.) 67 S. W. 172. If evidence appears in the record from which the court below would have been justified in finding a certain conclusion of fact, it will be presumed in favor of the ruling that such conclusion was found—Town of Montgomery v. Baltimore & O. S. W. R. Co., 29 Ind. App. 692. It will be presumed that all issues submitted in an action on a note in which equitable relief was prayed were submitted to the jury under proper instructions and by consent, and that the cross complaint was supported by no evidence—Horgwege v. Sage, 137 Cal. 539, 70 Pac. 621. If books used by commissioners appointed by the county court to settle with the sheriff collecting the county levy are not in the record, nor the parties thereto copied into the transcript, a presumption will be indulged that the books explained apparent duplications of credit and were sufficient to authorize the judgment—Bates v. Knott County Court, 24 Ky. Law Rep. 73. Where the conclusions of law below imputed an agent's malice to the principal in malicious attachment of goods, which were exempt, the court will presume in the absence of contrary facts the knowledge of the principal and acquiescence by him in the agent's acts—Leonard v. Harkleroad (Tex. Civ. App.) 67 S. W. 127.

83. Peele v. Ohio & I. Oil Co., 158 Ind. 374; Roberts v. Central Lead Co., 95 Mo. App. 581; Schallehn v. Hibbard, 64 Kan. 601, 68 Pac. 61. Presumed that money spent for a bank was for a lawful purpose—Laidlaw v. Pacific Bank (Cal.) 67 Pac. 897. Where an instrument incorrectly designates the location of land in a certain city addition, it will be presumed in the absence of contrary showing that an addition exists in which such land is found—Rinehardt v. Reifers, 158 Ind. 675. An issue not submitted nor requested to be submitted will be presumed on appeal to have been found by the court in the manner supporting the judgment; under Rev. St. 1895, art. 1331, relating to special verdicts—Texarkana & Ft. S. R. Co. v. Spencer (Tex. Civ. App.) 67 S. W. 196.

84. A finding that plaintiff was regularly appointed to office will raise a presumption that his appointment was authorized under the proper statute by the proper officers; that he was the one of two deputies appointed who was to receive the higher salary under the statute, if the appointment of no other is shown—Freeman v. Marshall, 137 Cal. 159, 69 Pac. 986. Facts on which contempt orders are based are reviewed only as to the legal sufficiency to support the judgment—Green v. Green, 130 N. C. 578.

85. Eklund v. Martin, 87 Minn. 441; St. Paul Trust Co. v. Kittson (Minn.) 92 N. W. 500. If sufficient evidence appears to support the finding—Malone v. Fisher (Tex. Civ. App.) 71 S. W. 996. If the evidence on which objections to a trustee's account were sustained does not appear, all presumptions will be in favor of the judgment—Gardner v. Stare, 136 Cal. xix., 69 Pac. 426. If no evidence is in the record on which a plea of privilege was heard, it will be presumed that the evidence sustained the judgment denying the plea—Robinson v. Chamberlain (Tex. Civ. App.) 68 S. W. 209. Agreement as to findings presumed to dispense with proof of separate facts—Massillon Engine Co. v. Arnold, 133 Ala. 368. It will be presumed that plaintiff's theory as to disputed ques-

showing as to the findings of a jury on an issue of fact, that they found in such a manner as to support the verdict;[86] but where the facts are stipulated it cannot be presumed that they were different in order to support the judgment.[87] The findings will be presumed to have been supported by evidence received without objection in the absence of contrary showing,[88] since it cannot be presumed that the record contains all the evidence heard on the trial in the absence of a showing to that effect;[89] but the transcript duly certified will be presumed to contain all necessary to be considered in determining the correctness of the rulings.[90] The presumption that sufficient facts appear to support a judgment in the short form will not apply to that part of the judgment dismissing the complaint as to one defendant.[91] Where no objection was taken to a complaint and the proceedings are not in the record, it must be presumed that every allegation of the complaint, whether defective or not, was sustained by evidence.[92] It must be presumed that evidence excluded by the court below could have been produced by the party offering it if permitted.[93] In favor of a verdict by the court without a jury, it must be presumed that only competent testimony was considered.[94] If the answer of a witness is liable to two constructions, one of which is admissible, such construction will be given it on appeal,[95] and it must be presumed that the answer of the witness was responsive to the question.[96] Where defendant requested an instruction submitting an issue of fact, it will be presumed that the evidence tended to establish the conclusion of the jury in opposition to his contention, so that he cannot complain of the finding on appeal.[97] The decision of a court or commissioner below as to the credibility of a witness cannot be disturbed unless the record discloses some reason for not giving full credit to his testimony.[98] An order based not alone on the affidavit of plaintiff's attorney but on all proceedings in the action which were not brought up on review, which awards full statutory costs against defendant, will not be disturbed.[99] It will be presumed in support of a judgment in replevin on a verdict which fails to fix the

tions of fact was adopted by the jury finding a verdict in his favor on appeal from a refusal to direct a verdict for defendant in an action for personal injuries—Gaukler v. Detroit, G. H. & M. R. Co. (Mich.) 9 Detroit Leg. N. 215, 90 N. W. 660. If a certain fact in issue is not found by the trial court it will be presumed that evidence did not warrant it—Rilling v. Schultze, 95 Tex. 352; Meislahn v. Irving Nat. Bank, 172 N. Y. 631. Where the record does not show when a trial was had below or what evidence was produced on a particular issue, it will be presumed that sufficient facts were shown the trial court to support the judgment—Keyes v. Moy Jin Mun, 136 Cal. 129, 68 Pac. 476.

86. Findings as to misrepresentation and deceit regarding the value of corporate stock conveyed—Guilford v. Mason, 24 R. I. 386.

87. Conway v. Supreme Council, 137 Cal. 384, 70 Pac. 223.

88. Beardsley v. Clem, 137 Cal. 328, 70 Pac. 175; Ball v. Marquis (Iowa) 92 N. W. 691. If only part of evidence is in the abstract, judgment will be presumed to have been supported by omitted evidence—Hartman v. Reid (Colo. App.) 68 Pac. 787. On appeal from an allowance of a widow's claim against the estate for erecting a monument for her husband, it will be presumed that the court had proper evidence of the value or solvency of the estate and of the suitableness of the monument—Pease v. Christman, 158 Ind. 642. It cannot be assumed that a judgment was rendered without proof of the allegations of the complaint on appeal from an order opening a default reciting that the motion to open the default was brought on an order to show cause reciting that it was made on annexed affidavits, pleadings and proceedings in the action, though the affidavits are omitted from the record—Hopkins v. Meyer (N. Y.) 74 App. Div. 619. Those facts which the appellant had the burden of proving, but which are not given in the findings, will be presumed not to have been affirmatively proved—Peele v. Ohio & I. Oil Co., 158 Ind. 374. If the evidence does not appear in a bill of exceptions, it will be presumed to have been sufficient to sustain a judgment correcting the verdict by inserting property omitted by mistake—Law v. Sanitary Dist. of Chicago, 197 Ill. 523.

89. Watkins v. La Mar (Kan. App.) 69 Pac. 730; Metz v. Bell, 137 Cal. xix., 70 Pac. 618.

90. Bush v. Tecumseh Nat. Bank (Neb.) 90 N. W. 236.

91. Deering v. Schreyer, 171 N. Y. 451.

92. Buckman v. Hatch (Cal.) 70 Pac. 221.

93. Anthony v. Carp, 90 Mo. App. 387.

94. Triska v. Miller (Neb.) 91 N. W. 870.

95. Supreme Council Am. Legion of Honor v. Orcutt (C. C. A.) 119 Fed. 682.

96. Stanley v. Core (Iowa) 93 N. W. 343.

97. Black v. Missouri Pac. R. Co (Mo.) 72 S. W. 559.

98. On appeal from an order of deportation of a Chinese person—United States v. Lee Huen, 118 Fed. 442.

99. Ballantyne v. Steenwerth (N. Y.) 79 App. Div. 632.

value of each article, that the property had been disposed of, making such finding unnecessary.[1] An exhibit shown by record to have been offered in evidence against the objections of the opposing party and referred to in the cross-examination and which appears in the record will be presumed to have been duly read when introduced.[2] In support of a judgment for damages for breach of a contract, it will be presumed that an offer made by defendant for performance was made after the breach of the contract and after the time within which performance was to be made.[3] Where the record showed that when objections to admission in evidence of a judgment roll in a former action were overruled, the judge directed entry of a statement that it had been admitted, that an appeal from the judgment was pending, to which no objection was made, it will be presumed that the existence of a pending appeal was sufficiently shown.[4] Where the answers of a wife, to whom her husband has conveyed immovables, to interrogatories of his creditors, show that the husband has conveyed property in another state for a consideration arising under the laws there, the appeal court will not assume that the consideration for conveyance of the property within the state was used for conveyance of the foreign property.[5] Where no conclusions of facts are filed by the trial court, the facts will be held to sustain the judgment unless irreconcilable.[6] The statement of the reasons for its rulings by the court, though apparently prolix, will be presumed proper and necessary.[7]

Review as affected by the character of the evidence.[8]—Evidence improperly admitted below and against which the finding of the court has been made must be treated as disregarded,[9] but conclusions not properly within the issues considered by the court below in making its judgment cannot be rejected as surplusage.[10] The record in another cause between the same parties and in the same court, merely certified to the supreme court by the clerk, cannot be considered on appeal, since judicial notice cannot be taken of it below.[11] Where the transcript of evidence used in the first trial is used on a second trial, the findings of the lower court on the first trial cannot affect the weight of the evidence on appeal.[12] Incompetent or improper judicial notice taken by the trial court will be rejected in determining the weight of evidence sustaining an order.[13] On appeal from a suit on a contract, the real contract must be largely inferred from the subsequent course of dealing of parties as a question of fact, where it was not originally in writing and the terms of the oral agreement were indefinite.[14] Which of the parties was in possession of lands cannot be settled on appeal in a cause where the evidence showed that neither had ever been in actual possession.[15] That a question of fact, on which a verdict was based, was decided with difficulty, will not be ground for a reversal unless the evidence was clearly misconstrued.[16] A verdict on conflicting evidence will not be disturbed unless clearly wrong,[17] especially if approved by the trial judge, unless he erred as to the law,[18]

1. Bonner v. Springfield Wagon Co. (Tex. Civ. App.) 69 S. W. 1032.
2. Sailor v. Caldwell, 65 Kan. 86, 68 Pac. 1085.
3. Emack v. Hughes, 74 Vt. 382.
4. Boucher v. Barsalou, 27 Mont. 99, 69 Pac. 555.
5. Rush v. Landers, 107 La. 549.
6. Anderson v. Carter (Tex. Civ. App.) 69 S. W. 78.
7. Gorham v. Sioux City Stock Yards (Iowa) 92 N. W. 698.
8. An order founded on both written and oral evidence will not be disturbed unless clearly inconsistent with established facts—Male v. Dahlgrin (Neb.) 92 N. W. 602.
9. In re Sawyer's Estate (Minn.) 92 N. W. 962.
10. Chappell v. Jasper County O. & G. Co. (Ind. App.) 66 N. E. 515.
11. The record must be introduced in evidence and brought up by statement of facts or bill of exceptions—Plumley v. Simpson (Wash.) 71 Pac. 710.
12. Hagerman v. Bates (Colo.) 69 Pac. 526.
13. State v. Fawcett (Neb.) 90 N. W. 259.
14. Whale v. Gatch (Or.) 70 Pac. 832.
15. Flanner v. Butler, 131 N. C. 151.
16. A verdict that a road was defective for want of a railing along a ravine—Barnes v. Rumford, 96 Me. 315.
17. Engel v. New York Evening Post Co., 38 Misc. Rep. (N. Y.) 377; Topliff v. Chicago, 196 Ill. 215; Parkins v. Missouri Pac. R. Co. (Neb.) 93 N. W. 197; Baker v. Borello, 136

and if supported by substantial evidence,[19] or if made on a view by the jury,[20] or

Cal. 160, 68 Pac. 591; Lowenstein v. Alexander (Colo. App.) 69 Pac. 270; Martin v. Dowd (Idaho) 69 Pac. 276; York v. Pacific & I. N. R. Co. (Idaho) 69 Pac. 1042; Kelly v. Morris, 101 Ill. App. 102; Catron v. Scripps, 101 Ill. App. 105; Renard v. Grande, 29 Ind. App. 579; Duckwall v. Williams, 29 Ind. App. 650; Roush v. Russell, 28 Ind. App. 699; Sharpless Co. v. Day (Iowa) 90 N. W. 814; Gulf, C. & S. F. R. Co. v. Mangham (Tex. Civ. App.) 69 S. W. 80; Mills v. Thomas Elevator Co., 172 N. Y. 660; Lilienthal v. McCormick (C. C. A.) 117 Fed. 89; Bryan v. Bryan, 137 Cal. xix., 70 Pac. 304; Columbia Sav. Bank v. Los Angeles County, 137 Cal. 467, 70 Pac. 308; Donellan v. Ketchum, 78 App. Div. (N. Y.) 144; Rath v. Rath (Neb.) 89 N. W. 612; Schaaf v. Hamilton (Neb.) 89 N. W. 614; Pecha v. Kastl (Neb.) 89 N. W. 1047; Link v. Reeves (Neb.) 91 N. W. 506; Clifford v. Braun, 71 App. Div. (N. Y.) 432; Hofferberth v. Myers, 71 App. Div. (N. Y.) 377; Hume v. Hood Camp Confed. Veterans (Tex. Civ. App.) 69 S. W. 643; Kleeb v. Long-Bell Lumber Co., 27 Wash. 648, 68 Pac. 202; Alexander v. Wakefield (Tex. Civ. App.) 69 S. W. 77; Nelson v. Lexington, 24 Ky. Law Rep. 1477; Carroll Contr. Co. v. Gilsonite R. & P. Co. (Mo. App.) 71 S. W. 1119; Jackson v. McNatt (Neb.) 93 N. W. 425; Rock Island & P. R. Co. v. Dormady, 103 Ill. App. 127; Beale v. Patterson (Iowa) 93 N. W. 594; Pine v. Callahan (Idaho) 71 Pac. 473; Boston & M. Consol. C. & S. Min. Co. v. Montana Ore Purchasing Co., 27 Mont. 431, 71 Pac. 471; Patterson v. Mills, 138 Cal. 276, 71 Pac. 177; Day & F. Lumber Co. v. Bixby (Neb.) 93 N. W. 688; McKee v. Fagan (Neb.) 93 N. W. 676; Pettee v. Deere Plow Co., 11 Okl. 467, 68 Pac. 735; Smith Premier Typewriter Co. v. Mayhew (Neb.) 90 N. W. 939; Dufrene v. Anderson (Neb.) 90 N. W. 221; Andrews v. Steele City (Neb.) 89 N. W. 739; Continental Nat. Bank v. Levy (Neb.) 89 N. W. 749; Paxton v. Scott (Neb.) 92 N. W. 611; Malone v. Garver (Neb.) 92 N. W. 726; Milwaukee Nat. Bank v. Gallun (Wis.) 92 N. W. 567; Patterson v. Mills (Cal.) 68 Pac. 1034; Lyons & E. P. Toll Road Co. v. People, 29 Colo. 434, 68 Pac. 275; Bernardis v. Allen, 136 Cal. 7, 68 Pac. 110; Phoenix Acc., etc., Ass'n v. Horton, 29 Ind. App. 198; Churchill v. Rose, 136 Cal. 576, 69 Pac. 416; Clipper Min. Co. v. Eli M. & L. Co., 29 Colo. 377, 68 Pac. 286; Felix v. Brandstetter Co. (Iowa) 89 N. W. 971; Gaboury v. Smith (Colo. App.) 69 Pac. 275; Williams v. Chapman (Ind.) 66 N. E. 460; Cinfel v. Malena (Neb.) 93 N. W. 165; Chicago, B. & Q. R. Co. v. Winfrey (Neb.) 93 N. W. 526; Chicago Cottage Organ Co. v. Erbe (Iowa) 90 N. W. 66; Schumacher v. Shawhan, 93 Mo. App. 573; Scheurmann v. Styninger (Mich.) 9 Detroit Leg. N. 119, 90 N. W. 292; Brinkworth v. Hazlett (Neb.) 90 N. W. 537; Omaha Nat. Bank v. Sanders (Neb.) 90 N. W. 211; Levy v. Hinz (Neb.) 90 N. W. 640; Lusk v. Riggs (Neb.) 91 N. W. 243; State Ins. Co. v. Farmers' Mut. Ins. Co. (Neb.) 90 N. W. 997; Metz v. Blattner (Mo. App.) 72 S. W. 489; Boudinot v. Hamann (Iowa) 90 N. W. 497; Bankers' Union v. Schiverin (Neb.) 92 N. W. 158; Miller v. Potter, 102 Ill. App. 483; Grafeman Dairy Co. v. St. Louis Dairy Co., 96 Mo. App. 495; Hyde v. Mendel (Conn.) 52 Atl. 744; Bank of Ackley v. Porter, 116 Iowa, 377; Hercules Min. Co. v. Central Inv. Co., 98 Ill. App. 427; Greer v. Clay, 99 Ill. App. 204; Doppelt v. Columbia Paper Stock Co., 99 Ill. App. 207; St. Louis S. W. R. Co. v. Campbell (Tex. Civ. App.) 69 S. W. 453; Simmons v. Hutchinson (Miss.) 33 So. 21; Mound City L. & S. Co. v. Miller, 170 Mo. 240; Webb v. Peck (Mich.) 9 Detroit Leg. N. 449, 92 N. W. 104; Dobbins v. Humphreys (Mo.) 70 S. W. 815; Garr v. Cranney (Utah) 70 Pac. 853; Peniston v. Schlude (Mo.) 71 S. W. 146; Johnston, etc., Hat Co. v. Lightbody (Colo. App.) 70 Pac. 957; Kendall v. Selby (Neb.) 92 N. W. 178; Guilford v. Mason, 24 R. I. 386; Missouri, K. & T. R. Co. v. Gentry (Tex. Civ. App.) 70 S. W. 562; Fears v. Fears (Ga.) 42 S. E. 999; Dunafon v. Barber (Neb.) 92 N. W. 198; Long v. Long (Tex. Civ. App.) 70 S. W. 587; Wunderlich v. Palatine Ins. Co. (Wis.) 92 N. W. 264; Todd v. York (Neb.) 92 N. W. 1040; Kirkham v. Moore (Ind. App.) 65 N. E. 1042; Love v. Central Life Ins. Co., 92 Mo. App. 192; Lindell v. Deere-Wells Co. (Neb.) 92 N. W. 164; Slack v. Harris, 101 Ill. App. 527; Chicago, B. & Q. R. Co. v. Presbrey, 98 Ill. App. 303; Ziemens v. Harwood, 99 Ill. App. 309; Williams v. Stroub, 168 Mo. 346; Zellars v. Missouri W. & L. Co., 92 Mo. App. 107; Warder, etc., Co. v. Stiritz & Co., 103 Ill. App. 525. If the verdict is responsive to the issues—Hudelson v. McCallum, 103 Ill. App. 408; Petzel v. Chicago & N. W. R. Co., 103 Ill. App. 210; Nehring v. Larson, 103 Ill. App. 160; Gribble v. Everett (Mo. App.) 71 S. W. 1124; Obuchon v. Boyd, 92 Mo. App. 412. Even though the evidence preponderates in favor of the unsuccessful party—Chicago City R. Co. v. Leach, 104 Ill. App. 30. Or he is sustained by the larger number of witnesses—Copeland v. Metropolitan St. R. Co., 78 App. Div. (N. Y.) 418; Pence v. Wabash R. Co., 116 Iowa, 279; Faivre v. Manderschied (Iowa) 90 N. W. 76. Merely a slight preponderance as to the number of witnesses testifying to the lack of mental capacity of a testator will not warrant the reversal of a verdict finding his capacity sufficient to make a will—Mahon v. Mooney, 196 Ill. 147. Though most of plaintiff's evidence is given by deposition—Rounthwaite v. Rounthwaite, 136 Cal. xx., 68 Pac. 304. The appeal court will only determine whether the evidence tended to support the verdict—Chicago Terminal T. R. Co. v. Kotoski, 199 Ill. 383. That the verdict is too small will not avail—Robinson v. Rhea-Thielens Implement Co., 103 Ill. App. 62. The trial judge is arbiter as to questions of fact depending on conflicting evidence, whether given by affidavit or deposition, or by word of witnesses—Sheehan v. Osborn, 138 Cal. 512, 71 Pac. 622. He has also a better opportunity of judging of the credibility of witnesses—Stivers v. Conklin, 103 Ill. App. 288; Dunn v. Springfield F. & M. Ins. Co. (La.) 33 So. 585. If the evidence of either side standing alone would support a verdict for it, the verdict rendered will be affirmed—Abrams v. Rideout, 101 Ill. App. 131. A sharp conflict in the evidence will not produce reversal, unless the rulings of the court on the evidence and the instructions were such as to prejudice appellant's case—Chicago, etc., R. Co. v. Johnson, 99

where the trial court made a personal examination of the subject-matter,[21] and if the losing party made no exceptions to the charge of the judge and did not request a different submission of facts to the jury,[22] and the view of the evidence most favorable to a party must be taken in support of a judgment for him,[23] the appeal court only

Ill. App. 400. Though there is much evidence which is obviously untrue, the judgment will not be disturbed—Snyder v. Nelson, 101 Ill. App. 619. Verdict on contradictory testimony of the parties as the only witnesses — Rickey v. Brady (Colo. App.) 70 Pac. 444. In a case depending entirely on disputed questions of fact properly submitted—Wholeben v. Warren Mica Lubricant Co., 203 Pa. 234. If the evidence is given by witnesses of apparently equal credibility and is directly conflicting, the jury has a right to select the person whom it will believe, and its verdict is conclusive. Action against railroad for personal injuries on conflicting evidence as to negligence of the company in running an engine without headlight or warning—Cleveland, C., C. & St. L. R. Co. v. Coffman (Ind. App.) 64 N. E. 233. If no evidence appears which fairly proves a material finding of the jury, their verdict will be reversed—Haenky v. Weishaar, 64 Kan. 717, 68 Pac. 610. The preponderance of evidence establishing contributory negligence of plaintiff in action for personal injuries will cause a verdict in his favor to be set aside—Pardridge v. Gilbride, 98 Ill. App. 134. The finding must be so manifestly against the evidence that a new trial should have been granted below—Randall v. Wadsworth, 130 Ala. 633. As where it is wholly unsupported—Grooms v. Lieurance, 98 Ill. App. 394; Kehlor v. Wilton, 99 Ill. App. 228; Derby v. Derby, 101 Ill. App. 154. And the undisputed fixed facts show that the verdict is contrary to the evidence—Manss-Bruning Shoe Co. v. Prince, 51 W. Va. 510. Or it is against the weight of evidence so as to shock the sense of justice of reasonable persons—Singer Mfg. Co. v. Rogers, 70 Ark. 385. Sufficiency of evidence to warrant reversal of verdict as against the evidence—Gulf, C. & S. F. R. Co. v. Mangham (Tex. Civ. App) 69 S. W. 80; Central of Georgia R. Co. v. Austin, 114 Ga. 905. Finding as to whether the opportunity was given plaintiff to be negligent in attempting to leave a car—Beringer v. Dubuque St. R. Co. (Iowa) 91 N. W. 931. As to contributory negligence of parent in protecting child, in action for personal injuries to the latter—St. Louis S. W. R. Co. v. Byers (Tex. Civ. App.) 69 S. W. 1009. Finding as to value of real estate to be sold on foreclosure—Bowman v. Bellows Falls Sav. Inst. (Neb.) 92 N. W. 204. Findings in highway proceedings—Raab v. Roberts (Ind. App.) 64 N. E. 618. Judgment in condemnation of lands—Guyer v. Davenport, R. I. & N. W. R. Co., 196 Ill. 370. Decision as to which was the predominant material in an article subject to customs duties—Leerburger v. United States, 113 Fed. 976. Finding as to blame for collision of vessels—Gaffner v. Pigott (C. C. A.) 116 Fed. 486. Amount of recovery found in replevin for fair rental of property—Adams v. Wright, 74 Conn. 551. Finding as to fraudulent disposal of property by debtor—Dimmock v. Cole (Mich.) 9 Detroit Leg. N. 166, 90 N. W. 333. Finding as to whether tenant held over after expiration of his term—Chicago v. Peck, 98 Ill. App. 434. Finding as to whether animal killed by train was struck on public highway on right of way which should have been fenced—St. Louis S. W. R. Co. v. Neal (Tex. Civ. App.) 69 S. W. 91. Finding of trial court that an irrigation ditch constructed on land of another had been materially enlarged without authority—Smith v. Fresno C. & I. Co., 136 Cal. xx., 68 Pac. 490. Civ. Code Cal. §§ 1835, 2061, regarding sufficiency of evidence to sustain verdict in civil cases, construed—Parker v. Gregg, 136 Cal. 413, 69 Pac. 22. Findings of fraudulent intent in transfer by bankrupt—Cullinane v. State Bank (Iowa) 91 N. W. 783. Finding as to ability of passenger to take care—Wheeler v. Grand Trunk R. Co., 70 N. H. 607. Finding as to whether an insured committed suicide or was murdered, where both parties without objection call witnesses to express their opinions as experts on the facts as shown and their opinions were conflicting—Union Cent. Life Ins. Co. v. Skipper, 115 Fed. 69, 52 C. C. A. 663. Finding as to whether plaintiff had disposed of mortgaged chattels without proper authority or permission of defendant—Matthews v. Granger, 196 Ill. 164. Finding on question whether the bell was properly rung or the whistles sounded in action for injuries on railroad—Chicago & A. R. Co. v. Corson, 101 Ill. App. 115. A verdict in an action for personal injuries held not to be disturbed unless plainly against the evidence or the result of passion or prejudice or because the jury has misconceived the effect of the evidence, where it plainly appears that the negligence of the defendant produced the injury to the injured person—Chicago & A. R. Co. v. Corson, 101 Ill. App. 115. Finding that one party to a contract for real estate sale was not to execute the notes necessary to bind the contract in an action to recover commissions—Carnes v. Howard, 180 Mass. 569.

18. Atlanta Consol. St. R. Co. v. Jones (Ga.) 42 S. E. 524; Central of Georgia R. Co. v. Bond, 114 Ga. 913. The rule obtains though the verdict was not strictly in accord with the evidence where the court below refused a new trial—Lackey v. State, 115 Ga. 242. And there was some evidence to support the verdict—Brown v. Latham, 115 Ga. 666.

19. Gorringe v. Read, 24 Utah, 455, 68 Pac. 147; De Mund Lumber Co. v. Stilwell (Ariz.) 68 Pac. 543; Willard v. Carrigan (Ariz.) 68 Pac. 538.

20. Judgment for damages for change of grade of a street—Danville v. Schultz, 99 Ill. App. 287.

21. Herriman Irr. Co. v. Keel, 25 Utah, 96, 69 Pac. 719.

22. Jones v. Lustig, 37 Misc. Rep. (N. Y.) 834; Lauck v. Metropolitan St. R. Co., 37 Misc. Rep. (N. Y.) 847; Waldeck v. Cushman, 37 Misc. Rep. (N. Y.) 848.

23. Kelley v. Chicago, B. & Q. R. Co. (Iowa) 92 N. W. 45; Akers v. Akers, 24 Ky. Law Rep. 636; Louisville & N. R. Co. v. Steenberger, 24 Ky. Law Rep. 761.

weighing the evidence to determine its sufficiency to support a verdict.[24] The finding of the trial court without a jury on both law and facts will be treated as the verdict of a properly instructed jury,[25] where there is evidence reasonably tending to support it,[26] or where no declarations of law are requested;[27] but if an error as to preponderance of evidence appears, it will be reversed.[28] The same is true of special findings of fact tried by the court.[29]

Effect of approval by the trial judge.—A verdict on questions of fact approved by the court will not be disturbed,[30] except for error on the part of the trial judge,[31] though the appellate court believes the weight of evidence to be against it.[32]

24. Anderson v. Medbery (S. D.) 92 N. W. 1089. The trial court should determine whether the verdict is against the evidence—Walbrath v. Bohnenkamp (Mo. App.) 70 S. W. 1112.

25. Excelsior Coal Min. Co. v. Gatliff, 24 Ky. Law Rep. 682; Curtis v. Tyler, 90 Mo. App. 345; McKee v. Verdin (Mo. App.) 70 S. W. 154; Solomon v. Solomon (Neb.) 92 N. W. 124; Hanna v. Clark (Pa.) 53 Atl. 758; Garr v. Cranney (Utah) 70 Pac. 853; Pollard v. Allen, 96 Me. 455; Beifeld v. Pease, 101 Ill. App. 539; Myers v. Menefee (Tex. Civ. App.) 68 S. W. 540; Austin v. Georgia L. & T. Co., 115 Ga. 152; Merkert's Estate v. Grobe (Iowa) 90 N. W. 490; Allen v. Henn, 197 Ill. 486; Rogers v. Hopper, 94 Mo. App. 437; Franklin County Bank v. Everett (Neb.) 91 N. W. 495; Hill v. Whale Min. Co., 15 S. D. 574; Noble v. Miller, 168 Mo. 533; Snyder v. Commercial Union Assur. Co., 67 N. J. Law, 626; Miller v. Servis (N. J. Sup.) 52 Atl. 374; Bozarth v. Lincoln Legion of Honor, 93 Mo. App. 564; Los Angeles Traction Co. v. Wilshire, 135 Cal. 654, 67 Pac. 1086; McGray v. Monarch Elevator Co. (S. D.) 91 N. W. 457; Kaestner v. Oldham, 102 Ill. App. 372; Atlantic City v. Goldstein, 67 N. J. Law, 517; Martin v. Williams, 96 Mo. App. 249; Leonard v. Mallory (Conn.) 53 Atl. 778; West v. East Coast Cedar Co. (C. C. A.) 113 Fed. 737; State v. Penter, 96 Mo. App. 416; Powers v. Perkins (Mich.) 92 N. W. 790; Romero v. Coleman (N. M.) 70 Pac. 559; Rush v. Fletcher (N. M.) 70 Pac. 559; Darling Milling Co. v. Chapman (Mich.) 92 N. W. 352; Tinker v. Catlin, 102 Ill. App. 264. It must appear manifestly against the weight of the evidence—Denver Life Ins. Co. v. Price (Colo. App.) 69 Pac. 313; Jones v. Maxton, 100 Ill. App. 201; Hare v. Winterer (Neb.) 90 N. W. 544; St. Louis, B. & S. R. Co. v. Gray, 100 Ill. App. 538. The credibility of witnesses is a question for the trial court—In re Moore's Estate (Minn.) 93 N. W. 523. Especially where the court has the opportunity to see and hear the witnesses—Springer v. Chicago Real Estate L. & T. Co., 102 Ill. App. 294; Bouton v. Cameron, 99 Ill. App. 600. Though affirmative admissions of the successful party tend to an adverse judgment—Wright v. Patterson (Ga.) 43 S. E. 49. It is insufficient that the conclusions of fact are subject to grave doubt—Shaffer v. Shaffer, 51 W. Va. 126. Especially where the trial judge in a written opinion states his conclusions of fact—Griffith v. Finger & S. Mfg. Co., 115 Ga. 592; and no propositions of law are submitted—Jones v. Glathart, 100 Ill. App. 630. On waiver of jury by stipulation—Wolff v. Wells, Fargo & Co., 115 Fed. 32, 52 C. C. A. 626; though the case is tried de novo on the appeal—Druse v. Davey (Neb.) 90 N. W. 644. Unreasonable delay in payment of claim as question of fact—Union El. R. Co. v. Nixon, 99 Ill. App. 502. Improper consideration of affidavits of jurors to impeach their verdict and of counter affidavits will not change the rule—Canon v. Farmers' Bank (Neb.) 91 N. W. 585. The finding is that of the court where each party asks direction of a verdict without asking submission of specific questions of fact—Westervelt v. Phelps, 171 N. Y. 212. Finding as to the furnishing of proofs of death in action on life policy—Franklin Life Ins. Co. v. Hickson, 197 Ill. 117. Findings as to adverse claims to mining property dependent on evidence as to veins, dips, etc.—Montana Ore Purchasing Co. v. Boston & M. Consol. C. & S. Min. Co., 27 Mont. 288, 70 Pac. 1114. As to misconduct of an executor—Thomas v. Hosselkus, 137 Cal. 474, 70 Pac. 455. Question of honesty of co-tenant in placing improvements on the land in action by the other co-tenant to recover profits of resale by the former—Friedrich v. Fergen, 15 S. D. 541. Finding as to cutting of timber by mortgagor after execution of mortgage in action for waste—Girard Life Ins., A. & T. Co. v. Mangold, 94 Mo. App. 125. Finding as to qualifications of signers of application for liquor license—Persinger v. Miller (Neb.) 90 N. W. 242. Questions of fact on hearing of petition for leave to file claim for damages resulting from defective highway under Pub. St. N. H. c. 76, § 9—Drew v. Derry, 71 N. H. 113. Finding in ejectment as to validity of plaintiff's title—West v. East Coast Cedar Co., 113 Fed. 737, 51 C. C. A. 411. Decision of court as to misconduct of counsel—German Ins. Co. v. Shader (Neb.) 93 N. W. 972. Conclusions of the court on submission of a case without a jury on an agreed statement of facts will be reviewed where the statement is filed and made a part of the record. The statement amounts to a special verdict—Mutual Life Ins. Co. v. Kelly, 114 Fed. 268, 52 C. C. A. 154.

26. Stai v. Selden, 87 Minn. 271.

27. Heman v. Gerardi, 96 Mo. App. 231.

28. Iroquois Furnace Co. v. Elphicke, 200 Ill. 411.

29. Board of Trustees v. Morris, 24 Ky. Law Rep. 1420; Veum v. Sheeran (Minn.) 92 N. W. 965; Rank v. Garvey (Neb.) 92 N. W. 1025. The evidence being largely oral, the appellate court will be greatly influenced by the greater ability of the trial judge to settle the question of their credibility—Crawford v. Dixon (Mo. App.) 71 S. W. 470.

30. Where the motion for new trial is confined to general grounds—Walters v. Freeman (Ga.) 42 S. E. 741.

Effect of two trials below.—The court of appeal may always consider the fact that two juries have found the same verdict in the case,[33] and where two juries have found the same verdict on a proper submission of fact and conflicting evidence,[34] on substantially the same evidence, and the trial judge in each instance has refused to set aside the verdict,[35] it will not be disturbed as against the weight of evidence, especially where the second verdict was on the same and additional evidence.[36] The rule will apply to a decision by two courts on the same question of fact.[37] Even a second verdict in favor of a party will be set aside where there is no evidence to support the theory of the case necessary to its support.[38]

Effect of theory of facts on which judgment is based.—A judgment for plaintiff rendered upon a certain theory cannot be supported upon another theory of the case not submitted to the jury nor upon which defendant made any defense.[39] That the judgment below was founded on a theory opposite from that urged by plaintiff below whereby he was aggrieved will not prevent relief on appeal on his theory.[40] Where a case is submitted solely on one of three grounds urged by plaintiff, a verdict for him cannot be sustained on the theory that the evidence would have justified a finding for him on either of the other grounds.[41] Where plaintiff relied upon two grounds and no declarations of law were asked or given, a judgment for defendant will not be reviewed where it cannot be ascertained which ground the judgment was based upon.[42] Though the judge below based his judgment, in a cause submitted on the merits, on legal principles, and declined to pass on other questions, upon a determination of which the same judgment might have been found, the supreme court may affirm the judgment on the latter grounds.[43]

In equitable proceedings.—Decrees or findings of fact in equity,[44] or findings of

31. National Cash Register Co. v. Hickox & R. Pub. Co., 102 Ill. App. 331.

32. Colyer v. Missouri Pac. R. Co., 93 Mo. App. 147.

33. McCoy v. Munro, 76 App. Div. (N. Y.) 435.

34. Moore v. Eldridge, 114 N. Y. St. Rep. 922; Illinois Cent. R. Co. v. Sporleder, 100 Ill. App. 626; Louisville & N. R. Co. v. Shumaker's Adm'x, 23 Ky. Law Rep. 2458. Unless there is a showing of undue partiality or prejudice—Haycraft v. Griggsby, 94 Mo. App. 74. Especially where the first verdict was reversed for errors on the trial—Louisville & N. R. Co. v. Alumbaugh's Adm'r, 24 Ky. Law Rep. 349. If there is evidence to support the verdict and it has been approved by the trial court, though the court on appeal and trial de novo might reach a different conclusion—Weinberger v. McDonough, 98 Ill. App. 441. Sufficiency of evidence of personal injuries warranting second verdict for same amount—Loker v. Southwestern Mo. Elec. R. Co., 94 Mo. App. 481.

35. Where only one issue of fact appeared in the case—McMahon v. Jacob, 76 App. Div. (N. Y.) 346.

36. Allen v. McKay (Cal.) 70 Pac. 8.

37. Brainard v. Buck, 184 U. S. 99. Facts twice passed on below with same result will not be re-examined by supreme court in a Chinese deportation case, although treaty questions were raised, enabling disposal of the entire case—Chin Bak Kan v. United States, 186 U. S. 193.

38. Where in an action on a note alleged to have been paid by an authorized agent, no evidence appears of the creation of the agency for that purpose—Antognoli v. Miller (Ga.) 42 S. E. 1006.

39. Clark v. Manhattan R. Co., 77 App. Div. (N. Y.) 284.

40. Owatonna v. Rosebrock (Minn.) 92 N. W. 1122.

41. Fielders v. North Jersey St. R. Co. (N. J. Err. & App.) 53 Atl. 404.

42. Early v. Helmaring, 170 Mo. 597.

43. Under Const. Miss. 1840, § 146, and Code Miss. 1892, §§ 4350, 4353—Yazoo & M. V. R. Co. v. Adams (Miss.) 32 So. 937.

44. Davis v. Auld, 96 Me. 559; Vinson v. Scott, 198 Ill. 144; Derdeyn v. Donovan (Miss.) 33 So. 652; Callender v. Dole, 198 Ill. 616; Hubbard v. Hubbard, 198 Ill. 621; Lacotts v. Dunn (Ark.) 72 S. W. 370; Robinson v. Sharp, 201 Ill. 86; Mississippi Cotton Oil Co. v. Smith (Miss.) 33 So. 443; Dermott v. Priddy (Mo. App.) 71 S. W. 1088; Arnold v. Northwestern Tel. Co., 199 Ill. 201; Stevens v. Magee (Miss.) 33 So. 73; Travis v. Parks (Mich.) 8 Det. Leg. N. 1118, 89 N. W. 569; Espenschied v. Baum (C. C. A.) 115 Fed. 793; Spencer v. Landsaw, 24 Ky. Law Rep. 15. Finding largely on oral evidence—Powell v. Canaday, 95 Mo. App. 713; Roberts v. Central Lead Co., 95 Mo. App. 581; based on advisory verdict of jury—Bemmerly v. Smith, 136 Cal. 5, 68 Pac. 97. Finding of court reversing finding of master—Nash v. Woodward (S. C.) 40 S. E. 895. Finding as to existence of a trust—Harris v. Harris, 136 Cal. 379, 69 Pac. 23; as to existence of partnership—Lyle v. Howard's Adm'x, 24 Ky. Law Rep. 143. Finding by chancellor as to wilfull trespass and punitive damages therefor—Howell v. Shannon, 80 Miss. 598. Finding in foreclosure that no proceedings have been had at law to

a master,[45] on conflicting evidence affirmed by the court,[46] or of a special master,[47] in an equitable accounting under the eye of the court,[48] will not be set aside unless irreconcilable with any reasonable construction of the testimony,[49] though if the evidence had been submitted to the appeal court it might have reached a different conclusion.[50] especially where the evidence leaves the appeal court in doubt,[51] or where the evidence is conflicting and heard in open court,[52] the chancellor hearing and seeing the witnesses being in a better position to judge of their credibility;[53] but if the chancellor did not have the advantage of hearing the testimony of the more important witnesses, his finding will not be binding on the appellate court.[54] In an equitable action in Missouri and South Carolina, the court will review evidence without regard to findings below and render a proper judgment.[55] The rule that a judgment will not be reversed unless clearly against the evidence will not apply to suits in equity in Kentucky.[56] Disputed facts in concurrent findings of a master and the circuit court together with the circuit court of appeals will not be disturbed by the supreme court of the United States.[57] Where an answer in an action tried by the court pleads an equitable defense and prays affirmative relief, the weight of evidence and the credibility of the witnesses are for the court if the action is tried as at law.[58] All reasonable presumptions are in favor of findings in a decree,[59] or of the findings of a master[60] where the evidence is not reported.[61] Facts omitted from the special findings of a suit in equity will be considered as found on appeal where conclusively established by the evidence and necessary to the decree.[62]

recover any part of debt—Engart v. Moran (Neb.) 89 N. W. 1045. Finding by chancellor that land covered by a patent from the state was included in an earlier patent and that the later patent was void—Asher v. Howard, 24 Ky. Law Rep. 961. Order allowing a receiver's account against charges of positive fraud—Minneapolis Trust Co. v. Menage, 86 Minn. 1. Finding as to existence of irregularity in decree made by the same court that made the decree—Tromble v. Hoffman (Mich.) 9 Detroit Leg. N. 183. 90 N. W. 694. Finding as to right to temporary injunction on contradictory counter affidavits impugning good faith of both parties—Syracuse & O. L. Elec. R. Co. v. Syracuse R. T. R. Co., 74 App. Div. (N. Y.) 565.

45. Barton v. Hulsey (Ind. T.) 69 S. W. 868; John Hancock Life Ins. Co. v. Houpt, 113 Fed. 572; Bogue v. Franks, 100 Ill. App. 434.

46. Ferguson Contract Co. v. Manhattan Trust Co. (C. C. A.) 118 Fed. 791; Hagemann v. Hagemann, 102 Ill. App. 479; Beatty v. Somerville, 102 Ill. App. 487; Helb v. Hake, 203 Pa. 625.

47. Murphy v. Southern R. Co. (C. C. A.) 115 Fed. 257.

48. Goetting v. Weber, 71 App. Div. (N. Y.) 503.

49. Frerking v. Thomas (Neb.) 89 N. W. 1005.

50. Kohlsaat v. Illinois T. & Sav. Bank, 102 Ill. App. 110.

51. Taylor v. King, 24 Ky. Law Rep. 1824; Lowry v. Paw Paw Sav. Bank (Mich.) 93 N. W. 530; Howton v. Gilpin, 24 Ky. Law Rep. 630.

52. Garden City Sand Co. v. Gettins, 200 Ill. 268; Wetzstein v. Largey, 27 Mont. 212, 70 Pac. 717; In re Fague's Estate, 19 Pa. Super. Ct. 638; Battle Creek Val. Bank v. Collins (Neb.) 90 N. W. 921.

53. Polarek v. Gordon, 102 Ill. App. 356; Kochman v. O'Neill, 102 Ill. App. 475.

54. Kinney v. Murray, 170 Mo. 674.

55. Rev. St. 1899, § 695, as to review on appeal does not apply to equity cases—Fitzpatrick v. Weber, 168 Mo. 562. Under Const. S. C., art. 5, § 4, the court must examine all the testimony in equity cases—Brown v. Newell, 64 S. C. 27.

56. Taylor v. King, 24 Ky. Law Rep. 1824.

57. Schwartz v. Duss, 187 U. S. 8.

58. Dermott v. Priddy (Mo. App.) 71 S. W. 1088.

59. If the evidence supporting a decree is not in the record, facts recited therein must be assumed as true and the decree sustained if its findings are sufficient—Russell v. Chicago & M. Elec. R. Co., 98 Ill. App. 347. Where it appears from the record that the order of sale was recalled after appraisement in foreclosure and the property was appraised and sold under another order, the presumption will obtain that the property brought two-thirds of each appraisement unless a contrary showing is made—Bowditch v. O'Linn (Neb.) 91 N. W. 523. Where several writs commanding a sheriff to execute a decree of foreclosure were issued, it will be presumed in the absence of contrary showing that the appraisement was valid—Omaha Nat. Bank v. Sanders (Neb.) 90 N. W. 211.

60. If an action was originally tried before a master, it will be presumed that the master did not consider part of the answer of a witness to a proper question because not responsive—Sargent v. Burton, 74 Vt. 24. It will be presumed that a proper foundation was laid for an answer of a witness as supporting the ruling made by the master before whom the action was tried—Sargent v. Burton, 74 Vt. 24.

Proceedings before referees or auditors.—Findings of a referee,[63] approved by the court below,[64] or on a compulsory reference,[65] or of an auditor approved by the court,[66] or in submission of issues at law by consent,[67] will not be disturbed except in clear cases. Findings of a compulsory statutory reference will be reviewed both as to law and facts.[68]

G. Rulings and decisions on intermediate appeals.—A lower court of appeal will presume that a case sent from the higher court is properly in its jurisdiction.[69] A question of fact in a state court is a question of fact in the supreme court of the United States,[70] and findings of fact in the state court are conclusive in the supreme court.[71] The decision of the Illinois appellate court on controverted questions of fact is binding on the supreme court,[72] whether on appeal from the finding of the

61. East Tennessee Land Co. v. Leeson (Mass.) 66 N. E. 427.

62. Lynch v. Egan (Neb.) 93 N. W. 775.

63. Creedon v. Patrick (Neb.) 91 N. W. 872; State v. Davis (Neb.) 92 N. W. 740; Collins v. McGuire, 76 App. Div. (N. Y.) 443; Ocorr & Rugg Co. v. Little Falls, 77 App. Div. (N. Y.) 592; Aronson v. Greenberg, 78 App. Div. (N. Y.) 639; Camp v. First Nat. Bank (Fla.) 33 So. 241; Lancieri v. Kansas City I. St. Sprinkling Co., 95 Mo. App. 319. Question of negligence—Dutton v. Amesbury Nat. Bank, 181 Mass. 154. Damages assessed by referee on stipulation—Hentz v. Mt. Vernon, 78 App. Div. (N. Y.) 515. Finding as to a claim against an estate will not be reversed though the evidence apparently justifies a doubt as to its correctness because of the superior advantages of the referee in seeing and hearing the witnesses—Hart v. Tuite, 75 App. Div. (N. Y.) 323.

64. Branner v. Webb, 65 Kan. 857, 68 Pac. 1107.

65. Roth v. Continental Wire Co., 94 Mo. App. 236.

66. In re Fague's Estate, 19 Pa. Super. Ct. 638.

67. Alexander v. Louisville & N. R. Co., 114 Fed. 774; Rumford Falls Boom Co. v. Rumford Falls Paper Co., 96 Me. 96.

68. Compulsory reference under Rev. St. Mo. 1899, § 698—Buxton v. Debrecht, 95 Mo. App. 599.

69. Ortt v. Leonhardt (Mo. App.) 68 S. W. 577; Bowlby v. Kline, 28 Ind. App. 659; State v. Ohio, etc., Land Co., 95 Mo. App. 349. As that no constitutional question is presented—Sneed v. Salisbury, 94 Mo. App. 426; Kirkwood v. Meramec Highlands Co., 94 Mo. App. 637. Case was treated as one of equitable nature and not mandamus which would not lie—Gowdy Co. v. Patterson, 29 Ind. App. 261.

70. Finding of fact as to what was the law of another state—Eastern B. & L. Ass'n v. Ebaugh, 185 U. S. 114, 46 Law. Ed. 830.

71. Jenkins v. Neff, 186 U. S. 230, 46 Law. Ed. 1140. In an equity suit—Bement v. National Harrow Co., 186 U. S. 70. Though the supreme court is bound by agreed facts before a state court it may inquire whether they support the judgment—Kelley v. Rhoads, 188 U. S. 1.

72. Chicago v. O'Malley, 196 Ill. 197; Starkweather v. Maginnis, 196 Ill. 274; Chicago City R. Co. v. Fennimore, 199 Ill. 9; Union El. R. Co. v. Nixon, 199 Ill. 235. Where evidence is conflicting and a motion to exclude the evidence and find for defendant is denied—Chicago v. Peck, 196 Ill. 260. Whether plaintiff was a fellow-servant with others is a question of fact—Frost Mfg. Co. v. Smith, 197 Ill. 253. As is also negligence of street railway company in action for injuries to passenger—Chicago City R. Co. v. Morse, 197 Ill. 327. And whether damages awarded are excessive—Chicago City R. Co. v. Morse, 197 Ill. 327; Chicago City R. Co. v. Fennimore, 199 Ill. 9. Finding of negligence on conflicting evidence in action against railroad company for death of child—Potter v. O'Donnell, 199 Ill. 119. Under Practice Act, § 87, finding of no negligence in action for personal injuries—Weeks v. Chicago & N. W. R. Co., 198 Ill. 551. Finding as to assumption of risk by employe—Anthony Ittner Brick Co. v. Ashby, 198 Ill. 562. Reversal by appellate court of findings of trial court as contrary to evidence and recital of findings in judgment—Aachen & M. Fire Ins. Co. v. Crawford, 199 Ill. 367. That a directed verdict is asked at close of all the evidence instead of at close of plaintiff's evidence will not change the rule as to review of refusal—Chicago City R. Co. v. Martensen, 198 Ill. 511. Finding as to waiver by mutual insurance society of forfeiture of membership—Grand Lodge v. Lachmann, 199 Ill. 140. Question of agency for fire insurance company—Northern Assur. Co. v. Chicago Mut. B. & L. Ass'n, 198 Ill. 474. Finding as to knowledge of benefit association that a member was engaged in selling liquor and as to waiver of by-law prohibiting members from such occupation—Coverdale v. Royal Arcanum, 199 Ill. 649. Excessiveness of verdict is a question of fact—Sinclair Co. v. Waddill, 200 Ill. 17. Finding as to waiver by insurance company of condition forfeiting policy—Aetna Life Ins. Co. v. Sanford, 200 Ill. 126. A finding as to delay in performance of a contract is substantially a finding of fact that defendant was guilty of a breach of the contract which plaintiff had not waived—Iroquois Furnace Co. v. Elphicke, 200 Ill. 411. Discussion of former decision in brief and suggestion that court of its own motion might review it will not avail—Best v. British & A. Mortg. Co., 131 N. C. 70. Whether a member of a benefit association was in good standing at time of his death is a question of fact, and the supreme court will not consider effect of a by-law, whether notice of assessment was given, or whether default in dues had been waived—Hunter v. National Union, 197 Ill. 478. Whether certain property was covered by chattel mortgage of a corporation and whether the mort-

trial court,[73] or of a jury;[74] but the facts so found must be the ultimate facts as shown in the pleadings.[75] The rule applies to findings of fact on appeal from the appellate division of the supreme court of New York;[76] though where a verdict directed on uncontradicted evidence is affirmed in the appellate division, the court of appeals may determine whether the evidence justified direction.[77] A finding of fact by the court of civil appeals of Texas, supported by the evidence, is conclusive on the supreme court though not on the lower court on retrial.[78] Findings of fact by the court of errors and appeals in New Jersey will not be reviewed by the supreme court.[79] Findings of fact by the court of chancery appeals of Tennessee will not be disturbed by the supreme court.[80] Exceptions to legal conclusions of a surrogate on dismissal of a proceeding will be reviewed by the court of appeals on appeal from an order of affirmance in the appellate division.[81] Modification, by the appellate division, of a judgment of a special term by striking out damages awarded one of the plaintiffs is a reversal, and if the order does not state the grounds on which it was based, the court of appeals will presume it was for errors of law and grant a new trial.[82] If the appellate division did not state that a reversal was upon the facts, in a case in which the question of the bar of limitations was not settled by the trial court, the court of appeals will not review that question.[83] Where a judgment on a verdict directed for the relator in mandamus in which both parties ask direction of a verdict has been affirmed by the appellate division of New York, the court of appeals will presume that the facts were settled so as to support the judgment.[84] The presence of both questions of law and fact in a particular issue will not make the finding reviewable.[85] Submission of a proposition, to the court on trial, that a chattel mortgage was executed without authority, does not render it a proposition of law reviewable by the supreme court under a law allowing "written propositions" to be submitted on trial without a jury.[86] If an appeal is taken to the appellate court of Illinois, involving a question of freehold, which that court cannot hear, appellant

gage was executed without authority—Gilbert v. Sprague, 196 Ill. 444. Finding as to assumption of risk by servant under control of foreman—Western Stone Co. v. Muscial, 196 Ill. 382. Whether loss to goods in transit was due to shipper's negligence in loading—Elgin, J. & E. R. Co. v. Bates Mach. Co., 200 Ill. 636. Negligence of mother in action for death of child—True & True Co. v. Woda, 201 Ill. 315. Finding as to procuring release by fraud—Indiana, D. & W. R. Co. v. Fowler, 201 Ill. 152.

73. Jones v. Maxton, 197 Ill. 248.

74. O'Hara v. Murphy, 196 Ill. 599. In action for personal injuries where direction of verdict for defendant was not requested—Spring Val. Coal Co. v. Rowatt, 196 Ill. 156.

75. Iroquois Furnace Co. v. Elphicke, 200 Ill. 411.

76. Under Const. art. 6, § 9, and Code Civ. Proc. § 191, subd. 4—Archer v. Mt. Vernon, 171 N. Y. 629; Rider v. Syracuse R. T. R. Co., 171 N. Y. 139; Bank of Monongahela Valley v. Weston, 172 N. Y. 259; National Revere Bank v. National Bank of Republic, 172 N. Y. 102; In re Boerum St., 173 N. Y. 321. Authority of city to make street repairs as dependent on evidence of damage by frost is a question of fact—People v. Featherstonhaugh, 172 N. Y. 112. If there is some evidence which the jury believed the court of appeals will leave the value thereof as sustaining the verdict to the appellate division—Merchants' Nat. Bank v. Barnes, 172 N. Y. 618. Whether the acts of an owner of an easement were reasonable, in building a wharf over a basin controlled jointly by him and his grantee in a deed reserving the easement, involves questions of fact as to circumstances and necessity for the improvement, and an appeal from a reversal of the appellate division in an action to restrain the grantor will be dismissed—India Wharf Brew. Co. v. Brooklyn W. & W. Co., 173 N. Y. 167.

77. Second Nat. Bank v. Weston, 172 N. Y. 250.

78. Hunter v. Eastham, 95 Tex. 648.

79. Finding that location of highway was not induced by improper offers to supervisors—Devine v. Olney (N. J. Err. & App.) 53 Atl. 466.

80. Carver v. Maxwell (Tenn.) 71 S. W. 752.

81. In re Killan's Estate, 172 N. Y. 547.

82. Van Siclen v. New York, 172 N. Y. 504.

83. Matteson v. Palser, 173 N. Y. 404.

84. People v. Scannell, 172 N. Y. 316.

85. Finding as to existence of waiver of by-law by benefit association—Coverdale v. Royal Arcanum, 199 Ill. 649.

86. The law does not permit exceptions as to rulings on submissions of fact (Practice Act, Ill. p. 138)—Gilbert v. Sprague, 196 Ill. 444. See, also, High Court Ind. v. Schweitzer, 171 Ill. 325.

cannot raise such question on appeal to the supreme court.[87] The appellate court of Illinois, in reversing a judgment and rendering one of its own, must give therein a recital of the facts as found as a basis for review by the supreme court.[88] If defendant submitted no propositions of law on trial and assigned no cross-errors on appeal by plaintiff to the appellate court, no questions of law remain for his appeal to the supreme court.[89] The statute restricting the supreme court to questions of law only, and making findings of fact by the appellate court conclusive, does not apply to chancery suits.[90] If the court of civil appeals of Texas does not review an error assigned on a finding of fact by the trial court, the supreme court will hold the error overruled, thus sustaining the trial court.[91] The finding of the circuit court on hearing of a motion to affirm a justice's judgment for failure to give notice of appeal, on conflicting evidence as to waiver of notice, is conclusive on appeal to the Missouri court of appeals.[92] A decision on re-examination as to whether a Chinaman is lawfully in the country, made by a federal commissioner and a judge of the district court on appeal from the commissioner, is conclusive on the supreme court.[93]

H. Effect of decision on former review in same court.—The decision of an appellate court is binding on that court on a subsequent appeal or writ of error in the same case,[94] where the second appeal from a trial as of right raises no question that could not have been raised on the first,[95] and where the case,[96] and the evidence, is in

87. Dean v. Plane, 195 Ill. 495.

88. Under Practice Act, Ill. § 88; sufficiency of finding as to practice of medicine or surgery without a license—People v. Smith, 199 Ill. 20.

89. Aachen & M. Fire Ins. Co. v. Crawford, 199 Ill. 367.

90. Prac. Act, § 90 (Rev. St. p. 1297); chancery proceeding against personal representative of deceased partner—Henry v. Caruthers, 196 Ill. 136.

91. Finding that contracts were procured by fraud—National Oil & Pipe Line Co. v. Teel, 95 Tex. 586.

92. Pattison v. Missouri, K. & T. R. Co., 93 Mo. App. 643.

93. Chin Bak Kan v. United States, 186 U. S. 193; Chin Ying v. Same, 186 U. S. 202.

94. Payette & Ferrier (Wash.) 71 Pac. 546; Commercial State Bank v. Ketcham (Neb.) 92 N. W. 998; Stager v. Troy Laundry Co., 41 Or. 141, 68 Pac. 405; Sisk v. Joyce (Tex. Civ. App.) 68 S. W. 50; Branner v. Webb, 65 Kan. 857, 68 Pac. 1107; Benton County Sav. Bank v. Boddicker (Iowa), 90 N. W. 822; State v. O'Neil Lumber Co. (Mo.) 70 S. W. 121. The remedy, if any, is by petition to rehear—Holley v. Smith (N. C.) 43 S. E. 501; allowance of interest on accounting—Anderson v. Northrop (Fla.) 33 So. 419; Northrop v. Anderson, Id. Decision of particular question directly before the court—Jones v. Wilmington & W. R. Co. (N. C.) 42 S. E. 559. Former appeal on foreign judgment for alimony held to be final and enforceable—Arrington v. Arrington, 131 N. C. 143. Acts of trial court approved by implication on the first appeal will not be reviewed—Olsen v. North Pac. Lumber Co. (C. C. A.) 119 Fed. 77. Right of defendant corporation to purchase claims against a third party from plaintiff—Mahoney v. Butte Hardware Co. (Mont.) 71 Pac. 674. Construction of writings between the parties—Weigley v. Kneeland, 172 N. Y. 625. Affirmance of judgment taxing costs—In re Jerome Ave. (N. Y.) 78 App. Div. 631; Hawes v. Hynes, Id. Appeal from judgment for plaintiff in action for personal injuries—Leeds v. New York Tel. Co. (N. Y.) 79 App. Div. 121. Right of plaintiff to recover for wrongful restraint of property by attachment—Farmers' & Shippers' Tobacco Warehouse Co. v. Gibbons, 24 Ky. Law Rep. 1670. Decision that mortgagee, after foreclosure, may bring an action for trespass before maturity of mortgage—Girard Life Ins., Annuity & Trust Co. v. Mangold, 94 Mo. App. 125. Rulings as to sufficiency of evidence to carry issues to the jury—Southern Mut. Ins. Co. v. Hudson, 115 Ga. 638. Though an amended complaint was filed after the complaint was held sufficient on demurrer by the appellate court, where it differed only as to parties included—Mississinewa Min. Co. v. Andrews, 28 Ind. App. 496. Offer of proof omitted on former trial which was not prejudicial to the other party will not change the law of the case—Lawson v. Spencer, 90 Mo. App. 514. That plaintiff withdrew all objection to incompetent evidence will not entitle defendant to have it considered by the appellate court so as to change its decision previously made—Standard Sewing Mach. Co. v. Leslie (C. C. A.) 118 Fed. 557; Tidball's Ex'rs v. Shenandoah Nat. Bank (Va.) 42 S. E. 867; decision that evidence on a particular issue warranted submission to the jury—Wunderlich v. Palatine Ins. Co. (Wis.) 92 N. W. 264. Where defendant, in a writ of error to review a judgment entered on affirmance in the appellate court of a verdict directed for plaintiff, gave no evidence except what he had introduced on the first trial, which was held incompetent, the giving or refusal of instructions will not be reviewed—Standard Sewing Mach. Co. v. Leslie (C. C. A.) 118 Fed. 557.

95. Bradley v. Lightcap, 201 Ill. 511; objection to appointment of receiver which might have been made on the first trial—Clark v. Brown (C. C. A.) 119 Fed. 130.

96. Burke v. Ledsinger, 115 Ga. 195; Middeke v. Balder, 98 Ill. App. 525.

legal effect, the same,[97] but only as to questions necessarily involved and such as where presented and expressly or impliedly decided.[98] Questions which might have been but were not determined on the first appeal are not settled.[99] If on second trial, after reversal, new material evidence is given, the decision on the appeal as to matters concerning the finding is not conclusive on a second appeal,[1] except as to questions of law.[2] Where a cause is reversed and remanded generally, the assumption of a certain fact by the appeal court will not preclude determination of its existence on a second appeal, the record of which brings up additional evidence.[3] On appeal from an order rendered in an action on a judgment, questions raised by special answers in such action but determined on appeal from the judgment will not be considered.[4] As to matters not considered by the higher appellate court on appeal from an intermediate court, the decision of the lower court remains the law of the case.[5] A second judgment like the first will not be reversed also for insufficiency of evidence where, on retrial, the evidence in support is strengthened.[6] A reversal on a former appeal by part of defendants from a judgment against all will not disturb the judgment against those not appealing.[7] Where an order granting a new trial was reversed as given on erroneous ground and the court refused to consider other grounds assigned, such questions may be considered on an appeal from the judgment afterward entered.[8] A ruling on a first appeal that a petition states a cause of action so as to admit evidence supporting it over an oral objection will be conclusive on a second appeal where on the second trial defendant neither demurred nor moved for more definite averments but urged his former objection.[9] Affirmance of a judgment denying a preliminary injunction depending solely on questions of law concludes plaintiff as to such questions raised in his assignments of error though not all are expressly referred to in the opinion or synopsis.[10] Appeal from a decree entered in pursuance of a mandate of the United States supreme court brings up only the question whether the decree properly followed the mandate.[11]

§ 14. *Provisional, ancillary, and interlocutory relief.*—It is inherent in the appellate court to protect the subject-matter in statu quo pending an appeal.[12] If the appellate court be given authority to issue writs in aid of its jurisdiction, it can preserve the subject of litigation by injunction and the trial court has no power whatever,[13] but in some states the lower court may do so.[14] The circuit court of appeals cannot issue writs of prohibition in protection of its appellate jurisdiction not yet invoked.[15] When an intermediate court acting only for the protection of its

97. Travers v. McElvain, 200 Ill. 377. Appeal from non-suit in action for personal injuries because of contributory negligence—Copeland v. Metropolitan St. R. Co. (N. Y.) 78 App. Div. 418.

98. Herriman Irr. Co. v. Keel, 25 Utah, 96, 69 Pac. 719.

99. Wine v. Woods, 158 Ind. 388.

1. Herriman Irr. Co. v. Keel, 25 Utah, 96, 69 Pac. 719.

2. State v. Paxton (Neb.) 90 N. W. 983; Brown v. State, Id.

3. Lang v. Metzger, 101 Ill. App. 380. A statement on the first appeal that tax deeds of another state were presumptive evidence of title and regularity of the proceedings will not prevent determination of their invalidity on the second appeal for failure to name the state as grantor—Wine v. Woods, 158 Ind. 388.

4. Salem-Bedford Stone Co. v. Hobbs, 28 Ind. App. 520.

5. Mutual Life Ins. Co. v. Hill (C. C. A.) 118 Fed. 708.

6. Though plaintiff's evidence on the first trial was so impeached as to render reversal of a judgment in his favor necessary, a second judgment for him will not be disturbed where on the second trial his evidence was so corroborated as to render its falsity uncertain—Wunderlich v. Palatine Ins. Co. (Wis.) 92 N. W. 264.

7. A writ of error by plaintiffs against defendants not appealing will not be dismissed—Williams v. Wiley (Tex.) 71 S. W. 12.

8. Gray v. Washington Water Power Co., 30 Wash. 155, 70 Pac. 255.

9. Marshall v. Ferguson, 94 Mo. App. 175

10. Savannah, T. & I. H. R. Co. v. Savannah, 115 Ga. 137.

11. United States v. Camou, 184 U. S. 572.

12. Finlen v. Heinze (Mont.) 69 Pac. 829.

13. Finlen v. Heinze (Mont.) 69 Pac. 829.

14. Injunction will issue from the lower court to protect the property pending appeal under Civil Code 1887, § 144—Ajax G. M. Co. v. Triumph G. M. Co. (Colo.) 69 Pac. 523.

15. In re Paquet (C. C. A.) 114 Fed. 437.

own jurisdiction continues a temporary restraining order issued by the lower court, such continuation ceases with the suing out of a writ of error to the highest court.[16] Before resorting to mandamus to compel a clerk to approve a supersedeas bond, the statutory remedy by motion should be tried.[17] The trial court during term may of its own motion revive an action where appellant dies after a short transcript, but before the bill of exceptions is filed.[18]

Since appealing from dissolution of an injunction does not continue it in force, an appeal may proceed after dissolution of a counter injunction against further proceedings and an appeal from the dissolution.[19]

Stay of appeal.—An appeal of a collateral judgment will be stayed until decision of an appeal from another judgment on which the first depends.[20] If a party has taken proper steps to procure the making of an order, and has in good faith appealed, proceedings may be stayed on the appeal until an order can be formally made on the motion appealed from.[21]

§ 15. *Decision and determination. A. Affirmance or reversal.*—Errors which do not prejudice appellant or are not substantial do not warrant a reversal,[22] but if error of law be prejudicial, a reversal follows though the court believes that the correct result on the evidence has been reached.[23] In some states however it is sufficient that a correct result is reached regardless of error.[24] If the case is decided below upon a certain theory of law, it may be affirmed on the correct theory.[25] The decisions upon the harmlessness or materiality of errors will be collected in a future article, which see.[26] Where mistake in the amount is offset by others in the appellant's favor, it is ignored,[27] nor will reversal be made to permit recovery of nominal damages solely.[28]

Affirmance or reversal should be on the facts in the record.[29] Affirmance may be with leave to apply for appropriate relief below when reversal cannot be made be-

16. Riggins v. Thompson (Tex.) 71 S. W. 14.

17. Code Civ. Pr. § 889—State v. Houseworth, 63 Neb. 658.

18. Crawford v. C., R. I. & P. R. Co. (Mo.) 66 S. W. 350.

19. Mauldin v. Greenville, 64 S. C. 444.

20. Freilsen v. Strader Cypress Co., 108 La. 61.

21. A motion to set aside a judgment and re-assess damages had been consolidated with a mandamus proceeding to compel payment, and mandamus was granted but no order made on the motion—People v. Holdredge (N. Y.) 75 App. Div. 622. Proceeding on appeal was stayed to enable party to procure formal entry of order below—People v. Holdredge (N. Y.) 75 App. Div. 622.

22. City of South Omaha v. Meyers (Neb.) 92 N. W. 743; Sibley Warehouse & S. Co. v. Durand & K. Co., 102 Ill. App. 406; Edmonston v. Jones (Mo. App.) 69 S. W. 741; Vinson v. Scott, 198 Ill. 542; Linam v. Jones, 134 Ala. 570; Moore v. Ortgier, 103 Ill. App. 579; Kalina v. Steinmeyer, 103 Ill. App. 502; Kerr v. O'Keefe, 138 Cal. 415, 71 Pac. 447; Hannum v. Hill, 52 W. Va. 166; Gray v. Washington W.-P. Co., 30 Wash. 665; Swanson v. Keokuk & W. R. Co., 116 Iowa, 304; Succession of Hewitt, 107 La. 446; Boston Sav. Bank v. Bradford, 181 Mass. 199; Goodwin v. Goodwin (N. Y.) 72 App. Div. 529; Chicago v. Le Moyne (C. C. A.) 119 Fed. 662. Errors affecting issues decided favorably to appellant not ground to reverse—Hartman v. Warner (Conn.) 52 Atl. 719. Erroneous charge was disregarded—Erickson v. Kansas City, O. & S. R. Co. (Mo.) 71 S. W. 1022. Failure to allow nominal damages—Willets v. Ida County Sav. Bank (Iowa) 90 N. W. 729. See many cases in Harmless Error. Erroneous instruction as to damages for delay in paying for injury to land, but verdict only slightly exceeded lowest estimate and there was nine years delay—Provident L. & T. Co. v. Philadelphia, 202 Pa. 78. A wife cannot complain that the former allowance was excessive—Wagner v. Wagner (Mich.) 93 N. W. 889.

23. McNicol v. Collins, 30 Wash. 318, 70 Pac. 753. So in Illinois appellate courts—Irwin v. N. W. Nat. Life Ins. Co., 200 Ill. 577.

24. So by statute—Germania Fire Ins. Co. v. Pitcher (Ind.) 64 N. E. 921; Cox v. Peltier (Ind.) 65 N. E. 6; McCardle v. Aultman Co. (Ind. App.) 66 N. E. 507; Jackson v. Helmer (N. Y.) 73 App. Div. 134. Defective pleadings—Willoughby v. Long (Tex. Civ. App.) 69 S. W. 646.

25. If questions of law alone are involved, the rule will be applied though all parties have not appealed—Sheafer v. Mitchell (Tenn.) 71 S. W. 86.

26. Harmless Error.

27. Mayer v. Nethersole (N. Y.) 71 App. Div. 383.

28. Hofferberth v. Myers (N. Y.) 71 App. Div. 377. Costs or other right must be involved—School Dist. v. Burress (Neb.) 89 N. W. 609.

29. Smith v. Hooper, 95 Md. 16; Reese v. Damato (Fla.) 33 So. 462.

cause lately developed conditions or defenses are not in the record.[30] Affirmance will be made despite error against an appellant whose failure to bring in a party would make any other decision wrong as to other appellees.[31] The changing of the law on which a judgment rests may require a reversal if no rights have become fixed or vested.[32] If a higher court reverses a decision on which the judgment at bar is based, a reversal in the case at bar will follow;[33] thus after two trials and the verdict of the jury in the first has been set aside below, exceptions taken and evidence certified, proceedings and evidence on the first trial will be examined, and, if error is discovered in setting aside the verdict, all subsequent proceedings will be set aside.[34] A decision may be had by agreement.[35] If inconsistent reliefs be granted, acceptance of one necessitates affirmance of the other.[36]

When a party has committed a defect or default in proceedings, a pro forma decision may be made without consideration of the merits,[37] so when there is no real dispute.[38]

An equal division of sitting and qualified judges makes an affirmance.[39] When a complete decision is made on one party's proceeding, others will be dismissed.[40] Where a judgment is reversed in a case controlled by questions made in the cross bill of exceptions, dismissal of a writ of error on the main bill will follow.[41]

Reversal or affirmance must be entire unless the parts of the decree are severable,[42] but a wrong judgment may be reversed in favor of one appealing defendant letting it stand against others who did not appeal,[43] and when reversed as to one, it is left so standing.[44] If not dependent on each other[45] and severable, a decision on one judgment does not affect the other,[46] but an original judgment may be reversed with the amended one in order to clear the record.[47] When an order denying the right to

30. Another judgment introduced in evidence as res adjudicata was later reversed—Reese v. Damato (Fla.) 33 So. 462.

31. Priorities would have been deranged—Hall v. New York (N. Y.) 79 App. Div. 102.

32. Law respecting disconnection of territory from city limits was retroactively repealed after affirmance in a lower court of appeal and affirmance was reversed—Burchett v. People, 197 Ill. 593. Decisions followed had been overruled—American Sugar Ref. Co. v. New Orleans (C. C. A.) 119 Fed. 691.

33. MacFarland v. Byrnes, 19 App. D. C. 531.

34. Wood v. American Nat. Bank, 4 Va. Sup. Ct. Rep. 133, 40 S. E. 981.

35. State v. Schwartz F'dry Co., 108 La. 85.

36. Judgment for specific performance and also damages for breach—Hoskins v. Dougherty (Tex. Civ. App.) 69 S. W. 102.

37. Power v. Stocking, 26 Mont. 475, 68 Pac. 857; Burnes' Estate v. American Br'g Co. (Mo.) 70 S. W. 512; Pavey v. Pavey, 102 Ill. App. 589. It is not given of right—Davis v. Huber Mfg. Co. (Iowa) 93 N. W. 78; Alexander v. Wilson (Mo. App.) 69 S. W. 602. Appellant discontinued and took no other appeal—Post v. Spokane (Wash.) 69 Pac. 371. Hearing on merits denied because of defects in briefs—Power v. Stocking, 26 Mont. 475, 68 Pac. 857. For failure of defendant to file briefs there should be a reversal and a pro forma judgment against defendant—Pavey v. Pavey, 102 Ill. App. 589. Striking briefs does not entitle the adverse party to decision—Davis v. Huber Mfg. Co. (Iowa) 93 N. W. 78.

38. Reversal made because of absence of any real dispute upon merits—Matter of Ferris (N. Y.) 74 App. Div. 619.

39. Chicago, B. & Q. R. Co. v. Camper, 100 Ill. App. 21.

40. Decision on cross-error—Harwell v. Martin, 115 Ga. 156.

41. Harwell v. Martin, 115 Ga. 156; Martin v. Harwell, Id.

42. New Cache La Poudre Irr. Co. v. Water Co., 29 Colo. 469, 68 Pac. 781; Chicago Traction Co. v. Stanford, 104 Ill. App. 99. Joint judgment in tort erroneous as to one—Holz v. Rediske (Wis.) 92 N. W. 1105.

Judgment on counts to cancel a release and for damages for injury is severable—Roberts v. Central Lead Co., 95 Mo. App. 581. Under Rev. Codes N. D. § 5630, providing that the supreme court must finally dispose of the case unless a new trial is ordered—Prescott v. Brooks (N. D.) 90 N. W. 129.

43. Orr v. Wolff (N. Y.) 71 App. Div. 614.

44. Merchants' Nat. Bank v. Stebbins, 15 S. D. 280.

45. Judgment against garnishee reversed with main judgment though another judgment had been entered—Decatur v. Simpson (Iowa) 93 N. W. 496. Final judgment reversed with interlocutory one on which it depended—Schieck v. Donohue, 114 N. Y. State Rep. 739.

46. Connor v. General Fire Ex. Co. (N. Y.) 73 App. Div. 624. Summary judgment against surety in forcible entry case may be reversed leaving judgment stand as against principal—Hadley v. Bernero (Mo. App.) 71 S. W. 451.

47. One corrected the other—State v. Denham, 30 Wash. 643, 71 Pac. 196.

become a party is affirmed, a reversal should be entered of an order for a stay until decision.[48]

B. Transfers and removals, and certifications or reservations.—In Indiana a cause will be sent to the highest court when there is one disqualified judge of the intermediate court and a division of the others.[49] Decision may be withheld until determination of other controlling causes.[50] The circuit court of appeals may certify a treaty question reserving decision on other questions presented, or may decide without passing on such question.[51]

C. Remand or final determination.—There can be no original adjudication but only review.[52] A judgment for plaintiff in an action which clearly in point of law will not lie must be reversed.[53] Final determination may be given if nothing remains to be decided by a retrial,[54] as when the sole contention is a matter of law,[55] or if no different or more favorable result can be reached on a new trial,[56] or if a defect of pleadings,[57] or deficiency of proof appears which cannot be supplied,[58] or if there be a defect which is unsubstantial or is capable of correction by the appellate court.[59] It may be done where the appeal is so taken that all doubtful questions are concluded.[60] Certain classes of cases are excepted from these rules.[61] The court will finally dismiss as against an appellant whose pleadings show no cause of action.[62] Remand will not be made if the case turns on a point of the legal sufficiency of the evidence to make a prima facie case.[63] When a primary court decrees a new trial, but, lest a further appeal be taken, makes findings of fact, it is proper for it to rest there without entering final judgment.[64]

If any material fact or right is in doubt,[65] or there be a defect in procedure or

48. Matter of Parsons, 73 App. Div. (N. Y.) 622.

49. By virtue of statute—Seiler v. State (Ind. App.) 64 N. E. 101.

50. Collateral rights in litigation—Frellson v. Strader Cypress Co., 108 La. 61.

51. U. S. v. Lee Yen Tai (C. C. A.) 113 Fed. 465.

52. Jurisdiction on appeal from settlement of guardian's account in probate court is purely appellate, excluding matters of original jurisdiction—Magness v. Berry (Tex. Civ. App.) 69 S. W. 987. Matters on provisional accounting incapable of adjudication will be left for a future accounting—Succession of Willis (La.) 33 So. 314.

53. Kelly v. Strouse (Ga.) 43 S. E. 280.

54. Good v. Lasher, 99 Ill. App. 653; Lazarus v. Rosenberg (N. Y.) 70 App. Div. 105. Appellate division may, under Code Civ. Pr. §§ 626, 1348, dissolve ex parte injunction on appeal from refusal of special term to do so—Marty v. Marty (N. Y.) 66 App. Div. 527. Error in assessing too great a proportion of costs of local improvements against abutter, requires reversal, although the city does not complain of the portion assessed against it—Kreiger v. Gosnell, 24 Ky. Law Rep. 1095.

55. On review of a mandamus to an officer, the sole issue was on a law question of all his powers—State v. Police Com'rs (Mo.) 71 S. W. 215.

56. City of Chicago v. Jackson, 196 Ill. 496; Bedford Quarries Co. v. Thomas, 29 Ind. App. 89.

57. Glover v. Clark, 100 Ill. App. 176. Injunctional order granted on bill showing no equity was finally dismissed—Worth Mfg. Co. v. Bingham (C. C. A.) 116 Fed. 785.

58. City of Galveston v. Brown (Tex. Civ. App.) 67 S. W. 156.

59. Under a provision requiring a decision according to substantial justice regardless of technical errors, judgment may be given without remanding to amend conformably to proof—Jackson v. Helmer (N. Y.) 73 App. Div. 134.

60. Action in Louisiana for killing sheep was appealed to supreme court which could not consider any but constitutional questions—Rausch v. Barrere (La.) 33 So. 602.

61. Election contest will be remanded, though all necessary evidence is up—Patterson v. Hanley, 136 Cal. 265, 68 Pac. 821, reluctantly following precedents.

62. Iodence v. Peters (Neb.) 89 N. W. 1041.

63. Richardson v. Moffit-West Co. (Mo. App.) 69 S. W. 398. Entire failure to fix liability on defendant—Wells, Fargo Express v. Waites (Tex. Civ. App.) 69 S. W. 450. Under N. Y. practice if a motion to dismiss be reserved until after general verdict, an appeal from dismissal takes up the verdict, and judgment may be given (Code Civ. Pr. § 1187)—Niemoller v. Duncombe (N. Y.) 59 App. Div. 614.

64. Traughber v. Smelser, 108 Tenn. 347.

65. Hurst v. Benson (Tex. Civ. App.) 71 S. W. 417; Low v. Moore (Tex. Civ. App.) 72 S. W. 421. Two women claiming as widows damages for death by wrongful act—Albinest v. Yazoo & M. V. R. Co., 107 La. 133. Decree refusing foreclosure reversed regardless of fact that separate judgment on note had been reversed—Cooper v. Haythorn (Kan.) 71 Pac. 277. Reversal in mandamus case is necessitated if findings are not returned by the trial judge as required—People v. Dalton (N. Y.) 77 App. Div. 499. Divorce case remanded to adjudicate property rights—McAllister v. McAllister, 28 Wash. 613, 69 Pac. 119. Judgment of ac-

proof which may be amended,[66] or if there be evidence tending to make a case or defense though the weight be against it, a remand for new trial is necessary.[67] It will not be denied because a different result is improbable.[68] Remand will be made to a lower court of review which failed to pass on a material point,[69] or where the trial court was not asked to correct error.[70]

Judgment may be modified if everything necessary to advise the court in so doing is before it, or the fact is admitted;[71] otherwise it must be affirmed or reversed and the changes made by the trial court.[72] Errors of computation[73] or clerical errors may be corrected,[74] and excessive or erroneous amounts may be reduced,[75] but relief against subsequent conditions requires the exercise of original jurisdiction.[76] Improper costs may be stricken out or a new judgment given which eliminates them.[77] It cannot be modified in favor of a party not appealing.[78]

Remand with directions.—If to sustain jurisdiction the action must necessarily be regarded one of tort and hence abatable by death, death of defendant pending appeal will necessitate a remand with direction to abate the action.[79] If the record of an intermediate court of appeal shows that it had no jurisdiction of the case, the case may be remanded to such court for it to dismiss the appeal.[80] Where much time has elapsed, a new trial should be given rather than send back the cause for find-

counting reversed as to one item may be remanded for finding on that alone—James v. West (Ohio) 65 N. E. 156. Allowance to executors for extraordinary services cannot be apportioned in the absence of facts—Glover v. Check, 24 Ky. Law Rep. 1783.

66. A faulty amended complaint was used though the original one was good—Braggins v. Holekamp (Tex. Civ. App.) 68 S. W. 57. Lack of proof of due passage of an ordinance—Puchen v. Jennings, 107 La. 413. Remanded with leave to amend to conform to proofs made—Denver & R. G. R. Co. v. Buffehr (Colo.) 69 Pac. 582. In an equitable cause defendant withheld evidence because some of plaintiff's evidence was excluded—Robson v. Hamilton, 41 Or. 239, 69 Pac. 651. Where pleadings were defective but had been treated as good, and judgment was given without proof of a material fact the cause was remanded—Eaton v. Tod (Tex. Civ. App.) 68 S. W. 546; Succession of Emonot (La.) 33 So. 368. Want of evidence due to error of exclusion—Wall v. Dimmitt, 24 Ky. Law Rep. 1749; Santaquin Min. Co. v. High Roller Min. Co. (Utah) 71 Pac. 77. As on reversing judgment of abatement where there had also been a demurrer to complaint—Hayden v. Kirby (Tex. Civ. App.) 72 S. W. 198.

67. Chicago City R. Co. v. Maloney, 99 Ill. App. 623; Gordon v. Hall (Tex. Civ. App.) 69 S. W. 219. Judgment formerly set aside in trial court not entered in lieu of that appealed—E. H. Taylor v. Warehouse Co., 24 Ky. Law Rep. 1656.

68. Sherman v. Ludin (N. Y.) 79 App. Div. 614.

69. Wideman v. Patton, 64 S. C. 408.

70. Appellant should move below for a correction of the verdict which is too small—Comstock v. Fraternal Ass'n (Wis.) 93 N. W. 22.

71. Order to vacate changed to one "opening" judgment where the object of it was to let in a defense—Potts v. Harmer, 19 Pa. Super. Ct. 252. Want of evidence other than improbable testimony of a party will require reversal—Numan v. Wolf (N. Y.) 73 App. Div. 38. Judgment against claim bond in statutory action to try right to attached property, instead of against the property itself held capable of correction—Arnold v. Cofer, 135 Ala. 364. Perpetual injunction against construction of a railroad may be modified to permit of its construction if proper condemnation proceedings be had—Peck v. Schenectady R. Co., 170 N. Y. 298. An injunction may be modified by excluding its operation from matters inadvertently included—Pape v. New York & H. R. Co. (N. Y.) 74 App. Div. 175.

72. It appeared that obstruction of a water course was not harmful at all seasons but it did not appear just when; hence injunction against it was affirmed—Mace v. Mace, 40 Or. 586, 68 Pac. 737, 67 Pac. 660. Absence of material evidence which trial court did not give appealing party time to produce—United States v. Rio Grande Dam Co., 184 U. S. 416, 46 Law. Ed. 619.

73. Error of referee in computation—Hasbrouck v. Marks (N. Y.) 58 App. Div. 33.

74. Hopper v. Hickam, 169 Mo. 166, 69 S. W. 297.

75. Judgment embracing admittedly unproved items—Mullin v. Langley (N. Y.) 37 Misc. 789.

76. Appellate court cannot relieve but must affirm—Village of New Holland v. Holland, 99 Ill. App. 251. Judgment for vendor for purchase price will not be reversed to add an order for delivery of deed, where one was tendered and refused, and no question of tender was brought in issue—North Stockton Town Lot Co. v. Fischer, 138 Cal. 100, 70 Pac. 1082.

77. Guttery v. Boshell, 132 Ala. 596; Cramer v. Huff, 114 Ga. 981.

78. Decree settling accounts—Snyder v. O'Beirne (Mich.) 93 N. W. 872.

79. Bank of Iron Gate v. Brady, 184 U. S. 665, 46 Law. Ed. 739.

80. Involving validity of the statute—Commissioners of Drainage Dist. v. Commissioners of Highways, 199 Ill. 80.

ings to sustain judgment.[81] An order to enter judgment on the verdict may be given when the setting aside of it is reversed.[82] If the reviewing court having power to change findings made on a trial to the court remands the cause without doing so, it cannot direct specific judgment below.[83] A direction may be made to take more evidence.[84] Amendments to prove a jurisdictional fact will not be permitted in the appellate court but reversal with leave to amend should be made.[85] A direction cannot be made for leave to plead a new cause of action cutting off new defenses, or allowing a prayer for relief which plaintiff was offered below but refused.[86]

An affirmance may be conditioned on a remittitur of excessive[87] or illegal sums awarded,[88] or upon payment of costs which should have been imposed but were not.[89] To warrant an order for remittitur of erroneous items in a verdict, the improper awards should be separated and identified from the others.[90] Reversal should not be made as against a party who offers to make good an inadequacy in the award.[91]

On appeal from the municipal court in New York, a demand for a new trial may be treated as surplusage where neither party demanded judgment for more than $50. Jurisdiction to grant the new trial cannot be conferred by stipulation of the parties.[92]

D. Findings, conclusions, or opinions on which decision is predicated.—When a lower court of appeal reverses it should make findings or conclusions to support and explain its decision,[93] unless there is no controversy of fact.[94] They will not as a rule find facts on evidence which the record itself shows.[95] Rights may be adju-

81. Want of material findings in partition—Levine v. Goldsmith (N. Y.) 71 App. Div. 204.

82. Set aside on a jurisdictional objection and was found to be supported by evidence and unaffected by error—Strawn v. Brandt-Dent Co. (N. Y.) 71 App. Div. 234.

83. Guyer's Estate v. Caldwell, 98 Ill. App. 232.

84. If affidavits on motion to attach for contempt are uncertain and unsatisfactory, a denial of the motion may be reversed, and the cause sent to a referee to take evidence—Hogan v. Clarke (N. Y.) 72 App. Div. 615.

85. Watson v. Bonfils (C. C. A.) 116 Fed. 157.

86. Action to set aside conveyance—Warner v. Godfrey, 186 U. S. 365, 46 Law. Ed. 1203.

87. Gulf, etc., R. Co. v. Darby (Tex. Civ. App.) 67 S. W. 446; Chicago, R. I. & P. R. Co. v. Burke, 101 Ill. App. 486; Leach v. Durkin, 98 Ill. App. 415; City of Chicago v. Glore, 99 Ill. App. 78; City of Chicago v. Gilfoil, Id. 88; Hill v. Oswald, Id. 120; Chicago & A. R. Co. v. Murphy, Id. 126; City of Chicago v. Doolan, Id. 143; Swafford v. Spratt, 93 Mo. App. 631; Illinois Car Co. v. Weibel, 101 Ill. App. 490. The county court may do so on appeal from the Syracuse municipal court—Lynch v. Syracuse, etc., R. Co. (N. Y.) 73 App. Div. 95.

If majority of court think excessive—Skelton v. St. Paul C. R. Co. (Minn.) 92 N. W. 960.

Court should be satisfied the jury acted honestly—Hawes v. Warren, 119 Fed. 978. And in Colorado (Code, § 217) remittitur cannot be ordered if the excess was due to passion and prejudice—F. M. Davis Ironworks v. White (Colo.) 71 Pac. 384.

88. Usury—Sorensen v. Central Lumber Co., 98 Ill. App. 581. Unproved item—Illinois Cent. R. Co. v. Tucker (Miss.) 31 So. 792; International & G. N. R. Co. v. Sampson (Tex. Civ. App.) 64 S. W. 692. Remittitur of a separate judgment erroneously entered in addition to a joint judgment—Cunningham v. Underwood (C. C. A.) 116 Fed. 803. Award exceeding ad damnum clause—Trustees of Christian University v. Hoffman, 95 Mo. App. 488; Missouri, K. & T. R. Co. v. Pawkett (Tex. Civ. App.) 68 S. W. 323; First Nat. Bank v. Calkins (S. D.) 93 N. W. 646. Erroneous interest remitted and costs paid—Meyer v. Phoenix Ins. Co., 95 Mo. App. 721. Allowance covered too long a time—United Press v. A. S. Abell Co. (N. Y.) 79 App. Div. 550.

89. Order granting new trial—Helgers v. Staten Island R. Co. (N. Y.) 69 App. Div. 570.

90. Held sufficient where verdict stated separate items and on what they were based, and where excess was equal to the amount claimed improperly—W. U. Tel. Co. v. Partlow (Tex. Civ. App.) 71 S. W. 584. Confirmation of special tax which included an improper item distributed over many properties must be reversed—Thompson v. Chicago, 197 Ill. 599.

91. Hoyt v. Chicago, etc., R. Co. (Iowa) 90 N. W. 724.

92. King v. Norton (N. Y.) 73 App. Div. 619. As to inferior court judgments generally, see Courts, Justices of the Peace.

93. In Illinois the appellate court must make findings if it finds different from the trial court, even when facts are stipulated—Irwin v. N. W. Nat. Life Co., 200 Ill. 577.

94. Matter of execution of written instrument—Iroquois Furnace Co. v. Elphicke, 200 Ill. 411.

95. Instruments set out—Scott v. Farmers' Nat. Bank (Tex. Civ. App.) 67 S. W. 343; Rountree v. Thompson (Tex. Civ. App.) 72 S. W. 69. Motion for additional conclu-

dicated if decisive of the question.[96] Unnecessary questions will not be answered.[97] No decision will be made as to a nonappealing party unless it is necessitated by the decision on appellant's case.[98]

E. Modifying or relieving from appellate decree.—Decision will not be modified ex parte for matters not in the record.[99] If the alimony part of a divorce decree was not appealed and the facts as to alimony are not in the record, the appellate decision cannot be modified in such respect.[1] A lower court decree pursuant to remand may be reversed to correct error in the appellate decision.[2] Leave may be granted after affirmance, to apply to the lower court to vacate a satisfied judgment.[3] If leave be given to vacate a judgment below, applicant is not restricted to the showing made above.[4] If right to plead over given below was not reserved in a judgment of affirmance, application for it should be made above.[5] Since a remand revests jurisdiction in the lower court, the reviewing court may vacate without notice any judgment thereafter made by it.[6]

F. Mandate and retrial.—The cause usually but does not necessarily go back to the same tribunal for trial.[7] After reversal of a referee's judgment, the case does not go back to him.[8] A motion for issuance of mandate without costs on ground of poverty requires a clear showing.[9] Time to issue mandate is computed from the date of original decision above and not from corrected dates.[10]

Retrial.—No new note of issue is required where a cause once on docket stays until stricken or disposed of.[11] In Kentucky, statutory notice of filing a mandate is needless to take a case to the next term when filed in court during term time.[12] A remanded cause may proceed by jury trial though the former trial was to the court.[13] When the highest court renders judgment absolute pursuant to appellant's stipulation, no proceeding to assess damages is needed if it was done in the order appealed.[14]

Matters decided are fixed and should not be raised again,[15] unless new evidence

sions denied because on matters in record by bill of exceptions—Texas Tram Co. v. Gwin (Tex. Civ. App.) 68 S. W. 721.

96. People v. Court of Appeals (Colo.) 69 Pac. 606.

97. Conflicting special findings not reconciled for an unsuccessful appellant—Kirkpatrick v. Tarlton (Tex. Civ. App.) 69 S. W. 179. Effect of breach of contract resulting in no damage—New Idea Pattern Co. v. Whelan (Conn.) 53 Atl. 953.

98. Christopher & S. Foundry Co. v. Kelly, 91 Mo. App. 93.

99. Smith v. Hooper, 95 Md. 16.

1. Gibson v. Gibson, 18 App. D. C. 72.

2. Intermediate court will reverse judgment following its own mandate if supreme court afterward reverses decision on which mandate issued—Guyer's Estate v. Caldwell, 98 Ill. App. 232.

3. Post v. Spokane, 28 Wash. 701, 69 Pac. 371, 1104.

4. State v. Superior Court (Wash.) 71 Pac. 740.

5. White v. Jackson (N. Y.) 39 Misc. 218.

6. Thomas v. Robinson (Iowa) 92 N. W. 70.

7. After the creation of two districts in W. Va. a remanded cause will, under the provision of Act of Congress, Jan. 22, 1901, be sent to the northern district in order to be heard before the trial judge, though otherwise the cause would have been transferred to the southern district—Hatfield v. King, 186 U. S. 178, 46 Law. Ed. 1112.

8. Camp v. Bank (Fla.) 33 So. 241.

9. Party had property but did not show that effort to sell had been made or that it was impossible to sell—Gulf, etc., R. Co. v. Matthews (Tex. Civ. App.) 67 S. W. 788.

10. Lee v. British & Am. Mortg. Co. (Tex. Civ. App.) 70 S. W. 775. Act 1901, c. 54, as to time of taking mandate, construed to operate prospectively and to apply where a defeated plaintiff procures a reversal—Scales v. Marshall (Tex.) 70 S. W. 945.

11. 2 Ball. Ann. Codes, § 4970—Spokane & V. Copper Co. v. Colfelt, 30 Wash. 628, 71 Pac. 196.

12. Chestnut v. Russell, 24 Ky. Law Rep. 704.

13. Guyer's Estate v. Caldwell, 98 Ill. App. 232.

14. Damages were found and case dismissed, that was reversed and reversal affirmed—Wright v. Mt. Vernon (N. Y.) 78 App. Div. 467.

15. People v. Hathaway, 102 Ill. App. 628; Fortunato v. New York (N. Y.) 74 App. Div. 441; Russell v. Mohr-Weil Co., 115 Ga. 35; Martin v. People's Bank, 115 Fed. 226. That action was equitable—Porter v. International Bridge Co. (N. Y.) 79 App. Div. 358. Rights of a lessee on certain facts—Shaft v. Carey (Wis.) 90 N. W. 427. Taxation and allowance of costs—In re Henschel, 114 Fed. 968. Fees should not be allowed to receiver after his appointment is held invalid—La Femina v. Arsene (N. Y.) 74 App. Div. 620. Though decided for a wrong reason—Hutch-

is received making a different case;[16] hence a judgment against defendant, who proved an answer held to state a complete defense, is wrong;[17] but if the point or issue was not reviewed, it is still open,[18] if the right to raise it has not been lost by delay, failure to object, or appeal, or the like.[19]

The court must follow the mandate else a second reversal will follow.[20] The verdict for a successful appellant may be set aside though a directed verdict for the adversary was wrong.[21] New terms of sale may be imposed in a second foreclosure after reversal of the first for usury.[22]

Unless restricted by the mandate, amendments may be allowed by the court below.[23] Pleadings and papers may be amended to state facts more fully,[24] or to state

inson v. Manhattan Co., 170 N. Y. 579. Decision on facts not binding where retrial was discontinued and new action brought in different jurisdiction—Ill. Cent. R. Co. v. Bentz, 108 Tenn. 670.

Answer may be let in after reversal for not defaulting defendant (Code, § 274) Cook v. Am. Exchg. Bank, 131 N. C. 96.

Trial court bound only by decisions of law—Hale v. People's Gas Co., 102 Ill. App. 364. Contradicting former testimony affects credibility only (Pacific Biscuit Co. v. Dugger (Or.) 70 Pac. 523; but see Wunderlich v. Palatine Ins. Co. (Wis.) 92 N. W. 264, holding that opinion cannot be read to contradict him. Trial may be de novo on facts if no directions given—Hovland v. McNeill & H. Co., 104 Ill. App. 149.

If no change in proof verdict may be directed—Lindsey v. Allen (Ga.) 43 S. E. 49. Instruction applicable to same facts sustained—Ward v. St. Vincent's Hospital (N. Y.) 78 App. Div. 317.

16. Phelps Co. Ins. Co. v. Johnston (Neb.) 92 N. W. 576; Friedman v. Lesher, 198 Ill. 21. Bass Dry Goods Co. v. Granite City Co. (Ga.) 42 S. E. 415; Sovereign Camp W. O. W. v. Haller (Ind. App.) 66 N. E. 186; Boston & M. Min. Co. v. Montana Ore Pchg. Co., 27 Mont. 431, 71 Pac. 471; State v. Paxton (Neb.) 90 N. W. 983; Griffen v. Manice (N. Y.) 74 App. Div. 371. Different evidence—Pacific Coast Biscuit Co. v. Dugger (Or.) 70 Pac. 523. New findings held immaterial on right of trustee to compensation—Bemmerly v. Woodard, 136 Cal. 326, 68 Pac. 1017. Retrial after reversal of involuntary nonsuit—Fuchs v. St. Louis, 167 Mo. 620. Evidence held not material as to time of accruing of right to proceeds of commercial paper—Hutchinson v. Manhattan Co., 170 N. Y. 579.

17. Pittsburgh, etc., R. Co. v. Mahoney, 29 Ind. App. 654.

18. Duncan v. Scott Co., 70 Ark. 607. Instructions given—Kibler v. Southern R. Co., 64 S. C. 242. Referee's report is still evidence if its admissibility was not reviewed—Boody v. Pratt (N. J. Law) 53 Atl. 470. Right to interest not concluded when not mentioned—Whitehead v. Brothers Lodge I. O. O. F., 24 Ky. Law Rep. 1633.

19. Sufficiency of pleadings—Greenwood Tp. v. Richardson, 10 Kan. App. 581, 62 Pac. 430. New possible defense covered by answer but not considered on review, cannot be let in after reversing judgment on pleadings for want of a specified fact—Shaft v. Carey (Wis.) 90 N. W. 427. Separate issues not appealed are closed—Bemmerly v. Woodard, 136 Cal. 326, 68 Pac. 1017.

20. Delbridge v. Lake B. & L. Ass'n, 98 Ill. App. 96. Judgment on retrial sustained—Kentucky Heating Co. v. Louisville Gas Co., 24 Ky. Law Rep. 990. Slight departure may be error but not make void—People v. Carpenter, 29 Colo. 365, 68 Pac. 221. Held error to deduct costs from sum adjudged—Lockhart v. Severance, 63 S. C. 74.

New judgment should not be entered on directions to modify it in a certain respect and "further if necessary"—Bemmerly v. Woodard, 136 Cal. 326, 68 Pac. 1017. **Contra** where the kind of modification was not prescribed—Downing v. Rademacher, 138 Cal. 324, 71 Pac. 343.

Mandamus not proper remedy for departure—People v. Carpenter, 29 Colo. 365, 68 Pac. 221.

Contra,—American Placer Co. v. Rich (Idaho) 69 Pac. 280.

Appeal lies if mandate be transgressed—Butler v. Thompson, 52 W. Va. 311.

Conformity of procedure to mandate; construction. It should construe an opinion in light of the subject of it—Farrow v. Eclipse Bicycle Co., 18 App. D. C. 101. Decision construed on right to prove subsequent facts not as defense but as going to mitigation of damages—Gabay v. Doane (N. Y.) 77 App. Div. 413. Reversal for errors on trial not construed as favorable to party on facts, in face of adverse holding on every issue—Smith v. Day, 117 Fed. 956; Huntress v. Portwood (Ga.) 42 S. E. 513. Reversal for want of a finding not a decision on facts—Conway v. Catholic Knights, 137 Cal. 384, 70 Pac. 223. Opinion on practice does not conclude merits—Bradshaw v. Gunter, 135 Ala. 240. Decision held conformable to opinion reversing decree quieting title and instead deciding equities in mining claim—Dowing v. Rademacher, 138 Cal. 324, 71 Pac. 343. Reversal of nonsuit does not decide on facts—Kelly v. Strouse (Ga.) 43 S. E. 280. When issue goes back as to whether writing sets out the whole of a contract, it is error to exclude testimony as varying an instrument—Huber Mfg. Co. v. Hunter (Mo. App.) 72 S. W. 484. As to right of recovery for breach of covenant for title—Egan v. Martin (Mo. App.) 71 S. W. 468.

21. Binion v. Georgia R. Co., 115 Ga. 330.

22. Morgan v. Wickliffe, 24 Ky. Law Rep. 1039.

23. The applicant should excuse failure to do so earlier—Russell v. Mohr-Weil Co., 115 Ga. 35. Refusal to let in a defense of limitations sustained—Wilson v. Winsor, 24 Ky. Law Rep. 1343. Reversal on reasons first developed on review held to warrant leave to amend without paying costs—Miller

additional facts.[25] Amendment to conform to proof is primarily discretionary with the court below.[26] Additional facts may before resubmission be added to a demurrable complaint after reversal of judgment for want of them.[27] After appeals de novo, as in equity, amendments are not allowable, but in special circumstances relief is given.[28]

Other relief may be given on a retrial which is not repugnant to the mandate.[29] When an order on a motion is reversed and remanded without direction, the merits are still open to the court below.[30] Application for a remedy may be renewed on a remand with leave to resort to any remedy without prejudice to former applications.[31] An intimation in the opinion as to right of recovery does not exclude that issue from a retrial.[32] An order of restitution may be made if judgment has been paid with an agreement to repay if reversed.[33]

Proceedings on remand to lower appellate court.—If sent back for want of jurisdiction, decision stands and mandate must issue.[34] An intermediate appellate court to which a cause was remanded because the agreed facts were too meagre must make findings of fact or if error of law exists remand the cause further to the trial court.[35] When a reversal is sent back to find facts or if reversed for error of law to remand, an affirmance may be made by the intermediate court.[36] An omitted finding of fact may be supplied on a mandate to reverse and remand or affirm.[37] An intermediate appellate court should reverse a judgment entered pursuant to its own mandate, if such course is necessitated by a decision of the highest court contrary to directions in such mandate.[38] A mere entry on rescript to the court below, "exceptions overruled," leaves the suit still pending until final decree.[39]

§ 16. *Rehearing and relief thereon.*—Rehearings are allowed only when the judgment finally disposes of the cause.[40] The petition must state matters not already considered,[41] but new points not before urged cannot be urged,[42] and record subsequent to judgment appealed will not be received.[43] A time is usually prescribed within which rehearing must be asked or petition filed.[44] The petition must be

v. Carpenter (N. Y.) 79 App. Div. 130. Amendment allowed to conform to statutory procedure and to use such evidence formerly adduced as was responsive (proceeding to enjoin prevention of change of point of diversion of water changed so as to sue to make change)—New Cache La Poudre Co. v. Water Supply Co., 29 Colo. 469, 68 Pac. 781. It is not a contempt but an occasion for appeal if the trial judge deny an amendment designed to present a defense not passed on because not pleaded—May v. Ball, 24 Ky. Law Rep. 241. Mandate gave directions on facts found and on which opinion was based —Butler v. Thompson, 52 W. Va. 311.

24. A contempt affidavit if meager may be amended on re-trial—Scott v. State (Tenn.) 71 S. W. 824.

25. Emerson v. Schwindt, 114 Wis. 124. Amendments should not be made to meet objections overruled by the supreme court —Russell v. Mohr-Weil Lumber Co., 115 Ga. 35.

26. Male v. Schaut, 41 Or. 425, 69 Pac. 137.

27. Charleston R. Co. v. Miller, 115 Ga. 92.

28. Evidence of bona fides and that former evidence was fraudulent—Fellows v. Loomis, 204 Pa. 225.

Evidence held not to show concealment of facts warranting such relief — Farrow v. Eclipse Bicycle Co., 18 App. D. C. 101.

29. Grant of new trial two years after remand held not error—Canosia Tp. v. Grand Lake Tp., 87 Minn. 347.

30. Temporary alimony—Marx v. Marx, 94 Mo. App. 172.

31. Contempt against one who interfered with receiver—Fletcher v. McKeon (N. Y.) 74 App. Div. 231.

32. Csatlos v. Metropolitan St. Ry. Co. (N. Y.) 78 App. Div. 635.

33. Denning v. Yount (Kan.) 71 Pac. 250.

34. Bradley v. Phoenix Ins. Co., 92 Mo. App. 241.

35. Heath & Milligan Co. v. National Linseed Oil Co., 99 Ill. App. 90.

36. Heath & M. Co. v. National Linseed Oil Co., 197 Ill. 632.

37. Agnew v. Supple, 99 Ill. App. 19.

38. Guyer's Estate v. Caldwell, 98 Ill. App. 232.

39. Cushing v. Cushing, 181 Mass. 209.

40. Refusal to dismiss is interlocutory—Gagneaux v. Desonier (La.) 33 So. 561.

41. Da Costa v. Dibble (Fla.) 33 So. 466.

42. Indiana Power Co. v. St. Joseph Power Co. (Ind.) 64 N. E. 468; Mathews v. Granger, 196 Ill. 164; Clipper Min. Co. v. Eli Co., 29 Colo. 377, 68 Pac. 286. Instruction cannot be assailed on objections not broader than urged at hearing—Union Pac. R. Co. v. Colorado Tel. Co. (Colo.) 69 Pac. 564; McDonald v. People, 29 Colo. 503, 69 Pac. 703. Points not in briefs—Fishel v. Goddard (Colo.) 69 Pac. 607.

43. Clipper Min. Co. v. Eli Co., 29 Colo. 377, 68 Pac. 286.

44. The court cannot extend the statu-

filed as of the day it is received; and delivering it for transmission to the clerk is not delivery to him.[45] It should be addressed to the court and the court should pass on it.[46] Final disposition of cause will not be made on application for rehearing.[47] Reversal founded on apparent defects of trial procedure will be set aside and the judgment affirmed on a showing that the clerk omitted to put them in the record and the party could not sooner have known of or corrected it; if there has been unexplained delay, and the case must go back in any event, he may be remanded to such remedy as may still be given in the trial court.[48]

§ 17. *Liability on bonds and the like.*[49]—No liability attaches to the obligor in an erroneously exacted supersedeas bond.[50] An appeal undertaking, insufficient to comply with the statute, may bind the sureties as a common law undertaking, if there is an actual stay of execution thereon.[51] The conservator of a lunatic who has given a bond on appeal from a judgment against him cannot question its validity for want of a proper obligee.[52]

Extent of liability.—Moneys already paid should be allowed on recovery.[53] Under statutes requiring an appellant to give an undertaking to pay all costs and damages awarded on appeal, the liability of a surety extends only to the costs of the appeal to the appellate court.[54] On supersedeas of a judgment overruling a demurrer to the petition, the surety is not liable for the amount of a verdict finally rendered.[55] On a bond filed by one party appealing, the liability extends only for loss occasioned by the suspension of the portion of judgment superseded by such party.[56]

Sureties are not liable for damage occasioned by the party's own neglect and not the stay.[57] Interest not awarded by the appellate court cannot be included in the damages where there is no proof of misconduct on the part of appellant.[58] On an appeal bond superseding an order confirming a foreclosure sale and directing the execution of a deed and delivery of possession to the purchaser, the obligee may

tory time to seek a rehearing—Dudgeon v. Bronson (Ind.) 65 N. E. 752. Must be filed within 25 days of filing opinion—Radloff v. Haase, 197 Ill. 98. 15 days after decision—Smith v. Simpson (Ind. T.) 69 S. W. 841.

45. Radloff v. Haase, 197 Ill. 98.

46. Under the laws of Arkansas as adopted for the government of the Indian Territory, the court of appeals in the territory, has no authority to adopt a rule permitting a judge to order a rehearing. If presented after term within the fifteen days allowed, a judge should indorse an order for filing upon the petition which shall then stand over for hearing until the tenth day of the next term—Smith v. Simpson (Ind. T.) 69 S. W. 841.

47. Losecco v. Gregory, 108 La. 648.

48. Service on a necessary party—Powell v. Nolan, 27 Wash. 318, 68 Pac. 389.

49. Variance in statement of term held unimportant—White v. Boreing, 24 Ky. Law Rep. 738.

50. Bond required of an administrator—Kerr v. Lowenstein (Neb.) 90 N. W. 931.

51. The sureties were charged with notice that they were not merely executing a cost bond—Coughran v. Hollister, 15 S. D. 318.

52. Bond given to the estate—Duncan v. Thomas (Colo. App.) 69 Pac. 310.

53. Penny v. Richardson (Okl.) 71 Pac. 227.

54. An undertaking on an appeal to the appellate court, stating that it was made pursuant to Code Civ. Proc. § 1326 and that the surety undertook that appellant would pay all costs and damages awarded against him on appeal, does not include costs in all the courts, though judgment absolute was rendered against appellant with costs in all the courts—Bennett v. American Surety Co. (N. Y.) 73 App. Div. 468.

55. His liability is only for the costs of prosecuting the writ of error—Franklin v. Kriegshaber, 114 Ga. 947.

56. On a bond given by a third party made defendant in foreclosure where a judgment had been rendered against the creditor for the debt and against both parties for foreclosure, the appellant is not liable for money judgment rendered against the creditor but only for loss directly occasioned by a postponement of the foreclosure sale—Adoue v. Wettermark (Tex. Civ. App.) 68 S. W. 553.

57. Adverse party failed to take possession of mortgaged property after the dismissal of appeal and dissolution of injunction—Pfirshing v. Peterson, 98 Ill. App. 70.

58. Fund deposited at interest, and no proof of unreasonable or vexatious delay in prosecuting the appeal and appellee had received the fund with its accumulations—Pike v. Gregory (C. C. A.) 118 Fed. 128.

recover rents and profits collected by the judgment debtor after confirmation of the sale,[59] though a deficiency judgment is paid.[60] On a bond on writ of error from a decree in rem, the obligors are not held to pay any of the money decree.[61]

Satisfaction and discharge of sureties.[62]—A bond on appeal from trial to an intermediate court is not discharged by a bond from an intermediate to a higher court, and payment of one does not satisfy the other.[63] A change of issues by amendment in the appellate court discharges the sureties.[64] An amendment of the judgment which does not affect the legal rights of the parties does not affect the rights of sureties on the appeal bond.[65] Confinement of the principal for contempt in failing to pay the judgment does not operate as a satisfaction.[66] Sureties on appeal for a defendant who gave bond to prevent restitution are liable until restitution is made.[67] Violation of an injunction pending an appeal should be redressed against the injunction bond and not against the supersedeas which left such injunction in force.[68]

Forfeiture and enforcement.—A bond on a writ of error is forfeited with dismissal of the writ.[69] An action on an appeal bond is barred by the statutes relating generally to official bonds.[70] One joint obligee may maintain an action if it is alleged and proven that he has become entitled to the interests of co-obligees, but he must prove such fact if it is denied, and where he has not made such showing, it is in the discretion of the court whether it will permit a juror to be withdrawn and the case continued.[71] Independent actions may be brought on bonds given by the same party on appeal to an intermediate court and from the intermediate to a final court.[72] The property of the judgment debtor need not be exhausted before suing on a supersedeas bond, nor need an execution be issued and returned nulla bona, nor in case of decease of the judgment debtor need the remedy against his estate be first pursued.[73]

Evidence of misrepresentations releasing the surety must connect them with the execution of the bond.[74]

59. Woodworth v. Northwestern Mut. Life Ins. Co., 185 U. S. 354, 46 Law. Ed. 945. During the time he has been kept out of possession by the bond—Brown v. Northwestern Mut. Life Ins. Co. (C. C. A.) 119 Fed. 148.

60. German Sav. & Loan Soc. v. Kern (Or.) 70 Pac. 709.

61. The bond was conditioned to prosecute the writ with effect—Smith v. Caldwell (Mo. App.) 70 S. W. 926.

62. The liability of a surety on an appeal bond in foreclosure is not discharged by payment of part of a bid made by him at a sale, under the judgment, which was not completed—Leopold v. Epstein (N. Y.) 54 App. Div. 133. Mistake in the omission of the husband from the judgment rendered on appeal from a judgment in favor of husband and wife, is not a defense to an action on the appeal bond. Judgment in city district court in an action for an injury to wife, removed to the common pleas—Rosenberg v. Stover, 67 N. J. Law, 506.

63. The securities are cumulative—Aurand v. Aurand, 98 Ill. App. 524.

64. Stay bond on appeal from probate to district court—Smith v. Haner (Idaho) 69 Pac. 109.

65. Amendment of a foreclosure judgment requiring the sheriff to pay from proceeds of the sale, the expenses of sale, the costs adjudged to the plaintiff and the amount of the mortgage debt, so as to direct him to pay the mortgage debt and thereafter the costs and expenses, does not affect the rights of the sureties—Leopold v. Epstein (N. Y.) 54 App. Div. 133.

66. Confinement of conservator of insane person for contempt in failing to pay a judgment to the estate of the ward not a satisfaction discharging the sureties on an appeal bond in the action leading to the judgment—Duncan v. Thomas (Colo. App.) 69 Pac. 310.

67. Forcible detainer—Penny v. Richardson (Okl.) 71 Pac. 227.

68. Green Bay & M. Canal Co. v. Norrie, 118 Fed. 923.

69. On a bond to stay execution, the sureties are liable to the owner of the judgment for its amount with interest and costs—Campbell v. Harrington, 93 Mo. App. 315.

70. Code Civ. Proc. § 14, bars an action on an appeal bond in ten years—Crum v. Johnson (Neb.) 92 N. W. 1054.

71. Code Civ. Proc. § 29—Harker v. Burbank (Neb.) 93 N. W. 949.

72. County to district and district to supreme courts—Duncan v. Thomas (Colo. App.) 69 Pac. 310.

73. Bonds given under Code Civ. Proc. § 588—Palmer v. Caywood (Neb.) 89 N. W. 1034.

74. The surety cannot testify that he was informed that a bond for payment of a judgment, if affirmed, was simply a cost bond, if it is not shown who informed him or

Summary judgment cannot be entered against a surety on a bond in unlawful entry and detainer.[75] Under statutory provisions for entry of judgments against sureties on appeal bonds on affirmance, when the amount can be ascertained without trial, judgment cannot be so entered on an appeal bond conditioned to pay rents and damages to real property pending appeal,[76] and the appellate court may refuse to enter judgment save for costs of appeal, where the appellee has performed acts prejudicial to the sureties.[77] General provisions for the entry of judgment against sureties on motion and notice for the amount adjudged against the plaintiff may be inapplicable to bonds given on appeal, in which case the remedy is by action.[78]

Judgment on the bond should be according to its terms.[79] In debt on an appeal bond, the judgment should be for the penalty, to be discharged by payment of damages resulting from the breach.[80]

APPEARANCE.

§ 1. Definitions and Kinds and What Constitutes.
§ 2. Who May Make or Enter.
§ 3. Effect.—General; Special.

This title deals with voluntary appearances, and of special appearances to the writ, or appearances as constituting a waiver of jurisdictional defects. Appearance to the writ generally, and consequences of it, or of nonappearance, pertain to other topics, as affecting questions of default, forfeiture, or time to plead.[1]

§ 1. *Definitions, kinds, and distinctions of appearances, and what constitutes them. General or special appearance.*—An appearance is general in its effect and for all purposes, if it is for any other purpose than to object to the jurisdiction,[2] or, while otherwise special, invokes other ground recognizing the jurisdiction, as a motion, on special appearance, by one not served, asking dismissal for

that he relied on the statement—Coughran v. Hollister, 15 S. D. 318, 89 N. W. 647.

75. The remedy is by action on the bond—Hadley v. Bernero (Mo. App.) 71 S. W. 451.

76. 2 Ballinger's Ann. Codes & Sts. § 6523—Carmack v. Drum, 27 Wash. 382, 67 Pac. 808.

77. The appellate court will not render judgment on the supersedeas bond except for costs of appeal, and will leave the appellee to sue on the bond where the surety became such on account of his knowledge that appellant was carrying on a profitable business and in reliance on his promise to make a certain deposit monthly, which would have been sufficient to discharge any judgment entered on appeal, and appellee obstructed the entrances to appellant's place of business and cut off his light, heat and water, rendering the place unfit for occupation, so that the payments could not be made—Quandt v. Smith, 29 Wash. 311, 69 Pac. 1097.

78. Under Code Civ. Proc. §§ 612-616, the supreme court is not authorized by the issuance of a writ of scire facias or on notice to order an execution on a cost bond given under Rule 12 of the court in error proceedings—Dunn v. Bozarth (Neb.) 90 N. W. 954.

79. The judgment should so run where the fiat for a supersedeas bond on writ of error required a bond for judgment, interest and costs—Taylor v. Wells (Tenn.) 69 S. W. 266.

80. Ackerman v. People, 100 Ill. App. 125.

1. See Default, Bail in Civil Actions, Justices of the Peace, Pleading.

2. Burnham v. Lewis (Kan.) 70 Pac. 337. To move to vacate appraisement of realty for a judicial sale, and to object to confirmation on grounds not going to jurisdiction over the party.—Nebraska L. & T. Co. v. Kroener (Neb.) 88 N. W. 499. Appearance in attachment to contest right to amend the affidavit—Burnham v. Lewis (Kan.) 70 Pac. 337. To obtain a copy of the complaint and to secure costs, under Mills' Ann. Code Colo. § 45—Brockway v. W. & T. Smith Co. (Colo. App.) 66 Pac. 1073. Asking to be made defendant to object to a confirmation of sale in foreclosure, and objecting on the ground of ownership and failure in service of summons upon himse.. and another—Nelson v. Nebraska L. & T. Co., 62 Neb. 549. To set aside a judgment by default for failure to answer—Thompson v. Alford, 135 Cal. 52, 66 Pac. 983.

To plead or answer to merits—McClure v. Paducah Iron Co., 90 Mo. App. 567; Galveston, H. & S. A. R. Co. v. Baumgarten (Tex. Civ. App.) 72 S. W. 78; Walters v. Field (Wash.) 70 Pac. 66. San Diego Sav. Bank v. Goodsell, 137 Cal. 420, 70 Pac. 299. To assail a suit on the ground that attachment was sued out on Sunday, and to enter a denial of the attachment, and plead in reconvention—Benchoff v. Stephenson (Tex. Civ. App.) 72 S. W. 106. By defendant in divorce to contest the right to custody of the children—Abercrombie v. Abercrombie, 64 Kan. 29, 67 Pac. 539.

jurisdictional defects and for personal right to be sued in another county;[3] or appearance by one not served with process to ask for vacation of a decree on the ground of failure of jurisdiction, of fraud, and of insufficiency of evidence.[4] An answer of several defendants without name, making no reference to one who was not served, is an answer of those served only, and will not give jurisdiction of the one not served as a voluntary appearance.[5] Voluntary appearance and tendering of issue by defendant in the main action and an attachment in aid, and the filing of a bond to perform the judgment, is a submission of the person to the jurisdiction, entitling plaintiff to personal judgment.[6]

Neither filing a petition to remove a cause from a state to a federal court,[7] nor appearance of defendant to raise the question of jurisdiction,[8] nor appearance in attachment to move to quash,[9] nor an appearance specially to move to dismiss for failure to issue summons within thirty days after filing the complaint, operates as a general appearance waiving summons or defects therein.[10] A demand by defendant's attorney in attachment, that plaintiff's attorney should declare plaintiff's residence, or the giving of a notice of a motion to strike out an order of the court validating the sheriff's return, where the invalidity was urged on the motion to quash, does not amount to a general appearance, though following a special appearance to quash.[11]

Appearance to testify as a witness is not an appearance in the action.[12]

Appearance by a foreign corporation to object to the jurisdiction is held in Texas an appearance to the next term of court.[13]

A subsequent plea to the merits by defendant is an appearance waiving the improper overruling of a previous motion to dismiss for want of jurisdiction of parties.[14] Filing a demurrer and plea to the declaration, after a motion to quash service is overruled, is an entry of appearance, and waives defects in process and service,[15] though not the right to object to the ruling on appeal.[16] A motion for a continuance by a defendant corporation, after entry of special appearance to object to the jurisdiction on an application for a receiver, which objection was overruled, is a demurrer as well as a motion affecting the jurisdiction, and operates as a full appearance, waiving all objections to jurisdiction.[17] A motion to dismiss a bill is a general defense, in the nature of a demurrer, and is such an appearance as will waive a motion to vacate service of subpoena on the ground that the teste antedates the filing of the bill.[18] An agreement between parties that a premature overruling of a motion to dismiss may be set aside to have the case heard on its merits is not a general appearance by defendant, but makes it necessary for the court to overrule the order and retain the case.[19]

An appeal amounts to an appearance so as to permit the court below on reversal to proceed with the case,[20] and, in Kentucky, though the service of pro-

3. Dudley v. White (Fla.) 31 So. 830.
4. Henry v. Henry, 15 S. D. 80.
5. Mullins v. Rieger, 169 Mo. 521.
6. New Albany Mfg. Co. v. Sulzer (Ind. App.) 63 N. E. 873.
7. Coombs v. Parish, 6 Colo. 296.
8. Evansville Grain Co. v. Mackler, 88 Mo. App. 186.
9. Franklyn v. Taylor Hydraulic Air Compressing Co. (N. J.) 52 Atl. 714.
10. Under Code Colo. §§ 30, 396—Coombs v. Parish, 6 Colo. 296.
11. Franklyn v. Taylor Hydraulic Air Compressing Co. (N. J.) 52 Atl. 714.
12. Commercial State Bank v. Rowley (Neb.) 89 N. W. 765.
13. Westinghouse Electric & Mfg. Co. v. Troell (Tex. Civ. App.) 70 S. W. 324.
14. Franklin Life Ins. Co. v. Hickson, 97 Ill. App. 387. Cf. Walters v. Field (Wash.) 70 Pac. 66.
15. Franklin Life Ins. Co. v. Hickson, 197 Ill. 117.
16. American Mut. Life Ins. Co. v. Mason (Ind.) 64 N. E. 525.
17. Chicago & S. E. R. Co. v. Kenney (Ind.) 62 N. E. 26.
18. Van Dyke v. Van Dyke (N. J. Ch.) 49 Atl. 1116.
19. Evansville Grain Co. v. Mackler, 88 Mo. App. 186.
20. Wylly v. Sanford L. & T. Co. (Fla.) 33 So. 453.

cess is insufficient, the appeal amounts to a general appearance;[21] however, in Wisconsin, a general appeal from the whole judgment will not cure lack of personal service on defendant.[22] Prosecution of an appeal for a defendant corporation is such an appearance that, on return of the case to the trial court, objections to the jurisdiction on the former hearing are waived.[23] In Ohio, where defendant has made reasonable objection to the jurisdiction over him, his subsequent plea to the merits does not waive objections to the jurisdiction, nor does his filing petition in error amount to a general appearance.[24] In the federal courts, a plea signed by counsel, raising an issue which is apparent on the face of the bill, will be considered an appearance for that purpose only.[25] A special appearance is not made general by perfecting an appeal.[26]

Agreement to a continuance of a suit before a justice is an appearance conferring jurisdiction of a person.[27] Application before a city police court for a change of venue in a prosecution to recover a penalty for violation of a city ordinance is a voluntary submission to the jurisdiction.[28] Where defendants defaulted during term time and afterwards stipulated with plaintiff extending the time for them to act in the case, judgment will be entered on subsequent failure to plead, though the service of process on them was defective.[29]

§ 2. *Who may make or enter.*—Appearance of plaintiff's attorney in court after entry and payment of judgment, when a motion was made by defendant to retax costs without further process, will not give jurisdiction of plaintiffs.[30] An answer by the guardian of an insane person constitutes an appearance for the latter, giving jurisdiction of his person.[31] Where a firm having goods of another is garnished, and one partner is served, the other may appear voluntarily and waive service of process on himself.[32] A county attorney may waive issuance and service of summons in error, though he has appeared in the case against the county at the trial.[33]

§ 3. *Effect.—General appearance* amounts to a waiver of notice or process,[34] and an appearance for any other purpose than the quashing of process waives any defects in process or service thereof,[35] especially if objection to service be withheld until too late to sue anew.[36]

It waives any mistake of the clerk in making the summons returnable to the wrong term,[37] or a statutory defect in summons in that a complaint was not

21. Louisville & N. R. Co. v. Chestnut & Co. (App.) 24 Ky. Law R. 1846.

22. Under Rev. St. 1898, § 2891, requiring personal service to give the clerk jurisdiction to enter a default judgment out of term—Electric Appliance Co. v. Warren (Wis.) 91 N. W. 970.

23. Louisville & N. R. Co. v. Jordan, 23 Ky. Law R. 1730.

24. Baltimore & O. R. Co. v. Freeman (C. C. A.) 112 Fed. 237.

25. The strict rules of the common law as to substantial issues regarding jurisdiction are not applied in the federal courts, but such issues may be raised by parties or counsel by plea, motion, or suggestion—Jenkins v. York Cliffs Imp. Co., 110 Fed. 807.

26. White House Mtn. G. M. Co. v. Powell (Colo.) 70 Pac. 679.

27. Kirkpatrick Const. Co. v. Central Electric Co. (Ind.) 65 N. E. 913.

28. In re Jones, 90 Mo. App. 318.

29. Cook v. American Exch. Bank, 129 N. C. 149.

30. Iowa Sav. & Loan Ass'n v. Chase (Iowa) 91 N. W. 807.

31. Under Code Civ. Proc. Cal. § 1769, providing for representation of insane persons by their guardians—Mullen v. Dunn, 134 Cal. 247, 66 Pac. 209.

32. Marx v. Hart, 166 Mo. 503.

33. Dakota County v. Bartlett (Neb.) 93 N. W. 192.

34. Kilmer v. Gallaher (Iowa) 88 N. W. 959. Filing demurrer—Fitzgerald v. Foster, 11 Okl. 558, 69 Pac. 878.

35. Baker v. Union Stock Yards Nat. Bank (Neb.) 89 N. W. 269.

General appearance and answer—McCormick Harvesting Mach. Co. v. Scott (Neb.) 89 N. W. 410; Cone v. Cone, 61 S. C. 512. Consent to continuance before a motion to quash—New River Mineral Co. v. Painter (Va.) 42 S. E. 300. Motion to set aside default for failure to plead—Barra v. People (Colo. App.) 69 Pac. 1074. Waiver of exemptions—English v. English, 19 Pa. Super. Ct. 586.

36. Fosha v. Western Union Tel. Co., 114 Fed. 701.

37. Patterson v. Yancey (Mo. App.) 71 S. W. 845.

served with it.[38] Persons appearing in proceedings to probate a will cannot object to insufficiency of the notice.[39] Appearance by an administrator to set aside a default against the estate, entered after his substitution in place of his decedent, waives any objection to jurisdiction in the first instance over decedent.[40] Appearance by defendant in replevin to contest the merits, and entry of judgment against him awarding possession to plaintiff, will waive objections to jurisdiction on the ground that the constable was not directed in writing to seize the property in the first instance.[41] A general appearance by a foreign corporation in a justice's court without objection, after the overruling of a special appearance and a motion to quash service, gives the justice, and the district court on appeal, jurisdiction to render judgment against the corporation.[42]

No subpoena is necessary on an amended libel in divorce where a subpoena issued and was served on the original libel, and respondent entered his appearance, answered the amended libel, and went to trial.[43] Where defendants appear generally without citation, they waive objection that, because of procedure and amended pleadings, such action is a new action;[44] and appearance at subsequent terms, and consent to continuance of two of four causes of action remaining after judgment upon the others, waives objections to jurisdiction for want of new process.[45]

Where there is jurisdiction of the subject-matter, an appearance and answer over by defendant waives any objection he may have to jurisdiction of the person.[46] Where an absent and nonresident defendant appears generally, in an attachment sued out against him in an action at law, personal judgment may be given against him, either with or without an order subjecting the attached property, though there has been no publication.[47] By pleading to the action a party sued out of the jurisdiction of the court waives the right to object on that ground.[48] The statutory privilege that railroad companies can only be prosecuted in the county where plaintiff resides is personal, and defendant's voluntary appearance waives the privilege.[49]

A full appearance by defendants will not prevent them from urging limitations to part of the causes of action which were urged in a new cause of action to which they appeared by answer.[50] A motion to release attached property on the ground that the attachment is unlawful may be made after general appearance by defendant.[51] Where defendant, in a suit for divorce and temporary alimony, entered a general appearance on the day preceding the hearing on the motion for alimony, and obtained a three days' continuance of the motion, he did not waive his right to apply for change of venue on the subsequent day, where the application was his first pleading, and the motion was heard on affidavits alone.[52]

Special appearance.—An appearance to move a stay of an execution issued on a void judgment will not waive defects in original service,[53] nor will appearance to set aside a judgment obtained without valid service amount to a submis-

38. Under Code Civ. Proc. N. Y. § 1897—Farmers' & Merchants' State Bank v. Stringer, 75 App. Div. (N. Y.) 127.
39. Flood v. Kerwin, 113 Wis. 673.
40. Moses v. Hoffmaster, 64 Kan. 142, 67 Pac. 459.
41. Under District Court Act N. J. § 143—Hunton v. Palmer, 67 N. J. Law, 94.
42. Plano Mfg. Co. v. Nordstrom (Neb.) 88 N. W. 164.
43. English v. English, 19 Pa. Super. Ct. 586.
44. Southern Pac. Co. v. Winton (Tex. Civ. App.) 66 S. W. 477.
45. Seay v. Sanders, 88 Mo. App. 478.
46. State v. Cryts, 87 Mo. App. 440; Jones v. St. Louis & S. F. R. Co., 89 Mo. App. 653.
47. Chilhowie Lumber Co. v. Lance & Co., 50 W. Va. 636.
48. Grant v. Birrell, 35 Misc. (N. Y.) 768; Franklin Life Ins. Co. v. Hickson, 97 Ill. App. 387.
49. Under Gen. Laws Tex. 1901, p. 31—Galveston, H. & S. A. R. Co. v. Baumgarten (Tex. Civ. App.) 72 S. W. 78.
50. Bernard v. Mott, 89 Mo. App. 403.
51. Sullivan v. Moffat (N. J.) 52 Atl. 291.
52. People v. District Court of Second Judicial District (Colo.) 69 Pac. 597.
53. Wren v. Johnson, 62 S. C. 533.

sion to jurisdiction of the person.[54] A special appearance to contest the jurisdiction of the court over the person of defendant will allow a contest of the sufficiency of the affidavit for publication.[55] Removal of a cause into the federal court will not prevent subsequent objection to the sufficiency of service,[56] and the filing of a petition and bond for removal by a corporation, as defendant, is not such an appearance as will prevent a motion to set aside defective service, even though the motion was in the state court before removal, and not acted upon.[57]

§ 4. *Relief, striking, or withdrawal.*—Withdrawal by defendant of appearance entered by mistake with the court's leave, while relieving him from a waiver of objections to the jurisdiction, does not authorize objection to the service on mere matters of form.[58] Withdrawal of appearance by defendant and motion to set aside summons may be allowed where the nature of the action was not fixed by service of the complaint.[59]

ARBITRATION AND AWARD.

§ 1. The Remedy in General.
§ 2. The Submission and Agreements to Submit.
§ 3. The Arbitrators and Umpire.
§ 4. Hearing and Procedure before Arbitrators.
§ 5. The Award.—Validity; Enforcement; Review.
§ 6. International Disputes.
§ 7. Statutory Arbitration between Employers and Employes.

This topic does not include submission to a referee,[1] or to a tribunal on agreed statements of rights or demands by parties,[2] or particular provisions in insurance policies for arbitration of loss.[3]

§ 1. *The remedy in general.*—Statutory arbitration is cumulative merely, and controversies capable of submission by parol agreement may still be submitted as at common law.[4]

§ 2. *The submission and agreements to submit.*—A provision for submission of future differences in a contract will not bar an action thereon,[6] and, if joined with a provision not to bring suit on the contract, will render the agreement void as invading the province of the courts;[7] but mere provisions that questions of difference between the parties should be settled by certain persons are not void, since they simply prescribe such determination as a condition precedent to suit by either party,[8] and, until an award or discharge of the arbitrators, no suit can be brought.[9] A condition in a bill of sale after an express agreement for payment, providing for arbitration of a dispute regarding the charging of expenses, does not make an award a condition precedent to action; and a provision that failure of either party to appoint an arbitrator will authorize the other to appoint will not prevent a revocation of the arbitration agreement.[10]

A submission in court or by agreement, providing for entry of the award

54. Wren v. Johnson, 62 S. C. 533.
55. Columbia Screw Co. v. Warner Lock Co. (Cal.) 71 Pac. 498.
56. Conley v. Mathieson Alkali Works, 110 Fed. 730.
57. Tortat v. Hardin Min. & Mfg. Co., 111 Fed. 426.
58. Jenkins v. York Cliffs Imp. Co., 110 Fed. 807.
59. Action for penalty for not making corporate report. Defendant could not attack the summons until the nature of the action was disclosed—Farmers' & Merchants' State Bank v. Stringer, 75 App. Div. (N. Y.) 127.
1. Reference.
2. Submission of controversy.
3. Insurance.
4. Poggenburg v. Conniff, 23 Ky. Law Rep. 2463, 67 S. W. 845; Gardner v. Newman, 135 Ala. 522.
6. Turner v. Stewart, 51 W. Va. 493.
7. Adjustment of insurance loss or damages on breach of policy—Phoenix Ins. Co. v. Zlotky (Neb.) 92 N. W. 736; Hartford Fire Ins. Co. v. Hon (Neb.) 92 N. W. 746.
8. Submission of questions of payment on building contract to engineers in charge of work—National Contracting Co. v. Hudson River Water Power Co., 170 N. Y. 439.
9. Citizens' Trust & Surety Co. v. Howell, 19 Pa. Super. Ct. 255.
10. Dickson Mfg. Co. v. American Locomotive Co., 119 Fed. 488.

as judgment, is irrevocable, and bars a suit on any demand submitted; but it is void as to parties not joining.[11] Appointment of a representative by one of the parties to a contract pursuant to its provisions to settle a dispute between the parties is not a submission to an arbitrator so as to make an award by him binding on his superior until set aside in legal proceedings.[12]

§ 3. *The arbitrators and umpire.*—Members of an ecclesiastical court may act as arbitrators, and their award will be binding in the civil courts.[13] A mere agent to compromise is not an arbitrator.[14] The arbitrator must be sworn.[15]

§ 4. *Hearing and procedure before arbitrators.*—The arbitrator must hear all the facts, but he need not consider admissions by parties not relating to their differences.[16] Where the issues are simple, or involve matters concerning which the arbitrators are experts, they may refuse to hear counsel at their discretion;[17] and one going into an arbitration waives objection for want of oath of the arbitrators and failure to admit counsel.[18]

§ 5. *The award; requisites, validity, and effect of award.*—The award must be certain as to an amount of money to be paid,[19] and is not conclusive as to matters not submitted,[20] and may be set aside as to such matters.[21] It need not be treated as an adjudication, where the dispute was submitted informally, and the award received by one party, but afterwards returned to the other.[22] If an award is void or not mutual as to one party, it cannot prejudice him,[23] but, if void in part for uncertainty, it may be sustained, where separable, by rejecting the void part as surplusage.[24]

Unless the submission contains stipulations or shows a conclusive intent that the parties should be bound by ministerial acts of the arbitrator, his decision in such matters is not final.[25] A finding that a person employed as a clerk may bind his employer by accepting, for his principal, a void transaction arranged by himself, is a wrong on the parties. If the arbitrators overstep the bounds of the submission or disregard the facts or rules thereof, either willfully or ignorantly, through good or bad motives, the award may be set aside by the injured party.[26]

The parties, and all claiming under them, are bound,[27] in the absence of fraud or mistake, and the successful party is entitled to judgment if the award follows the judgment.[28]

An award, in an oral submission, of rights in real property, is not a transfer,

11. Turner v. Stewart, 51 W. Va. 493.

12. Agent appointed to settle dispute as to sale of lumber—Williamson v. North Pac. Lumber Co. (Or.) 70 Pac. 387.

13. Poggenburg v. Conniff, 23 Ky. Law Rep. 2463, 67 S. W. 845.

14. Williamson v. North Pac. Lumber Co. (Or.) 70 Pac. 387.

15. Amicable compounder—L. J. Mestier & Co. v. A. Chevalier Pavement Co., 108 La. 562.

16. Amicable compounder—L. J. Mestier & Co. v. A. Chevalier Pavement Co., 108 La. 562.

17. Pennsylvania Iron Works Co. v. East St. Louis Cold Storage Co. (Mo. App.) 70 S. W. 903.

18. Gardner v. Newman, 135 Ala. 522.

19. Award for support of a bastard—Poggenburg v. Conniff, 23 Ky. Law Rep. 2463, 67 S. E. 845.

20. Award as to claim on gambling contract not submitting legality of contract—Lum v. Fauntleroy, 80 Miss. 757.

21. The effect of a first contract between the parties, which was followed by a second contract relating to the same subject-matter, cannot be settled by the arbitrator where such effect was not submitted in the arbitration—Cullen v. Shipway, 78 App. Div. (N. Y.) 130.

22. Phipps v. Norton (Iowa) 93 N. W. 562.

23. Turner v. Stewart, 51 W. Va. 493.

24. For damages and support of bastard—Poggenburg v. Conniff, 23 Ky. Law Rep. 2463, 67 S. W. 845.

25. The ministerial acts, such as calculations and measurements, are not necessarily performed by the arbitrator—Nelson v. Charles Betcher Lumber Co. (Minn.) 93 N. W. 661.

26. The wrong cannot be attributed to a mere error of judgment—Bartlett v. L. Bartlett & Son Co. (Wis.) 93 N. W. 473.

27. Horne v. Hutchins, 71 N. H. 128.

28. Corrigan v. Rockefeller (Ohio) 66 N. E. 95.

within the statute of frauds, but a mere definition of already existing rights.[29] The award on a claim for alimony and other pecuniary demands by a wife amounts to an alimony decree.[30] A common-law award is established by showing an agreement to submission and the proceedings thereon.[31] The award is not a lien on land until entered as a judgment or decree after notice to the parties, but retains its common-law force, though by statute it may be entered as a judgment.[32] A decree will not merge with an award on the same cause of action; but a judgment made subject of submission will be merged by the award, though not carried into a new judgment.[33] A lien for services in favor of one party against a fund to be realized by the other from such services is not merged in an award settling the value of the services, but may be enforced to the extent of the award.[34]

Enforcement of award.—In an action to enforce the award, it need not be alleged that the judgment of the arbitrators was still in force.[35] In a suit to determine the rights of grantees in the subject of a submission by their grantors, the arbitration may be shown.[36] In an action on a contract containing an arbitration clause, the interest of an arbitrator and the plaintiff's knowledge of such interest are questions for the jury, and the burden of proof is on plaintiff to show such interest.[37] All presumptions will be indulged to sustain an award.[38] Parol evidence is admissible to show the application of the award to the subject-matter.[39]

Review of award and rearbitration.—Equity will not review on its merits an award rendered by an arbitrator consistently with legal principles as he understood them.[40] Neither denial of right to counsel nor refusal to be sworn constitutes such fraud on the part of the arbitrators as will vitiate the award,[41] unless it prejudice results; and even then the denial of counsel cannot be urged on a motion to vacate the award where the objection had been waived by submission.[42] An award within the scope of the submission cannot be disturbed judicially, but any departure, misconduct, or error of judgment on the part of the arbitrators is fatal.[43] Terms offered to induce arbitration, which are fully understood, cannot be ground of fraud to set aside the award.[44] Under an agreement to have an award entered as a judgment, acceptance of service of a motion to that effect and agreement to its adoption will not waive the right to benefit of the statutory provision that the entry must be made at the succeeding term; and the arbitration, being void, may be set aside.[45]

29. Submission of rights to water power—Horne v. Hutchins, 71 N. H. 128.

30. The arbitrators had full power, and the parties had previously agreed to accept the result—Harris v. Davis, 115 Ga. 950.

31. Unless fraudulent, it is as effectual in a subsequent suit on the same claim as a statutory arbitration, and may be pleaded in bar without showing statutory requirements—Gardner v. Newman, 135 Ala. 522.

32. Code W. Va. c. 108, § 3—Turner v. Stewart, 51 W. Va. 493.

33. Turner v. Stewart, 51 W. Va. 493.

34. Sanborn v. Maxwell, 18 App. D. C. 245.

35. Poggenburg v. Conniff, 23 Ky. Law Rep. 2463, 67 S. W. 845.

36. Right of mill owners in dam—Horne v. Hutchins, 71 N. H. 128.

37. Hall v. Western Assur. Co., 133 Ala. 637.

38. It will be presumed that it related to the matters submitted, and that the evidence was heard on them—Poggenburg v. Conniff, 23 Ky. Law Rep. 2463, 67 S. W. 845.

39. Use of dam granted by award to mill owners—Horne v. Hutchins, 71 N. H. 128.

40. Code Civ. Proc. N. Y. §§ 2374, 2375, provides that fraud, corruption, or mistake is the only ground of attack on an award—Dobson v. Central R. Co., 38 Misc. Rep. (N. Y.) 582.

41. Gardner v. Newman, 135 Ala. 522.

42. Pennsylvania Iron Works Co. v. East St. Louis Cold Storage Co. (Mo. App.) 70 S. W. 903.

43. Bartlett v. L. Bartlett & Son Co. (Wis.) 93 N. W. 473.

44. Insurance loss—Townsend v. Greenwich Ins. Co., 39 Misc. Rep. (N. Y.) 87; Same v. Continental Ins. Co., Id.; Same v. Hanover Fire Ins. Co., Id.

45. Arbitration of rights to property as between husband and wife—Crouch v. Crouch (Tex. Civ. App.) 70 S. W. 595.

A plea of partiality on the part of the arbitrators must show that rights granted to the adverse party were denied the pleader.[46] An opinion delivered to counsel of the parties, on rendition of the award, citing reasons for the decision, but not made a part of the award or referred to therein, and not required by the submission, cannot be used as evidence to impeach the award; nor can the testimony of the arbitrators be used.[47] A judgment setting aside an award may properly enjoin the removal of money deposited, pending a hearing by one party to pay the claim of the other if he is successful.[48] An agreement to set aside an award and have a rearbitration is binding, though no rearbitration is had.[49]

§ 6. *International disputes.*—The claims of a United States railroad company against a foreign government for revocation of a concession to build a road were submitted, by agreement under a special law of the foreign state, to arbitration by a special commission, which was given power to determine its own procedure, to examine the property and records of the company, to take testimony, and to settle the amount of indemnity to the company, and it was agreed that the award should be final. Under this agreement the award was made, and on review by the circuit court of appeals it was held: (1) That the matters to be considered and included in the award were to be settled by the commission, the presumption being in favor of the award unless excess of power was shown; (2) that the commission was empowered to consider, in awarding indemnity to the company, other expenses incurred by it in the enterprise, as well as cost of construction, such as the amount paid for the concession, salaries paid to its officers, and its office and traveling expenses; (3) that, in absence of an express provision, the submission could not be construed to require a unanimous decision, and, the commission having unanimously determined that all matters should be settled by a majority vote, a majority award was binding; (4) that the resignation of one member after many items had been considered and agreed upon, and just before the taking of the final vote, by a letter to his government and his colleagues, which was not shown to have been received or accepted by his government, did not create a vacancy on the commission, or terminate its existence, or affect its award made the same day by concurrence of all the other members; (5) that a provision in the submission for allowance and assessment of expenses of the commission did not include attorney's fees for one party, to be paid by the other; and (6) that, the submission making no provision for interest on the award, and the company having received the revenues of the road until settlement, interest could not be allowed, but the erroneous allowance thereof did not avoid the whole award, the items being separable.[50]

§ 7. *Statutory arbitration between employers and employes.*[51]—Labor differences may be the subject of statutory regulation.[52] Where there is a court established for settlement of differences between employers and employes regarding wages, a submission of prices for certain labor, with a schedule of items of work, will justify an award of a certain compensation by the piece; and where there is testimony showing an understanding between the parties as to the time the decision shall take effect, the court may fix the time, though it need not fix the term,

46. Plea of denial of right to counsel—Gardner v. Newman, 135 Ala. 522.

47. Corrigan v. Rockefeller (Ohio) 66 N. E. 95.

48. Cullen v. Shipway, 78 App. Div. (N. Y.) 130.

49. Insurance loss—Goodwin v. Merchants' & B. Mut. Ins. Co. (Iowa) 92 N. W. 894.

50. Republic of Colombia v. Cauca Co. (C. C. A.) 113 Fed. 1020; Cauca Co. v. Republic of Colombia (C. C. A.) Id.

51. See, also, "Master and Servant."

52. Southern Pac. Co. v. Schoer (C. C. A.) 114 Fed. 466.

for which the scale of wages is to run, especially if the parties have fixed the term in their submission. The decision need not be rendered within ten days, a statutory provision to that effect being directory merely.[53]

ARGUMENT OF COUNSEL.

§ 1. *Right of argument.*—Counsel for each of defendants severally liable may be heard.[1] A party defending in person cannot address the jury where his answer sets up no defense and on his own evidence a verdict should be against him.[2] If defendants waive their argument, plaintiff cannot close.[3]

§ 2. *Opening statements.*—Counsel may state what he purposes to prove unless the proof will be manifestly incompetent.[4] The time for an opening statement is discretionary with the trial court.[5] Defendant is not as of right entitled to reserve his opening statement to the conclusion of plaintiff's evidence.[6] Where facts alleged in an opening statement recite a different cause of action than that in the petition, trial should not be proceeded to over an objection without amendment of the petition or striking of one of the causes of action.[7] Motions for judgment on the opening statement cannot be granted unless plaintiff admits facts absolutely preventing recovery.[8] Defendant in opening may read his answer.[9]

§ 3. *Kind, extent, and mode of argument or comment during trial.*—A judgment may be reversed for misconduct of counsel in argument.[10]

Use of pleadings and other writings belonging to case.[11]—Counsel is not entitled to read special interrogatories to the jury and inform them how to answer them.[12] Counsel cannot be compelled to read a whole instruction to the jury.[13] If a party's pleadings are read by the adverse party, the party may adopt his own interpretation of them so long as they are not misquoted.[14]

Statements of law and reading from decisions.—An opinion by the court cannot be read in argument,[15] or an opinion in another case.[16] Arguments of legal

53. Comp. Laws Mich. 1897, § 563, providing for and regulating the state court of mediation and arbitration—Pingree v. State Court of Mediation & Arbitration (Mich.) 9 Detroit Leg. News. 18; 89 N. W. 943.

1. As where a principal and surety on a bond are defendants—Lyman v. Fidelity & Casualty Co., 65 App. Div. 27.

2. Gunn v. Head (Ga.) 42 S. E. 343.

3. 2 Ball. Ann. Codes and Statutes, Sec. 4993, subd. 5—Seattle & M. R. Co. v. Roeder, 30 Wash. 244, 70 Pac. 498; Collins v. Clark (Tex. Civ. App.) 72 S. W. 97.

4. He may give a history of the case and state other contests between the parties in another state—Pritchard v. Henderson (Del.) 3 Pen. 128.

5. In the absence of abuse of discretion, a ruling as to the time of allowing an opening statement is not reviewable—D. Sinclair Company v. Waddill, 99 Ill. App. 334.

6. Though such statement will inform plaintiff of the error and enable him to amend—D. Sinclair Co. v. Waddill, 200 Ill. 17.

7. Hunter Milling Co. v. Allen, 65 Kan. 158, 69 Pac. 159.

8. Coffeyville Mining & Gas Co. v. Carter, 65 Kan. 565, 70 Pac. 635.

9. It appeared that plaintiff was not prejudiced and the court's discretion not abused —Waid v. Hobson (Colo. App.) 67 Pac. 176.

10. Spaulding v. Grundy, 23 Ky. Law Rep. 1759. As where the attorney disregards rulings of the court, repeats questions excluded as improper, and asks questions tending to arouse the jury's sympathy, calls them "boys" in an appeal for mercy, and makes remarks not justified by the evidence and also reflecting on the person through whom plaintiff claims—Atherton v. DeFreeze (Mich.) 8 Detroit Leg. N. 994, 88 N. W. 886.

11. Pleadings from other trials or cases, see infra this section.

12. So held under March 4, 1897, Acts 1897, p. 128, Burns' Rev. St. 1901, § 555, where counsel was permitted to fully argue the evidence and with respect to the interrogatories from memory—Chestnut v. Southern Ind. R. Co., 157 Ind. 509.

13. Ward v. Bass (Ind. T.) 69 S. W. 879.

14. Nicholson v. Merritt, 23 Ky. Law Rep. 2281.

15. Cent. Ga. R. Co. v. Hardin, 114 Ga. 548.

16. Stone v. Commonwealth, 181 Mass. 438. It was held error to allow cases not pertinent to any issue of law but strikingly similar as to the facts to be read to the jury, and statements made to them that in the similar cases substantial damages had been approved and plaintiff found free from negligence—Houston & T. C. R. Co. v. Gee, 27 Tex. Civ. App. 414. So definitions of "reasonable time" or discussions of what may be "contributory negligence" cannot be read—Newport News & O. P. R. & Electric

conclusions are not to be permitted,[17] so remarks discrediting the authoritative value of instructions are improper.[18] Statements of law are presumed to have been made in a connection rendering them correct.[19]

Comments on witnesses.—Particular comments on the credibility of witnesses may be made,[20] though the jury cannot be asked to go outside of the evidence;[21] hence, the interest of witnesses may be argued.[22] Absence of witnesses may be commented on where it does not appear that their evidence is not peculiarly within the knowledge of the adverse parties.[23] Failure to question a witness may be commented on,[24] or the failure of a party to testify.[25]

Inferences from the evidence must be justified.[26] An argument though improper may be so illogical as to be harmless.[27]

Co. v. Bradford, 4 Va. Sup. Ct. Rep. 219, 40 S. E. 900.

17. As where it is stated that a change in the method of operating a train after an accident was of itself a confession of liability, and justified a recovery by plaintiff—Prescott & N. W. R. Co. v. Smith, 70 Ark. 179; but it is fair to assume that the account books of a decedent are in the hands of his administrator—Ryans v. Hospes, 167 Mo. 342.

18. But reversal is not required where the remark is immediately ordered withdrawn and counsel explains that he does not wish to be understood as having such meaning—Chicago & A. R. Co. v. McDonnell, 194 Ill. 82.

19. As where it is stated that an officer sued for assault on service of a writ, was presumed to have served the writ in a legal way—McKinstry v. Collins, 74 Vt. 147.

20. So it is proper to remark that a witness excused from the rule should more than all the others have been placed thereunder—Louisville & N. R. Co. v. York, 128 Ala. 305. Where witnesses were brought from a distant city it is not going too far to say "Would you have gone to St. Louis to get pimps and detectives? Would you have gone to Chicago and employed detectives of the Pinkerton gang to have gone to St. Louis and followed through the hospital after this man? There is but one man who would have done it and he is the mayor of the city of Salem"—City of Salem v. Webster, 95 Ill. App. 120. Where in a deposition the witness states his residence at a town not in existence, such fact may be argued as a badge of fraud, and that the witness was attempting to conceal his identity, such witness being a person in whom the ownership of notes sought to be recovered in bankruptcy is alleged to be—Reeder v. Traders' Nat. Bank, 28 Wash. 139, 61 Pac. 461.

21. Where defendant in his examination has denied making a certain statement and is not impeached, plaintiff's attorney cannot ask the jury to consider whether he would be apt to ask such a question if it were not well founded and also to consider defendant's manner when he answered the question—Moran v. Baldi, 71 N. H. 490. It is error to allow a claim agent to be called a cow coroner and to state that he will not be believed by the jury, and that a particular juror named having had dealings with him knew what kind of a cat he was and would not believe him—Texas & P. R. Co. v. Rea, 27 Tex. Civ. App. 549.

22. As where counsel states that if a witness had given contrary evidence it would have admitted his gross negligence and occasioned his discharge from employment—Wimber v. Iowa Cent. R. Co., 114 Iowa, 551.

23. As where on contest of a will testator's hired men are not called by either party, proponent's counsel may ask the jury if they have seen the hired men—In re McCabe's Will, 73 Vt. 175. In commenting on failure to introduce certain witnesses it may be stated that a party did not dare place them on the stand—Wilkins v. City of Flint, 128 Mich. 262.

24. As where one witness for a party testifies to a confession overheard by another witness for the same party, and such witness, on his examination, is not questioned thereto—McKinstry v. Collins, 74 Vt. 147.

25. As where the absence of one of a plaintiff partnership is argued to be a circumstance indicating that matters are being kept from the jury—Gillman v. Williams (Vt.) 52 Atl. 428.

26. So in slander, an inference that plaintiff started a newspaper controversy, is not warranted by evidence of a reporter that he asked defendant, if a statement in an article by plaintiff was true, where the original article is not in evidence—Jarman v. Rea, 137 Cal. 339. Where a remark was testified to and denied by certain witnesses, counsel may state that another witness, if called, would have testified that he heard it—Walker v. Boston & M. R., 71 N. H. 271. Where an expert testifies that he expects the party for whom he is a witness to pay him a certain sum, it is not reversible error to state that such witness had been bought up by the party to testify in its favor for such sum—Missouri, K. & T. R. Co. v. Follin (Tex. Civ. App.) 68 S. W. 810. Counsel does not exceed the limits of argument by asserting that either one of certain witnesses was mistaken or one has lied—Ex parte Snodgrass (Tex. Cr. App.) 65 S. W. 1061. Counsel cannot be allowed to call a defendant a robber and a self confessed robber of his wife's grandmother and to state that he was trying to deny a debt where the sum in regard to which such statements were made, was alleged by defendant to have been included in a settlement prior to the suit—Grabowsky v. Baumgart, 128 Mich. 267.

27. Where in slander for charging unchastity it is argued that a verdict for defendant would be a judgment as to plain-

Matters outside of issues.—Counsel may argue anything within the issue,[28] but not grounds of relief not presented by the pleadings.[29] Comments extraneous to the issue may require a reversal,[30] though the pendency of other suits of a similar nature may be commented on.[31]

Matters not in evidence.—Evidence which has not been objected to may be commented on,[32] and denial of the right to discuss evidence is equivalent to its exclusion;[33] but counsel must not discuss matters not in evidence,[34] nor make statements of fact concerning matters not in the record,[35] or from their own experience not in evidence.[36] Counsel should not refer to amount of verdicts sustained in other cases.[37] An argument that a plea of non est factum to a note charges plaintiff with forgery is not the statement of a fact not in evidence, but is a mere expression of an opinion.[38] Persistence in arguing facts not in evidence and excluded by the court may be ground for a new trial or reversal.[39] It is improper to read pleadings not introduced in evidence to the jury,[40] or for

tiff's lack of chastity—Hacker v. Heiney, 111 Wis. 313.

28. As where plaintiff was injured by stumbling over slag near a railroad track, counsel may argue the continued and safe use of the premises, since the slag had been there—Southern R. Co. v. McLellan, 80 Miss. 700. Where a note in payment of lightning rods was sued by an assignee, defendant's counsel may state that though he had read that plaintiff had houses, he did not think that plaintiff had any of his assignor's lightning rods—Kirby v. Berguin, 15 S. D. 444. Where a conductor testified that he was discharged for incompetency and defendant that he was discharged for not ringing up fares, argument that defendant was negligent in leaving an incompetent man on the car will not be regarded as an argument that plaintiff's injury resulted from general incompetency of the conductor but as a comment on the credibility of the conductor's testimony—Leach v. Detroit Electric Ry. (Mich.) 8 Detroit Leg. N. 951, 88 N. W. 635.

29. Humphreys v. Eastlack, 63 N. J. Eq. 136. In an action by a carrier for freight submitted on the theory that there was an undertaking to pay on the part of the defendant, defendant cannot state that he had lost the chance to protect himself, though there is evidence that the plaintiff made a delivery of the goods to the consignee without demanding its freight—Montpelier & W. R. R. Co. v. Macchi, 74 Vt. 403.

30. As where in partition of personalty sought by an execution purchaser, and the title is in issue, defendant's counsel states that the property was worth $750 and plaintiff bid only $25 therefor—Hunstock v. Roberts (Tex. Civ. App.) 65 S. W. 675. A remark by counsel that an action was not brought for more, since, had it been, the cause would have been removed to the tribunal, where recovery was not allowed for mental anguish, is not fatal where the jury are told not to consider such remark and the verdict of damages awarded was not complained of as excessive—Western Union Tel. Co. v. Perry (Tex. Civ. App.) 70 S. W. 499.

31. So held in an action against a railway company for personal injuries in which it was alleged that the claim was fraudulent—Wheeler v. Detroit Elec. R. Co., 128 Mich. 656.

32. Chicago & E. I. R. Co. v. Mochell, 193 Ill. 208.

33. Home Riverside Coal Min. Co. v. Fores, 64 Kan. 39.

34. Warren v. Nash, 24 Ky. Law Rep. 479.

35. As where counsel states from his knowledge of the adverse party that if there were $500 and such party's honor on the table, the party would grab the $500 and let his honor go—Gutzman v. Clancy, 114 Wis. 589. Statements that family quarrels and charges of infidelity will be proved are substantiated by evidence of charges of "whoring"—Hacker v. Heiney, 111 Wis. 313. Statements that defendant has the names of witnesses which it refuses to divulge, or summons, are erroneous where not based on the evidence —Stewart v. Metropolitan St. R. Co., 72 App. Div. 459. Statement that bankers had been for many years taking usury and that it was unreasonable to believe that they had not done so in the case at bar and that it was hard to collect taxes from them, is ground for setting aside a verdict where the action is by the bankers and the defense usury—Wells v. Moses, 87 Minn. 432. In an action for libel in the publication of a charge of murder, counsel should not be allowed to allude to plaintiff as a murderer where there is no evidence to sustain such charge and plaintiff was discharged after arrest on a warrant in which no offense was named—Jones v. Murray, 167 Mo. 25. It is misconduct to charge plaintiff with having bribed witness to swear falsely, there being no evidence thereof—Hopkins v. Hopkins (N. C.) 43 S. E. 506.

36. Louisville & Nashville R. Co. v. Hull, 24 Ky. Law Rep. 375, 57 L. R. A. 771.

37. Quincy Gas & Electric Co. v. Bauman, 104 Ill. App. 600. Counsel must not state to the jury that in similar cases, certain sums awarded as damages have been held not excessive and that it is the jury's duty to punish defendant—Chicago, I. & L. R. Co. v. Martin, 28 Ind. App. 468.

38. Brown v. Johnston Bros., 135 Ala. 608.

39. Courier Printing Co. v. Wilson (Neb.) 90 N. W. 112.

40. Nicholson v. Merritt, 23 Ky. Law Rep. 2281.

counsel to refer to them;[41] this, though a file mark on the pleading has been introduced.[42] Counsel may read from a transcript of the stenographer's notes.[43]

Appeals to passion, prejudice, and sympathy.—Arguments arousing the passion and prejudice of the jury cannot be permitted,[44] or incorrect statements exciting sympathy,[45] though arraignment of the conduct of the opposite party may be severe.[46] It is improper to make arguments attacking plaintiff's public spirit.[47]

Remarks during the trial are on the same basis as arguments.[48] It is not ground for new trial for counsel to say, on eliciting evidence on cross-examination, "that is something I didn't know about, I am glad to find that out."[49] Attempts by counsel to get matters in evidence by the asking of leading questions which are improper may be ground for reversal.[50] Remarks of counsel on a jury coming in to report its inability to agree may require its dismissal.[51]

41. Louisville & Nashville R. Co. v. Hull, 24 Ky. Law Rep. 375, 57 L. R. A. 771.

42. Johnston v. Johnston (Tex. Civ. App.) 67 S. W. 123.

43. Bradley v. City of Spickardsville, 90 Mo. App. 416.

44. As where defaulted defendants in a libel suit have been permitted to answer, it is improper to allow plaintiff's counsel to state that the answer was delayed to allow defendants to get rid of their property, and such matter was also referred to on cross-examination contrary to the court's rulings—Hocks v. Sprangers, 113 Wis. 123. Statements that the title of an action for malpractice should read as the action of a lot of doctors against a poor girl do not require reversal where the counsel is rebuked and directed to argue the evidence without making general statements—Keikhoefer v. Hidershide, 113 Wis. 280. In crim. con. where plaintiff's wife had been divorced and died far from home and apart from defendant language of plaintiff's attorney in calling defendant a "seducer and murderer" is not ground for reversal—Lee v. Hammond, 114 Wis. 550. Counsel for defendant in action for divorce on ground of adultery should not exhibit her child to the jury saying that a verdict for plaintiff would bastardize the child and disgrace and dishonor defendant—Hopkins v. Hopkins (N. C.) 43 S. E. 506. Repeated denunciations of defendant as a corporation are erroneous—Stewart v. Metropolitan St. R. Co. (N. Y.) 72 App. Div. 459. It is improper to accuse a defendant of conducting a trial at an unnecessary personal expense to the members of the jury as tax-payers—Stewart v. Metropolitan St. R. Co. (N. Y.) 72 App. Div. 459. To say that the only way to reach a railroad defendant is to make it pay money; that it has no soul, no conscience, no sympathy, and no God, is improper—Western & A. R. Co. v. Cox, 115 Ga. 715. It is improper and prejudicial to say that a railroad company "has rights that you don't have; it can plow through your land and move your houses; it has unusual rights and ought to pay for them"—Ft. W. & D. C. R. Co. v. Lock (Tex. Civ. App.) 70 S. W. 456. Telling the jury that it must assess such an amount as damages as will show a railroad company that it cannot violate the law is not ground for reversal—Louisville, H. & St. L. R. Co. v. Chandler's Adm'r, 24 Ky. Law Rep. 998. Argument that a jury should, as Southern gentlemen, find in favor of a Southern woman as against a soulless corporation of the North, is improper—Ferguson-McKinney Dry Goods Co. v. City Nat. Bank (Tex. Civ. App.) 71 S. W. 604. Counsel should not state that he understands an insurance company is defending a case—Geo. A. Fuller Co. v. Darragh, 101 Ill. App. 664.

45. As where counsel states that a person desired as a witness demands a large sum for his testimony, since there was a remedy to enforce such witness' attendance—American Malting Co. v. Lelivelt, 101 Ill. App. 320. A remark that a verdict is not asked for plaintiff because he is poor or defendant rich and powerful but only if he is entitled to verdict, does not require a new trial—Gilman v. City of Laconia, 71 N. H. 212. On a question of damages the jury must not be asked to consider the fact that plaintiff cannot now be a mother if there is no evidence to that effect—Blackman v. West Jersey & S. R. Co. (N. J. Law) 52 Atl. 370.

46. As where it is stated that there was an intent to rob a cripple of his rights, that defendant's counsel displayed a cloven hoof of the monster and that reference to a party concerned in the alleged fraud was like a crimson rag thrown in the counsel's face—Hedlun v. Holy Terror Min. Co. (S. D.) 92 N. W. 31. In an action on notes, statements in argument that defendants are vultures and wolves, and fit subjects for the penitentiary, do not require a reversal—Huber v. Miller, 41 Or. 103, 68 Pac. 400. Argument that plaintiffs were engaged in drunken and lewd debauch showing contributory negligence in reckless driving held permissible—Guertin v. Hudson, 71 N. H. 505.

47. Where damages were sought for the construction of a railroad, and plaintiff's conduct was characterized as an impediment to progress and defendant's bondsmen characterized as public spirited citizens—Hanna v. Gulf, C. & S. F. R. Co., 27 Tex. Civ. App. 492.

48. Welch v. Union Cent. Life Ins. Co. (Iowa.) 90 N. W. 828.

49. Guertin v. Hudson, 71 N. H. 505.

50. Manigold v. Black River Traction Co., 114 N. Y. State Rep. 861.

51. As where counsel requests that the jury be discharged as they stood ten to two, that a majority should not be dragged into

§ 4. *Excuses for impropriety.*—Prejudicial remarks are not excused by the fact that they are provoked by opposing counsel,[52] though the contrary has been held.[53]

§ 5. *Objections and rulings.*—Objections must be made to erroneous remarks.[54] The ground need not be stated,[55] though it has been held that objections to an opening statement must state the reason thereof.[56] The objectionable language should be specifically pointed out.[57] The extent of an exception is for the determination of the court,[58] as is the question of whether an argument is a statement of fact or a request for an inference.[59]

§ 6. *Action of court or counsel curing objection.*—Remarks which the jury are instructed to disregard are no ground for reversal,[60] especially where offending counsel also cautions the jury not to consider matter outside the record,[61] or there is an immediate rebuke to counsel,[62] but such instruction is not always sufficient.[63] An emphatic statement by the court that language is improper and ought not to be used obviates the necessity for a new trial, where no exception was taken or another action requested by the opposite party.[64] It may be ground for reversal that an improper question is asked though the answer was excluded.[65] Error in argument may be cured by its immediate withdrawal on exception.[66] Reference to the amount of a former verdict may be harmless if withdrawn and the jury

finding a low verdict by an obstructionist, that it was an outrage—Hagen v. N. Y. Cent. & H. R. Co. (N. Y.) 79 App. Div. 519.

52. Welch v. Union Cent. Life Ins. Co. (Iowa) 90 N. W. 828.

53. As where he invites a statement that plaintiff should either be done justice or sent to the county house at once—Wilkins v. City of Flint, 128 Mich. 262.

54. Portland Gold Min. Co. v. Flaherty (C. C. A.) 111 Fed. 312.

55. As where counsel persists in stating amounts of damages held excessive in other cases—Chicago, I. & L. R. Co. v. Martin, 28 Ind. App. 468.

56. Where an answer was read by defendant—Waid v. Hobson (Colo. App.) 67 Pac. 176.

57. To counsel summing up—Dimon v. N. Y. Cent. & H. R. R. Co., 173 N. Y. 356.

58. Walker v. Boston & M. R., 71 N. H. 271.

59. Walker v. Boston & M. R., 71 N. H. 271.

60. Allen v. McKay & Co. (Cal.) 70 Pac. 8. As where the insolvency of a contractor is commented on in lien proceedings, and the jury are instructed that questions of financial condition are not to be considered—Hammond v. Pullman (Mich.) 8 Detroit Leg. N. 1052, 89 N. W. 358. As where a counsel states in the presence of other jurors to a juror who has denied acquaintance with certain persons that he believes that the juror does know such persons because he has been around trying to compromise the case—Gundlach v. Schott, 95 Ill. App. 110. Statements that corporations object to the passage of laws protecting employees and to laws requiring the inclosure of elevators will not cause reversal, where the court admonishes the counsel to confine himself to the evidence—Wendler v. People's House Furnishing Co., 165 Mo. 527; Cameron Lumber Co. v. Somerville (Mich.) 8 Detroit Leg. N. 1064, 89 N. W. 346. A statement of the court after objection to argument that "the jury in this case will regulate their deliberations upon the evidence in this case, which the jury always does" is sufficient and not erroneous as being in the nature of a rebuke to the objecting party—Clukey v. Seattle Electric Co., 27 Wash. 70, 67 P. 379. Where judgment was modest in amount—Moore v. Neubert, 21 Pa. Super. Ct. 144. An improper reading from a reported case may be cured by causing a counsel to stop, and instructing the jury to disregard what he had read—Hayes v. Continental Casualty Co. (Mo. App.) 72 S. W. 135.

61. Where in an action for careless driving, plaintiff's counsel in argument attempted to bring out the fact that defendants were in the custom of racing—Westercamp v. Brooks, 115 Iowa, 159.

62. Lockwood v. Fletcher, 74 Vt. 72.

63. As where when the case was largely dependent on one witness and counsel remarked that if the jury knew such witness' business methods they would say, "God save the plaintiffs and God save all those who deal with them"—German-American Insurance Co. v. Harper, 70 Ark. 305. So held where, on a proceeding by an execution purchaser, opposing counsel stated that plaintiff bid only a small portion of what the property was worth and that the action was an attempt to confiscate the property—Hunstock v. Roberts (Tex. Civ. App. (65 S. W. 675. The party's misconduct is not cured by an instruction at his request that "In case either counsel in summing up the stated facts that were not proved upon the trial, or in case either counsel gave a recollection of the facts which disagrees with the recollection of the jury, the jury may disregard these statements and take their own recollection of the facts"—Stewart v. Metropolitan City R. Co. (N. Y.) 72 App. Div. 459.

64. United States v. Alexander, 119 Fed. 1015.

65. Cosselmon v. Dunfee, 172 N. Y. 507.

66. Kilpatrick v. Grand Trunk R. Co., 74 Vt. 288. As where the remark is not only withdrawn but an apology made and a request to the jury to disregard it—University of Illinois v. Spalding, 71 N. H. 163. Re-

instructed not to consider it, and there is no reasonable ground to believe that they were influenced.[67] A court on adjudging counsel's remarks to be improper may, by pointed rebuke of counsel, remove as far as it can any improper effects from his statements, and may state that it is not based on evidence and such action is sufficient.[68] A direction to the jury that there was no evidence of a statement made in argument, and that it should not be considered, is a ruling that the remark is improper.[69] The jury should be instructed to disregard reference to matters not in issue.[70]

ARREST AND BINDING OVER.

§ 1. Occasion or Necessity for Warrant.
§ 2. Privilege from Arrest.
§ 3. Complaint or Affidavit to Procure Warrant.
§ 4. The Warrant and Its Issuance.
§ 5. Making Arrest and Keeping and Disposition of Prisoner.
§ 6. Preliminary Hearing and Binding Over.
§ 7. Custody Awaiting Trial.

§ 1. *Occasion or necessity for warrant.*—His official position will not authorize a peace officer to arrest at pleasure without a warrant;[1] the offense must be committed within his view, especially if a misdemeanor,[2] or, if a felony, he must have reasonable cause to believe, either from his own information or that of others, that the person he seeks to arrest committed the offense.[3] If the person arrested did, in fact, commit the crime charged, the reasonableness of the information on which the officer arrested him is immaterial.[4] Discovery of a person running toward him from direction of a disturbance at a late hour of the night may be reasonable ground for belief that he has committed an offense.[5] Under special acts no warrant or information is necessary to arrest a child under 16, found without parent or guardian in a place where intoxicating liquors are sold.[6] An officer acting without a warrant is not justified in shooting a man fleeing from arrest for a less offense than a felony.[7]

A private person may arrest without a warrant where an offense has been committed,[8] or attempted in his presence,[9] but, unlike an officer, he takes the risk of a mistake in attempting to arrest for a felony.[10] If one engaged in a misdemeanor desists and attempts flight a private person cannot arrest him.[11]

marks withdrawn concerning damages, the jury instructed to disregard them and verdict reduced to a not excessive amount—Meyer v. Milwaukee El. R. & L. Co. (Wis.) 93 N. W. 6.

67. Baker v. Independence, 93 Mo. App. 165.

68. Brzozowski v. National Box Co., 104 Ill. App. 338.

69. Jas. Smith Woolen Mach. Co. v. Holden, 73 Vt. 396.

70. Keck v. Bode, 23 Ohio Cir. Ct. R. 413.

1. People v. Hochstim (N. Y.) 36 Misc. Rep. 562. The possibility that one who threatens the life of another, may assault him is insufficient; Code Cr. Proc. (Tex.) arts. 107-112—Allen v. State (Tex. Cr. App.) 66 S. W. 671.

2. People v. Glennon (N. Y.) 37 Misc. Rep. 1; arrest for indecent exposure—Rarick v. McManomon, 17 Pa. Super. Ct. 154. An officer may arrest one carrying a dangerous weapon, without legal authority, and disarm him—Manger v. State (Tex. Cr. App.) 69 S. W. 145.

3. That an offense has been committed is, of itself, insufficient—People v. Hochstim (N. Y.) 36 Misc. Rep. 562; Rarick v. McManomon, 17 Pa. Super. Ct. 154; mere conscious knowledge that a house is disorderly will not justify an arrest of the keeper—People v. Glennon (N. Y.) 37 Misc. Rep. 1. This rule has been applied in a civil case—Park v. Taylor (C. C. A.) 118 Fed. 34. That a deputy superintendent of elections is also a peace officer will not change the rule as to arrests for violation of the election laws; see Code Cr. Proc. § 177—People v. Hochstim (N. Y.) 76 App. Div. 25.

4. Code Iowa, § 5196—State v. Phillips (Iowa) 92 N. W. 876.

5. Brooks v. State, 114 Ga. 6.

6. Under Pen. Code N. Y. § 291, subds. 4, 5—People v. Angie (N. Y.) 74 App. Div. 539.

7. Cr. Code Prac. Ky. §§ 36, 43, declares that unnecessary force or violence shall not be used—Petrie v. Cartwright, 24 Ky. Law Rep. 954.

8. Cr. Code Neb. § 284.—Kyner v. Laubner (Neb.) 91 N. W. 491.

9. Code Cr. Proc. N. Y.—Tobin v. Bell (N. Y.) 73 App. Div. 41.

10. People v. Glennon (N. Y.) 37 Misc. Rep. 1.

11. Golibart v. Sullivan (Ind. App.) 66 N. E. 188.

§ 2. *Privilege from arrest.*—An officer of the United States army cannot be arrested on a warrant or order of a state court.[12] A citizen cannot be arrested and taken away to prevent his voting.[13]

§ 3. *Complaint, affidavit, or information to procure warrant.*—The preliminary complaint for examination before a magistrate need not charge the crime with the same particularity as an indictment.[14] It is sufficient in South Dakota though it shows that the offense was committed more than three years before if the statutory exception is not pleaded.[15] An affidavit which negatives all exceptions and excuses given in the statute need not state that the act was "unlawfully" done.[16] An affidavit before a magistrate in Mississippi must conclude "against the peace and dignity of the state."[17] The name by which a person is generally known will be sufficient in preliminary examination though his real name is subsequently substituted.[18] An information charging that defendant did commit the crime of misdemeanor at a certain time and place by violating a certain statute is insufficient to give the justice jurisdiction.[19] A complaint for issuance of a warrant is not based on information merely where based on the evidence of another than affiant given before a justice which affiant swore he believed to be true.[20] A verification on information and belief is sufficient except for issuance of a warrant of arrest, and objection must be made by motion to quash the warrant before plea to the merits or other steps which operate as waiver.[21] A preliminary complaint made by one person cannot be substituted for a lost complaint made by another.[22]

§ 4. *The warrant and its issuance.*[23]—Legal evidence that a crime has been committed is necessary to issuance of a warrant by a magistrate.[24]

A clerk of court so named in the statute authorizing him to issue a warrant does so as the court; and it is lawful; and the clerk pro tempore may exercise the power.[25] A law giving a court of record, or a judge thereof, power to issue warrants for specified offenses, as election frauds, extends the power to every judge of such court.[26]

In Missouri, a justice cannot issue a warrant without an information filed by the prosecuting attorney unless it appears that the accused is about to escape, or has no property to prevent his leaving, or that he has no known place of residence.[27] The necessity of a warrant, issued by a justice on mere affidavit before information filed, should be shown by an entry on the docket, an indorsement on the writ, or other writing of equal weight.[28]

The warrant is ordinarily directed to the regular sheriff or constable.[29] If

12. In re Turner, 119 Fed. 231.

13. People v. Hochstim (N. Y.) 36 Misc. Rep. 562.

14. Sufficiency of such complaint in forgery—State v. Newton, 29 Wash. 373, 70 Pac. 31.

15. Comp. Laws, §§ 7114, 7115, construed—Smith v. Jones (S. D.) 92 N. W. 1084.

16. Prosecution of parent under Act Ind., Mch. 6, 1899, concerning duties of parents and guardians in regard to attendance of children at school—State v. Bailey, 157 Ind. 324.

17. Const. § 169—Miller v. State (Miss.) 32 So. 951.

18. State v. Pipes, 65 Kan. 543, 70 Pac. 363.

19. Under Code Cr. Proc. N. Y. §§ 148, 149—People v. Tuthill (N. Y.) 79 App. Div. 24.

20. The positive testimony under oath is sufficient—Village of Sparta v. Boorom (Mich.) 89 N. W. 435, 8 Detroit Leg. N. 1100.

21. In re Cummings (Okl.) 66 Pac. 332.

22. Under Code Cr. Proc. Tex. art. 470, providing for substitution of a new indictment on loss of the former one—Morrison v. State (Tex. Cr. App.) 66 S. W. 779.

23. Sufficiency of order of arrest issued by magistrate of Russian circuit court as warrant of arrest required by treaty with Russia—In re Grin, 112 Fed. 790.

24. Though it need not be convincing, the uncorroborated oath of a single witness is insufficient where the charge is denied—People v. McGirr (N. Y.) 39 Misc. Rep. 471.

25. Under St. 1893, c. 396, § 44; clerk pro tempore was appointed under St. 1893, c. 396, § 6—Commonwealth v. Posson, 182 Mass. 339.

26. Const. art. 8, § 14—In re Election Court (Pa.) 53 Atl. 784.

27. McCaskey v. Garrett, 91 Mo. App. 354.

28. McCaskey v. Garrett, 91 Mo. App. 354.

29. Sufficiency of warrant of arrest directed to a person other than the regularly

it follows the statutory requirements, it is sufficient though it does not state the particulars of the crime.[30] Where the complaint was amended as to the name of the owner of property alleged to be stolen, it was not necessary to amend the warrant since it necessarily recited the substance of the complaint and a plea thereto was in effect a plea to the complaint.[31] A warrant of arrest for defacement of a building is not void because it charges that the building was on a highway; a statement of the names of owners specifying a certain person "and divers other persons" is sufficient as to ownership.[32] The warrant is not void because issued on Sunday.[33] An order in contempt to arrest one and bring him before the court without bail or giving a return day in the warrant is not substantial error where he is in court with time to plead and in the meantime is allowed to go on his own recognizance.[34] Waiver of preliminary examination in misdemeanor cures all defects in the warrant.[35] A plea to the merits or entering a recognizance for future appearance waives a defect in the complaint in that it is verified on information and belief.[36]

§ 5. *Making arrest and keeping and disposition of prisoner.*—The officer must make his character as an officer known to the person at time of arrest.[37] He must inform the person arrested of the intention to arrest him, the cause, and authority to arrest, and that he is a peace officer.[38] A sheriff may arrest an escaped convict at any time and is allowed a reasonable time in which to deliver him to the employer of county convicts.[39] One may be arrested and held to await the action of the grand jury though a former jury failed to indict him, especially where the state subsequently discovers new evidence of the charge against him.[40] A private citizen arresting another for a crime committed or attempted in his presence need not state the cause of the arrest.[41] The common-law rule that one arrested on a capias and surrendered in discharge of bail may be committed without any mittimus is not changed by statute, nor the rule that one, brought into court on a capias issued on information or indictment and failing to furnish bail, may be committed to jail without a mittimus or express order of court.[42] Removal of one under arrest to another parish for sake keeping does not prevent constructive jurisdiction of his person by the former parish and its judge and sheriff.[43]

§ 6. *Preliminary hearing, binding over, or discharge.*—The preliminary examination is a right or personal privilege which the accused may waive.[44] One may be proceeded against by information without examination before a magistrate and his right to meet the witnesses face to face may be satisfied on the trial.[45] An accused is not entitled to a preliminary examination before a justice

elected constable—Parish v. State, 130 Ala. 92.

30. Under Code Cr. Proc. N. Y. §§ 151, 152—Krauskopf v. Tallman, 170 N. Y. 561.

31. Under Rev. St. Wis. 1898, §§ 4740, 4747, and §§ 4703, 4706, providing for amendment of the complaint — Fetkenhauer v. State, 112 Wis. 491.

32. The act is none the less a crime if the building is lawfully on the highway; sufficiency of warrant under 2 Ballinger's Ann. Codes and Stat. §§ 6678, 6683, 6695—State v. Yourex, 30 Wash. 611, 71 Pac. 203.

33. Parish v. State, 130 Ala. 92.

34. State v. Peterson, 29 Wash. 571, 70 Pac. 71.

35. Defendant must show that he has not waived preliminary examination where he pleads in abatement alleging a defect on the warrant and the state joins issue thereon—Everson v. State (Neb.) 93 N. W. 394.

36. In re Cummings, 11 Okl. 286, 66 Pac. 332.

37. Cortez v. State (Tex. Cr. App.) 69 S. W. 536.

38. Code Iowa, § 5199—Stewart v. Feeley (Iowa) 92 N. W. 570.

39. McQueen v. State, 130 Ala. 136.

40. Ex parte Baker (Tex. Cr. App.) 65 S. W. 91.

41. Barclay v. United States, 11 Okl. 503, 69 Pac. 798.

42. V. S. §§ 2028, 2029, 1981, construed—State v. Shaw, 73 Vt. 149.

43. State v. Gray (La.) 33 So. 108.

44. Reinoehl v. State, 62 Neb. 619.

45. Bel. & C. Ann. Codes & St. Ore., §§ 1258-64, 1278, 1660, construed in the light of

where an indictment for felony has been found.[46] The district attorney cannot send an indictment before the grand jury without preliminary examination or the sanction of the court.[47] A judge who sits on election day with jurisdiction of breaches of the peace or violation of the election laws is a committing magistrate.[48] Where the grand jury for the term in session has been discharged, the committing magistrate, in his discretion, may remand an accused to appear before the next succeeding grand jury and is not required to recognize him for appearance at the present term.[49] Where a week passed between first arraignment and preliminary examination, the magistrate may refuse further postponement to allow accused to procure an attorney.[50] It cannot be objected after the examination that it was taken and certified by another than the official reporter. The magistrate may select the reporter.[51] The public may be excluded on examination by a magistrate.[52] The evidence need only establish probable cause.[53] It must appear on preliminary examination before a committing magistrate of one charged with perjury in a former suit that the alleged false testimony was material to the issues of the suit.[54] Duplicity in charging two offenses in the same count of a complaint in preliminary examination will not affect the proceedings nor the information on trial.[55] The trial court may permit the committing magistrate to amend his certificate to depositions taken before him at preliminary examination outside his district but in the county.[56] Though the transcript of the preliminary examination on which the grand jury acted was not indorsed by the magistrate as required by law, the grand jury may act thereon and the witnesses whose names are indorsed on the indictment may be examined on the trial where the identity of the transcript is unquestioned.[57]

§ 7. *Custody awaiting indictment or trial.*[58]—A bail warrant is unnecessary when one on trial for felony is ordered into custody in exercise of the court's discretion.[59] A justice has no authority to review an order of the circuit court remanding one charged with seduction to custody to await the action of the grand jury or to change the amount of his bail as fixed by that order.[60]

ARSON.

The offense.—Only a willful burning is essential to arson by a tenant.[1] If the upper floor of a building is occupied as a dwelling, it is a dwelling house.[2]

Const. art. 1, § 11—State v. Belding (Or.) 71 Pac. 330.

46. State v. Mooney, 49 W. Va. 712.

47. Commonwealth v. Sheppard, 20 Pa. Super. Ct. 417.

48. In re Election Court (Pa.) 53 Atl. 784.

49. Under Code Cr. Proc. Tex. art. 411, providing for discharge and reassembling of the grand jury—Ex parte Glascow (Tex. Cr. App.) 64 S. W. 1053.

50. Arrest on charge of rape—People v. Figueroa, 134 Cal. 159, 66 Pac. 202.

51. Under Code Iowa. §§ 5227, 4702, providing for taking examinations before magistrates; in this case it was agreed that the minutes of testimony should be taken by the official reporter—State v. Turner, 114 Iowa, 426.

52. People v. Wyatt (N. Y.) 39 Misc. Rep. 456; Same v. O'Brien, Id.

53. Sufficiency of evidence to warrant magistrate in holding an officer of an association on a charge of larceny for appropriating property of the association under Pen. Code N. Y. § 528; Code Cr. Proc. N. Y. § 208, construed—People v. Crane, 114 N. Y. State Rep. 408. Sufficiency of commitment to await action of grand jury on charge of violating a certain section of the Penal Code. Under Pen. Code N. Y. § 351—People v. Hagan, 170 N. Y. 46.

54. The offering of the decree in the suit in evidence is insufficient where the materiality of the alleged false testimony does not appear and the judgment roll is not produced—State v. Second Jud. Dist. Ct., 26 Mont. 275, 67 Pac. 943.

55. Sothman v. State (Neb.) 92 N. W. 303.

56. Such permission gives the justice jurisdiction to make the amendment—State v. McGann (Idaho) 66 Pac. 823.

57. Indorsement required by Code Iowa, § 5228—State v. Turner, 114 Iowa, 426.

58. Sufficiency of showing for commitment by magistrate of one charged with fraud in regard to civil service appointment—Palmer v. Colladay, 18 App. D. C. 426.

59. V. S. § 1981, construed—State v. Shaw, 73 Vt. 149.

60. Hall v. State, 130 Ala. 139.

1. The contention was that the elements of arson by an owner (insurance, etc.) must

Indictment.—An averment that a building was "in the possession of and occupied by" a person named sufficiently alleges his tenancy.[3] The offense may be laid on or about a certain day,[4] and property may be laid in one of the codevisees.[5] The name of the person who was in the building need not be stated.[6]

Variance.—Proof of rightful possession by the person charged as owner is sufficient.[7] The evidence of ownership will not be closely scrutinized,[8] and in California if the proof identify the building and it be occupied by another, ownership need not be shown.[9]

Evidence that defendant's clothing smelled of kerosene, which had been used, is admissible,[10] as is evidence of his possession of a tool such as was used in the commission of the offense.[11] Evidence that property not identified as coming from the burned building was taken from defendant's house by an alleged accomplice is inadmissible.[12]

Other offenses.[13]—Incriminating admissions by defendant are sufficient corroboration of an accomplice.[14] An *instruction* omitting the element of malice is insufficient.[15] *Verdict* of guilty as charged is sufficient where the information alleges the degree.[16]

Review.—Failure to object to an instruction assuming a material fact does not waive right to attack the sufficiency of the evidence because of failure to show such fact.[17]

ASSAULT AND BATTERY.

§ 1. *Nature and elements of criminal offense.*[1]—There are numerous statutory crimes of assault with intent to commit felony all of which are differentiated from assault in the proper sense by the specific intent which enters and is

appear—Kelley v. State (Tex. Cr. App.) 70 S. W. 20.

2. State v. Jones (Mo.) 71 S. W. 680.

3. Kelley v. State (Tex. Cr. App.) 70 S. W. 20.

4. Comp. Laws, § 7245, provides that the precise time need not be stated unless a material ingredient of the offense—State v. McDonald (S. D.) 91 N. W. 447.

5. Code Cr. Proc. art. 445—Kelley v. State (Tex. Cr. App.) 70 S. W. 20.

6. State v. Jones (Mo.) 71 S. W. 680. Indictment for burning a building in which there was a human being held sufficient—State v. Jones (Mo.) 71 S. W. 680. An allegation that the burning was with intent to injure the building may be rejected as surplusage—State v. Snellgrove (Ark.) 71 S. W. 266. Description of the premises as a "house and tenement" is not bad for duality—State v. Snellgrove (Ark.) 71 S. W. 266.

7. Hannigan v. State, 131 Ala. 29; People v. Davis, 135 Cal. 162, 67 Pac. 59.

8. Defendant had sold the building to the alleged owner, but attempted to show a prior sale by him to a third person—People v. Davis, 135 Cal. 162, 67 Pac. 59.

9. People v. Davis, 135 Cal. 162, 67 Pac. 59.

10. People v. Bishop, 134 Cal. 682, 66 Pac. 976. A witness may state from the color and smell that a bottle had contained alcohol—People v. Fitzgerald, 137 Cal. 546, 70 Pac. 554. It was further held that if the admission of this proof was error, it was rendered harmless by a remark of the court, in checking further inquiry, that others had access to the clothing.

11. Defendant was accused of burning his own house to defraud insurers. Holes were bored in the floor and filled with kerosene. A brace found in the house after the fire was admitted—People v. Bishop, 134 Cal. 682, 66 Pac. 97.

12. Ray v. State (Tex. Cr. App.) 64 S. W. 1057.

13. Evidence of the burning of other buildings as part of the same scheme is admissible—State v. Jones (Mo.) 71 S. W. 680. Evidence of other offenses held improper—State v. McCall, 131 N. C. 798. **Evidence held insufficient**—Chapman v. State, 157 Ind. 300; People v. Johnson, 70 App. Div. (N. Y.) 308; People v. Wagner, 71 App. Div. (N. Y.) 399. In the last cited case threats by defendant and his presence at the time the fire started were shown, but there was nothing to indicate that the fire was of incendiary origin. No evidence except previous threats—State v. Freeman, 131 N. C. 725. Circumstantial evidence held to support a conviction—Kelley v. State (Tex. Cr. App.) 70 S. W. 20.

14. People v. Davis, 135 Cal. 162, 67 Pac. 59.

15. Boone v. State (Miss.) 33 So. 172.

16. Comp. Laws, § 7428, requires the jury to find the degree, but section 7421 provides that a general verdict of guilty refers to the crime charged—State v. McDonald (S. D.) 91 N. W. 447.

17. The assumption was that the fire was incendiary. Defendant had moved for an acquittal because such fact was not shown—People v. Wagner, 71 App. Div. (N. Y.) 399.

1. **Definitions.** Assault—State v. Mills

elemental in them.[2] Intent to injure is usually essential.[3] In the note are holdings as to what is an assault.[4]

Battery is not essential to an assault with intent to commit a felony.[5] Assault is defined as aggravated by disparity of age or condition of parties under the Texas statute.[6] Indecent liberties taken without the consent of the female constitute an assault and battery.[7]

§ 2. *Defenses.*—A school teacher may administer reasonable chastisement.[8] Mere words do not justify an assault,[9] nor does a chastisement of, or indignities to, defendant's child.[10] Where defendant struck the first blow or willingly entered the combat, he cannot urge self-defense,[11] though provoked thereto by abusive words;[12] but one who interferes to prevent injury to the aggressor is justified if he did not know who started the affray.[13] Mere holding of a knife, without overt act, does not justify an assault.[14] Forcible recaption of personalty voluntarily parted with is not justified.[15]

§ 3. *Indictment.*[16]—An indictment that defendant assaulted, etc., another "by pointing a revolver at him in a threatening manner," sufficiently charges the manner of the assault.[17] Matter of aggravation must be fully charged.[18] Conviction may be had under a charge of a greater offense, provided it be one which includes assault.[19]

§ 4. *Evidence; instructions; verdict; punishment.*[20]—In the notes are cases

(Del.) 52 Atl. 266; battery—State v. Mills (Del.) 52 Atl. 266; Jacobi v. State, 133 Ala. 1.

2. See Homicide, Robbery, Rape. **Accessories.** Any person aiding or abetting an assault and battery is liable therefor—State v. Mills (Del.) 52 Atl. 266; Anderson v. State (Tex. Cr. App.) 67 S. W. 110.

3. To ride a horse toward another without intent to ride him down is not an assault, though such person is injured in fleeing from the apparent danger—Barnes v. State (Tex. Cr. App.) 72 S. W. 168. But see (pointing pistol)—State v. Llewellyn, 93 Mo. App. 469.

4. Following and attempting to detain a woman—State v. Fulkerson (Mo. App.) 71 S. W. 704. Riding horse toward another—Barnes v. State (Tex. Cr. App.) 72 S. W. 168. Shooting away from prosecutor—State v. Hunt, 25 R. I. 75. Taking hold of prosecutor while others dispersed his cattle—Fortenberry v. State (Tex. Cr. App.) 72 S. W. 593. Going into the house for a weapon, it not being brought into the presence of prosecutor, is not an assault—Spradling v. State (Tex. Cr. App.) 71 S. W. 17. Indecent liberties—Walker v. State, 132 Ala. 11. Making improper gesture to woman—Fuller v. State (Tex. Cr. App.) 72 S. W. 184.

5. Knight v. State (Fla.) 32 So. 110.

6. A man 28 years old, 6 feet tall, weighing 165 pounds, is a person of robust health—Black v. State (Tex. Cr. App.) 67 S. W. 113. A man 57 years old, 6 feet 2 inches tall, weighing 175 pounds, is not an aged person—Black v. State (Tex. Cr. App.) 67 S. W. 113.

7. Walker v. State, 132 Ala. 11.

8. Whipping which left marks on boy's person held not excessive—Stephens v. State (Tex. Cr. App.) 68 S. W. 281.

9. Particularly when used the day before the assault—State v. Mills (Del.) 52 Atl. 266.

10. Walkley v. State, 133 Ala. 183. Insulting words to defendant's daughter on the previous day—Walker v. State (Ga.) 43 S. E. 737.

11. Johnson v. State (Ala.) 34 So. 209.

12. Shaw v. State (Tex. Cr. App.) 73 S. W. 1046.

13. Kees v. State (Tex. Cr. App.) 72 S. W. 855.

14. State v. Pohl, 170 Mo. 422.

15. Lockland v. State (Tex. Cr. App.) 73 S. W. 1054.

16. Indictment for indecent assault held sufficient—State v. Fulkerson (Mo. App.) 71 S. W. 704.

17. State v. Llewellyn, 93 Mo. App. 469.

18. An averment of "serious injury" without stating its nature and extent insufficient—State v. Battle, 130 N. C. 655. Allegation of assault with a deadly weapon towit, a scythe blade—Spradley v. State, 80 Miss. 82; or a pistol—Mann v. State, 80 Miss. 398, sufficient. The weapon need not be one named in the statute (a brick)—State v. Sims, 80 Miss. 381. Indictment under Texas Statute for assault by robust person upon an aged one—Black v. State (Tex. Cr. App.) 67 S. W. 113; or by a male upon a female person—Webb v. State (Tex. Cr. App.) 68 S. W. 276, held sufficient.

19. A conviction of simple assault may be had on an indictment for aggravated assault—Weiner v. State (Tex. Cr. App.) 68 S. W. 681; or for assault with intent to kill—Sessions v. State, 115 Ga. 18; Com. v. Yarnell, 24 Ky. Law Rep. 144; State v. Washington, 107 La. 298; State v. Kelly, 41 Or. 20, 68 Pac. 1; or for assault with intent to rob—Rambo v. State, 134 Ala. 71; or for assault with intent to do great bodily harm—State v. Climie (N. D.) 94 N. W. 574; or for assault with intent to rape—Duggan v. State (Ga.) 43 S. E. 253; Caddell v. State (Tex. Cr. App.) 72 S. W. 1015; State v. Trusty (Iowa) 92 N. W. 677. But not under an indictment for manslaughter—People v. De Garmo, 73 App. Div. (N. Y.) 46.

20. Where defendant assaulted an agent removing a sewing machine from defendant's house, evidence as to the contract under which such machine was obtained is competent—Lockland v. State (Tex. Cr. App.)

showing the relevancy of evidence in particular prosecutions, also its sufficiency to make out a case or defense.[21]

Instructions will be necessitated on any matter of defense of which there is evidence,[22] or upon limitation of a right of self-defense.[23] Where there is evidence that prosecutor struck the first blow, a charge on provocation should be given,[24] and defendant's testimony to his intent requires a charge as to use of a weapon with intent only to frighten.[25] If given in answer to a question by the jury, they should be specific.[26] An instruction on self-defense not requiring defendant to have been free from fault is properly refused.[27]

Verdict guilty as charged,[28] or of a specific offense charged, is, generally speaking, correct.[29] Where the penalty affixed would apply to either of two degrees, the verdict should be specific as to degree.[30]

Punishments held proper are shown in the note.[31]

§ 5. *Civil liability.*—The liability of a master for assault by his servant is elsewhere treated.[32]

What constitutes.[33]—The intent to injure is essential.[34] Anger or malice need not appear.[35] The assault need not culminate in physical violence,[36] and defendant need not have been the actual assailant.[37]

73 S. W. 1054. An altercation the previous day may be shown, where the evidence is conflicting as to who was aggressor in the assault in issue—People v. Tillman (Mich.) 92 N. W. 499. **Defendant may show** that the place where the assault was alleged to have been committed was public—Duffy v. People, 197 Ill. 357. On trial for assaulting one who was attempting to arrest defendant, he may show the motives and conduct of the person assailed — Spradley v. State, 80 Miss. 82. On trial for indecent assault bad repute of prosecutrix and her admissions of former misconduct may be shown—Wilson v. State (Tex. Cr. App.) 67 S. W. 106. Defendant cannot state why he had the pistol—Holmes v. State (Ala.) 34 So. 180. Opprobrious words used by prosecutor cannot be shown in extenuation under Code, § 4345, where the defendant was the first to use them—Johnson v. State (Ala.) 34 So. 209.

21. Identification by prosecutor, opposed by alibi held insufficient—Duffy v. People, 197 Ill. 357. Assault with deadly weapon; evidence sufficient—People v. Ametta, 111 N. Y. State Rep. 177; People v. Maggio, 111 N. Y. State Rep. 204; Werner v. State (Tex. Cr. App.) 68 S. W. 68; Black v. State (Tex. Cr. App.) 67 S. W. 113. Indecent assault; evidence sufficient—Doyle v. Com., 4 Va. Sup. Ct. R. 143, 40 S. E. 925; State v. Fulkerson (Mo. App.) 71 S. W. 704. Self-defense held to be for jury—State v. Goode, 130 N. C. 651. From threats and the firing of a pistol the jury may find that it was loaded—Mazzotte v. Territory (Ariz.) 71 Pac. 911. And see Lockland v. State (Tex. Cr. App.) 73 S. W. 1054.

22. Evidence of affray in which defendant shot one who was attempting to disarm him held to require instructions on heat of passion and self-defense—Gordon v. Com., 24 Ky. Law Rep. 552. Evidence held to require charge on accidental shooting—Calhoun v. State (Tex. Cr. App.) 71 S. W. 279. Evidence of assault on defendant's daughter held to require instruction on self-defense—Williams v. State (Tex. Cr. App.) 70 S. W. 957.

23. Evidence held to require a charge on duty to retreat—State v. McCann (Or.) 72 Pac. 137.

24. Edgerton v. State (Tex. Cr. App.) 68 S. W. 678.

25. Instructions for shooting in heat of passion, without malice—Howard v. Com., 24 Ky. Law Rep. 1301; Werner v. State (Tex. Cr. App.) 68 S. W. 681.

26. Instruction defining assault held not sufficient answer to question by jury as to accident—People v. Schlesinger, 70 App. Div. (N. Y.) 199.

27. Johnson v. State (Ala.) 34 So. 209.

28. Lockland v. State (Tex. Cr. App.) 73 S. W. 1054.

29. A verdict of "guilty of aggravated assault" is good in Arkansas, but not one of "guilty of assault with a deadly weapon," the latter phrase having no technical significance—In re Burns, 113 Fed. 987.

30. Williams v. State (Tex. Cr. App.) 70 S. W. 957.

31. Evidence in prosecution for aggravated assault held to justify maximum punishment—Webb v. State (Tex. Cr. App.) 68 S. W. 276. $1000 fine held not excessive—Doyle v. Com., 4 Va. Sup. Ct. R. 143, 40 S. E. 925.

32. Master and Servant. Carriers.

33. Definition of assault and battery—Butler v. Stockdale, 19 Pa. Super. Ct. 98; Armstrong v. Little (Del. Super.) 54 Atl. 742.

34. Gilmore v. Fuller, 198 Ill. 130.

35. Catching hold of a person in a sportive manner and jerking him so as to injure plaintiff—Reynolds v. Pierson, 29 Ind. App. 273.

36. Driving a woman from the house whereby she was exposed to inclement weather—Kline v. Kline, 158 Ind. 602. Pointing a firearm with threat to shoot—Hickey v. Welch, 91 Mo. App. 4.

37. Accessories: One who merely approves an assault by another is not liable —Ryan v. Quinn, 24 Ky. Law Rep. 1513; but one who orders an assault is jointly liable with him who commits it—Sellman v. Wheeler, 95 Md. 751.

Defenses.—Reasonable force may be used in expelling a trespasser.[38] One who uses excessive force in self-defense is liable.[39] Mere provocation or abuse is not a defense.[40] An officer has no right to strike a person not under arrest for disobeying his order.[41]

§ 6. *Pleading, evidence, and trial.*[42]—A denial of assault to an averment of battery raises no issue,[43] but denial of that charged with allegations of a lesser justifiable one does.[44] In the notes are collected instances of pleadings considered as to sufficiency.[45]

The burden of a prima facie case is on plaintiff.[46] Provocation is admissible in mitigation,[47] but proof of a criminal conviction is not.[48] Evidence of defendant's wealth is not admissible.[49] Other facts admissible generally,[50] or as proving damages or extent of injury,[51] or provocation,[52] as well as sufficiency of evidence,[53] are discussed in the note. Rules of measure and proof of damages are the subject of a forthcoming article but illustrative cases are given.[54] An instruction that one who "caused" or "approved" an assault is liable is misleading.[55]

38. Illinois Steel Co. v. Waznius, 101 Ill. App. 535; Hannabalson v. Sessions, 116 Iowa, 457.

39. Gutzman v. Clancy, 114 Wis. 589; Armstrong v. Little (Del. Super.) 54 Atl. 742.

40. Palmer v. Winston Salem R. & E. Co., 131 N. C. 250; Armstrong v. Little (Del. Super.) 54 Atl. 742.

41. Ryan v. Quinn, 24 Ky. Law Rep. 1513.

42. **Amendment** of answer before verdict allowed—Hannabalson v. Sessions, 116 Iowa, 457. **Costs**—Comp. Laws 1897, § 11,258, allowing no costs on recovery of less than $50 applies to recovery against master for assault by servant—Johnson v. Detroit, Y. & A. A. R. Co. (Mich.) 90 N. W. 274.

43. Zwerling v. Annenberg, 38 Misc. Rep. (N. Y.) 169.

44. And the burden is on plaintiff—Berkner v. Danneberg (Ga.) 43 S. E. 463.

45. Averments authorizing punitive damages sufficient—Johnson v. Bedford, 90 Mo. App. 43. Petition against police officer need not allege that battery was without warrant or order—Connelly v. American B. & T. Co., 24 Ky. Law Rep. 714. Petition held sufficient—Long v. McWilliams, 11 Okl. 562, 69 Pac. 882. **Self defense:** Answer that plaintiff began difficulty but not alleging that defendant acted in self defense bad—Ryan v. Quinn, 24 Ky. Law Rep. 1513. If justification appears it is effectual though there was no plea son assault demesne—Ryan v. Quinn, 24 Ky. Law Rep. 1513.

46. The burden is on plaintiff to show the assault but not to negative self-defense—Orscheln v. Scott, 90 Mo. App. 352; Sellman v. Wheeler, 95 Md. 751.

47. Palmer v. Winston Salem R. & E. Co., 131 N. C. 250; Genung v. Baldwin, 77 App. Div. (N. Y.) 584; Berkner v. Dannenberg (Ga.) 43 S. E. 463. **Contra,**—Armstrong v. Rhoades (Del. Super.) 53 Atl. 435.

48. Armstrong v. Rhoades (Del. Super.) 53 Atl. 435; Edwards v. Wessinger, 65 S. C. 161.

49. Beavers v. Bowen, 24 Ky. Law Rep. 882, 70 S. W. 195.

50. On trial for an assault committed by an officer preserving order at the polls it was held that rules of a political party were inadmissible. That evidence that the election was declared off because of interference was inadmissible—Ryan v. Quinn, 24 Ky. Law Rep. 1513. Evidence of plaintiff's turbulent character held inadmissible, and in no case can bad character be proved by specific acts—Houston & T. C. R. Co. v. Bell (Tex. Civ. App.) 73 S. W. 56.

51. Evidence of time of plaintiff's disability proper though no damages claimed for loss of time—Gutzman v. Clancy, 114 Wis. 589. Evidence of physician as to injury held competent though he did not know the cause thereof—Sellman v. Wheeler, 95 Md. 751.

52. Evidence of defamatory publications by defendant long before not admissible in mitigation—Genung v. Baldwin, 75 App. Div. (N. Y.) 195.

53. **Evidence held sufficient.** Question as to sufficiency of replevin proceedings in action against officer serving writ—McKinstry v. Collins, 74 Vt. 147. Evidence as to conspiracy between defendants held for the jury—Orscheln v. Scott, 90 Mo. App. 352. Evidence of conspiracy insufficient—Ryan v. Quinn, 24 Ky. Law Rep. 1513. On undisputed evidence a verdict is properly directed—Genung v. Baldwin, 75 App. Div. (N. Y.) 195.

54. See Damages. Elements of compensatory damages—Armstrong v. Rhoades (Del. Super.) 53 Atl. 435. Where a woman was driven from the house at the point of a pistol and suffered from exposure to weather, damages for fright and mental suffering may be recovered—Kline v. Kline, 158 Ind. 602. **Amount.** Substantial damages not allowed for technical trespass—Slingerland v. Gillespie, 67 N. J. Law, 385. $300 not excessive where illness was caused and plaintiff's arm was disabled several weeks—Long v. McWilliams, 11 Okl. 562, 69 Pac. 882. $500 for indecent familiarities held not excessive—Bruske v. Neugent (Wis.) 93 N. W. 454. Evidence held not to justify punitive damages—Orscheln v. Scott, 90 Mo. App. 352.

55. Ryan v. Quinn, 24 Ky. Law Rep. 1513. **Miscellaneous decisions respecting instructions.** Instruction that day laid in declaration is not essential is correct though the evidence fixes the day and there is proof of an alibi—Bruske v. Neugent (Wis.) 93 N. W. 454. Instructions held to be conflicting—Stone v. Heggie (Miss.) 34 So. 146. Instruction as to self-defense held proper where plaintiff attempted to ride defendant down—Halley v. Tichenor (Iowa) 94 N. W. 472. In-

ASSIGNMENTS.

§ 1. Rights Assignable.
§ 2. Requisites and Sufficiency of Express Assignment.
§ 3. Constructive or Equitable Assignments.
§ 4. Construction, Interpretation and Effect.
§ 5. Enforcement of Assignment and of Rights Assigned.

§ 1. *Rights susceptible of assignment.*—Matter not in esse may be assigned,[1] or demands not yet due,[2] such as rights to accrue under an unperformed contract,[3] or wages to be earned under an existing contract,[4] and the rule is not changed by statutes prohibiting what is known as the "truck system;"[5] but there can be no assignment of a possibility of future employment.[6] An heir cannot assign his expectancy.[7]

An office or agency involving personal confidence cannot be assigned,[8] nor contracts for personal services.[9] It cannot be objected that a contract is not assignable because one of trust and confidence, where there is a consent to its transfer and payment to the transferee.[10] An agreement to buy merchandise is not so personal that it cannot be assigned.[11] A contract between a railroad company and a lumber company whereby the lumber company agrees to ship entirely by the railroad cannot be assigned so as to bind the railroad without its assent.[12] A covenant not to engage in business is assignable.[13] An agreement by a corporation to construct and operate a street railroad may be assigned,[14] as may a contract empowering a railroad company to take water from a spring and erect a pumping works.[15] An assignment of the salary of a public officer to be earned in the future is void.[16] The assignability of a contract may be restricted by agreement.[17]

struction as to self-defense against officers not disclosing their purpose, correct—Stuck v. Yates (Ind. App.) 66 N. E. 177. Instruction as to exemplary damages incorrect—proper form stated—Ryan v. Quinn, 24 Ky. Law Rep. 1513. Instruction as to powers of officer preserving order at polls, incorrect—Ryan v. Quinn, 24 Ky. Law Rep. 1513. Instruction held to authorize consideration of plaintiff's epileptic condition though it should have been more specific—St. Louis Trust Co. v. Murmann, 90 Mo. App. 555. Evidence held to require instruction as to injury impairing plaintiff's capacity to work—Sellman v. Wheeler, 95 Md. 751. Evidence held not to require instruction as to recaption of property—Keller v. Lewis, 116 Iowa, 369.

1. Such assignments operate as present contracts, and attach to matter assigned when it comes into being—Williams v. West Chicago St. R. Co., 101 Ill. App. 291; as a right, covered by a mortgage, to receive securities to be issued—Central Trust Co. v. West India Imp. Co., 169 N. Y. 314; Brewer v. Griesheimer, 104 Ill. App. 323.

2. Citizens' Trust & Surety Co. v. Howell, 19 Pa. Super. Ct. 255.

3. Citizens' Trust & Surety Co. v. Howell, 19 Pa. Super. Ct. 255.

4. Tolman v. Union Casualty & Surety Co., 90 Mo. App. 274. This whether the employment is of certain or uncertain duration or whether the assignment is as security for present or future advances or an outright sale—Bell v. Mulholland, 90 Mo. App. 612; Brewer v. Griesheimer, 104 Ill. App. 323; Wenhan v. Mallin, 103 Ill. App. 609.

5. Brewer v. Griesheimer, 104 Ill. App. 323.

6. Bell v. Mulholland, 90 Mo. App. 612.

7. In re Wickersham's Estate, 138 Cal. 355, 70 Pac. 1076.

8. Colton v. Raymond (C. C. A.) 114 Fed. 863. A contract to rent a space in a department store with an agreement to furnish services is not assignable without mutual consent—Moore v. Thompson, 93 Mo. App. 336.

9. Applying to a contract to do county printing—Campbell v. Board of Com'rs, 64 Kan. 376, 67 Pac. 866.

10. Employment of an architect by county commissioners to draft plans—Weatherhogg v. Board of Com'rs, 158 Ind. 14.

11. Liberty Wall Paper Co. v. Stoner Wall Paper Mfg. Co., 170 N. Y. 582.

12. Tifton, T. & G. R. Co. v. Bedgood (Ga.) 43 S. E. 257.

13. Fleckenstein Bros. Co. v. Fleckenstein (N. J. Eq.) 53 Atl. 1043.

14. Under both general law and Revised Statutes, art. 308, providing for the assignment of non-negotiable instruments—Lakeview Land Co. v. San Antonio Traction Co., 95 Tex. 252. A promise to build a sidetrack in consideration of release from liability for loss by fire is assignable by a railroad company (Rev. St. Tex. art. 308)—Missouri, K. & T. R. Co. v. Carter, 95 Tex. 461.

15. Rev. St. art. 308, makes the interest of an obligee of any non-negotiable written instrument assignable—Houston & T. C. R. Co. v. Cluck (Tex. Civ. App.) 72 S. W. 83.

16. City of Chicago v. People, 98 Ill. App. 517; First Nat. Bank v. State (Neb.) 94 N. W. 633. An agreement by which a partner appointed boiler inspector agrees to allow his salary to go to the partnership is not void as assignment of unearned salary—McGregor

Rights of action which survive may be assigned,[18] though they may, by statute, be nonassignable before suit is brought.[19] An assignment of a portion of whatever may be recovered in an action or by way of compromise is not against public policy as preventing compromise of disputed claims.[20] A grantor's right of re-entry for condition broken is assignable after breach.[21] The right to charge a partner's individual property for firm debts and a judgment therefor is assignable.[22] A claim for damages may be wholly or partially assigned,[23] but in some jurisdictions a right of action sounding in tort for unliquidated damages is not assignable,[24] as also a right to sue for the balance due on an insurance policy after settlement under mistake as to the amount.[25] Assignments of distinct claims to one person are not invalidated by the fact that the sum over which a particular court has jurisdiction is thereby exceeded.[26] The right to maintain an action may pass with an assignment of a substantial property right.[27] A right of action limited to particular persons is nonassignable,[28] so a statutory right of redemption from foreclosure is not assignable.[29] An assignment void as a conveyance may be enforced by way of estoppel.[30]

§ 2. *Requisites and sufficiency of express assignments.*—Assignments may be by parol,[31] as in case of a debt,[32] in which instance they may be established by acts and conduct of the parties.[33] An assignment of a right of action need not be witnessed.[34] Written evidences of debt may be assignable by delivery.[35] A written evidence of assignment may be transferred by delivery of possession and indorsement.[36] Where a contract is personal, consent to its assignment may be pre-

v. McGregor (Mich.) 9 Det. Leg. N. 118, 90 N. W. 284.

17. Where a building contract contains an agreement that there shall be no assignment without the architect's consent, an assignee without such consent derives no rights—Mueller v. Northwestern University, 195 Ill. 236. A provision in a building contract that rights thereunder shall not be assigned without consent of the architect is not waived by failure to repudiate an assignment, of which the notice to the owners was sufficient only to afford them knowledge, after investigation, that the contractor was to collect the amount due and to account to his assignee therefor—Mueller v. Northwestern University, 195 Ill. 236.

18. A portion of a cause of action against a railroad company for injuries to the person may be assignable before suit. Sayles' Ann. Civ. St. art. 3353a, providing that causes of action for personal injuries not resulting in death shall survive—Galveston, H. & S. A. R. Co. v. Ginther (Tex.) 72 S. W. 166. Actions to recover penalty for exaction of usurious interest under Rev. St. art. 3106—Taylor v. Sturgis (Tex. Civ. App.) 68 S. W. 538. Rights of the owner of a horse and cutter to sue for an injury resulting from a defective highway may pass by assignment—Bolster v. Ithaca St. R. Co. (N. Y.) 79 App. Div. 239.

19. Action by wife for death of husband, construing Rev. St. arts. 3025, 4647—Southern Pac. Co. v. Winton, 27 Tex. Civ. App. 503. A cause of action for personal injuries is assignable before suit brought—Galveston, H. & S. A. R. Co. v. Ginther (Tex. Civ. App.) 70 S. W. 96.

20. Galveston, H. & S. A. R. Co. v. Ginther (Tex.) 72 S. W. 166.

21. Bouvier v. Baltimore & N. Y. R. Co., 67 N. J. Law, 281.

22. Right preserved by Code, § 27—Wood v. Carter (Neb.) 93 N. W. 158.

23. Breach of warranty—McConaughey v. Bennett's Ex'rs, 50 W. Va. 172. Claim of a tenant against his landlord—United States Casualty Co. v. Bagley (Mich.) 8 Det. Leg. N. 843, 87 N. W. 1044, 55 L. R. A. 616.

24. A right of action by a widow to recover for the wrongful death of her husband is not assignable before verdict—Marsh v. Western N. Y. & P. R. Co., 204 Pa. 229.

25. Goodson v. National Masonic Acc. Ass'n, 91 Mo. App. 339.

26. So held in the case of claims for killing stock—Henderson v. Detroit & M. R. Co. (Mich.) 9 Det. Leg. N. 386, 91 N. W. 630.

27. So an action to avoid a fraud may be maintained where incidental to a subsisting substantial right—National Valley Bank v. Hancock 4 Va. Sup. Ct. Rep. 20, 40 S. E. 611.

28. Bank's right of action to have transfers of bonds by its directors to its president, set aside—Smith v. Pac. Bank, 137 Cal. 363, 70 Pac. 184.

29. Terry v. Allen, 132 Ala. 657.

30. In re Wickersham's Estate, 138 Cal. 355, 70 Pac. 1076.

31. Over claims of subsequent attaching creditors—Beard v. Sharp, 23 Ky. Law Rep. 1582.

32. Forsyth v. Ryan (Colo. App.) 68 Pac. 1055.

33. Forsyth v. Ryan (Colo. App.) 68 Pac. 1055.

34. An assignment of a right to annul a judicial sale need not be by authentic act—Viguerie v. Hall, 107 La. 767.

35. Checks for services payable in goods at the employer's store are assignable by delivery (Sand. & H. Dig., § 489)—Martin-Alexander Lumber Co. v Johnson, 70 Ark. 215.

36. Twelfth Ward Bank v. Samuels (N. Y.) 71 App. Div. 168.

sumed from acquiescence.[37] An executory agreement to assign does not pass legal title.[38] The person liable cannot question the consideration for the assignment of a claim,[39] nor is his consent necessary;[40] but before a partial assignment may be enforced at common law the debtor must assent,[41] though assent is not necessary to its enforcement in equity if all parties are before the court;[42] so an order drawn on a debtor in favor of a third person must be accepted to amount to an assignment.[43] The debtor cannot object that the debt is stated at less than its amount.[44]

As to third persons, a *consideration* is immaterial,[45] or where the only defense made is an accord and satisfaction.[46] An assignment under seal will be presumed to be on good consideration.[47] A mistake in the name by which a claim is assigned will not invalidate it.[48]

On assignment of a claim, *notice to the debtor* is unnecessary except as against junior assignees.[49] Priorities between assignments may depend on notice.[50]

Record.—An assignment of part of a cause of action before suit need not be filed where there is actual notice, though there is a statutory requirement that sales of judgment or causes of action shall be acknowledged, filed, and noted on the judgment or trial docket.[51]

§ 3. *Constructive or equitable assignments.*—Any order, writing, or act which makes an appropriation of a fund amounts to an equitable assignment thereof,[52] so an order on a specified fund operates pro tanto;[53] but it must be drawn on a particular fund,[54] and must be accepted by the party on whom it is drawn.[55]

37. Consent to assignment of the privilege of conducting a shoe department in a department store may be shown by permission to the assignee to continue in possession—Moore v. Thompson, 93 Mo. App. 336.

38. After such an agreement, the assignor may still maintain an action in his own name—National City Bank of Grand Rapids v. Torrent (Mich.) 9 Det. Leg. N. 49, 89 N. W. 938.

39. A defendant railroad company cannot where a stock claim is assigned by writing which recites a valuable consideration, object to the assignment on the ground that the assignee was to turn over the proceeds and was not the owner—Henderson v. Detroit & M. R. Co. (Mich.) 9 Det. Leg. N. 386, 91 N. W. 630.

40. Kingsbury v. Joseph, 94 Mo. App. 298.

41. Rivers v. A. & C. Wright & Co. (Ga.) 43 S. E. 499.

42. Rivers v. A. & C. Wright & Co. (Ga.) 43 S. E. 499.

43. Andrews v. Frierson (Ala.) 33 So. 6.

44. Colorado School Land Leasing & Mining Co. v. Ponick (Colo. App.) 66 Pac. 458.

45. Forsyth v. Ryan (Colo. App.) 68 Pac. 1055.

46. Phipps v. Bacon (Mass.) 66 N. E. 414.

47. McDonough v. Aetna Life Ins. Co. (N. Y.) 38 Misc. Rep. 625.

48. Claim against Colorado School Land Leasing & Mining Company, assigned sub nom. Colorado School Land Mining & Leasing Company—Colorado School Land Leasing & Mining Co. v. Ponick (Colo. App.) 66 Pac. 458.

49. Where accounts and bills receivable were transferred as collateral for a loan—Young v. Upson, 115 Fed. 192; Houser v. Richardson, 90 Mo. App. 134. On assignment of equitable interest, the assignee must notify the trustee to protect himself against junior assignees—Houser v. Richardson, 90 Mo. App. 134.

50. A contract right to an assignment has no priority over a subsequent assignment, unless the debtor and subsequent assignees both have notice prior to the subsequent assignment—Enochs-Havis Lumber Co. v. Newcomb, 79 Miss. 462.

51. Sayles' Ann. Civ. St. art. 4647—Galveston, H. & S. A. R. Co. v. Ginther (Tex.) 72 S. W. 166.

52. As where by an instrument in writing addressed to a city treasurer and recorded, by which it was agreed to pay claimants an amount due for services as a fireman—Harlow v. Bartlett, 96 Me. 294; McConaughey v. Bennett's Ex'rs, 50 W. Va. 172. Sufficiency of assignment of notes and book accounts—Smith v. Meyer, 84 Minn. 455. An agreement to pay 50 per cent of any sum recovered in any proceedings which an attorney should deem it advisable to take to secure compensation for the taking of land for a street amounts to an equitable assignment—Deering v. Schreyer, 171 N. Y. 451. An instrument reciting that it had empowered petitioner and a banker to make certain sales, and had agreed to allow petitioner a per cent on purchase price received from his sales, and directed the banker to pay such per cent from the purchase money to petitioner, operates as an equitable assignment giving the petitioner a lien on the funds—Leupold v. Weeks, 96 Md. 280.

53. Willard v. Bullen, 41 Or. 25, 67 Pac. 924. Order on a fund due a municipal contractor filed with the proper city officers—Dickerson v. Spokane, 26 Wash. 292, 66 Pac. 381.

54. Izzo v. Leddington (N. Y.) 79 App. Div. 272.

55. So an agreement that a third person shall collect money and apply it to a particular indebtedness is not an assignment, until the third person has agreed to make such application—Hanchey v. Hurley, 129 Ala. 306. There must be an acceptance be-

Delivery of a check for payment of notes against a deposit subject to check is an assignment pro tanto,[56] though, contra, a bank check for a portion of a deposit does not at the time of delivery operate as an assignment pro tanto.[57] A mere promise to pay from a particular fund does not amount to an equitable assignment,[58] or to pay a debt from a fund to be created.[59] A power of attorney to collect operates an equitable assignment.[60] An agreement to pay an attorney a certain amount on settlement or recovery of a claim does not amount to an equitable assignment,[61] but an agreement to pay attorneys compensation from an appropriation to be secured by them has such effect.[62]

§ 4. *Construction, interpretation, and effect.*[63]—Assignees of nonnegotiable choses in action take subject to existing equities.[64] An assignment of the earnings of a threshing machine cannot be enforced against an innocent purchaser without notice.[65] After assignment of an equitable interest and notice to the trustee, the assignee's rights attach to the property itself.[66] Where an attorney is assigned one-third of a cause of action, the defendant with notice will be liable to the attorney for such portion of a sum paid directly to the client by way of compromise against the attorney's rights.[67] The assignee of corporate stock acquires rights accruing to his assignor.[68] When certain shares of stock are assigned to the receiver by an instrument vesting him with "rights of an owner so far as regards sale, disposition, and management," dealings with the stock by the receiver after the death of the assignor for the benefit of all parties in interest cannot be attacked by the assignor's administrator for the reason that he did not consent to them.[69] An agreement to sell bonds in litigation does not convey a judgment regarding them.[70] On an equitable assignment of rights under a contract, the assignee must show that his assignor has so performed as to be entitled to payment.[71] An assignment of moneys to become due under a contract may not

fore an implied request of the creditor that the debtor pay the debt to a third person, will amount to an assignment—Shackelford v. M. C. Kiser Co. (Ala.) 31 So. 77. An instrument reciting that for value received, the makers "hereby sell and assign" a certain amount of "any money due or to become due," and containing a request to pay persons named out of any moneys becoming due or due on an account mentioned, and to charge the same to the drawers, is not an assignment, but is an order or bill of exchange, which must be accepted, as required by Act 1899, § 132—Nelson v. Nelson-Bennett Co. (Wash.) 71 Pac. 749.

56. Staninger v. Tabor, 103 Ill. App. 330.

57. Donohoe-Kelly Banking Co. v. Southern Pac. Co., 138 Cal. 183, 71 Pac. 93.

58. Phillips v. Hogue, 63 Neb. 192; Addison v. Enoch, 168 N. Y. 658.

59. So held on an agreement to transfer bonds to be thereafter issued in consideration of an assignment of a judgment—Cushing v. Chapman, 115 Fed. 237.

60. Power of attorney conferring on a bank full authority to collect all sums due for government work, amounts to an equitable assignment of the entire amount to become due, including a percentage retained as a guaranty fund. So held awarding the assignment priority over a subsequent assignment of the percentage retained to a person without notice—National Bank of Republic v. United Security Life Ins. & Trust Co., 17 App. D. C. 112.

61. Randel v. Vanderbilt (N. Y.) 75 App. Div. 313.

62. Sanborn v. Maxwell, 18 App. D. C. 245.

63. On an agreement to assign so much of a claim as should be unsecured at a certain time, a garnishment in a suit on the claim may be regarded as security—National City Bank of Grand Rapids v. Torrent (Mich.) 9 Det. Leg. N. 49, 89 N. W. 938. Where there is an equitable assignment of 50% of an award in condemnation, the amount of a mortgage ordered paid by the court must be deducted in determining the sum transferred, though the owner was not bound to pay such mortgage—Deering v. Schreyer, 171 N. Y. 451.

64. Third Nat. Bank v. Western & A. R. Co., 114 Ga. 890. So the assignee of a cost bill takes subject to any right of off-set—Northwestern & Pacific Hypotheek Bank v. Rauch (Idaho) 66 Pac. 807.

65. Rydson v. Larson (Neb.) 93 N. W. 195.

66. Houser v. Richardson, 90 Mo. App. 134.

67. Galveston, H. & S. A. R. Co. v. Ginther (Tex.) 72 S. W. 166.

68. Where a corporation taking over another agrees to pay its stockholders a certain sum, the assignee of a shareholder may recover an amount paid his assignor under the agreement though he may not bring an action against the corporation—Bacon v. Grossmann (N. Y.) 71 App. Div. 574.

69. McCartney v. Earle (C. C. A.) 115 Fed. 462.

70. Smith v. Pac. Bank, 137 Cal. 363, 70 Pac. 184.

71. Goldengay v. Smith, 62 N. J. Eq. 354.

deprive the assignor of the right to collect such moneys.[72] The holders of a fund cannot contend that nothing was due the assignor where they have led the assignee to believe that only the amount was in controversy and to be fixed by the court.[73] Before acceptance by the assignee, an employer is not released by an assignment of the contract of employment.[74] A contract by a lessor to save a lessee harmless for damages on account of an adverse claim cannot be assigned to the adverse claimant so as to permit a recovery against the lessor of rent paid under the lease.[75]

§ 5. *Enforcement of assignment and of rights assigned.*—An action at law may be brought on an equitable assignment.[76] A consideration is not necessary to enable an absolute assignee to sue in his own name,[77] but an assignee for collection cannot sue in his own name,[78] though one who has agreed to use the proceeds for the benefit of the assignor may recover.[79] Where by statute permission is given an assignee to sue in his own name, permission to sue in the name of the assignor is immaterial.[80] The assignor of a chose in action need not be made a party to an action thereon by the assignee.[81] The assignee of a subcontractor on public work may sue in the assignor's name.[82] Where the assignee of a contract assumes the obligations of his assignor, he does not become a party thereto so that he may be sued at law on the contract, nor will the doctrine of subrogation apply in such an action.[83]

It is sufficient to allege that a contract was "duly" assigned.[84] Consideration may be generally alleged.[85] An averment before a justice that a claim for services was assigned to plaintiff is a sufficient averment that the assignment was of an antecedent debt.[86] Failure of the declaration to state that an assignment is in writing must be taken advantage of by demurrer, and objection cannot be made

72. So held where all moneys were assigned, "except such sums as may be due or owing to other material men, sub-contractors, or laborers," but no method was specified by which the amount to be received by the assignee was to be determined, nor express authority given him to collect the moneys assigned him—Mueller v. Northwestern University, 195 Ill. 236. Knowledge of the owners of such an assignment does not render them liable to the assignee in case the contractor converts money received to his own use—Mueller v. Northwestern University, 195 Ill. 236. In case a building contract provides that it shall not be assigned without consent of the owner, failure of the owners to investigate a notice of assignment does not prevent them from setting up payment as against the assignee where but slight information would have been gained by investigation after notice—Mueller v .Northwestern University, 195 Ill. 236.

73. So held where after an allowance to trustees for counsel fees they attempted to retain the amount as against the counsel's assignee on the ground that there had been an agreement that the assignor was not to receive a fee by permission of the other attorneys, though there had been a refusal by the court to allow any fee to the assignor—Stone v. Hart, 23 Ky. Law Rep. 1777.

74. Acceptance is not shown by letters from the assignee to the employe requesting him to report and adjust a question of salary, salary being specified in the original contract—Griffin v. Brooklyn Ball Club (N. Y.) 68 App. Div. 566.

75. Examine Sherman v. Spalding (Mich.) 9 Det. Leg. N. 617, 93 N. W. 613.

76. Dickerson v. Spokane, 26 Wash. 292, 66 Pac. 381.

77. Notwithstanding a statutory requirement that actions must be instituted by the real party in interest—Roth v. Continental Wire Co., 94 Mo. App. 236. Assignee of a cause of action arising from a breach of an agreement to discontinue another suit may maintain an action though there is no consideration—Rosenthal v. Rudnick (N. Y.) 65 App. Div. 519.

78. Assignments of an itemized verified account and oral agreements to pay the full amount when collected to the assignor—Stewart v. Price, 64 Kan. 191, 67 Pac. 553.

79. As where a claim if collected was to be applied on a board bill of the assignor—Forsyth v. Ryan (Colo. App.) 68 Pac. 1055.

80. St. 1897, c. 402, § 1; Gilman v. American Producers' Controlling Co., 180 Mass. 319; Peters v. Same, Id.

81. Wood v. Carter (Neb.) 93 N. W. 158.

82. Brownell Imp. Co. v. Critchfield, 197 Ill. 61.

83. Goodyear Shoe Mach. Co. v. Dancel (C. C. A.) 119 Fed. 692.

84. Buffalo Tin Can Co. v. E. W. Bliss Co., 118 Fed. 106.

85. It is sufficient to allege that an order against the city was in payment of labor performed for a contractor on public work—Dickerson v. Spokane, 26 Wash. 292, 66 Pac. 381. Where a written assignment states that it is for a valuable consideration, it cannot be contended that the actual consideration was not specifically set forth, in an exception of no cause of action—Viguerie v. Hall, 107 La. 767.

86. Farnam v. Doyle, 128 Mich. 696.

after the written assignment has been admitted without objection.[87] It cannot be shown that an assignment is colorable unless such fact is pleaded.[88] The capacity of the assignor may be investigated.[89] An allegation of assignment by a company is not supported by an assignment executed by an individual.[90] A question as to the existence of an assignment and the assent of a controlling party thereto is for the jury.[91]

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

§ 1. Nature in General.
§ 2. Statutory Provisions and Conflict of Laws.
§ 3. Right to Make.
§ 4. Filing, Recording, Etc.; Qualifying of Assignee, Removals and Substitutions.
§ 5. Meaning and Effect in General.
§ 6. Legality and Equitableness.—Conditions; Reservations; Preferences.
§ 7. Property Passing and Rights of Assignee.
§ 8. Collection of Assets and Reduction to Money.
§ 9. Administration of the Trust in General.
§ 10. Debts and Liabilities.
§ 11. Presentment and Allowance of Claims.
§ 12. Classes and Priorities of Debts.
§ 13. Satisfaction and Discharge of Debts.
§ 14. Accounting, Settlement and Discharge, or Failure of Trust.

§ 1. *Nature of transaction in general.*—A transfer of property direct to a creditor as collateral security is not a general assignment,[1] nor is a conveyance by a testamentary trustee of his interest in the trust estate, and a reconveyance to him of the same estate,[2] nor an assignment of particular choses for the benefit of particular creditors in the absence of such intentions.[3]

§ 2. *Statutory provisions and conflict of laws.*—Under the rule of comity as to real estate,[4] the laws of the state of the making of a general assignment govern its validity,[5] or the assignee's title,[6] and it will be enforced as against the property in a foreign state if the creditors residing therein are not prejudiced thereby,[7] or public policy thereof is not transgressed.[8]

§ 3. *Right to make a general assignment.*—An officer of a corporation can only make an assignment of the corporate assets with the concurrence of the board of directors.[9]

§ 4. *Filing, recording, or registering; qualifying of assignee, removals, and substitution.*—In some of the states it is required by statute, to pass title of nonresident assignors, that the assignment be recorded in the county of the situs of the property or debt.[10]

The trust does not fail because the assignee fails to qualify as required by statute,[11] or because of incapacity of and maladministration of the assignee,[12]

87. Phipps v. Bacon (Mass.) 66 N. E. 414.

88. The execution of the assignment was admitted—Lesh v. Meyer, 63 Kan. 524, 66 Pac. 245.

89. In an action on an assigned claim which originally stood in the name of the assignor in trust, it is proper to inquire whether the assignor held in trust for some one else as bearing on the validity of the assignment—Chambers v. Webster (N. Y.) 69 App. Div. 546.

90. Kibler v. Brown, 114 Fed. 1014.

91. Liberty Wall Paper Co. v. Stoner Wall Paper Mfg. Co., 170 N. Y. 582.

1. Transfer to the receiver of the creditor—McCartney v. Earle (C. C. A.) 115 Fed. 462.

2. Within Act 1843—In re Hart's Estate, 202 Pa. 503; Appeal of Philadelphia Trust, Safe Deposit & Ins. Co., Id.

3. Assignment of an insurance policy—Brookshier v. Chillicothe Ins. Co., 91 Mo. App. 599.

4. Memphis Sav. Bank v. Houchens (C. C. A.) 115 Fed. 96.

5. Memphis Sav. Bank v. Houchens (C. C. A.) 115 Fed. 96.

6. Watson v. Bonfils (C. C. A.) 116 Fed. 157.

7. Memphis Sav. Bank v. Houchens (C. C. A.) 115 Fed. 96.

8. Bloomingdale v. Weil, 29 Wash. 611; Bloomingdale v. Security Safe Deposit & Trust Co., Id.

9. Lesher v. Friedman, 99 Ill. App. 42.

10. Situs of debt due by a domestic corporation authorized to transact business in the state of the nonresident assignor held to be in the foreign state, and that the assignment need not be recorded in this state—De Turck v. Woelfel, 19 Pa. Super. Ct. 265, 270.

11. H. B. Claflin Co. v. Middlesex Banking Co., 113 Fed. 958.

12. Long v. Campbell, 133 Ala. 353.

but a court of equity will execute the trust[13] by removing the assignee[14] and appointing another in his place.[15] A substituted assignee is precluded by acts of his predecessor.[16]

§ 5. *Meaning and effect in general.*—A deed of general assignment will operate to relinquish all rights of the assignor in his assets.[17]

§ 6. *Legality and equitableness.*—A deed invalid in its inception cannot be validated by a subsequent deed,[18] and, if valid, it cannot be invalidated by any subsequent acts of the creditors,[19] assignor or assignee,[20] or by erroneous orders of court.[21] By participating in or accepting benefits from the estate, creditors will be estopped to question the validity of the assignment.[22]

Conditions.—An undisclosed condition releasing the assignor from claims authorizes a rescission by an assenting creditor.[23]

Reservation of property.—While property may remain in the hands of the assignor on assignment,[24] yet, if the deed of assignment on its face conveys all the assignor's property and he retains undisclosed property, the assignment is void;[25] but the reservation of a homestead[26] or an unmatured claim may be valid.[27]

Preferences.—Preferring certain creditors by omitting other creditors renders the assignment void,[28] provided there was an intent to prefer such creditors;[29] but assenting creditors will be estopped to claim that the assignment is a general one.[30] In the absence of such an assent thereto by all the creditors, it may be declared a general assignment for the benefit of them all.[31] This may be done on action brought against the assignee in his individual capacity.[32] Such a judgment will relate back to the original deed,[33] and is admissible in evidence in action against the assignee to recover the assets.[34] A nonassenting creditor may reach the property, in the hands of a trustee under deed to prefer certain creditors, by garnishment.[35] A conveyance of property on the day of the execution of the assignment does not constitute a preference.[36]

§ 7. *Property passing to and the rights of the assignee therein.*—All of the debtor's property,[37] except that which equitably belongs to creditors[38] and that

13. H. B. Claflin Co. v. Middlesex Banking Co., 113 Fed. 958.

14. Long v. Campbell, 133 Ala. 353.

15. In New York the county court has jurisdiction—Matter of Sheldon (N. Y.) 72 App. Div. 625.

16. In re Plankinton Bank, 114 Wis. 582; National Bank of Republic v. Herman, Id.; Provident L. & T. Co. v. Fidelity Co., 203 Pa. 82, wherein assets were abandoned by predecessor.

17. And he can do nothing to invalidate it—Taylor v. Seiter, 100 Ill. App. 643.

18. Rainwater-Bradford Hat Co. v. McBride (C. C. A.) 117 Fed. 597; H. B. Claflin Co. v. Harrison (Fla.) 31 So. 818.

19. The subsequent acts of the creditors or the assignee cannot be imputed to the assignors.—Taylor v. Seiter, 100 Ill. App. 643.

20. Long v. Campbell, 133 Ala. 353.

21. Taylor v. Seiter, 100 Ill. App. 643.

22. Memphis Sav. Bank v. Houchens (C. C. A.) 115 Fed. 96; Taylor v. Seiter, 100 Ill. App. 643; Kaufman v. Simon, 80 Miss. 189.

23. Graves v. Morgan, 182 Mass. 161. And a suit by the creditors to enforce claims is a sufficient rescission—Graves v. Morgan, 182 Mass. 161.

24. Owens v. Taylor, 23 Ohio Cir. Ct. R. 612.

25. Owens v. Taylor, 23 Ohio Cir. Ct. R. 612: H. B. Claflin Co. v. Harrison (Fla.) 31 So. 818.

26. Long v. Campbell, 133 Ala. 353.

27. Claim for compensation for personal services to be performed—Rainwater-Bradford Hat Co. v. McBride (C. C. A.) 117 Fed. 597.

28. H. B. Claflin Co. v. Harrison (Fla.) 31 So. 818. Contra in Indian Territory—Robinson v. Belt, 187 U. S. 41.

If an assignment contains no preferences, it is not necessary to file the schedule required by Code 1892, § 124—Kaufman v. Simon, 80 Miss. 189.

29. Lenhardt v. Ponder, 64 S. C. 354; Mengert v. Brinkerhoff (Ohio) 66 N. E. 530. Rev. St. § 6343, amended April 26, 1898—Owens v. Taylor, 23 Ohio Cir. Ct. R. 612.

30 Mengert v. Brinkerhoff (Ohio) 66 N. E. 530.

31. Mengert v. Brinkerhoff (Ohio) 66 N. E. 530.

32. Mengert v. Brinkerhoff (Ohio) 66 N. E. 530.

33. Mengert v. Brinkerhoff (Ohio) 66 N. E. 530.

34. Mengert v. Brinkerhoff (Ohio) 66 N. E. 530.

35. Hungerford v. Greengard, 95 Mo. App. 653.

36. Taylor v. Seiter, 199 Ill. 555.

37. Cornell v. Sulter, 23 Ohio Cir. Ct. R. 384. The county court has jurisdiction thereover—Taylor v. Seiter, 100 Ill. App. 643.

38. Ross v. Sayles, 104 Ill. App. 19.

which was subsequently acquired by the assignor, passes to the assignee;[39] but if the deed conveys specific property, no other property passes.[40] The law of the state of the making of an assignment governs the title of the assignee.[41] He takes subject to all existing equities.[42]

Under the rights and interests passing may be included an interest as distributee in a decedent's estate,[43] a life estate,[44] a contingent remainder,[45] property pledged to the assignor as collateral security,[46] money earned under a contract, though not due at the time of the making of the assignment,[47] and a bank deposit, though the bank held unmatured notes against the assignor.[48]

Property which has no value as an asset may be properly excluded from the appraisement by the assignee;[49] and if the assignee fails to include property in his inventory, or to assert any claim of ownership or right thereto, it will constitute an abandonment thereof as an asset of the estate.[50] Where the assignee had abandoned a portion of the assets of the estate, his successor in office could not claim the same as against an intervening bona fide purchaser.[51]

Property transferred or conveyed by assignor.—While the assignor may in good faith, before an intent to make an assignment for the benefit of creditors, transfer his property or give liens thereon,[52] yet, if made after a contemplated assignment, the property attempted to be transferred will be included in the assignment,[53] provided there is an intent to prefer the creditor[54] and the assignor is insolvent, of which the grantee had knowledge.[55] A conveyance by the assignor, recorded on the same day, though executed some time before the assignment was recorded, will not except the property from the assignment.[56] Chattel mortgages void as to the mortgagor's creditors are so as to his assignee.[57] Since it is the duty of the assignee to sue to set aside fraudulent transfers by the assignor,[58]

39. Rainwater-Bradford Hat Co. v. McBride (C. C. A.) 117 Fed. 597.

40. Owens v. Taylor, 23 Ohio Cir. Ct. R. 612.

41. Watson v. Bonfils (C. C. A.) 116 Fed. 157.

42. Storts v. Mills, 93 Mo. App. 201.

43. Though the administrator had not reduced the entire estate to possession—Gatewood v. Gatewood's Adm'x, 24 Ky. Law Rep. 931, 70 S. W. 284.

44. Cunningham v. Estill, 24 Ky. Law Rep. 559, 68 S. W. 1081.

45. Whether the parties to the deed believed it so passed or not—McAllister v. Ohio Valley Banking & Trust Co., 24 Ky. Law Rep. 1307, 71 S. W. 509.

46. Cornell v. Sulter, 23 Ohio Cir. Ct. R. 384.

47. A building contract provided that, in case the owner was compelled to complete the building, the cost thereof should be offset against whatever was due the contractor. Held, that the money so due for the surplus passes to the assignee of the contractor—New Jersey Steel & Iron Co. v. Robinson (N. Y.) 74 App. Div. 481.

48. Pearsall v. Nassau Nat. Bank (N. Y.) 74 App. Div. 89.

49. An endowment insurance policy due in eight years, and, in case of death, payable to others and creditors of the assignor, held a valueless asset—Provident L. & T. Co. v. Fidelity Ins. Co., 203 Pa. 82.

50. Failure to exercise rights over an endowment insurance policy—Provident L. & T. Co. v. Fidelity Ins. Co., 203 Pa. 82.

51. Provident L. & T. Co. v. Fidelity Ins. Co., 203 Pa. 82.

52. International Trust Co. v. First Nat. Bank, 101 Ill. App. 548. A partial transfer of money earned under a building contract which had been, under the terms of the contract, withheld by the owner of the building until the completion thereof as security, is valid as against the assignee for the benefit of all the creditors of the contractor—Ludowici Roofing Tile Co. v. Pennsylvania Inst. for Instruction of Blind, 116 Fed. 661.

53. International Trust Co. v. First Nat. Bank, 101 Ill. App. 548; Rev. St. § 6343—Hunt v. Bode, 66 Ohio St. 255; Cooper v. Nolan, 138 Cal. 248.

54. The burden of proving it is on the person attacking the transfer—International Trust Co. v. First Nat. Bank, 101 Ill. App. 548.

55. Lenhardt v. Ponder, 64 S. C. 354.

56. The deed being given in payment of corporate stock, the assignor being president thereof, and retaining possession of the deed as such officer—Taylor v. Seiter, 199 Ill. 555.

57. Watson v. Rowley, 63 N. J. Eq. 195. If unrecorded, is void as to the assignee—Clark v. Baker (Colo.) 69 Pac. 506; or if recorded after the assignment—In re H. G. Andrae, 117 Fed. 561. If a holder fails to make affidavit as required by Laws 1899, c. 54, § 15, it is void as to the mortgagor's assignee—Watson v. Rowley, 63 N. J. Eq. 195.

58. Cornell v. Sulter, 23 Ohio Cir. Ct. R. 384. Sufficiency of complaint in action by assignee to set aside fraudulent conveyance by the assignor—Cooper v. Nolan, 138 Cal. 248.

creditors may sue only in case the assignee refuses to do so.[59] In Ohio, such a suit should be in a court of insolvency.[60] At common law, however, the right to avoid such transfers belongs to the creditors, and not to the assignee.[61] Conveyances or transfers by insolvent, which are fraudulent as to creditors, will be treated elsewhere.[62]

§ 8. *Collection of assets and reduction to money.*—In actions by assignee to collect assets, proof of the original assignment as recorded and the assignee's bond and schedule is sufficient evidence, in the absence of specific objections, as to his authority.[63] The right of set-off exists in case of mutual indebtedness at the time of assignment,[64] but unmatured claims,[65] or claims arising subsequent to the assignment, cannot be set off.[66]

Sale of assets by assignee.—The assignee may reduce property to money by permitting an execution against the assignor to be levied thereon and sold according to law.[67] The bank books of an assignor banker should not be sold.[68]

The assignee cannot purchase at his own sale.[69] The right of an assignee to sue in his own name does not pass by purchase of a chose in action from the assignee,[70] but the purchaser must proceed under the name of the assignor.[71] This would not be true in states which allow the real party in interest to sue in his own name.[72]

Validity and setting aside sale.—A private sale may be approved by the court,[73] which may be done without notice to the creditors,[74] but, before the court will approve it, it must appear to have been beneficial to the creditors.[75] If the consideration was grossly inadequate, the sale may be avoided;[76] but that the consideration was for a sum less than the appraised value of the property will not necessarily invalidate the sale,[77] nor will the fact that the purchase money was not paid until after the time fixed by the deed for the expiration of the trust,[78] nor will any irregularity in the appraisement by the assignee.[79] Jurisdiction to set aside a sale by an assignee may be obtained by a summary proceeding,[80] in the county court in New York.[81]

59. Rev. St. § 6344—Cornell v. Sulter, 23 Ohio Cir. Ct. R. 384.

60. Rev. St. § 6344. A judgment of that court is conclusive on the right of creditors to sue in the common pleas—Cornell v. Sulter, 23 Ohio Cir. Ct. R. 384.

61. Ross v. Sayler, 104 Ill. App. 19. So, also, under the statutes of Missouri—Watson v. Bonfils, 116 Fed. 157.

62. Fraudulent Conveyances.

63. Hitchings v. Kayser, 171 N. Y. 636.

64. Storts v. Mills, 93 Mo. App. 201. A deposit in the assignor bank cannot be set off against a surplus realized on collaterals in the hands of the depositor—Storts v. Mills, 93 Mo. App. 201.

65. Pearsall v. Nassau Nat. Bank (N. Y.) 74 App. Div. 89.

66. Storts v. Mills, 93 Mo. App. 201.

67. Mengert v. Brinkerhoff (Ohio) 66 N. E. 530.

68. Andrews v. Wilson's Assignee, 24 Ky. Law Rep. 1497, 71 S. W. 890.

69. Where the son and daughter of the assignee purchase at his sale, the father loaning a part of the money, and part of it being in his possession, he purchasing in behalf of the son, it also appearing that they realized a large sum in excess of the purchase price shortly after, the purchase is properly set aside—Matter of Sheldon (N. Y.) 72 App. Div. 625.

70. Congress Const. Co. v. Farson & Libby Co., 101 Ill. App. 279.

71. Congress Const. Co. v. Farson & Libby Co., 101 Ill. App. 279.

72. See Parties.

73. Shirk v. Trundle, 96 Md. 177.

74. Conclusiveness of confirmation of assignee's sale in subsequent action to avoid the sale—Peele v. Ohio & I. Oil Co., 158 Ind. 374.

75. Shirk v. Trundle, 96 Md. 177. Evidence held sufficient to show that a private sale was beneficial to creditors—Peele v. Ohio & I. Oil Co., 158 Ind. 374.

76. Evidence held insufficient to show that sale by the assignee was properly advertised, and that the consideration was not grossly inadequate—Shirk v. Trundle, 96 Md. 177. Where the assignor, by his conduct at the sale, was instrumental in preventing the property from bringing a better price, he will be estopped from alleging inadequacy of consideration as ground for avoidance—Helena Coal Co. v. Sibley, 132 Ala. 651.

77. Burns' Rev. St. § 744, "providing that no property shall be sold on execution or order of court for less than two-thirds of the appraised cash value," has no application to sales by assignees, the latter being governed by Act 1881, p. 74, § 10—Peele v. Ohio & I. Oil Co., 158 Ind. 374.

78. Shirk v. Trundle, 96 Md. 177.

79. Peele v. Ohio & I. Oil Co., 158 Ind. 374.

80. Matter of Sheldon, 173 N. Y. 287. The administration of an estate by an assignee for benefit of creditors being a proceeding

§ 9. *Administration of the trust in general.*—If the creditors consent to the continuance of the debtor's business by the assignee, they will be estopped to deny his authority.[82]

Other titles wherein administration of trust is involved.—The rules respecting collection of assets, administration, and settlement are somewhat like those applied to personal representatives, trustees, and like functionaries; hence the corresponding parts of titles given below should be examined for authorities analogous.[83]

§ 10. *Debts and liabilities of the estate.*—A claim for damages for breach of contract by the assignor may be proven against the estate.[84] A debt created subsequent to the assignment cannot be,[85] but only against the surplus arising after a settlement.[86]

Claim of assignee for compensation and allowances.—Commissions cannot be allowed an assignee where his assignor was adjudged bankrupt within four months after making the assignment,[87] but he may be allowed for actual and necessary expenses incurred in the preservation of the estate.[88] The amount of commission allowed assignees is the subject of various statutory regulations, as shown in the footnotes,[89] and attorney's fees are within the court's discretion.[90] Orders of the court fixing the amount of compensation for the assignee and his attorney may be reviewed on the coming in of the auditor's or referee's report of his account.[91]

§ 11. *Presentment and allowance of claims.*—In the absence of objections made within the statutory time, the presented claims will stand as allowed,[92] but they may thereafter be interposed by application to the court on notice to the creditor.[93] The successor assignee cannot object to the list of creditors filed by his predecessor, though the time for filing objections thereto has not expired.[94] If a claim is unlisted or in excess of the listed amount, the assignee is justified in rejecting it,[95] and a creditor may be estopped to assert that the schedule of claims was not in full for all demands.[96]

§ 12. *Classes and priorities of debts.*—It is one of the assignee's duties to have the right to liens and the priority thereof determined by the court.[97] Priority should be given one who, to protect himself, overpaid the assignee,[98] and also to a claim put into judgment before ratification of the assignment.[99] In

in court, one who purchases at an assignee's sale thereby makes himself a party to such proceeding—Matter of Sheldon, 173 N. Y. 287.

81. Matter of Sheldon (N. Y.) 72 App. Div. 625.

82. Quimby v. Uhl (Mich.) 9 Detroit Leg. N. 1, 89 N. W. 722.

83. Bankruptcy, Estates of Decedents, Receivers, Trusts.

84. Moore v. Thompson, 93 Mo. App. 336; Laclede Power Co. v. Stillwell (Mo. App.) 71 S. W. 380.

85. Buckler v. Trigg, 24 Ky. Law Rep. 410, 68 S. W. 637.

86. Buckler v. Trigg, 24 Ky. Law Rep. 410, 68 S. W. 637.

87. In re Mays, 114 Fed. 600.

88. In re Mays, 114 Fed. 600.

89. In South Dakota the assignee may be allowed the same commissions as are allowed to executors under Comp. Laws, § 5888—Woodcock v. Reilly (S. D.) 92 N. W. 10. The same under Code, c. 87, § 17—Beecher v. Foster, 51 W. Va. 605. Creditors held estopped to object to an allowance of commissions on judgments which were uncollectible—Woodcock v. Reilly (S. D.) 92 N. W. 10.

90. Amount of allowances for attorney's fees—National Bank of Baltimore v. Dulaney, 96 Md. 159; Marshall v. National Bank of Baltimore, Id.

91. National Bank of Baltimore v. Dulaney, 96 Md. 159; Marshall v. National Bank of Baltimore, Id.

92. In re Plankinton Bank, 114 Wis. 582; National Bank of Republic v. Herman, Id.

93. In re Plankinton Bank, 114 Wis. 582; National Bank of Republic v. Herman, Id.

94. In re Plankinton Bank, 114 Wis. 582; National Bank of Republic v. Herman, Id.

95. Sitter v. Karraker, 100 Ill. App. 669.

96. As where the wife of the assignor joined in the assignment under an understanding that her only share of the estate was to be the amount of her claim as scheduled—Gates v. Union Trust Co. (Mich.) 9 Detroit Leg. N. 81, 90 N. W. 45.

97. Court of insolvency in Ohio—Cornell v. Sulter, 23 Ohio Cir. Ct. R. 384.

98. As where a customer of the assignor stock brokers paid the market price on the day of redemption of stock to which he was entitled, and which the assignor had pledged as collateral—Matter of Price, 171 N. Y. 15; Matter of Crocker, Id.

respect to property situated within the state, the rights of resident creditors are entitled to priority over nonresident creditors under a foreign assignment.[1]

§ 13. *Satisfaction and discharge of debts and claims.*—The rights of all the creditors to dividends will be determined as of the date of the assignment.[2] The presentment of a claim after the estate had been exhausted will not bar an action by the claimant against the assignor to recover a personal judgment.[3] Creditors may be estopped to question the validity of a general assignment by recognizing the same or by accepting benefits thereunder,[4] as where they filed their claims and received dividends.[5]

§ 14. *Accounting, settlement and discharge, or failure of trust.*—The trust is not terminated by the death of the assignor,[6] or by the discharge of the assignee and his sureties by order of the court,[7] but in such case a receiver may be appointed to take charge of unadministered assets.[8] A provision directing the closing of the estate within a limited time is directory only, and does not terminate the trust at the expiration of the time.[9] It may be terminated by the consent of the assignor and the majority of the creditors,[10] and it is terminated as to creditors by the payment of their claims.[11] A discharge should not be ordered on the day that the account is entered, and is void in Kentucky if so made.[12] The termination of the assignee's powers terminates his right to sue in his own name.[13] The trust is not destroyed by the assignee's failure to properly qualify.[14]

A decree settling the assignee's accounts is not binding on the wife and children of the assignor.[15] The retention after order of surrender of the surplus property by the assignee is constructive notice to subsequent creditors of a present title in the assignee.[16]

ASSISTANCE, WRIT OF.

Nature and grounds.—The purpose of the writ is to render effectual decrees by which rights have been fixed, or to place a party in possession of property by

99. It appearing that the only purpose of making the assignment was the defeat of such preference—Friedman v. Lesher, 198 Ill. 21.

1. Bloomingdale v. Weil, 29 Wash. 611; Bloomingdale v. Security Safe Deposit & Trust Co., Id.

2. Matter of Hayes (N. Y.) 37 Misc. Rep. 264.

3. New Albany Mfg. Co. v. Sulzer, 29 Ind. App. 89.

4. Where the creditors, after a general assignment, made a composition, whereby they were to receive notes secured by the trust estate, and accepted such notes, they are estopped to question the validity of the assignment or the title of the assignee—Memphis Sav. Bank v. Houchens (C. C. A.) 115 Fed. 96.

5. Taylor v. Seiter, 100 Ill. App. 643. Where the creditor had participated in the assignment by accepting a distribution thereunder, and consenting to a sale, he will be estopped to assert invalidity on the ground that the assignee filed no petition, no schedule, and gave no bond—Kaufman v. Simon, 80 Miss. 189.

6. Andrews v. Wilson's Assignee, 24 Ky. Law Rep. 1497, 71 S. W. 890.

7. Andrews v. Wilson's Assignee, 24 Ky. Law Rep. 1497, 71 S. W. 890.

8. Andrews v. Wilson's Assignee, 24 Ky. Law Rep. 1497, 71 S. W. 890.

9. Two years—Shirk v. Trundle, 96 Md. 177.

10. But an order of discontinuance of the proceedings, made before the expiration of three months, is void under St. c. 10, §§ 10, 15, and the creditors whose consent is required, are those who, within three months, file their claims under said statute—Manufacturers' Paper Co. v. Royal Trust Co., 98 Ill. App. 41.

11. After payment of claims, the assignor may assume possession and carry on the business in his own or the assignee's name—Quimby v. Uhl (Mich.) 9 Detroit Leg. N. 1, 89 N. W. 722.

12. St. § 93, provides that notice of application be given, and at the second regular term thereafter the court may hear the motion—Knoedler v. Teegarden, 24 Ky. Law Rep. 1785, 72 S. W. 268.

13. No matter how his powers were terminated—Congress Const. Co. v. Farson & Libbey Co., 101 Ill. App. 279.

14. See ante, § 4.

15. Cunningham v. Estill, 24 Ky. Law Rep. 559, 68 S. W. 1081.

16. A trust for assignor's family was created in the surplus in consideration of the wife's releasing dower. It was not recorded, but the creditors were settled with, which facts were equivalent to notice to subsequent creditors—Cunningham v. Estill, 24 Ky. Law Rep. 559, 68 S. W. 1081.

order of court.[1] The writ may issue to place the purchaser at foreclosure sale,[2] or his grantee, in possession;[3] and the mortgagor cannot successfully resist a petition for such a writ where he does not show an action, pending or contemplated, to obtain relief against the decree,[4] nor on the ground that the sale was void under an agreement between the parties relied on in a motion to enjoin the sale.[5] It may also issue to oust a lessee, where time was given him to prevent forfeiture of his lease by complying with its conditions, which he fails to do until so shortly before expiration of the period that performance is impossible;[6] but not on a decree cancelling a deed,[7] nor against one not a party who came into possession before suit, nor against a stranger who is a tenant of one of the parties,[8] nor against one, entering land pendente lite, claiming paramountly to all the parties.[9]

Procedure.—An alias writ should not be granted where several years have elapsed after the suit, and the original writ was returned executed before application for the alias writ, especially if the application does not deny that defendant holds as tenant of the party applying or under a claim of right.[10] A petition for issuance is unnecessary to compel defendant to comply with orders of the court, where he had full notice of the claim against him and opportunity to contest it.[11]

ASSOCIATIONS AND SOCIETIES.

§ 1. *Definition and nature.*[1]—A "grange" may be regarded as a voluntary association.[2]

§ 2. *Internal relations, rights, and duties.*—A voluntary association is not subject to judicial control except for the protection of property interests.[3] Power of expulsion of members may be entrusted to a board of directors.[4] The decision of an association with regard to the admission or expulsion of members is not reviewable by the courts unless there is a violation of good faith or of law.[5] A member expelled against the laws of the association may have a remedy in equity if property interests are involved.[6] Before a remedy in the courts may be invoked, remedies by appeal within the society must be exhausted.[7] Rules concerning membership do not in general confer a property right, hence a gen-

1. It is almost unknown in Missouri—Sills v. Goodyear, 88 Mo. App. 316.
2. Magruder v. Kittle (Neb.) 89 N. W. 272; Burns' Rev. St. 1901, §§ 249, 1062, 1096, construed; the change to the Code did not destroy the right—Emerick v. Miller (Ind.) 64 N. E. 28.
3. Emerick v. Miller (Ind.) 64 N. E. 28.
4. An answer alleging a meritorious defense to the foreclosure, which was prevented by fraud of the mortgagee, and that a suit to set aside the decree was dismissed for failure of the mortgagee to sign interrogatories, is insufficient—Emerick v. Miller (Ind.) 64 N. E. 28.
5. Murchison v. Miller, 64 S. C. 425.
6. Railroad lease—the supreme court extended the time, and the writ was issued by the lower court five days before expiration of the period—Pittsburg, J. E. & E. R. Co. v. Altoona & B. C. R. Co., 203 Pa. 108.
7. Remedy is at law—Clay v. Hammond, 199 Ill. 370.
8. In the last instance, a writ of restitution will be as effective—Sills v. Goodyear, 88 Mo. App. 316.
9. A claim by one in possession, in good faith, under a void tax deed, is under such an independent title—Merrill v. Wright (Neb.) 91 N. W. 697.
10. Application by purchaser at foreclosure sale—Ex parte Forman, 130 Ala. 278.
11. Dorr v. Root, 104 Ill. App. 417.

1. Incorporated societies, clubs, etc., see Corporations.
2. Henry v. Simanton (N. J. Ch.) 54 Atl. 153.
3. Courts will not interpose between the association and a member except for such a purpose—Froelich v. Musicians' Mut. Ben. Ass'n, 93 Mo. App. 383.
4. Brandenburger v. Jefferson Club Ass'n, 88 Mo. App. 148; State v. St. Louis Medical Soc., 91 Mo. App. 76.
5. Being quasi judicial in their character—Froelich v. Musicians' Mut. Ben. Ass'n, 93 Mo. App. 383; State v. St. Louis Medical Soc., 91 Mo. App. 76.
6. Froelich v. Musicians' Mut. Ben. Ass'n, 93 Mo. App. 383; O'Brien v. Musical M. P. & B. Union (N. J. Ch.) 54 Atl. 150.
7. No property right being involved—O'Brien v. Musical M. P. & B. Union (N. J. Ch.) 54 Atl. 150.

eral association cannot be compelled to continue association with a local one, no property right being involved;[8] nor do rights of membership conferred on a local by a general society.[9] They may do so when involving pecuniary benefits.[10] Where an association tribunal has power to determine certain matter under its rules, the members are bound by its decision to the extent of the powers conferred on it.[11]

Funds cannot be diverted from the objects and purposes of the association by a majority against the will of the minority.[12] Members of an association may sue to prevent other members from exercising rights concerning the association property or affairs.[13] A member may procure a renewal of a lease of property occupied by the association without rendering the property subject to be impressed with a trust in his hands or to be regarded as obtained by him as agent of the association.[14] Rights of withdrawing members of a communistic society to a distribution of the property may be lost by lapse of time.[15] The right of withdrawing members of a community to compensation will be presumed to be satisfied after lapse of a long time.[16] Members of an association who attempt to incorporate will not be regarded as having withdrawn and forfeited their rights in its property.[17] The burden of showing a withdrawal is on those asserting it.[18]

A by-law not proposed in writing before its adoption as required by the constitution is not binding on a member.[19] By-laws may be amended so as to affect the rights of members who have already come within their scope.[20] By-laws of an association are to regulate the conduct and to define the duties of the members toward the association and to each other.[21] Where by-laws are to be regarded as a contract, the parties are the members of the association as among themselves, or the association and the individual members.[22] In so far as by-laws do not relate to purely contract relations they may be altered by the association without destroying vested rights, since by the fundamental contract of membership, the member pledges his assent to every lawful rule adopted by the majority in furtherance of common objects.[23] Regulations of the conduct of members must be reasonable and proper.[24] By-laws need not be literally construed.[25] Where it is

8. O'Brien v. Musical M. P. & B. Union (N. J. Ch.) 54 Atl. 150.

9. O'Brien v. Musical M. P. & B. Union, (N. J. Ch.) 54 Atl. 150.

10. If an association's by-laws provide for a contribution to funeral expenses of its members, the member has such a property interest as will entitle a court to interfere to prevent his expulsion by unauthorized proceedings—Froelich v. Musicians' Mut. Ben. Ass'n, 93 Mo. App. 383.

11. Bartlett v. Bartlett & Son Co. (Wis.) 93 N. W. 473.

12. Bachman v. Hoffman, 104 Ill. App. 159.

13. The rule in relation to partnerships does not apply—Boston Base Ball Ass'n v. Brooklyn Base Ball Club, 37 Misc. Rep. (N. Y.) 521.

14. Lumbard v. Grant, 35 Misc. Rep. (N. Y.) 140.

15. Schwartz v. Duss, 187 U. S. 8.

16. Schwartz v. Duss. 187 U. S. 8.

17. As where under St. 1895, p. 25, providing for the incorporation of co-operative associations, certain members incorporate, adopt the association name and use its trade marks and books, and members refusing to join the corporation treated the others as having withdrawn, and elected successors—Strong v. Los Nietos & R. W. Growers' Ass'n, 137 Cal. 607, 70 Pac. 734.

18. Strong v. Los Nietos & R. W. Growers' Ass'n, 137 Cal. 607, 70 Pac. 734.

19. Froelich v. Musicians' Mut. Ben. Ass'n, 93 Mo. App. 383.

20. A member of a pilot's association whose license had been revoked for disability and who was receiving half pay under a by-law providing that a member losing his license for any cause other than intoxication, should receive half pay until reinstated, is bound by an amendment of the by-laws to the effect that members losing their license through not being capable of following their business, should receive $50 per month—Marshall v. Pilots' Ass'n, 18 Pa. Super. Ct. 644.

21. Marshall v. Pilots' Ass'n, 18 Pa. Super. Ct. 644.

22. Marshall v. Pilots' Ass'n, 18 Pa. Super. Ct. 644.

23. Marshall v. Pilots' Ass'n, 18 Pa. Super. Ct. 644.

24. A by-law of a pilots' association is reasonable which provides that pilots refusing to go on boats in their turn shall be considered on sick leave and receive pay accordingly—Marshall v. Virden, 19 Pa. Super. Ct. 245.

25. As where a by-law of a pilots' association provides for the contingency of a pilot refusing to go on a boat in his turn,

provided that propositions for amendment of a constitution must be submitted in writing and referred to a special committee which must report at the next annual meeting, action need not be taken on a printed report of a committee for revision at the annual meeting next following its circulation, but such report may be acted on at a subsequent meeting where it does not appear that there have been intermediate changes.[26] Rules of an association may be construed by a tribunal established by it if they reasonably admit of two constructions. The jurisdiction of such tribunal is limited by the laws of the association, and its decisions are not open to judicial control except as regards jurisdictional error and at the demand of a person whose property rights are injured.[27]

§ 3. *The association and persons not members.*—Persons outside the association cannot enjoin the association from the enforcement of by-laws operating directly only on its members.[28] An agricultural society must use reasonable care for the safety of persons attending its exhibitions at its invitation and paying an admission fee, whether they are inside its grounds or on the usual approaches to them.[29]

An injunction may be had to prevent the violation of an agreement of association.[30] It will be presumed that distant relatives of deceased members of a community have no claims which they may assert against the community.[31]

§ 4. *Actions and litigation.*—Under certain statutes, an association may be regarded as a quasi corporation for the purpose of service of process.[32] In some states, voluntary unincorporated associations which are not organized to hold property or carry on a trade or business cannot sue or be sued as associations.[33] A statute may allow an election between a proceeding against the association as such or against all the members thereof.[34] Where persons are sued as an association, the burden is on plaintiff to establish the joint liability of the defendants, if it is denied.[35] An action may be maintained against an officer of an association for its acts, though all the members have joined therein.[36] The right is not affected by joinder of certain members as co-defendants.[37] Suits against unincorporated voluntary associations as such may be authorized by statute.[38]

a pilot who absents himself from port without leave and does not take his turn, may be regarded as refusing to go on a boat—Marshall v. Virden, 19 Pa. Super. Ct. 245.

26. Construing art. 30 of the rules and regulations of the Union Veterans' Union—Goulding v. Standish, 182 Mass. 401.

27. Disciplinary proceedings by regular constituted tribunal are in the nature of the determination of a quasi judicial body, in effect like an award of arbitrators—Bartlett v. Bartlett & Son Co. (Wis.) 93 N. W. 473.

28. As where an association of cattle merchants adopted rules prohibiting members from dealing with non-members—Downes v. Bennett, 63 Kan. 653, 66 Pac. 623, 55 L. R. A. 560.

29. A society is liable in case a bullet fired in a shooting gallery conducted within the grounds, misses the target, goes through the fence and strikes a person standing on a railroad platform outside at its invitation, the association having let space for the conduct of the gallery—Thornton v. Maine State Agric. Soc., 97 Me. 108.

30. Construing Code Civ. Proc. § 603, where certain ball clubs, members of a voluntary unincorporated association, sought to prevent the violation of the agreement by other clubs, and to avoid an election by them of a certain person as officer of the league and to restrain his acting as such, and holding such an action not one to determine title to office, which must be brought by the people under Code Civ. Proc. §§ 1948, 1984—Boston Base Ball Ass'n v. Brooklyn Base Ball Club, 37 Misc. Rep. (N. Y.) 521.

31. Schwartz v. Duss, 187 U. S. 8.

32. Construing Const. § 208 and Ky. St. § 457—Adams Exp. Co. v. Schofield, 23 Ky. Law Rep. 1120, 64 S. W. 903.

33. Cleland v. Anderson (Neb.) 92 N. W. 306.

34. Holding Pub. Acts 1897, Act No. 25, § 1, not invalid for the reason that it grants two remedies against the association and only one in its favor—United States Heater Co. v. Iron Molders' Union (Mich.) 8 Detroit Leg. N. 978, 88 N. W. 889.

35. Where several plead non joint liability the joint liability of even defaulted defendants must be proven or else the pleadings must be amended and a dismissal had as to co-defendants not jointly liable—Powell Co. v. Finn, 198 Ill. 567.

36. Construing Code Civ. Proc. § 1919, in an action against a president to recover damages for a conspiracy by all the members to injure plaintiff's business.—Rourke v. Elk Drug Co., 75 App. Div. (N. Y.) 145.

37. Rourke v. Elk Drug Co., 75 App. Div. (N. Y.) 145.

§ 5. *Dissolution and termination.*—Where the existence of an association is limited to three years, after which its affairs were to be wound up by the incumbent officers, a distribution of its property may be enforced in equity by one of the members where five years have elapsed without a successful attempt to wind up its affairs.[39] Where property contributed to a community becomes joint and indivisible stock and contributions are irrevocable, descendants of deceased members who contributed no property to the society have no rights to share in the property of the society on its dissolution on the theory of a resulting trust.[40] A court of chancery may have jurisdiction to appoint a receiver to wind up the affairs of an association.[41] Proceedings under a statute for winding up voluntary associations may be availed of by creditors becoming such after incorporation of the association, the debts not being germane to the corporate existence and no notice of intention to incorporate having been given at an association meeting.[42] A bill filed to wind up an association is not bad on demurrer though it appear that one of the creditors is a foreign corporation and there is no showing that it has been authorized to do business in the state.[43]

ASSUMPSIT.

§ 1. *Nature, form, and propriety of action.*—Assumpsit cannot be maintained in the absence of an express or implied promise, though there may be a right of action for deceit or a suit in equity for an accounting,[1] but it may be brought where the party making an offer has prevented its acceptance.[2] It does not lie for negligent performance of a contract.[3] By statute, it may lie to recover a sum, the amount of which must be ascertained by evidence.[4] A surplus resulting from a sale of the land conveyed to a creditor by a debtor for such purpose may be recovered in assumpsit.[5]

The common counts.—If after execution of a contract nothing remains but the payment of the agreed price, recovery may be on the common counts.[6] There

38. Holding Pub. Acts 1897, Act No. 25, § 1, valid and not beyond the power of the legislature as authorizing associations not legal entities to be sued—United States Heater Co. v. Iron Molders' Union (Mich.) 8 Detroit Leg. N. 978, 88 N. W. 889.

39. Clerks' Inv. Co. v. Sydnor, 19 App. D. C. 89.

40. Schwartz v. Duss, 187 U. S. 8.

41. Bill filed under Act 1894 to wind up a Grange, organized for the purpose of conducting a general store for the benefit of members, which was conducted under a superintendent in his own name though the executive functions of the organization were in the hands of three trustees—Henry v. Simanton (N. J. Ch.) 54 Atl. 153.

42. Proceedings under Act 1899 after incorporation of a Grange—Henry v. Simanton (N. J. Ch.) 54 Atl. 153.

43. Henry v. Simanton (N. J. Ch.) 54 Atl. 153.

1. Where plaintiff, defendant and a third person who were the owners of the entire stock of a corporation agreed to sell it and defendant at the same time made a secret agreement with the purchaser to be paid a further sum for his interest in consideration for which he gave an option on other property, plaintiff cannot maintain assumpsit to recover a share of the amount so received by defendant—Cummings v. Synnott (C. C. A.) 120 Fed. 84.

2. Offer to sell corporate stock to remain open until a particular date and to be accepted in a designated manner where the party is prevented from accepting it by the conduct of the other—Guilford v. Mason, 24 R. I. 386.

3. A declaration for "unskillfully and negligently" doing what was "undertaken" sounds in case and not assumpsit—Mullin v. Flanders, 73 Vt. 95.

4. Under Rev. St. c. 94, § 10, assumpsit will lie to recover unpaid rental under a contract by which defendant took possession of and operated plaintiff's boom, agreeing to collect the expenses of receiving and delivering logs from other parties and pay plaintiff its proportionate share of 10% earned on the capital stock of plaintiff. The proportionate part was to be determined by the proportion which defendant's logs and lumber bore to the whole number of logs and other lumber handled.—Rumford Falls Boom Co. v. Rumford Falls Paper Co., 96 Me. 96.

5. There was an oral agreement that any surplus remaining should be paid to the debtor—Moran v. Munhall, 204 Pa. 214.

6. McDermott v. St. Wilhelmina Benev. Aid Soc. (R. I.) 54 Atl. 58; McArthur Bros. v. Whitney, 202 Ill. 527. Especially where the contract only fixes a maximum price—Board of Com'rs v. Gibson, 158 Ind. 471; Union El. R. Co. v. Nixon, 99 Ill. App. 502; Zapel v. Ennis, 104 Ill. App. 175; Morin v. Robarge (Mich.) 9 Detroit Leg. N. 635, 93 N. W. 886.

may be recovery on the common counts after faulty performance of a special agreement.[7]

Where a special contract has been terminated indebitatus assumpsit will lie,[8] as where a written contract is rescinded,[9] or a partly performed contract abandoned by mutual consent;[10] but where plaintiff is prevented by defendant from performing work to be done under an express contract, recovery cannot be had under the common counts.[11]

Where notes are given for an obligation, a recovery on the common counts cannot be had if the notes are introduced in evidence, though only to sustain a specification that the obligation as such is sought to be recovered.[12]

An action for money had and received is similar to a bill in equity and may be maintained on any showing that defendant received or obtained possession of money of the plaintiff which in equity and good conscience he should pay over to him. It is a liberal action in which all tort, trover, and damage is waived.[13] Where defendant has actually had and received the money, it is immaterial whether he is doing business in his own name or in the name of a purported corporation.[14]

A quantum meruit may be joined to a declaration on a special contract.[15]

Money paid voluntarily under a mistake of law and not under a claim of right cannot be recovered in assumpsit, though otherwise where paid under a mistake of fact.[16] A count for money paid will not lie against a town on account of a voluntary payment of a precinct treasurer.[17] *The count for use and occupation* is founded on an express or implied contract and there must be the relation of landlord and tenant.[18] The title to real estate cannot be tried.[19]

Existence and waiver of other remedies.—An action for trover may be waived and assumpsit brought,[20] so where personalty is delivered in exchange for land, assumpsit may be maintained if the party agreeing to convey the land refuses to comply though the personalty has not been converted into money or its identity destroyed,[21] and on a misappropriation of money by a bank clerk the tort may

7. As where work was done under a special agreement but not in the stipulated time and manner but was nevertheless beneficial to the defendant and enjoyed by him —Empire Coal Co. v. Hull Coal Co., 51 W. Va. 474.

8. Whether the termination is by the terms of the contract, the conduct of the parties or the wrongful conduct of defendants—Zapel v. Ennis, 104 Ill. App. 175.

9. Assumpsit to recover a payment on rescission for fraud—Hanrahan v. National B. L. & P. Ass'n, 67 N. J. Law, 526.

10. Recovery for labor performed—Empire Coal Co. v. Hull Coal Co., 51 W. Va. 474.

11. Contract to fill a road, prevented of performance by failure of defendant to notify plaintiff can be recovered on, only on the contract agreement—Truitt v. Fahey (Del. Super.) 52 Atl. 339.

12. Action by an insurance agent to recover premiums as such, and introduction of notes given by the policy holder for the amount thereof, the specification being that the agent sought to recover the premiums as such—Aseltine v. Perry (Vt.) 54 Atl. 190.

13. It lies whenever one man has received money from another man without consideration—Law v. Uhrlaub, 104 Ill. App. 263; Morris v. Jamieson, 99 Ill. App. 32. Where one believing defendant to be the owner of realty made an agreement to pay rent to him the true owner cannot recover such payments from defendant as money had and received—Sherman v. Spalding (Mich.) 93 N. W. 613.

14. Level v. Chadbourne, 99 Ill. App. 171.

15. Burton v. Rosemary Mfg. Co. (N. C.) 43 S. E. 480.

16. Heath, etc., Mfg. Co. v. National Linseed Oil Co., 99 Ill. App. 90.

17. A count for money paid at the request of a town will not warrant a recovery against it, where payment was voluntarily made by the treasurer of a fire precinct for water pipe which one of the precinct commissioners had been authorized by the chairman of the town selectmen to procure, the payment being to accommodate persons to whom it was due and not because the precinct was liable or because the town had requested him to make it—Contoocook Fire Precinct v. Hopkinton, 71 N. H. 574.

18. Hill v. Coal Val. Min. Co., 103 Ill. App. 41. Possession of a mere trespasser will not sustain an action for use and occupation—Janouch v. Pence (Neb.) 93 N. W. 217. Assumpsit for use and occupation cannot be maintained where defendant is in possession claiming adversely to plaintiff and under a third person, there being no contract relation between the parties—Adsit v. Kaufman (C. C. A.) 121 Fed. 355.

19. Hill v. Coal Val. Min. Co., 103 Ill. App. 41.

20. Moore v. Richardson (N. J. Err. & App.) 53 Atl. 1032.

21. Plaintiff is not required to resort to

be waived and suit brought on an implied contract.[22] Assumpsit will not lie for failure to repair property occupied under an agreement for a fixed rental.[23]

An action of assumpsit may be brought on a contract though it contains an inaccurate reference to "foregoing covenants," the expression "agreement," being elsewhere used throughout the contract.[24]

§ 2. *The declaration.*—Though the declaration is on a special contract, recovery may be had on a common count in general assumpsit if sufficient facts are set out, though there is not a specific declaration on a second cause of action, but. where the special contract is established, plaintiff cannot abandon it and recover on the common count.[25]

§ 3. *Pleas and defenses.*[26]—Where the tort is waived and suit brought in assumpsit, the defense, available to a defendant in trover, of showing ownership and right of possession in a third person, may be asserted.[27]

A defendant who has refused to perform an express contract cannot contend that assumpsit will not lie with regard to matter covered by the express agreement and on assumpsit after refusal of defendant to return the consideration on refusal to perform a contract void within the statute of frauds, it cannot be contended that plaintiff had a remedy on the express contract until the statute of frauds was pleaded.[28]

Where the contract is performed according to its terms, it cannot be shown that the work done was without value.[29]

Defendant in an action for money had and received may set off the indebtedness of plaintiff to him.[30]

Where the complaint is assumpsit for extra work outside a building contract, it is not a sufficient answer to aver execution of the original contract.[31] It will not be presumed that money was used for an unlawful purpose in the absence of an express averment.[32]

§ 4. *Evidence and instructions.*—Under the general issue, plaintiff has the burden of proving the contract and also the breach of it assigned.[33] The burden of proof of a set-off is on defendant.[34]

Under the general issue, matter in discharge of the promise or which goes to show that plaintiff had never a cause of action is admissible.[35] Specific rulings as to evidence are grouped in the notes.[36]

replevin or trover but may bring an action on the implied agreement after termination of the express contract—Booker v. Wolf, 195 Ill. 365.

22. Lipscomb v. Citizens' Bank (Kan.) 71 Pac. 583.

23. The remedy is an action for breach of contract where a party renting a boom and piers fails to keep them in repair—Rumford Falls Boom Co. v. Rumford Falls Paper Co., 96 Me. 96.

24. Gen. Laws 1896, c. 202, § 4, providing that the word "covenant" shall have the same effect as though a seal was affixed, construed in an action on a contract to furnish engravings.—Providence Tel. Pub. Co. v. Crahan Engraving Co. (R. I.) 52 Atl. 804.

25. Burton v. Rosemary Mfg. Co. (N. C.) 43 S. E. 480.

26. Where actions of assumpsit are limited to 6 years after accrual of the cause of action, an action on a note secured by mortgage is included—Houghton v. Tolman, 74 Vt. 467.

27. Federal courts will apply this rule in jurisdictions where it is upheld—Phelps v. Church of Our Lady (C. C. A.) 115 Fed. 882.

28. Booker v. Wolf, 195 Ill. 365.

29. In assumpsit by a contractor to recover the value of certain concrete placed in a foundation according to the terms of a building contract, it cannot be shown that such concrete is without value as a foundation.—Board of Com'rs v. Gibson, 158 Ind. 471.

30. Morris v. Jamieson, 99 Ill. App. 32.

31. Complaint alleged that the work was in addition to the work required by the original contract—Board of Com'rs v. Gibson, 158 Ind. 471.

32. In an action for money loaned pleas must aver that the money borrowed was used in fact for the unlawful purpose mentioned—Edman v. Charleston State Bank, 101 Ill. App. 83.

33. Ward v. Athens Min. Co., 98 Ill. App. 227.

34. In an action to recover the contract price of certain grading in which defendant set off work performed by it in order to

Instructions as to defendant's admissions do not demand his presence at the trial.[37]

§ 5. *Verdict and judgment.*—Damages cannot be recovered under the common counts except for a failure to pay money.[38] Where a tort is waived and the action is brought in assumpsit and not for a conversion, the measure of damages is the value of the property at the time of conversion.[39]

ATTACHMENT.

§ 1. **Definition, Nature, and Distinctions.**
§ 2. **In What Actions it will Issue.**
§ 3. **Right to and Grounds for the Writ.**
§ 4. **Attachable Property.**
§ 5. **Procedure in General.**
§ 6. **Affidavit and its Sufficiency.**
§ 7. **Attachment Bond.**—Terms, Liability, Actions.
§ 8. **The Writ or Warrant.**
§ 9. **The Levy or Seizure.**—Indemnifying Bonds; Levy on Debts; Notice; Equitable Attachment.
§ 10. **Return to the Writ.**
§ 11. **Custody, Sale, Redelivery or Release of Property.**—Confirmation; Wrongful Taking from Officer.
§ 12. **Forthcoming Bonds and Receipts.**—Claimants' Bonds.
§ 13. **Lien or Other Consequences of Levy.**
§ 14. **Conflicting Levies, Liens, and Creditors.**—Priorities; Mortgages; Receivers; Assignments; Bankruptcy.
§ 15. **Enforcement and Dissolution, Discharge, Vacation, or Abandonment.**—Validity and Grounds to Set Aside; Procedure.
§ 16. **Hostile and Opposing Claims to Attached Property.**—Pleading; Evidence; Trial; Judgment.
§ 17. **Wrongful Attachment.**

§ 1. *Definition, nature, and distinctions.*—The term "attachment," as here

complete the job in time—McArthur Bros. v. Whitney, 202 Ill. 527.

35. The plea raises the question of whether at the time of suit there was an existing debt or cause of action—Ward v. Athens Min. Co., 98 Ill. App. 227.

36. On a complaint for value of certain cotton alleged to be due under a written instrument or mortgage executed by defendant, the mortgage is admissible—Ingram v. Bussey, 133 Ala. 539. In an action for the use and occupation of certain rooms in which were presses alleged to belong to defendant under a bill of sale, evidence of a bill of sale of presses executed by defendant to a third person and the record of a suit by him for breach of contract to purchase such presses are admissible to controvert a contention of defendant that the bill of sale had been executed to him to enable him to sell the presses as mortgagee; but, concerning the action for breach of contract, a question is too broad which asks defendant to state the circumstances under which the action was brought, and whether it was brought at the request of another. Letters to defendant showing that the writer was endeavoring to obtain purchasers and that the bill of sale was to give defendant authority to sell the presses as the property of the mortgagor are admissible, together with the bill of sale and an offer by defendant to purchase the property —Emory Mfg. Co. v. Rood, 182 Mass. 166. Where under an agreement for grading the right was reserved to put on an additional force and deduct the cost from the contract price, in an action for grading the amount and value of the grading done before defendant put on its own force is admissible—McArthur Bros. v. Whitney, 202 Ill. 527.

Under the general issue it may be shown that the contract was void or voidable, that it was performed, that there was a legal excuse for nonperformance, such as a release or discharge before breach or nonperformance of a condition precedent or that it was rescinded—Ward v. Athens Min. Co., 98 Ill. App. 227.

Under a quantum meruit the value of the services and not the benefits immediate or remote that have been derived therefrom is in issue—Rothstein v. Siegel, Cooper & Co., 102 Ill. App. 600. It cannot be shown what services were worth to third persons at a time after that in which they were rendered to defendant—Connelly v. Cover, 102 Ill. App. 426. The plaintiff may show ill treatment by defendant compelling him to abandon a special contract in an action on quantum meruit for the services performed thereon—Davis v. Streeter (Vt.) 54 Atl. 185.

Sufficiency. Evidence held insufficient to warrant a recovery in assumpsit for money to be paid on purchase of land—Newman v. Baker (Mich.) 9 Detroit Leg. N. 232, 90 N. W. 1027. An action on quantum meruit for work performed may be sustained by evidence showing that plaintiff performed services in keeping house for defendant under a contract on his part to take care of her and her children and to marry her, which she was forced to abandon by defendant's ill treatment and a refusal to permit one of her children to remain in the house—Davis v. Streeter (Vt.) 54 Atl. 185.

37. An instruction that defendant admits that the work was done but not to the extent claimed by plaintiff if warranted by the evidence may be given, though defendant himself was not present at the trial—Morin v. Robarge (Mich.) 9 Detroit Leg. N. 635, 93 N. W. 886.

38. A verdict for damages resulting from failure to do any other particular thing agreed to be done, cannot be supported—Stewart Mfg. Co. v. Iron Clad Mfg. Co., 67 N. J. Law, 577.

39. It is error to base the damages on the cost price specified in an agreement antedating the conversion, if there is other evidence of value more favorable to defendant—Moore v. Richardson (N. J. Err. & App.) 53 Atl. 1032.

used, is confined to original or mesne process by seizure of property which it is sought to subject to a demand. In some jurisdictions it is applied, though inaccurately, to garnishment proceedings as well. Garnishment is designed to reach a third person's obligation towards the defendant, the process issuing against such third person. These are the modern uses of the terms. Attachment of the person is now usually considered in connection with the law of contempt. The practice in justices' courts on issuing attachment is more appropriately treated in another place.[1] The exemption of property from such process,[2] and the liability of officers for a wrongful levy, will also be treated elsewhere.[3]

§ 2. *In what actions it will issue.*—The local statutes must be consulted. Ex contractu actions for liquidated demands almost universally warrant attachment. Unliquidated demands and immature ones in most of the states, and tort actions in some jurisdictions, may support attachment.[4] Special grounds, as fraud, or nonresidence, or concealment, must in some states coexist with the fact that the action is of a given class.[5] The remedy will not lie in a proceeding to revive a dormant judgment,[6] but may be employed to enforce collection of a chancery decree for money, as in the case of a judgment at law.[7] Attachment will issue on a claim for the contract price of cut marble for building, which may be rendered certain as to amount.[8] It will not lie in a suit for breach of marriage promise under a statute authorizing attachment on affidavit showing a just claim to be due.[9] A debt for coal for domestic purposes is within the law giving attachment on a claim for "necessaries."[10] Attachment in action to recover the value of goods fraudulently conveyed cannot be refused as suing for a penalty, and not a debt;[11] but the right to money obtained by a third person's fraud from its owner is not a debt warranting the issuance of attachment, though the holder is bound to reimburse the owner.[12] Attachment may issue against property of one joint debtor in favor of a creditor, who has filed an affidavit bringing him within the attachment act, and the summons may include all shown by the affidavit to be indebted, regardless of the attachment.[13] In South Carolina it issues in aid of an action for unliquidated damages sounding in tort.[14]

§ 3. *Right to and grounds for the writ.*—Statutory attachment on claims not due is a matter of right,[15] and not of discretion.

Nonresidence.—If a nonresident is not subject personally to jurisdiction of the court his property is attachable.[16] Actual residence of the debtor, and not his domicile, determine his status in attachment.[17] Personal service does not establish that defendant is resident of the state.[18] Attachment will not issue for nonresidence while an amended law is in force which does not make nonresidence the

1. See the forthcoming articles on Contempt, Garnishment, Justices of the Peace. Attachment of the person to enforce alimony, see Curr. Law No. 1, p. 74, Alimony. Attachment to enforce payment of rent, see Landlord and Tenant.
2. Exemptions.
3. Sheriffs and Constables.
4. On contract of employment—Cohen v. Walker, 38 Misc. Rep. (N. Y.) 114.
5. See post, § 3.
6. Farak v. First Nat. Bank (Neb.) 93 N. W. 682.
7. Whalen v. Billings, 104 Ill. App. 281.
8. Sullivan v. Moffat (N. J.) 52 Atl. 291.
9. Gen. Laws R. I. c. 252, §§ 14, 17—Mainz v. Lederer (R. I.) 51 Atl. 1044.
10. Rev. St. Ohio, § 6489, providing attachment for recovery of a claim for necessaries—Collins v. Bingham, 22 Ohio Cir. Ct. R. 533.
11. Rothschild v. Knight, 184 U. S. 334, 46 Lawy. Ed. 573.
12. Ryles, Wilson & Co. v. Shelley Mfg. Co., 93 Mo. App. 178.
13. Jones v. Lunceford, 95 Ill. App. 210.
14. Chitty v. Pennsylvania R. Co., 62 S. C. 526.
15. Code Civ. Proc. Kan. §§ 230, 231—Nelson v. Stull (Kan.) 70 Pac. 590.
16. Rev. St. Ohio, § 5524—Thompson v. Ogden, 23 Ohio Cir. Ct. R. 185.
What absence shows nonresidence under the attachment law—Stickney v. Chapman, 115 Ga. 759.
17. Thompson v. Ogden, 23 Ohio Cir. Ct. R. 185.
18. Hall v. Packard, 51 W. Va. 264.

ground of attachment.[19] Attachment of debts owing to a nonresident creditor in the state of his debtor's residence according to its laws does not deprive the creditor of property without due process of law.[20] Wrongful discharge of a servant may be ground for an attachment against property of a nonresident employer.[21] Mere temporary absence from the state to work for three months is not nonresidence justifying attachment.[22] Voluntary removal from the state to discharge duties of indefinite duration, requiring continuous absence for an unlimited time, shows nonresidence under the attachment law; and an occasional return to visit, or intent to return at some uncertain time in the future, will not prevent loss of residence.[23] Embezzlement by a bank clerk will authorize suit on an implied contract for his honesty and good faith, and an attachment of his property, where he is a nonresident.[24]

Attachment against corporations.—Attachment may issue against a foreign corporation or a nonresident defendant on the same grounds as a resident defendant, and because of nonresidence alone, in aid of an action on contract or a judgment or an award.[25] That a foreign corporation has an office and does business within the state will not prevent attachment against it.[26] A domestic corporation with its chief office or place of business within the state is not liable to attachment provided against foreign corporations.[27] It cannot issue against national banks, whether solvent or insolvent.[28] A suit in equity, in attachment, for breach of contract, to which a national bank is made defendant because it received the proceeds, is not an attachment prohibited by the federal statute.[29]

Fraudulent transfer or disposition of property.—Fraudulent transfer of a debtor's assets is ground for attachment of the property.[30] The writ should be sustained if the acts of defendant constituting plaintiff's ground were committed with an intent to hinder, delay, or defraud creditors, or either of these.[31] An attachment will lie in Tennessee on behalf of a judgment creditor to set aside a fraudulent transfer of property, and subject defendant's equity of redemption to payment of the judgment.[32] Creditors may proceed by attachment to subject assets of a corporation to their claims, where such assets have been transferred to a new corporation to defeat such claims.[33] An irregular sale of goods from a debtor's factory, below cost, and out of all usual course of business, will justify attachment, unless

19. Act April 26, 1898, repealed in 1900, amended Rev. St. Ohio, § 5521, but failed to make nonresidence a ground of attachment—Hough v. Dayton Mfg. Co., 66 Ohio St. 427.

20. Rothschild v. Knight, 184 U. S. 334, 46 Lawy. Ed. 573; affirming judgment, 176 Mass. 48.

21. Cohen v. Walker, 38 Misc. Rep. (N. Y.) 114, 11 N. Y. Ann. Cas. 135.

22. Sufficiency of evidence of defendant's witnesses to establish his intention to remain a resident—Newlon-Hart Grocer Co. v. Peet (Colo. App.) 70 P. 446.

23. Thompson v. Ogden, 23 Ohio Cir. Ct. R. 185.

24. Gen. St. Kan. 1901, § 4624, authorizing attachment against nonresidents on demands arising on contract—Lipscomb v. Citizens' Bank (Kan.) 71 P. 583.

25. Civ. Code Prac. Ky. § 194—Bates Mach. Co. v. Norton Iron Works (Ky. App.) 68 S. W. 423.

26. Voss v. Evans Marble Co., 101 Ill. App. 373.

27. "Or," in Code Colo. § 92, providing for such attachment, should read "and"—Rocky Mountain Oil Co. v. Central Nat. Bank, 29 Colo. 129, 67 P. 153.

28. Under Rev. St. U. S. § 5242—Van Reed v. People's Nat. Bank, 173 N. Y. 314.

29. Rev. St. U. S. § 5242; the bank purchased a draft given for a sale of corn, and received payment—Searles v. Smith Grain Co., 80 Miss. 688.

30. Colorado Trading & Transfer Co. v. Acres Commission Co. (Colo. App.) 70 Pac. 954.

Sufficiency of evidence of attempts to defeat efforts of creditors warranting the issuance of attachment—Blewett v. Sprague, 24 Ky. Law R. 1860. Sufficiency of evidence to sustain fraudulent disposition of property as to creditors—Dye v. Bank of Plankinton (S. D.) 92 N. W. 28.

Evidence of fraudulent purpose to remove property held insufficient—Rallings v. McDonald, 76 App. Div. (N. Y.) 112.

31. Bowles Live-Stock Commission Co. v. Hunter, 91 Mo. App. 333.

32. Templeton v. Mason, 107 Tenn. 625.

33. The stockholders of the new corporation need not be made parties, nor need they be given notice of pendency of the attachment—Buckwalter v. Whipple, 115 Ga. 484.

such sale was secretly made without defendant's knowledge.[34] That a debt is about to be collected by a nonresident creditor who will take the money from the state, leaving insufficient property to satisfy a claim against the creditor, is sufficient for an attachment against him.[35]

§ 4. *Attachable property.*[36]—The remedy will lie against any property of defendant, not exempt, within the county of the officer serving the writ, though in possession of plaintiff.[37] Horses in possession of a trainer, and entered in races in his name, cannot be attached for his debts.[38] Money borrowed by defendant to deposit as bail is not attachable.[39] Refusal of a debtor to receive goods which he had bought from third person, and his attempt to secure their sale to another, shows a rescission of the sale to him preventing attachment of the goods as his property.[40] Where the property of debtors was transferred to a creditor by his receipt of the keys of the building where it was stored, and removal of part of the property, as well as by execution of an unrecorded instrument, the apparent possession by the debtors of the remainder, which was not removed, was not sufficient to sustain attachment.[41] Money deposited within the jurisdiction by a foreign corporation having an office there may be attached for a debt made in the course of business in the state, as where held by a public officer to secure the debt in litigation, the custody of the law being no obstacle.[42]

Money deposited in a federal court pending litigation cannot be attached by any other court.[43] Attachment cannot issue against an estate being administered,[44] nor money in hands of an executor or administrator,[45] nor the interest of the beneficiary of a trust,[46] nor lands conveyed in trust for the benefit of creditors,[47] nor personal property of a partnership on the death of one of the partners, so as to affect the partnership estate,[48] nor upon interest coupon bonds, brought into the state by the receiver of a foreign corporation in an action to recover damages for breach of contract between the corporation and the attachment plaintiff.[49]

A lien could not have been obtained by attachment on land fraudulently conveyed as to creditors in Iowa prior to Code, § 3899.[50] A law providing for attachment and sale of liquor licenses includes the certificate and the franchise under the license.[51] The owner may use reasonable force to retake exempt property attached by an officer.[52]

Attachable debts and choses in action.—Decisions relative to this question per-

34. Secret sale fails to support fraudulent intent—Abel & Bach Co. v. Duffy, 106 La. 260.

35. Civ. Code Prac. Ky. § 194, subsec. 6, providing for attachment against debtors about to remove, or who have removed, their property from the state—Bates Mach. Co. v. Norton Iron Works (Ky. App.) 68 S. W. 423.

36. Sufficiency of evidence to show that title to goods remained in the shipper, regardless of indorsement of the bill of lading, so as to render them liable to attachment as his property—Westervelt v. Phelps, 171 N. Y. 212.

37. Gallun v. Weil (Wis.) 92 N. W. 1091.

38. Anderson v. Heile (App.) 23 Ky. Law R. 1115.

39. Rallings v. McDonald, 76 App. Div. (N. Y.) 112.

40. Blaul v. Mayes (Iowa) 90 N. W. 730.

41. Under Code, § 2906, making the retention of actual possession without record of an instrument in evidence of a sale sufficient to warrant seizure under an attachment against the vendor—Peycke v. Hazen (Iowa) 93 N. W. 568.

42. India Rubber Co. v. Katz, 65 App. Div. (N. Y.) 349.

43. Jurisdiction of the court over such money continues until a decree or order for its disbursement has been executed—Corbitt v. Farmers' Bank (Va.) 114 Fed. 602.

44. Barnes v. Stanley, 96 Mo. App. 1.

45. Gorman v. Stillman (R. I.) 52 Atl. 1088.

46. Fiske v. Parke, 77 App. Div. (N. Y.) 422.

47. 3 Comp. Laws Mich. § 8839. The trustees are entitled to the property in order to complete their power—Geer v. Traders' Bank of Canada (Mich.) 9 Detroit Leg. N. 578.

48. Barnes v. Stanley, 96 Mo. App. 1.

49. Woodhull v. Farmers' Trust Co. (N. D.) 90 N. W. 795.

50. Byers v. McEniry (Iowa) 91 N. W. 797.

51. Acts Conn. 1895, c. 123, giving right of attachment against interests under liquor licenses—Quinnipiac Brew. Co. v. Hackbarth, 74 Conn. 392.

52. Property exempt under Gen. St. Conn. § 1164—State v. Hartley (Conn.) 52 Atl. 615.

tain more properly to the law of garnishment, q. v., but a few decisions are collected here. Demands against the public,[53] or in litigation,[54] or unliquidated claims,[55] or interests in partially performed contracts,[56] are not subject to such process. For attachment purposes, a debt secured by bond and mortgage does not exist and cannot be attached independent of the securities.[57] A creditor of a foreign firm cannot attach a debt due from a foreign corporation to the firm within the state, and payment of the debt will not avail the corporation against subsequent action for recovery by a receiver of the firm.[58] An attachment of a debt existing by reason of insurance of property destroyed by fire, given by a company domiciled in another state, is not invalid because levied before adjustment of the loss, since the amount may be ascertained in the proceeding. The situs of the debt was the domicile of the company, and it could be attached in an action against the company there.[59] No demand exists in favor of insured in a tontine policy, providing for no cash surrender value, until completion of the tontine period, and no benefit accrues to the insured or beneficiary before that time, except the face value in case of death, which is liable to attachment by service of warrant and notice to the insurance company; nor is the right of a holder of a tontine policy to elect to take a cash surrender value, annuity, or a paid-up policy in settlement a cause of action, a demand, or property liable to attachment.[60]

§ 5. *Procedure in general.*—A petition showing that the debt of the attachment defendant is a judgment on which execution has issued, sufficiently shows the debt to be due.[61]

Beginning action and acquiring jurisdiction.—Jurisdiction of an action against nonresident debtors is acquired under the Michigan practice by commencement of attachment against land fraudulently conveyed by them,[62] and of its property by attachment against a foreign corporation.[63] The jurisdiction secured by publication applies to the property only to the extent of the amount claimed in the publication.[64] The rule that a common-law action is commenced when summons is issued applies to an attachment.[65] The issuance of the writ for the seizure of the property is not requisite to an order for service by publication.[66]

Necessity of issuance of summons.—The conditions precedent to issuance of a writ are the concurrent issuance of a summons, unless that has already been done, and the action has not proceeded to final judgment, and that the ground for a writ is proper.[67] The mere order by the clerk for publication of summons and notice, and filling out the papers without issuance, will not give jurisdiction where issuance is not waived.[68] An attachment in aid, issued before return of a notice

53. Board v. Bodkin (Tenn.) 69 S. W. 270.
54. Waples-Platter Co. v. Texas & P. R. Co. (Tenn.) 68 S. W. 265; Nelson v. Stull (Kan.) 70 Pac. 590.
55. Waples-Platter Co. v. Texas & P. R. Co. (Tex.) 68 S. W. 265.
56. Rothrock Co. v. Port Gibson Co., 80 Miss. 517.
57. Fiske v. Parke, 77 App. Div. (N. Y.) 422.
58. Allen v. United Cigar Stores Co., 39 Misc. Rep. (N. Y.) 500.
59. Sexton v. Phoenix Ins. Co. (N. C.) 43 S. E. 479.
60. Under Code Civ. Proc. N. Y. § 649, subd. 3, providing for attachment against insurance companies on interests in policies, and sections 648, 649—Columbia Bank v. Equitable Life Assur. Soc. (Sup.) 80 N. Y. Supp. 428.
61. Petition held not uncertain as to amount realizable from estate of a codebtor—First Nat. Bank v. Wallace (Tex. Civ. App.) 65 S. W. 392.
62. Comp. Laws Mich. §§ 10,556, 10,559, providing for attachment for fraudulent conveyance, and section 9167, applying the attachment to real estate—Archer v. Strachan (Mich.) 8 Detroit Leg. N. 920, 88 N. W. 465.
63. Chitty v. Pennsylvania R. Co., 62 S. C. 526.
64. Code N. C. § 352, requiring the publication of warrant and summons to state the amount of the claim—Alpine Cotton Mills v. Weil, 129 N. C. 452.
65. Under Code Va. §§ 3223, 3959—Furst v. Banks (Va.) 43 S. E. 360.
66. Gallun v. Weil (Wis.) 92 N. W. 1091.
67. Under Rev. St. Wis. 1898, §§ 2730, 2731—Gallun v. Weil (Wis.) 92 N. W. 1091.
68. Code N. C. §§ 161, 199, 219, 348, and 352—McClure v. Fellows, 131 N. C. 509.

in an action for money on contract, under a law providing that judgment may be had after fifteen days' notice, is void.[69]

In New York, proof of the issuance of summons is not a necessary condition to issuance of the writ.[70] Also, in Kansas, the filing of a petition, the issuance of summons, and the levy of the writ constitute the taking of an attachment, though no personal service was had or service by publication attempted until after filing petition.[71] Under a law requiring publication to be within a certain time, it may begin on the last day.[72] Filing an affidavit of nonresidence, stating defendant's residence, and mailing a copy of publication to defendant more than two years after the return, is insufficient.[73]

§ 6. *Affidavit and its sufficiency.*[74]—Facts constituting ground for an attachment must appear by a verified affidavit, and must be proved by the plaintiff on the trial.[75] A verified complaint, merely stating on information and belief that certain persons had contracted with plaintiff as agents of defendant, is insufficient. An affidavit must be filed showing the facts of the agency or the grounds for plaintiff's belief.[76] The clerk of a superior court of Georgia cannot administer an affidavit.[77] An affidavit made by the principal in the transaction out of which the cause of action arose, who had been in personal contact with defendant, reciting that the latter was the resident of another state, is sufficiently made on personal knowledge.[78] An affidavit on the ground of fraudulent transfer of property is not a direction to an officer to levy on property in the hands of a purchaser from the transferee.[79]

Averments in general.—A statement of mere conclusions and not facts relating to the existence of a debt owing to plaintiff from defendant is insufficient.[80] A statement in an affidavit that certain facts will be alleged in the complaint is insufficient to show the truth of such facts.[81] The affidavit may be made by an agent.[82] A complaint and affidavit by the agent of plaintiff on information and belief, taken from correspondence and telegrams from his principal, without setting forth the correspondence, are insufficient.[83]

It must state the debt to be recovered in amount over and above all legal set-offs and counterclaims, and that the debt is due.[84] The amount of plaintiff's

69. The attachment was issued under Code Va. § 2959, in aid of an action under Code Va. § 3211—Furst v. Banks (Va.) 43 S. E. 360.

70. Code Civ. Proc. N. Y. § 638—Belmont v. Sigua Iron Co. (Sup.) 80 N. Y. Supp. 771.

71. Code Civ. Proc. Kan. § 20, providing for the first publication or service within sixty days, applies only to the statute of limitations. Section 57, providing for commencement of actions, applies to civil actions in general—Wester v. Long, 63 Kan. 876, 66 Pac. 1032.

72. July 31st to August 30th is thirty days, within Code Civ. Proc. § 638—Doheny v. Worden, 75 App. Div. (N. Y.) 47; Salt Springs Nat. Bank v. Worden, Id.

73. Britton v. Gregg, 96 Ill. App. 29.

74. Sufficiency of affidavit for attachment as against a motion for dissolution by other creditors—Axford v. Seguine, 70 App. Div. (N. Y.) 228; of affidavit and complaint in attachment against a foreign corporation to show that the corporation was foreign, under Code Civ. Proc. N. Y. § 1776, requiring an affirmative verified allegation thereof—Steele v. R. M. Gilmour Mfg. Co., 77 App. Div. (N. Y.) 199; of affidavit to show that plaintiff owned property shipped by defendant's railroad as a connecting line; under Rev. St. S. C., providing that a connecting carrier is liable severally with the receiving line for loss or damage to freight—Chitty v. Pennsylvania R. Co., 62 S. C. 526.

75. Brandenburg v. Malcolm, 102 Ill. App. 302.

76. Civ. Code Proc. N. Y. § 636, renders an affidavit necessary—Sizer v. Hampton & B. R. Lumber Co., 67 App. Div. (N. Y.) 547.

77. Heard v. Nat. Bank of Illinois, 114 Ga. 291.

78. Hayden v. Mullins, 76 App. Div. (N. Y.) 69.

79. Siersema v. Meyer, 38 Misc. Rep. (N. Y.) 358.

80. American Audit Co. v. Industrial Federation (Sup.) 80 N. Y. Supp. 788.

81. Axford v. Seguine, 70 App. Div. (N. Y.) 228. But facts shown in pleading need not always be stated—Teague v. Lindsey (Tex. Civ. App.) 71 S. W. 573.

82. Under Code Civ. Proc. N. Y. § 636—Steele v. R. M. Gilmour Mfg. Co., 77 App. Div. (N. Y.) 199.

83. Barrell v. Todd, 65 App. Div. (N. Y.) 22.

84. Rev. St. § 4303, by implication clearly

damage must be fully ascertainable from the affidavit and papers.[85] It must show that plaintiff is entitled to recover a certain sum from defendant, which is done by stating that a certain balance was due plaintiff after taking out all credits to be given defendant, and that defendant has agreed to pay another sum certain for goods furnished.[86] The affidavit need not state the value of the property, but only the amount of damages, where the attachment is in aid of a suit to recover damages to property.[87] Where the petition in an action on a note shows that payments have been made reducing the debt to the sum specified in the affidavit for attachment, those facts need not be averred in the affidavit.[88] An affidavit alleging want of sufficient personal property of defendant within the state to satisfy the claim is necessary to a sale of land.[89] When against residents of the state, it must, in California, show that the debt was not secured.[90]

Averments as to nonresidence.—The affidavit must state the residence of both of two defendants, or that plaintiff was unable to ascertain the residence after diligence, and must state that both defendants are indebted to plaintiff.[91] An affidavit showing that the defendant had been absent from the state for a long time, and had expressed himself as unwilling to return, and as intending to go to a foreign country, sufficiently shows facts authorizing an attachment against him as a nonresident, and sufficiently shows his intent to leave the state to defraud his creditors or avoid service of process.[92] An averment that defendant has removed to another state, where he now resides, is sufficient as to nonresidence;[93] and a statement that defendant resides without the state at a certain address, which fact is shown by the affidavit of another, annexed, sufficiently authorizes attachment against a nonresident.[94] If other grounds exist, it seems needless to aver nonresidence.[95]

Amended and supplemental affidavits.—An affidavit defective as to venue may be amended, on motion nunc pro tunc, on a showing that it was properly verified before an officer within his jurisdiction.[96] A motion before hearing, asking an extension of time within which plaintiff might file affidavits and proofs to amend those already filed, because of newly-discovered evidence unknown at time of the original affidavits, is a motion for continuance to secure further evidence, and not for purpose of amendment.[97]

§ 7. *Attachment bond or undertaking; terms.*—Omission of a description of land will not render the bond void if the description may be obtained from the original record and the officer's return.[98] That one of the sureties claims ownership of valuable property involved in litigation will not justify the court in refusing

requires such statement—Kerns v. McAulay (Idaho) 69 Pac. 539. Plaintiff must allege by affidavit his right to a certain sum over and above all counterclaims—Roth v. American Piano Mfg. Co., 35 Misc. Rep. (N. Y.) 509.

85. Attachment based on claim for unliquidated damages—Mallon v. Rothschild, 38 Misc. Rep. (N. Y.) 8.

86. Mere allegation of breach of contract, and its cancellation by plaintiff for the breach, is insufficient—Roth v. American Piano Mfg. Co., 35 Misc. Rep. (N. Y.) 509.

87. Chitty v. Pennsylvania R. Co., 62 S. C. 526.

88. Teague v. Lindsey (Tex. Civ. App.) 71 S. W. 573.

89. Civ. Code Prac. Ky. § 230—Webber v. Tanner, 23 Ky. Law R. 1694.

90. Such attachment can only lie under Code Civ. Proc. Cal. § 538, providing for attachment of unsecured claims against residents—Sparks v. Bell, 137 Cal. 415, 70 Pac. 281.

91. Britton v. Gregg, 96 Ill. App. 29.

92. Code Civ. Proc. N. Y. § 636, subd. 2, which authorizes attachments against nonresidents—Doheny v. Worden, 75 App. Div. (N. Y.) 47; Salt Springs Nat. Bank v. Worden, Id.

93. Citizens' State Bank v. Porter (Neb.) 93 N. W. 391.

94. Mallon v. Rothschild, 38 Misc. Rep. (N. Y.) 8.

95. As that the debt was unsecured—Kerns v. McAulay (Idaho) 69 Pac. 539.

96. Fisher v. Bloomberg, 74 App. Div. (N. Y.) 368.

97. Hood v. Fay, 15 S. D. 84.

98. Requirement of description by Pub. St. Mass. c. 161, § 128—Berry v. Wasserman, 179 Mass. 537.

to consider such property in estimating the value of the sureties' assets on a plea in abatement for insufficiency of sureties.[99] Since it cannot be known that the federal bankruptcy law will not be repealed before final judgment in attachment, its enactment cannot affect the reference in an attachment bond to local laws relating to special judgments against bankrupts by enabling the attachment plaintiff to proceed against their sureties.[1]

Liabilities on bond.—If the bond in words binds the "undersigned," all signers are included in the obligation. Persons not named in the body of the bond, signing it as "securities," bind themselves as sureties.[2] Sureties are not liable to defendant, though he recovers judgment, if no levy has actually been made.[3] The expenses of trial on vacation of an attachment may be recovered of sureties, and they are liable for costs on an unsuccessful motion to vacate, not denied on the merits, where judgment is for defendant in the main action.[4] A bond of plaintiff and sureties, providing that plaintiff will prosecute the suit, and that "they" will pay all damages and costs rendered against "them" for wrongful issuance, sufficiently includes the plaintiff and sureties.[5] The measure of damages to the owner is the costs awarded on vacation of the warrant, and interest on the value of the property for the time it was held, where it appears that, in vacating the attachment, it was not held void ab initio.[6] The sureties on bond conditioned that sureties should pay defendants all damages they or either of them may sustain by the attachment if wrongful are liable only for the value of the attached property, less the proceeds of its sale, and not for a sum erroneously paid to plaintiff.[7] Discontinuance of the attachment by plaintiff is equivalent to a final determination that plaintiff was not entitled to attachment, and gives defendant an immediate right of action on the attachment bond.[8] A chattel mortgagor may sue for damages on the attachment bond of one who levied on his interest after default, even though the mortgagee has recovered against the attachment plaintiff for conversion of the property.[9] An action will lie on a bond given the sheriff to protect him against claimants of the attached property, where it appears that judgment has been rendered against him which he has had to pay.[10] Where a bond in attachment of land is conditioned to pay the judgment recovered after the obligee shall assert title by writ of entry, and no appraisal of the land is had, the obligors have waived such appraisal and are bound by the judgment.[11]

Actions on bond.[12]—A declaration in a suit on an attachment bond, which fails to assert that plaintiff has first established his title by writ of entry, which was required by the bond, is liable to demurrer.[13] The surety cannot show in de-

99. First Nat. Bank v. Wallace (Tex. Civ. App.) 65 S. W. 392.

1. Public St. Mass. c. 171, and St. Mass. 1888, c. 405, §§ 1, 2—Berry v. Wasserman, 179 Mass. 537.

2. Sufficiency of attachment bond given by plaintiff as to warranty of the action, relation of the parties, and obligation assumed—First Nat. Bank v. Wallace (Tex. Civ. App.) 65 S. W. 392.

3. Code Civ. Proc. N. Y. provides that the undertaking shall secure costs and damages only to defendant on recovery of his judgment—Krall v. Howard, 37 Misc. Rep. (N. Y.) 832.

4. Tyng v. American Surety Co., 69 App. Div. (N. Y.) 137.

5. First Nat. Bank v. Wallace (Tex. Civ. App.) 65 S. W. 392.

6. Hartmann v. Burtis, 65 App. Div. (N. Y.) 481.

7. Files v. Davis, 119 Fed. 1002.

8. Straus v. Guilhou (Sup.) 80 N. Y. Supp. 180.

9. The legal title to the property still remains in the mortgagor—Jencks v. Murphy, 15 S. D. 425.

10. Tucker v. Smith (Kan.) 68 Pac. 40.

11. Appraisal of attached land required by Pub. St. Mass. c. 161, § 126—Berry v. Wasserman, 179 Mass. 537.

12. Sufficiency of evidence of damages to property by reason of attachment—Witherspoon v. Cross, 135 Cal. 96, 67 Pac. 18; reasonableness of verdict on conflicting evidence as to value of land levied on, and of attorney's services—Barnett v. Lucas, 27 Ind. App. 441.

13. Berry v. Wasserman, 179 Mass. 537.

fense of a suit on the bond that there was a chattel mortgage on the property.[14] Where an attachment against nonresidents was vacated, and the appeal from the vacating order was abandoned, in a suit by local attorneys on the attachment bond, as assignees of defendants, to recover for their services, the surety could not set up that the foreign attorneys of the attachment plaintiff were negligent as to service of summons, so that the attachment was vacated, nor allege that the appeal was still pending, where they alleged no stay of proceedings.[15] The burden is on defendant to show the sufficiency of the sureties.[16] The levy of an attachment upon his property for which the bond was executed must be shown by the obligee.[17]

Judgment in the original action may be rendered in some jurisdictions.[18] On discontinuance of an attachment by plaintiff, in which defendant appeared specially to move for vacation of the service and warrant, judgment cannot be entered against plaintiff for defendant's costs and damages.[19] Judgment for the amount of the bond cannot be rendered either in a suit or by rule without notice of the proceedings.[20]

§ 8. *The writ or warrant.*—In Wisconsin the affidavit stating statutory grounds of attachment must be attached to the writ.[21] An attachment should issue in amount not exceeding the sum stated in the complaint, especially where it appeared that such amount included damages in two causes of action, as to one of which plaintiff was not entitled to attachment.[22] The writ should be confined to the demand in that cause of action as to which attachment is authorized.[23] The remedy is to reduce, and not to vacate, a writ that exceeds the amount of the demand.[24] The writ may call defendants by their reputed names or surnames, and joint defendants by their separate or partnership names, or by such names as they are usually known.[25] That defendant's name was given as "Kavarik," when it was really "Kovarik," will not render the writ void where fraud or bad faith is not shown, and amendment to correct the name will not work dissolution of the attachment already levied.[26] A simple mistake in a writ in computing the amount due is immaterial where the petition shows the date and amount of judgment sued on, and the rate of interest.[27] A defect of omission to state the cause of action is not waived by default, but may be raised on appeal.[28] A warrant may be amended nunc pro tunc for failure to state the ground of attachment as against one acquiring an interest in the attached property after issuance of the defective warrant, as well as against the original owner.[29] Abandonment of an attachment merely because defendant is not rightly named therein will not affect issuance of a second writ in good faith, though the property seized under the first attachment is not returned before the second is made.[30]

14. Hartmann v. Hoffman, 65 App. Div. (N. Y.) 443.
15. Powell v. Bursky, 39 Misc. Rep. (N. Y.) 533.
16. First Nat. Bank v. Wallace (Tex. Civ. App.) 65 S. W. 392.
17. Barnett v. Lucas, 27 Ind. App. 441.
18. Civ. Code Prac. § 232—Deposit Bank of Frankfort v. Thomason (App.) 23 Ky. Law R. 1957.
19. Straus v. Guilhou (Sup.) 80 N. Y. Supp. 180.
20. Thompson v. Arnett (App.) 23 Ky. Law R. 1082.
21. The grounds are set out in Rev. St. 1898, § 2731—Gallun v. Weil (Wis.) 92 N. W. 1091.
22. The word "demand," used in Code Civ. Proc. § 538, refers to the amount stated in the affidavit as the indebtedness owing from defendant—Baldwin v. Napa & S. Wine Co., 137 Cal. 646, 70 Pac. 732.
23. The words "demand in conformity with the complaint," in Code Civ. Proc. § 540, construed in connection with sections 427, 537—Baldwin v. Napa & S. Wine Co., 137 Cal. 646, 70 Pac. 732.
24. Cohen v. Walker, 38 Misc. Rep. (N. Y.) 114, citing 35 Misc. Rep. 509.
25. Nester's Estate v. Carney Bros. Co., 98 Ill. App. 630.
26. Norris v. Anderson, 181 Mass. 308.
27. First Nat. Bank v. Wallace (Tex. Civ. App.) 65 S. W. 392.
28. Cline v. Patterson, 191 Ill. 246.
29. Code Civ. Proc. N. Y. §§ 641, 723—King v. King, 68 App. Div. (N. Y.) 189.
30. Brady v. Royce, 180 Mass. 553.

An alias writ of special execution under the Illinois practice cannot issue under the statutes.[31] In equitable attachments under the Rhode Island statute the affidavit need not be attached to the writ, though the remedy is mesne process; because the affidavit must first be submitted to the court; and it is immaterial that it calls on attachment defendants to answer the bill.[32]

§ 9. *The levy or seizure; indemnifying bonds.*—Levying creditors should be allowed to take and retain only enough property to meet their debts.[33] The officer may take a reasonable time to pack the goods and remove them from the premises.[34] A levy is not sufficient where it appears that it was not made in the presence of any witness.[35] The validity of a levy on mortgaged chattels against a mortgage subsequently executed is not affected by payment of security required to be given the mortgagee.[36]

Levy on debts or choses.—Where an attachment judgment for money only was recovered without personal service within the state, acceptance by the officer of a certificate of the mortgagor as to his indebtedness in the sum therein named, instead of taking into custody a bond and mortgage due defendant, was an insufficient levy. The bond collaterally secured by the mortgage was insufficiently seized by the delivery of a certified copy of the warrant with notice to the debtor.[37]

Notice of levy.—An attachment sale of realty cannot be upheld where it appears that the officer did not give notice of the levy to the tenant in possession, nor recite such notice in his return.[38] Service of a paper merely purporting to be a copy of the attachment upon one claimed to be owing defendant is insufficient, and failure to serve a certified copy of the attachment is not a mere irregularity, but an error going to the jurisdiction.[39] Serving notice of a levy on land as late as the day preceding the levy will not render it void, though it should be after levy is made.[40] A notice of an attachment of lands held by devisees under a will, served on the "agent for the heirs and legatees," is sufficient.[41]

An equitable attachment on the assets of a partnership requires actual or constructive notice to both partners before decree as to the property, but should not be abated, after service on one partner, for failure to take an order of publication against the other.[42]

That some of the averments in a petition, in an action on a bond given a sheriff to protect him against claimants of attached property, are indefinite and informal, will not prevent recovery where liability is clearly shown.[43]

§ 10. *Return to the writ.*—Levy against property of a nonresident in one county cannot be returned in another county so as to give jurisdiction there.[44] A

31. Attachment Act Ill. § 26 (Hurd's Rev. St. 1899, p. 178), does not provide for an alias attachment writ, nor is the alias writ of special execution authorized by Attachment Act, § 35 (Hurd's Rev. St. 1899, p. 180), authorizing a special execution—Keeley Brewing Co. v. Carr, 198 Ill. 492, affirming judgment, 94 Ill. App. 225; Ill. Cyc. Dig. vol. 1, p. 751.

32. Under Gen. Laws, c. 252, § 27—Ladd v. Franklin Loan & Trust Co. (R. I.) 53 Atl. 59.

33. A levy for $76.74 and costs on property worth $1,225 is excessive—Anderson v. Heile (App.) 23 Ky. Law R. 1115.

34 Ramsey v. Burns (Mont.) 69 Pac. 711.

35. Under Code Neb. § 205—Citizens' State Bank v. Porter (Neb.) 93 N. W. 391.

36. Code Iowa, § 3979—Tollerton & Stetson Co. v. Skelton (Iowa) 92 N. W. 651.

37. Under Code Civ. Proc. § 649, providing for levy on personal property capable of manual delivery—Fiske v. Parke, 39 Misc. Rep. (N. Y.) 157; order affirmed, 77 App. Div. (N. Y.) 327.

38. Rev. St. Mo. 1889, § 543—Walter v. Scofield, 167 Mo. 537.

39. General rules of practice No. 37, Code Civ. Proc.—Weil v. Gallun, 75 App. Div. (N. Y.) 439.

40. Kilham v. Western Bank & Safe Deposit Co. (Colo.) 70 Pac. 409.

41. Kilham v. Western Bank & Safe Deposit Co. (Colo.) 70 Pac. 409.

42. Time for maturity of the suit should be given plaintiff fixed as to the absent partner—Brown v. Gorsuch, 50 W. Va. 514.

43. Tucker v. Smith (Kan.) 68 Pac. 40.

44. Code Ala. §§ 526, 524, subd. 4, and § 4205, providing for venue of civil actions—Kress v. Porter, 132 Ala. 577.

return is sufficient to give the officer a lien, though it appears that he included more property than defendant owned at the place of attachment.[45] If it sets out receipt of a notice to remove attached property, and recites the fact of removal, it is prima facie sufficient to show removal.[46] A return showing attachment of a certain number of sacks of potatoes is not conclusive as to the number of bushels attached.[47] Return of a writ reciting a levy on land and service on a Chinaman as sole occupant will not render a judgment of sale void because of failure to give the name of the Chinaman, which was unknown.[48] The court may allow the officer to amend his return after verdict, especially as to matters occurring after entry of the writ.[49]

§ 11. *Custody, sale, redelivery, or release of attached property.*—The property may be left with plaintiff as bailee by the officer without endangering the lien.[50] The officer cannot recover fees for keeping property attached for more than the time provided by law, though he has an oral agreement with defendant for such fees.[51]

Sale and confirmation or vacation.—Though by law the officer may sell perishable property, an order of the court is necessary unless it is subject to speedy decay.[52] Where land was attached before death of its owner, and after his death the complaint was amended to ask foreclosure of the lien, but not waiving recourse against other property, a foreclosure by sale was unauthorized, but the personal judgment against the estate could be given preference in the proceeds of a sale of the attached property if sold by the executor to pay debts.[53] The validity of the attachment because of death of defendant before service, and service on his executor, cannot be questioned on a motion to confirm the sale; nor can it be urged that the service was insufficient to give jurisdiction, where the question was raised by an amended complaint, and not controverted. A motion to vacate a judgment of sale, in so far as it applies to lands because the attachment is invalid, raises the question of the validity of the judgment, and is not merely a motion to set aside the sale.[54] A motion by a junior attaching plaintiff to set aside a sale under the senior attachment for inadequacy of price will be denied where it appears that sufficient property remains unsold to satisfy his claim.[55] The court cannot order funds in the hands of levying officers as proceeds from the sale to be paid to plaintiff before final judgment.[56] A second attaching creditor is not entitled to notice of an application for an order from the judge in vacation to direct the sheriff, who has sold the goods, to turn over the proceeds to his successor in office; and the law providing for appointment of a receiver cannot apply where the officer has sold the goods, and, pursuant to the order, turned the money over to his successor.[57]

45. Stearns v. Silsby, 74 Vt. 68.
46. Riley v. Tolman, 181 Mass. 335.
47. La Follett v. Mitchell (Or.) 69 Pac. 916.
48. White v. Ladd, 41 Or. 324, 68 Pac. 739.
49. Harding v. Riley, 181 Mass. 334.
50. Gallun v. Weil (Wis.) 92 N. W. 1091.
51. Under Pub. St. Mass. c. 161, § 42, providing for appointment of a keeper of attached personalty, and chapter 199, § 6, limiting the compensation of the officer or keeper to ten days, unless on written consent of parties or special order of court—Leach v. Eastman (Mass.) 65 N. E. 60; Eastman v. Leach, Id.
52. Code Civ. Proc. Cal. §§ 547, 548—Witherspoon v. Cross, 135 Cal. 96, 67 Pac. 18.
53. Under Rev. St. Ariz. 1887, pars. 1117, 1119, and 1176, providing for presentation of claims against an estate, and payment of secured claims by the executor on sale of the property covered by the lien—Wartman v. Pecka (Ariz.) 68 Pac. 534.
54. White v. Ladd, 41 Or. 324, 68 Pac. 739.
55. Levi v. Goldberg, 76 App. Div. (N. Y.) 210.
56. Under Civ. Code Ga. §§ 4556, 4558, 5463—Lambert Hoisting Engine Co. v. Bray (Ga.) 43 S. E. 371.
57. Authority is not given by Rev. St. 1899, § 393, giving the court custody and disposition of proceeds of attached property; Rev. St. 1899, §§ 395, 399, provide for appointment of receiver in ejectment—Tennett-Strippling Shoe Co. v. Magill, 91 Mo. App. 570.

Wrongful taking from officer.—The measure of damages for wrongful taking of property from a sheriff holding it under a valid writ is its value when taken, with interest, not exceeding enough to satisfy the writ, considering the value of the goods when taken, in the situation in which they were found, with a view to the manner in which the officer might lawfully have disposed of them. Evidence of the value of goods attached in the ordinary market may be heard.[58]

§ 12. *Forthcoming bonds and receipts.*—The surety on a bond for discharge of attached property is liable for failure of its return, though judgment is recovered only against a defendant who does not own the property.[59] The sufficiency of grounds of an attachment, or the liability of the property thereto, cannot be determined in an action to enforce a bond for discharge of the attachment.[60]

Claimant's bonds.[61]—Execution of a claimant's bond, and his receipt of the property, will not discharge the lien of the levy, and he must become a party to the action.[62] After sale of property delivered on a claimant's bond, it cannot be objected that the bond did not secure a joint owner of the debtor.[63] After surrender of the property to the claimant under his bond, terms in the bond in excess of the statutory requirement will be treated as surplusage.[64] Death of a surety will not require a new bond by a claimant who had received the property from the sheriff.[65] A claimant's bond is not broken until a judgment subjecting the property has been rendered which the debtor has failed to satisfy, and until then no action can be brought.[66] In an action on a bond conditioned to require the claimant to establish ownership, the burden is on the defendant to show ownership.[67] A bond payable to the deputy sheriff who is the "levying officer" may be enforced by him.[68] Issues raised by a claimant in intervention cannot be set up in an action on the bond after judgment in the intervention finding the property liable.[69] An allegation in an action on claimant's bond showing a liability of the obligor to pay the value of the property in a certain sum need not be proved, where it is not denied.[70]

§ 13. *Lien or other consequences of levy.*[71]—An attachment rightfully issued and levied creates a lien for plaintiff to the amount of his claim and costs, whether in aid to an action or as a special proceeding.[72] A judgment of sale was not conclusive as to the validity of the seizure of part of the attached property, though attachment of the remainder was good, where defendant died before service, and it was made on his executor.[73] A mere clerical mistake of the clerk in recording an attachment lien by inserting the name of the wrong county in the title of the

58. Merchants' Nat. Bank v. McDonald (Neb.) 88 N. W. 492; Id., 89 N. W. 770.

59. Code Civ. Proc. §§ 554, 555, provide that the bond should be conditioned to pay the value of the property in case the plaintiff recover judgment—McCormick v. National Surety Co., 134 Cal. 510, 66 Pac. 741.

60. Civ. Code Prac. § 221—Thompson v. Arnett (App.) 23 Ky. Law R. 1082.

61. Sufficiency of evidence, in action on a claimant's bond, to show that the obligor was not the owner of the attached property—Goldstein v. Goldman, 74 App. Div. (N. Y.) 356.

62. Civ. Code Prac. §§ 29, 214, providing for intervention in attachment suits—Deposit Bank of Frankfort v. Thomason (App.) 23 Ky. Law R. 1957.

63. Deposit Bank of Frankfort v. Thomason (App.) 23 Ky. Law R. 1957.

64. Under Civ. Code Prac. §§ 214, 682, providing for bond of a claimant in attachment, and the filing of a new bond where the first is insufficient—Deposit Bank of Frankfort v. Thomason (App.) 23 Ky. Law R. 1957.

65. Larsen v. Murray (Tex. Civ. App.) 68 S. W. 295.

66. Deposit Bank of Frankfort v. Thomason (App.) 23 Ky. Law R. 1957.

67. Code Civ. Proc. § 2912—Goldstein v. Goldman, 74 App. Div. (N. Y.) 356.

68. Civ. Code, §§ 4571, 4572—Thompson v. O'Connor, 115 Ga. 120.

69. Thompson v. O'Connor, 115 Ga. 120.

70. Goldstein v. Goldman, 74 App. Div. (N. Y.) 356.

71. Effect on lien of leaving property with plaintiff, see ante, § 11.

72. Rhodes v. Samuels (Neb.) 93 N. W. 148.

73. Jurisdiction depended on the validity of the attachment—White v. Ladd, 41 Or. 324, 68 Pac. 739.

cause will not affect the lien.[74] Default in attachment by creditors who knew of a mortgage covering the property gives the creditors no property rights of which they were deprived without due process of law by passage of a law, pending the attachment, validating the record of the mortgage.[75] An entry of judgment by agreement in favor of defendant in attachment on lands, including satisfaction of claims not existing at time of attachment, renders the lien void as against purchasers of land from defendant after commencement of the suit.[76]

§ 14. *Conflicting levies, liens, and creditors; priorities.*[77]—Title under attachment sale does not necessarily prevail over a prior unrecorded debt.[78] An unrecorded assignment of a title bond is valid against a subsequent attachment for debts of the assignor.[79] Attachment of a bank deposit precedes an unpresented check for a part thereof.[80] An unindorsed bill of lading delivered to a creditor of the owner of goods shipped with a draft on the consignee for the proceeds gave the creditor a lien superior to that of a subsequent attachment.[81] The court has sufficient chancery power to postpone one attachment for another for a sound equitable reason.[82] On attachment in a suit against an insolvent foreign corporation, a preference, based on the view of the law held by the courts in the state of the domicile of the corporation, and not on its statutes, cannot be allowed.[83]

Priorities between attachments and mortgages.[84]—Notice to the attaching creditor, by his attorney and agent, that another creditor holds a chattel mortgage on the property seized prior to levy, puts him on inquiry; but record of a chattel mortgage, executed in one state on property in another, in the state of execution, is not notice to attaching creditors in the state where the property is situate.[85] Consent by a chattel mortgagee that the surety on the mortgagor's forthcoming bond in attachment should have a lien prior to his own in case he became liable will not give the attachment priority over the mortgage.[86] The insufficiency of a chattel mortgage to give notice to a subsequent attaching creditor will not prevent notice where such creditor was informed of the existence of the mortgage, before levy, by his own attorney, who had learned of the mortgage from the mortgagor and the records.[87] The burden is on attaching creditors claiming priority over a mortgage on the ground that fraudulent representations of the mortgagee as to the financial condition of the mortgagee induced them to give credit to him, and, if evidence of fraud is not produced, a verdict for the mortgagee should be directed.[88] An attachment lien on property of a son is prior to a former security given by the son for his father's debt, which the creditor failed to enforce, while allowing the son to continue business and to obtain credit from the attachment plaintiff, and where it appears that the father induced the withdrawal of the at-

74. Under Hill's Ann. Laws, Or. § 151, the lien depends on the date of the filing of the certificate—Schlosser v. Beemer, 40 Or. 412, 67 Pac. 299.

75. McFaddin v. Evans-Snider-Buel Co., 185 U. S. 505, 46 Lawy. Ed. 1012; affirming judgment, 105 Fed. 293.

76. Oconto Co. v. Esson, 112 Wis. 89; Wright v. Same, Id.; Bellew v. Same, Id.

77. Confirmation of sale as affecting rights and priorities, see ante, § 11.

78. Rohrer v. Snyder (Wash.) 69 Pac. 748.

79. The bond was recorded as authorized by Code, § 2459—Macrae v. Goodbar, 80 Miss. 315.

80. The check at time of delivery does not operate as an equitable assignment pro tanto—Donohoe-Kelly Banking Co. v. Southern Pac. Co. (Cal.) 71 Pac. 93.

81. Clary v. Tyson (Mo. App.) 71 S. W. 710.

82. Freedman v. Holberg, 89 Mo. App. 340.

83. Lamb v. Russel (Miss.) 32 So. 916.

84. Sufficiency of fraudulent statements by chattel mortgagee to attaching creditors to give the latter priority over the mortgage—Chittenden v. Charles H. Sieg Mfg. Co. (Colo. App.) 66 Pac. 1077.

85. Aultman & Taylor Mach. Co. v. Kennedy, 114 Iowa, 444.

86. Caumiser v. Humpich (App.) 23 Ky. Law R. 1133.

87. Frick v. Fritz, 115 Iowa, 438.

88. Chittenden v. Chas. H. Sieg Mfg. Co. (Colo. App.) 66 Pac. 1077.

tachment by fraud, so as to enable the former creditor to obtain a preference by entering up a judgment.[89]

Surrender of attached property to a receiver under a stipulation approved by the court that it shall be without prejudice will not terminate the attachment, but the priority of lien is retained.[90] Creditors who have turned over attached property to a receiver appointed in a suit to foreclose a mortgage thereon, under a stipulation holding part of the gross proceeds subject to the attachment, can claim only that portion after payment of necessary expenses of sale, and cannot be charged with a proportion of taxes, insurance, and expenses from the claim of the receiver.[91] Subsequent appointment of a receiver, or his subsequent taking possession of property within the state of his appointment, will not affect an attachment of the property already made.[92]

Priority between attachments and assignments for benefit of creditors.—Subsequent attachments of land fraudulently conveyed are prior to the title of assignees, under a general assignment.[93] On a feigned issue to determine the validity of an assignment of stock prior to an attachment, the attaching creditors may show that in a prior attachment, dissolved for defect in the bond, the claimant under the assignment had entered appearance for the assignor to claim for him benefit of the exemption laws, as showing the invalidity of the assignment.[94] A sale under execution in attachment proceedings, and payment proceeds to plaintiff after institution of claim proceedings by an assignee for benefit of creditors, will not prevent plaintiff from contesting the validity of the claim. The debtor's act in postponing an assignment for creditors until after a levy is not chargeable to levying creditors who did not know or participate in his intent, and the general creditors must prove affirmatively that there was such participation; hence the fact that they afterwards took part in a scheme to start him in business, and helped him to purchase the attached property for that purpose, will not invalidate their attachment as against the assignment for benefit of creditors.[95]

Effect of bankruptcy proceedings.—An adjudication in bankruptcy dissolves all attachments issued during four months preceding the petition, unless preserved by an order of court.[96] The attaching creditor of an alleged bankrupt has a lien, until the attachment is vacated or rendered void by the adjudication in bankruptcy, which is a preference.[97] The bankruptcy act does not invalidate the lien of an attachment obtained more than four months before the bankruptcy proceedings, though the lien depends on a judgment obtained within four months. That the service was made prior to that time is sufficient.[98] An attachment against property of a bankrupt exempt from the bankruptcy proceedings, and over which the court therein has refused to take jurisdiction, will not be discharged, though issued within four months preceding the petition.[99] A judgment against a garnishee in an action against the bankrupt within four months before

89. Leonard v. Bowne, 63 N. J. Eq. 488.

90. Central Trust Co. v. Worcester Cycle Mfg. Co., 114 Fed. 659.

91. American Surety Co. v. Worcester Cycle Mfg. Co., 114 Fed. 658.

92. Woodhull v. Farmers' Trust Co. (N. D.) 90 N. W. 795.

93. Watson v. Bonfils (C. C. A.) 116 Fed. 157.

94. McConnel v. Dilworth, 18 Pa. Super. Ct. 114.

95. Evidence of such participation will not prevail against direct testimony of the attaching creditors that no collusion existed between them and the bankrupt—H. B. Claflin Co. v. Muscogee Mfg. Co., 127 Ala. 376.

96. Bankruptcy Act 1898, § 67—Watschke v. Thompson, 85 Minn. 105.

97. He cannot maintain a petition in involuntary bankruptcy—In re Scherkein, 113 Fed. 421.

98. Under Bankruptcy Act 1898, § 67f, providing that attachments issuing within four months preceding the filing of the petition are void—In re Beaver Coal Co., 110 Fed. 630.

99. The attachment is not void under Bankruptcy Act U. S. § 67f—Powers Dry Goods Co. v. Nelson, 10 N. D. 580.

the filing of the petition is void, whether questioned directly or collaterally.[1] The trustee in bankruptcy may apply to the state court for an order discharging previous attachments, against the bankrupt's property, void under the bankruptcy law. His laches in moving for dissolution will not render the attachment a prior lien; it need only appear, in addition, that the bankrupt was insolvent when the attachment issued.[2] On annulment of the lien of an attachment in a state court by an adjudication in bankruptcy, the court loses jurisdiction of the property, and cannot affect the jurisdiction.[3] Discharge of an attachment against property of a bankrupt by discharge of the debtor will not prevent enforcement of the lien against the property by judgment.[4] A referee in bankruptcy may properly proceed, on application of the trustee, to determine the validity and amount of an attachment lien on the property held by a party to the proceedings, though such party gave him notice that he had released the lien; and his decision is conclusive as to the creditor's interest in property covered by the lien, but not as regards other property. A judgment for the amount claimed in the attachment will stand against a finding of the referee for less than was set up in an insufficient answer in bar, where the record of the bankruptcy was not introduced on the trial, and the attachment defendant did not claim benefit of the referee's finding.[5]

§ 15. *Enforcement and dissolution, discharge, vacation, or abandonment of attachment. A. Validity and grounds for setting aside.*—An attachment in aid must abide the result of the suit, since the existence of the ground of action cannot be determined in a proceeding to enforce the provisional remedy.[6] Service on a nonresident within the county of issuance will not abate the attachment, nor will grounds for demurrer to a bill in equity, founded on the nonresidence.[7] Persons upon whom notices of attachment are served on the ground of their indebtedness to defendant cannot have the existence of such debts determined on motion to set aside the service.[8] An amendment to a petition, showing recovery in a cause of action on an implied promise to repay money had and received, supports the original petition, alleging an oral contract to pay, so as to constitute proper ground for attachment.[9] One moving as a subsequent lienor to vacate a prior attachment does not make good his right by showing his own attachment, and an incomplete publication to sustain it.[10] Dismissal is proper where the court has not the required jurisdiction of defendant, and no property within the state has been seized.[11] An attachment against residents for a debt, on contract for direct payment of money, must be discharged, though two of six defendants whose property was taken are nonresidents, where the affidavit does not show that the claim was not secured.[12] An attachment in an action for breach of a contract void under the statute of frauds is properly vacated on motion.[13] Collection of a sum, and its credit on the claim for which attachment issued, from the estate of one jointly

1. Under Bankruptcy Act 1898, § 67f—In re Beals, 116 Fed. 530.
2. Bankruptcy Act, § 67f—Hardt v. Schuylkill Plush & Silk Co., 69 App. Div. (N. Y.) 90.
3. In re Tune, 115 Fed. 906.
4. Powers Dry Goods Co. v. Nelson, 10 N. D. 580.
5. Wakeman v. Throckmorton, 74 Conn. 616.
6. Gallun v. Weil (Wis.) 92 N. W. 1091.
7. Hall v. Packard, 51 W. Va. 264.
8. Weil v. Gallun, 75 App. Div. (N. Y.) 439.
9. Munns v. Donovan Commission Co. (Iowa) 91 N. W. 789.
10. Under Code Civ. Proc. N. Y. § 638, providing for publication; section 442, providing for time of publication; and section 682, giving one acquiring a lien after attachment the right to apply for vacation—Doheny v. Worden, 75 App. Div. (N. Y.) 47; Salt Springs Nat. Bank v. Same, Id.
11. Beasley v. Lennox-Haldeman Co. (Ga.) 42 S. E. 385.
12. Code Civ. Proc. § 556—Sparks v. Bell, 137 Cal. 415, 70 Pac. 281.
13. Knight v. Hatfield, 129 N. C. 191.

liable with defendant, which was accepted by plaintiff's amended petition, does not render the attachment void;[14] nor omission of the cause of attachment in the writ, since plaintiff may have it amended as the court may direct.[15] Attachment against a foreign corporation should not be vacated on the ground that the action was at law, merely because a referee, who had received the affidavits, had decided that the action was not in equity, since that question should not be determined on a preliminary motion.[16] Where service of summons, made without the state, is set aside, the attachment will be vacated, though appeal has been taken and no stay granted.[17] A slight change in the names of the defendants as they appear in the affidavits will not be ground for vacating the writ, where it is certainly shown that they were the proper persons.[18] Defendant's failure to execute a bond will not prevent vacation of attachment brought on ground of breach of a contract, which, it was apparent from the pleadings, was void under the statute of frauds.[19] Vacation of a warrant on a condition with which each defendant complies works plaintiff no injury.[20] Where the warrant of an attachment states that the action is for wrongful detention of property, while the complaint alleges wrongful conversion, it is merely an irregularity, not to be considered on a motion to vacate.[21] In Arizona the death of defendant will not dissolve the attachment;[22] but it is otherwise in South Dakota as to attachment issued on an ordinary money judgment.[23] Dismissal of a cause of action on which property is seized dissolves the attachment, so that a sale cannot be had, though an amended petition is subsequently filed setting forth another and different cause of action.[24] A motion to dissolve should prevail where the causes of action as to some of several claims on which the attachment issued have been dismissed by plaintiff.[25] Attachment against a national bank in an action to recover property secured by the bank by intervention in a preceding attachment against others should be dissolved on motion of the bank.[26]

B. Procedure.—After general appearance by defendant, a motion may be made to release the property for failure of the grounds of attachment.[27] Where defendant appears and joins issue on the petition, the court may render judgment for the amount found due, without regard to the extent of the levy.[28] Outside of defendant's liability, the ground of attachment must be questioned by traverse of the affidavit and trial by the issues thus formed.[29] The jury cannot be remitted to the affidavit to ascertain the issues to be determined.[30] Annulment of an attachment in a state court by proceedings in bankruptcy deprives such court of

14. First Nat. Bank v. Wallace (Tex. Civ. App.) 65 S. W. 392.

15. Hurd's Rev. St. 1899, p. 176, §§ 6, 28, providing the form of the writ, and that it should not be quashed for mere insufficiency—Cline v. Patterson, 191 Ill. 246; reversing judgment, 88 Ill. App. 360.

16. Schultz v. Brackett, Bridge Co., 35 Misc. Rep. (N. Y.) 595.

17. Code Civ. Proc. requires personal service within thirty days after issuance of the attachment, or service by publication commenced within that time—Martin v. Smith, 37 Misc. Rep. (N. Y.) 425.

18. Sparks v. Bell, 137 Cal. 415, 70 Pac. 281.

19. Knight v. Hatfield, 129 N. C. 191.

20. McDonald v. Manice (Sup.) 72 N. Y. Supp. 543.

21. Rallings v. McDonald, 76 App. Div. (N. Y.) 112.

22. Rev. St. pars. 67, 68, 725—Wartman v. Pecka (Ariz.) 68 Pac. 534.

23. Yankton Sav. Bank v. Gutterson, 15 S. D. 486.

24. Holway v. American Exch. Nat. Bank (Neb.) 89 N. W. 382.

25. First Nat. Bank v. Van Doren (Neb.) 93 N. W. 1017.

26. Under Rev. St. U. S. § 5242, prohibiting attachment against national banks in state courts—Willard Mfg. Co. v. Geo. H. Tirney & Co., 130 N. C. 611.

27. Sullivan v. Moffat (N. J.) 52 Atl. 291.

28. Attachment in aid of action for money had and received, in which the identical money deposited by plaintiff was attached—Munns v. Donovan Commission Co. (Iowa) 91 N. W. 789.

29. Rev. St. 1898, § 2745—Gallun v. Weil (Wis.) 92 N. W. 1091.

30. Bowles Live-Stock Commission Co. v. Hunter, 91 Mo. App. 333.

jurisdiction, and the question of comity cannot arise.[31] In Texas, defendant's right to answer with as many defenses as necessary and pertinent to his cause, if filed simultaneously and in due order, will not prevent him from filing a plea in abatement to the writ on the ground of the insolvency of the sureties on the bond after filing a plea to merits; but where defendant's answer, a general denial, was filed nine months after the commencement of the suit, a plea in abatement filed three years and fifteen days later is too late.[32] That sureties on a bond are nonresidents, and that the resident sureties are not worth the amount required, may be raised by plea in abatement.[33] A motion may be made for an order for accounting from the party served in an equitable attachment; but a motion for an account under oath of the shares of stock attached cannot be made before complainants have established their bill, or shown circumstances requiring disclosure.[34] Plaintiff may discontinue the suit where defendant has only appeared specially to move vacation of the service and warrant.[35] The motion to dismiss attachment against a nonresident, to aid which garnishment has issued, on the ground that no property or credits of defendant within the jurisdiction have been seized, cannot lie until the garnishee has answered, though a bond for dissolution has been given.[36] Defendant may move for a discharge of the writ before levy.[37]

On a motion to dismiss for improvident issuance, the questions of existence of action in fact against defendant, or of statutory conditions requisite to the writ, or of the facts upon which such conditions rest, are immaterial.[38] An affidavit traversing the attachment affidavit in all parts except in the statement that plaintiff has reason to believe that defendant was disposing of his property to defraud his creditors is insufficient.[39]

Evidence.[40]—Until the contrary is shown, it will be presumed that the court decided an issue of right to an attachment on the affidavit alone.[41] Where the writ issues for the price of coal furnished as "necessaries," it will be presumed that it was furnished for domestic purposes, unless it appears otherwise.[42] If a corporation, cited to appear and give a certificate of property in its possession belonging to the defendant, refuses to do so, or gives an insufficient certificate, plaintiff may have an examination, but such examination must be limited to property liable to attachment within the jurisdiction.[43] The rights of parties to the property should be determined only by the preponderance of the evidence.[44] The manner of taking evidence on the motion is discretionary, where defendant traverses the affidavit.[45] On a petition to dissolve, defendant may testify that he had no knowledge of any debt owing to plaintiff, as showing absence of fraudulent intent in disposing of his property.[46] An affidavit of nonresidence, by the person from

31. In re Tune, 115 Fed. 906.
See ante, § 14, where the effect of bankruptcy as annulling attachment is treated.

32. Rev. St. art. 1262—Wallace v. First Nat. Bank (Tex.) 65 S. W. 180.

33. Wallace v. First Nat. Bank (Tex.) 65 S. W. 180.

34. Under Gen. Laws, c. 252, § 27—Ladd v. Franklin Loan and Trust Co. (R. I.) 53 Atl. 59.

35. Straus v. Guilhou (Sup.) 80 N. Y. Supp. 180.

36. Henry v. Lennox-Haldeman Co. (Ga.) 42 S. E. 383.

37. Sparks v. Bell (Cal.) 70 Pac. 281.

38. Gallun v. Well (Wis.) 92 N. W. 1091.

39. Reese v. Damato (Fla.) 33 So. 459.

40. Sufficiency of evidence of fraudulent intent—Abel & Bach Co. v. Duffy, 106 La. 260; of evidence as to failure of actual levy on property, so as to prevent running of limitations against the officer making the levy—Hill v. Haas, 46 App. Div. (N. Y.) 360; affirmed, 170 N. Y. 566.

41. The complaint cannot be considered unless verified and attached to the affidavit and referred to therein—Chitty v. Pennsylvania R. Co., 62 S. C. 526.

42. Attachment for claims for necessaries, under Rev. St. Ohio, § 6489—Collins v. Bingham, 22 Ohio Cir. Ct. R. 533.

43. Under Code Civ. Proc. §§ 650, 651—Stine v. Greene, 65 App. Div. (N. Y.) 221.

44. Bowles Live-Stock Commission Co. v. Hunter, 91 Mo. App. 333.

45. Geo. F. Dittman Boot & Shoe Co. v. Graff (Neb.) 91 N. W. 188.

46. Dimmock v. Cole (Mich.) 9 Detroit Leg. News, 166; Smith v. Same, Id.; Goodwin v. Same, Id.

whom the information as to nonresidence given in the affidavit of attachment was obtained, attached to the latter affidavit, may be considered on a motion to vacate to show the source of information, though not sufficiently authenticated to be admitted in evidence.[47] On notice of a motion to vacate, both on the attachment papers and the judgment, without any limitation as to the use of the judgment by defendant, it may be used by plaintiff, as well as defendant, to establish any facts recited therein; and where the judgment recited that defendant was a foreign corporation, and showed a claim due from it to plaintiff for breach of contract, which was based on the attachment papers and the judgment, it will be presumed that the recitals of the judgment were sufficiently proved, and it is immaterial that they were not substantiated by the affidavits.[48]

Judgment and decree or order.—A personal decree cannot be had in foreign attachment in chancery.[49] The judgment need not recite that execution shall issue against the property, or that the judgment is in rem, and valid only as against the attached property.[50] Judgment must be entered on the merits, where the parties appear voluntarily and go to trial on the issue of ownership in the original action.[51] A judgment of sale is not prima facie void as including land not owned by the defendant, unless that fact appears from the return of service.[52] A judgment in attachment in aid of assumpsit is entire, and, if void as to one of two defendants, is void as to both.[53] A defendant without title to, but in possession of, real estate attached as that of another, and claiming it as her own, may urge errors in a judgment for its sale.[54] An attachment creditor does not lose his rights by failing to take out execution on his judgment within sixty days after rendition, where he surrendered the property to a receiver prior to judgment, thereby preventing a levy.[55] Finding and judgment for defendant ipso facto discharge the attachment.[56] In vacating an attachment because founded on breach of a contract void under the statute of frauds, the court need not find that plaintiff had expended money on the property under the contract.[57]

On discharge of an attachment, neither party can be ordered to pay the sheriff's bondage by reason of the law providing for payment of legal charges on delivery to defendant by the officer, and defendant cannot be ordered to pay the sheriff's bondage as taxed by him, though the court has authority to tax it.[58] An order by the judge at chambers, discharging an attachment levied by one assuming to act as officer, but not qualified, on plaintiff's release, executed without presence of his counsel, or contest, does not settle the right of plaintiff to seize the property under a subsequent attachment, based on the original affidavit, filed when the action was commenced.[59] Where property is seized without an affidavit of grounds, the seizure may be discharged on motion, but the writ cannot be set aside.[60]

47. Mallon v. Rothschild, 38 Misc. Rep. (N. Y.) 8.
48. Belmont v. Sigua Iron Co. (Sup.) 80 N. Y. Supp. 771.
49. The proceeding is purely statutory, under Code Miss. §§ 486, 487—Chamberlin-Hunt Academy v. Port Gibson Brick & Mfg. Co., 80 Miss. 517.
50. Kerns v. McAulay (Idaho) 69 Pac. 539.
51. Haines v. Stewart (Neb.) 91 N. W. 539.
52. White v. Ladd, 41 Or. 324, 68 Pac. 739.
53. Britton v. Gregg, 96 Ill. App. 29.
54. Webber v. Tanner (App.) 23 Ky. Law R. 1694; modifying 23 Ky. Law R. 1107.
55. Under Gen. St. Conn. 1887, § 922—Central Trust Co. v. Worcester Cycle Mfg. Co., 114 Fed. 659.
56. Alpirn v. Goodman (Neb.) 91 N. W. 530.
57. Knight v. Hatfield, 129 N. C. 191.
58. Code Civ. Proc. § 709—Treadwell v. John A. Mead Mfg. Co., 75 App. Div. (N. Y.) 478.
59. J. V. Brinkman Co. Bank v. Gustin, 63 Kan. 758, 66 Pac. 990.
60. Under Rev. St. 1898, § 2731—Gallun v. Weil (Wis.) 92 N. W. 1091.

§ 16. *Hostile and opposing claims to attached property.*[61]—A mere claim of ownership of attached property will not give the right to intervene to settle the ownership in the attachment suit.[62] An interpleader cannot be maintained after the property is destroyed in the hands of plaintiff.[63] Interposition by a mortgagee who claims the proceeds of the property will not bind the owner by estoppel to prevent assertion of his rights.[64] Where a second attachment following one in the federal court is made subject thereto, one claiming the property under a deed of trust, and receiving the property from the marshal in the first attachment on a forthcoming bond, after selling the property and satisfying his deed, cannot interplead in the second attachment.[65] An attachment procured by collusion of the parties to give preference to plaintiff over other creditors is void against them.[66] After an attachment lien on land, obtained against a debtor, is enforced against his executrix by sale, insolvency of his estate is unnecessary to jurisdiction to clear title as against fraudulent grantees of the debtor.[67] A national bank may intervene in attachment; but intervention does not make it a party, so as to authorize dismissal.[68] A stranger in possession of attached property, who gives a statutory undertaking for redelivery, cannot assert ownership, so as to try the right of property.[69] A judgment creditor who assigned the judgment before its attachment by his creditor cannot bring an action to compel his assignee to interplead to protect his interests, since notice may be given the assignee to appear, which will fully protect the judgment creditor against him.[70] An interpleader is in the nature of replevin, so that the respective interests of the parties may be settled.[71] Interposition of a claim suit admits both the debt claimed by plaintiff and the levy.[72] Where defendants allow judgment to go by default, the only issue between them and plaintiffs is as to damages, so that an intervenor claiming the property has no right to interfere;[73] but intervention filed after sale of the property, and deposit of the proceeds with the clerk under order of court, is in time.[74] An intervenor in a landlord's attachment cannot recover for the use of the property, though he claims ownership.[75]

Pleading.—The provisions of a state statute as to the trial of claims against attached property are binding on the federal courts, so that, where the attachment plaintiff fails to have an issue made up at the term to which the execution is returnable as to the claim against the property, the claimant is entitled to have the property discharged, and be discharged from his forthcoming bond, and his right is not lost by failure to move for discharge during a number of terms of

61. Priorities, see ante, § 14; also see Priorities between Creditors. Bonds to indemnify levying officer, see ante, § 9; also see Bonds, Indemnity.

62. Haines v. Stewart (Neb.) 91 N. W. 539.

63. It involves primarily the right of possession—I. Stadden Grocery Co. v. Lusk, 95 Mo. App. 261.

64. The mortgagee cannot, by his acts, estop the mortgagor as against a wrongdoer—Petty v. Hayden, 115 Iowa, 212.

65. Simmons Hardware Co. v. Loewen, 95 Mo. App. 122.

66. Under Code, § 2156—Butler v. Feeder, 130 Ala. 604.

67. First Nat. Bank v. Tompkins (Neb.) 91 N. W. 551.

68. Willard Mfg. Co. v. Geo. H. Tirney & Co., 130 N. C. 611.

69. Right to trial under Code Civ. Proc. §§ 945, 996—Allyn v. Cole (Neb.) 91 N. W. 505.

70. Code, art. 9, § 17, providing for determination of rights to funds attached—Fetterhoff v. Sheridan, 94 Md. 445.

71. Drumm Flato Commission Co. v. Summers, 89 Mo. App. 300; Barnes v. Stanley, 96 Mo. App. 1.

72. Code, § 4141, provides for interposition of claims in attachment—Schloss v. Inman, 129 Ala. 424.

73. Alpine Cotton Mills v. Weil, 129 N. C. 452.

74. Code, § 3928—Petty v. Hayden, 115 Iowa, 212.

75. Intervention authorized by Code, § 3594—Ohde v. Hoffman (Iowa) 90 N. W. 750.

court.[76] A claim to property attached as belonging to a firm, which was declared bankrupt within four months after beginning the attachment, must be disposed of on the pleadings, and not on motion.[77] On proceedings by claimant, only the specific property covered by the affidavit and bond can be considered, and the claimant cannot prove that there was no valid levy.[78] The issue on interplea in attachment is the title of the attached property as between defendant and the interpleader.[79] Defects in a notice by a third person that attached property belonged to him are waived by execution of a proper indemnifying bond, and such waiver is sufficiently pleaded by alleging that the officer, in pursuance of the notice, required an indemnifying bond, which was given.[80]

Evidence and questions of fact.[81]—Where a claimant of attached goods withdrew his claim before the jury retired, and sued the officer in conversion, it will be presumed, on motion by defendant for judgment on the pleadings, that such suit was commenced prior to the sale in the attachment, there being no evidence on that issue.[82] The burden of proof is on the claimant, and he has the right to open and close;[83] he must establish his title affirmatively.[84] Where the claimant admits that defendant was in possession of goods at time of levy, he has the burden of proof, so as to entitle him to open and close, and must explain the possession of defendant as consistent with his claim of title.[85] Where the interpleader does not question the validity of the attachment and levy, plaintiff need introduce no evidence that he is a creditor of defendant, especially if he allege that the interpleader's title is fraudulent.[86] The inventory attached by the sheriff to the levy may be admitted as evidence,[87] and, on intervention after sale, testimony may be given as to the amount for which the property sold.[88] Complainant cannot introduce a receipted bill for the attached property, dated after the levy; and where the wife of defendant claims personal property attached as her own, evidence that defendant had listed the property with the assessor as his own may be admitted in rebuttal of his testimony that the property belonged to his wife.[89] Evidence that a debtor owning a kiln on the land of another had told the landowner to take the kiln for supplies advanced, and that he had done so, is admissible in favor of the landowner, who claims the land as against an attaching creditor who seized the kiln.[90] The issue for the jury on a claim is whether the property belongs to defendant and is liable to satisfaction of the writ.[91]

Trial.[92]—A separate trial is discretionary where the only issue is that of

76. Code Miss. 1892, §§ 4425-4428—Miller v. Tennant-Stribling Shoe Co. (C. C. A.) 119 Fed. 865.

77. New Orleans Acid & Fertilizer Co. v. Grissom, 79 Miss. 662.

78. H. B. Claflin Co. v. Harrison (Fla.) 31 So. 818.

79. Graham Paper Co. v. Crowther, 92 Mo. App. 273.

80. Under Code, §§ 3991-3993, 3906—Donnelly v. Mitchell (Iowa) 93 N. W. 369.

81. Sufficiency of evidence to show the right of claimant in attachment to the property—Brewer v. Gates (Miss.) 31 So. 205; of title of intervenor—Alpine Cotton Mills v. Weil, 129 N. C. 452; of value of goods in a suit by a claimant to recover them from attachment against another—Roberts v. Burr, 135 Cal. 156, 67 Pac. 46.

82. Singer Mfg. Co. v. Driver, 40 Or. 333, 67 Pac. 111.

83. H. B. Claflin Co. v. Harrison (Fla.) 31 So. 818; Graham Paper Co. v. Crowther, 92 Mo. App. 273.

84. Alpine Cotton Mills v. Weil, 129 N. C. 452.

85. People's Nat. Bank v. Harper, 114 Ga. 603.

86. Graham Paper Co. v. Crowther, 92 Mo. App. 273.

87. Schloss v. Inman, 129 Ala. 424.

88. Ohde v. Hoffman (Iowa) 90 N. W. 750.

89. Arnold v. Cofer (Ala.) 33 So. 539.

90. Code 1892, § 4231, which requires assignments of trusts to be in writing, is not applicable—Brewer v. Gates (Miss.) 31 So. 205.

91. Code, § 4142—Schloss v. Inman, 129 Ala. 424.

92. Sufficiency of instruction as to the possession of personalty as prima facie evidence of title in a case in which the wife of defendant claimed the property as her own, and of an instruction directing the

title.[93] Trial of a claim to attached property cannot be held before publication or service after issuance of an ancillary attachment writ.[94] A debt, though incapable of manual delivery, is within the statute authorizing the sheriff to proceed by jury to try title to attached property for the purpose of obtaining a bond.[95] Under the law giving the sheriff power to try the validity of a claim to attached property by a jury, and relinquish the levy if the verdict is for claimant, unless plaintiff gives a sufficient bond, a bond given by the attaching creditor voluntarily on such claim without a jury trial is valid, so as to enable the holding of the property.[96]

Findings and judgment.—The finding need not show general ownership in the claimant, where the taking is admitted by plaintiff, since special ownership is sufficient.[97] Judgment cannot be entered against the claimant and sureties in an indefinite amount, to be afterwards ascertained by the judgment in the principal suit, but may be given against them for the value of the property as fixed by the attaching officer, where the value is not controverted on trial of the claim, nor any finding had thereto.[98] Judgment cannot be rendered against the obligors on the claim bond, but should be made merely condemning the property as subject to the attachment, and liable to satisfaction of the judgment which has been rendered or is to be rendered.[99] Where goods claimed by an intervenor are sold as perishable by order of court, a judgment in favor of the claimant should be for the amount in court, not the value of the goods.[1] Where the recitals of the jury's verdict in a trial of right of property show that the verdict was made pursuant to an agreement between the parties, it will be presumed that the separate assessment of each item, according to the statutory requirement, was made unnecessary by the agreement, and, unless the contrary appears, that the assessment was impracticable.[2]

§ 17. *Wrongful attachment.*[3]—Where the action to aid which attachment was issued was pending, the owner of property attached cannot maintain an action of contract for its recovery against the officer serving the attachment.[4] That plaintiff gave an indemnity bond to the officer does not show responsibility for, or approval of, a seizure of goods of a third person.[5] Where one who had loaned money to a railroad contractor levied on property of the contractor and the railroad company, when a levy against property of the contractor alone would have stopped construction, he is liable in wrongful attachment for only such damages to the company as are clearly shown.[6] Where it appears that the administrator of an estate received goods uninjured which had been attached as property of the

jury to consider the assessment of taxes on the property against defendant in connection with other evidence on the question of title—Arnold v. Cofer (Ala.) 33 So. 539.

93. Alpine Cotton Mills v. Weil, 129 N. C. 452.

94. Lamb v. Russel (Miss.) 32 So. 916.

95. Code Civ. Proc. § 651—Minor v. Gurley, 39 Misc. Rep. (N. Y.) 662.

96. Comp. Laws, §§ 5002, 5125—Matheson v. F. W. Johnson Co. (S. D.) 92 N. W. 1083.

97. Roberts v. Burr, 135 Cal. 156, 67 Pac. 46.

98. Under Rev. St. § 1200, providing that judgment as to adverse claims shall be entered deciding the right of property, and giving plaintiff a right of recovery against the claimant for costs and damages of his intervention—Geiger v. Henry (Fla.) 32 So. 874.

99. Arnold v. Cofer (Ala.) 33 So. 539.

1. Hughes Bros. Mfg. Co. v. Reagan (Ind. Ter.) 69 S. W. 940.

2. Assessment of items required by Code, § 4143—Massillon Engine & Thresher Co. v. Arnold, 133 Ala. 368.

3. Amount of exemplary damages in wrongful attachment, as out of proportion to amount of actual damages—Leonard v. Harkleroad (Tex. Civ. App.) 67 S. W. 127. Sufficiency of evidence to show that the writ of venditioni exponas grew out of the attachment referred to in the bond sued on—Hamilton v. Maxwell, 133 Ala. 233.

4. Brady v. Royce, 180 Mass. 553.

5. Siersema v. Meyer, 38 Misc. Rep. (N. Y.) 358.

6. Cameron v. Orleans & J. R. Co., 108 La. 83.

estate, and that, after sale under order of court, the proceeds were paid to the estate, the attachment plaintiff is not liable for wrongful issuance of the writ.[7] The owner of attached goods may sue for wrongful attachment on plaintiff's bond, or independently thereof, and join the surety; and in the latter suit the surety cannot object to jurisdiction because his liability on the bond is less than the limit of jurisdiction, where the owner claims exemplary damages, bringing the amount within the limit.[8] A wrongful attachment cannot be attacked by other creditors on an ordinary creditor's bill.[9]

Pleading and damages.—Where the same amount of actual damages is claimed in an original and an amended petition, a plea to the jurisdiction will not lie on the amended petition after a plea to the merits on the original petition.[10] Plaintiff cannot recover "any damages" resulting from wrongful detention of the property,[11] nor lost profits.[12]

Evidence and questions of fact.—The inventory and appraisement made by the officer on levy is admissible on the value of the goods as against the creditor.[13] Evidence of the amount of plaintiff's business, profits, and credit, and the effect of a wrongful attachment thereon, are admissible; and evidence that news of the attachment was published by a mercantile agency is admissible under an allegation that the attachment injured plaintiff's business and credit, though defendants are not shown to have been directly responsible for publication; and where defendants pleaded a release from plaintiff, evidence thereof should have been admitted, though the complaint showed such excessive levy as to amount to duress.[14] Evidence of a sale of a part of his property by plaintiff, where limited to the issue of probable cause, is properly admitted where the attachment was on the ground of fraudulent disposition of property, and evidence is admissible to show that a deed from plaintiff to his father, was not filed until the day of issuing the writ, though it appeared to have been executed three years before.[15] Evidence of the proceedings in the attachment, and the action in which it was in aid, and of the application of the proceeds of the sale to the judgment obtained, is also admissible to show defendant's good faith. He may also testify as to the value of the goods after qualifying himself.[16] Where it appears that no writ was on file, motions by the attachment plaintiff in the original suit to substitute the writ, and to direct the officer to sell the property, may be admitted to show that the attachment defendant recognized the validity of the levy.[17] A suit against the officer for conversion, tried after sale and after withdrawal of his claim before it was submitted to the jury, the contrary not being shown, will be presumed, on a motion by the officer for judgment on the pleadings, to have been begun before sale.[18] The question of existence of a fraudulent intent is for the jury.[19]

7. Pinkard v. Willis (Tex. Civ. App.) 67 S. W. 135.
8. Leonard v. Harkleroad (Tex. Civ. App.) 67 S. W. 127.
9. Meyrovitz v. Glaser (Ala.) 31 So. 360.
10. Thompson v. Rosenstein (Tex. Civ. App.) 67 S. W. 439.
11. An instruction in such language is too broad—Hayes v. Union Mercantile Co. (Mont.) 70 Pac. 975.
12. Legal interest on the value of the goods may be recovered—Moravec v. Grell, (Sup.) 79 N. Y. Supp. 533.
13. Green v. McCracken, 64 Kan. 330, 67 Pac. 857.
14. Hayes v. Union Mercantile Co. (Mont.) 70 Pac. 975.
15. Cline v. Hackbarth (Tex. Civ. App.) 71 S. W. 48.
16. Cline v. Hackbarth (Tex. Civ. App.) 71 S. W. 48.
17. Hamilton v. Maxwell, 133 Ala. 233.
18. Singer Mfg. Co. v. Driver, 40 Or. 333, 67 Pac. 111.
19. Hamilton v. Maxwell, 133 Ala. 233.

CURRENT LAW.

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VOLUME I. OCTOBER, 1903. NUMBER 3.

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§ 1. *Admission to practice and license taxes.*—The right to practice law is not a natural one, and females cannot be admitted except by statutory authority; and a statute not expressly authorizing their admission cannot be so construed, since it is in derogation of the common law, under which they were not eligible;[2] and a law authorizing admission of members of the bar of other states under certain conditions will not authorize their admission, though members of the bar elsewhere.[3] An unmarried woman cannot be admitted in Tennessee to practice in the supreme court.[4] A law permitting admission of attorneys from another state without examination does not change the requirement of another law that they should be citizens of the United States.[5] A judgment rendered in an action in a municipal court in New York, defended by one not a party and not regularly admitted to practice, is void.[6]

In Maryland a purchaser at a foreclosure sale may file exceptions to a resale signed by himself, and not by the solicitor.[7] One who wrongfully procures admission should be disbarred.[8]

A license on the vocation may be imposed on lawyers by a city ordinance under statutory authority,[9] but it cannot now be imposed in California, either for

1. Questions relating to attorneys in fact (Agency), appointment of counsel for persons charged with crime (Criminal Procedure), conduct and argument of counsel in civil cases (Argument of Counsel, Trial), or criminal proceedings (Criminal Procedure), or presence of special counsel before the grand jury (Grand Jury), will be treated under topics indicated.

2. Code Md. art. 10, § 3, as amended by Act 1898, c. 139, and Code Md. art. 1, § 6—In re Maddox, 93 Md. 727.

3. Code Md. art. 10, § 6, as amended by Act 1898—In re Maddox, 93 Md. 727.

4. Ex parte Griffin (Tenn.) 71 S. W. 746.

5. Act 1895 (Wash.) § 6, as affected by Act Feb. 16, 1897 (Laws 1897, p. 12), amending Laws 1895, p. 178—In re Takuji Yamashita (Wash.) 70 Pac. 482.

6. Code Civ. Proc. §§ 63, 64—Kaplan v. Berman, 37 Misc. Rep. (N. Y.) 502.

7. Under Code Md. art. 16, §§ 126, 166, 186, authorizing appearance of a party for himself in equity in certain cases—Aukam v. Zautzinger, 94 Md. 421.

8. Neff v. Kohler Mfg. Co., 90 Mo. App. 296.

9. So in Virginia (Code, § 1040)—Blanch-

purposes of revenue,[10] or as a regulation of business.[11] A municipal license is not required of an attorney whose place of business or residence is not in the municipality, or who does not hold himself out as practicing before its bar.[12] Services which may be performed as well by a layman as a lawyer will not require a license.[13]

§ 2. *Privileges, disabilities, exemptions and liabilities; general powers of the vocation.*—An attorney who is also a notary may take the affidavit of his client for service by publication.[14] A law requiring an attorney bringing suit for a nonresident to be liable for costs will not apply where the suit is for several plaintiffs, part of whom are nonresidents.[15] An attorney in the United States courts is an officer liable to contempt for misbehavior.[16] Acceptance by an attorney of a trusteeship in bankruptcy is a surrender of his power to represent creditors as an attorney.[17] A statute prohibiting an attorney from acting as surety on an undertaking in a suit or proceeding applies to an injunction bond.[18] Attorneys must refrain from offensive language to court, opposing counsel, or witnesses.[19]

§ 3. *Suspension and disbarment.*—Disbarment is not punishment, but an exercise of the court's discretion in determining whether the attorney is a proper person; and the power to disbar is distinct from power to punish for contempt, though the same causes may be ground for both.[20] Statutory authority is unnecessary.[21] In North Dakota, the proceedings should begin in the district court unless the offense was committed in the supreme court, or with reference to its proceedings.[22] The supreme court of South Carolina has jurisdiction of disbarment proceedings.[23] The exclusive original jurisdiction of the Louisiana supreme court over professional misconduct does not apply to nonprofessional misconduct.[24] The proceedings are not criminal, and may be brought in the chancery branch of the district court.[25] Disbarment proceedings, and not a motion to vacate an order licensing an attorney, is the proper remedy for fraud and false representations in securing such order.[26]

Grounds.—The courts are not confined to the statutory grounds of disbarment.[27] Charges against an attorney must affect his professional fitness, and not merely his character as a citizen.[28] Misappropriation of a client's money;[29] or

ard v. Bristol (Va.) 41 S. E. 948, citing many cases. The Portland, Oregon, council is authorized, under the city charter, to impose a license tax on attorneys practicing in the city, notwithstanding their general license to practice, the city tax being on the occupation (construing Portland City Charter, § 32, subds. 1-4, 33)—Lent v. Portland (Or.) 71 Pac. 645.

10. Act March 23, 1901 (Pol. Code Cal. § 3366), impliedly repealed the power of municipalities to license for other purposes than regulation—City of Sonora v. Curtin, 137 Cal. 583, 70 Pac. 674.

11. Under St. Cal. 1883, p. 93, § 862, subd. 10, empowering municipalities to license "for regulation and revenue"—City of Sonora v. Curtin, 137 Cal. 583, 70 Pac. 674.

12. Evidence merely that he was a lawyer, and practiced in trial of three cases during the month given in the complaint, is insufficient—Ahlrichs v. Cullman, 130 Ala. 674.

13. St. Ky. § 100. Securing reduction of tax claim for another—Dunlap v. Lebus, 23 Ky. Law Rep. 1481, 65 S. W. 441.

14. Genest v. Las Vegas Masonic Bldg. Ass'n (N. M.) 67 Pac. 743.

15. Civ. Code Ga. § 5387—Berrie v. Atkinson, 114 Ga. 708.

16. Rev. St. U. S. § 725—Ex parte Davis, 112 Fed. 139.

17. In re Evans, 116 Fed. 909.

18. Dennett v. Reisdorfer, 15 S. D. 466.

19. In re Voss (N. D.) 90 N. W. 15.

20. In re Adriaans, 17 App. D. C. 39.

21. State v. Gebhardt, 87 Mo. App. 542.

22. Rev. Codes N. D. 1899, §§ 434-437—In re Freerks (N. D.) 90 N. W. 265.

23. In re Duncan, 64 S. C. 461.

24. The supreme court has such jurisdiction, by Const. art. 85, and nonprofessional misconduct is in the jurisdiction of the district court, under Act No. 129, 1896—State v. Fourchy, 106 La. 743.

25. Const. Ky. § 137—Commonwealth v. Richie, 24 Ky. Law Rep. 1218, 70 S. W. 1054.

26. Neff v. Kohler Mfg. Co., 90 Mo. App. 296.

27. State v. Gebhardt, 87 Mo. App. 542.

28. Neff v. Kohler Mfg. Co., 90 Mo. App. 296.

Ground of disbarment must show either conviction of crime or evidence of its commission or fraud amounting to moral turpitude—In re Cahill, 66 N. J. Law, 527.

29. In re Bearnes (Minn.) 92 N. W. 466; Southworth v. Bearnes (Minn.) Id.

advertisement by an attorney who agrees to obtain divorces in violation of law;[30] or misrepresentation amounting to fraud in collection of debts, whereby he retained more than his proper contingent fee;[31] or fraudulent acts regarding a sale of lands, and acceptance of payment therefor after he had parted with the title;[32] or substantial alteration or destruction of a transcript of testimony by an attorney who afterwards certified its genuineness;[33] or fraudulent use of a judgment by introduction of unauthorized provisions, whereby he obtains money from the county treasury;[34] or retention of a client's money after collection, and continual misrepresentation regarding his collection of claims and payment to the client;[35] or filing a motion in arrest of judgment falsely charging court officers with usurpation of office and improper interest, though the attorney stated he believed them true when made;[36] or obtaining a license on presentation of a license from another state, which he knew had been revoked, especially where his conduct since admission has been immoral and reprehensible;[37] or obtaining admission on an original certificate of admission from another state, which had been revoked, and a certificate of good moral character from a person in that state who did not know of the revocation;[38] or presentation by an attorney from another state, who asks for admission to the bar, of a forged letter of recommendation by a local firm, though the forgery was made by him under the impression that the firm would approve his action,[39]—constitutes sufficient grounds for disbarment. Frequenting a gambling house to play, and willful refusal to prosecute the proprietor, or neglect to prosecute offenders when proofs are furnished him, or to proceed to abate public nuisances under the statute, is such moral turpitude as justifies suspension of a state's attorney from practice.[40] Retention of money may be unprofessional, though not embezzlement.[41] It does not matter that a false statement in a motion did not amount to a technical or indictable crime.[42]

Censurable conduct.—Disbarment is not called for by misconduct previous to admission,[43] or deposit of a client's money as his own, and drawing it for his own use,[44] or a transfer of property inconsistent with a purpose to obtain title for his client,[45] or neglect to notify his client of the collection of money, or to pay it over immediately, there being no fraud or deceit,[46] or advising and assisting his client to disregard and oppose an order for appointment of a receiver pending appeal,[47] though these acts are deserving of censure.

30. People v. Smith, 200 Ill. 442.

31. In re Weed, 26 Mont. 507, 68 Pac. 1115.

32. In re Weed, 26 Mont. 507, 68 Pac. 1115.

33. Withdrawing from the transcript testimony as to talks with one accused of homicide after the crime, and substitution of other statements therefor, was a material alteration—Ex parte St. Rayner (Or.) 70 Pac. 537.

34. Rev. Codes N. D. 1899, § 427, subd. 3, and § 428—In re Freerks (N. D.) 90 N. W. 265, holding that the fact that attorney believed he had a valid claim may be considered by the court in mitigation.

35. People v. Keigan (Colo.) 69 Pac. 524.

36. In re Adriaans, 17 App. D. C. 39.

37. People v. Hahn, 197 Ill. 137.

38. Admission of attorneys from other states under Rev. Codes N. D. 1899, §§ 421, 424—In re Olmstead (N. D.) 91 N. W. 943.

39. Code Civ. Proc. Mont. § 394, and supreme court rule 22, require statutory evidence of good moral character as requisite for admission to the bar on license from a foreign jurisdiction — In re Woodward (Mont.) 71 Pac. 161.

40. Rev. Codes N. D. 1899, §§ 7243, 7620, c. 63. The violation of oath and refusal to obey the statute is a misdemeanor—In re Voss (N. D.) 90 N. W. 15.

41. The attorney kept the client's funds provided to bring suit on false representation that he had done so, even after she learned the truth, and intrusted the case to another attorney—People v. Mead, 29 Colo. 344, 68 Pac. 241.

42. The only question to be considered is the personal fitness of the attorney to be a member of the bar—In re Adriaans, 17 App. D. C. 39.

43. State v. Gebhardt, 87 Mo. App. 542.

44. In re Duncan, 64 S. C. 461.

45. Code Civ. Proc. Mont. § 402, providing for disbarment for felony, etc., construed with Comp. St. 1887, div. 4, § 200, making fraudulent transfer of property a felony—In re Weed, 26 Mont. 241, 67 Pac. 308.

46. In re Veeder (N. M.) 66 Pac. 545.

47. Coffin v. Burstein, 68 App. Div. (N. Y.) 22.

Defense or excuse.—The attorney cannot prevent disbarment by an offer to restore money converted by him.[48] The question of privilege cannot be urged to excuse falsifications in motions.[49] An attorney who appeared in his own defense in disbarment proceedings in which his license was revoked cannot plead ignorance of such revocation in subsequent disbarment proceedings against him in another state for procuring a license by means of the former revoked license.[50]

Proceedings in general.—Disbarment proceedings are not barred as ex delicto actions,[51] and are not affected by bar of criminal prosecution for the same offense.[52] In Louisiana a change in statutory procedure cannot retroact.[53]

The proceedings are most properly begun by a majority of the bar,[54] and should be entitled in the matter of the accused, and not as the state against him.[55] The mailing of an affidavit, charging misconduct of an attorney, to a judge in vacation, will authorize him, on sitting as a court, to direct proceedings and appoint attorneys to prosecute.[56]

The information must be certain and definite.[57] A petition on the ground of a statutory crime must allege specifically the facts constituting such crime.[58] It must ordinarily be verified by the oath of some person not upon mere information and belief,[59] unless verification is excused for good cause.[60] Neither petition nor information need be verified where instituted by the state bar association to the supreme court, and thereon information is prepared by the attorney general.[61]

Evidence.[62]—In a proceeding on the ground of retention of a client's money, a demand for the money must be shown, unless false representations of the attorney have led the client to believe that no moneys have been collected.[63] In proceedings to disbar an attorney admitted on license from another state, a copy of disbarment proceedings in the other state, showing a judgment finding him guilty of moral turpitude, is sufficient to show want of good moral character.[64]

Suspension pending trial.—If he is accused of crime as ground of disbarment, he can only be suspended until the facts are ascertained as required by the statute.[65]

Hearing and trial.—The attorney accused is not entitled to be present at the hearing of the charges against him by a commission created by the supreme court.[66] The evidence may be heard by referee and report made to the court.[67] The attorney's witnesses may be examined in open court.[68]

Decision and judgment; disbarment, reprimand or suspensions.—A proceeding

48. In re Z——, 89 Mo. App. 426.
49. In re Adriaans, 17 App. D. C. 39.
50. People v. Hahn, 197 Ill. 137.
51. The proceedings lie on a violation of the attorney's obligation under his license, and do not constitute an action ex delicto—State v. Fourchy, 106 La. 743.
52. In re Weed, 26 Mont. 507, 68 Pac. 1115.
53. State v. Fourchy, 106 La. 743.
54. In re Duncan, 64 S. C. 461.
55. The proceeding is in the nature of a rule to show cause why his name should not be stricken from the rolls—Hyatt v. Hamilton County (Iowa) 90 N. W. 508.
56. In the name of the state (Code, § 325)—State v. Tracy, 115 Iowa, 71.
57. Merely charging that money accounts were placed with the attorney, and that he appropriated the collection, is insufficient—State v. Gebhardt, 87 Mo. App. 542.
58. Code Civ. Proc. Mont. § 402, providing grounds for disbarment. Fraudulent transfer of property constituting a felony, under Comp. St. Mont. 1887, div. 4, § 200, in which the word "or" should be read "if"—In re Weed, 26 Mont. 241, 67 Pac. 308.
59. Code Civ. Proc. § 420—In re Weed, 26 Mont. 241, 67 Pac. 308.
60. State v. Gebhardt, 87 Mo. App. 542.
61. People v. Mead, 29 Colo. 344, 68 Pac. 241.
62. **Sufficiency of evidence** in disbarment—In re Bearnes (Minn.) 92 N. W. 466; Southworth v. Bearnes (Minn.) Id. Of fraudulent deception as ground for disbarment—State v. Fourchy, 106 La. 743. Of tampering with records—Ex parte St. Rayner (Or.) 70 Pac. 537.
63. Repeated calls by the client, which were understood, constitute sufficient demand—People v. Keigan (Colo.) 69 Pac. 524.
64. People v. Miller, 195 Ill. 621.
65. Rev. St. Mo. 1899, §§ 4929, 4930—State v. Gebhardt, 87 Mo. App. 542.
66. State v. Fourchy, 106 La. 743.
67. People v. Mead, 29 Colo. 344, 68 Pac. 241.
68. In re Duncan, 64 S. C. 461.

on the ground of conversion of a client's money cannot be dismissed, though instituted merely to coerce payment by the attorney.[69] An attorney should not always be disbarred, though he may be liable to censure.[70] Improper retention of money belonging to his client, by an attorney who employs subterfuge to prevent payment and proceedings against him, will warrant suspension for six months.[71] Collusion of parties to effect a dissolution of marriage with knowledge of their attorney is not cause for disbarment, though ground for temporary suspension.[72] In Iowa, where the attorney is found not guilty, a judgment for costs, and that he should be reprimanded, cannot be rendered on dismissal.[73] An order of disbarment or suspension, made without application and notice to the attorney, may be reviewed on writ of review (certiorari).[74] A disbarment judgment for contempt is not conclusive against the attorney in subsequent proceedings based upon the same charges, which included professional misconduct, since the two are distinct offenses.[75]

Reinstatement.—A court with power to suspend or disbar an attorney may reinstate him on proper proof that he has become a proper person. Where a report of a committee on a motion for reinstatement shows that the applicant has regretted his past misconduct, and has no financial entanglements connected with such acts, he may be restored to practice, but proof of subsequent good character must be sufficient to overcome the judgment of disbarment.[76] An attorney disbarred for larceny while drunk may be reinstated on proper showing of reform. His application for reinstatement must be under oath, must set forth the facts concerning the disbarment proceedings, the causes for reinstatement, and comply with rules for first admission of attorneys.[77] He will not be reinstated on petition of others, but must appear in person or by his own petition.[78]

§ 4. *Creation and nature, termination and change of the relation.*—A warrant of attorney is an instrument authorizing an attorney to appear for the maker or to confess judgment against him.[79] An agreement between an attorney and another, whereby the attorney was to procure the services of another attorney to prosecute certain claims, does not create the relation of attorney and client between the two attorneys, so as to enable the first to recover a contingent fee from the second in summary proceedings; nor does the fact that the first attorney had formerly performed work under an original retainer to prosecute the same suits raise the relation of attorney and client.[80] It will not be presumed that a husband has authority to employ an attorney for his wife from their relations, and because he made a contract for her separate estate,[81] nor because he was executor of a will under which she was legatee and trustee.[82] A contract authorizing an attorney to bring an action for a husband for personal injuries to his wife will not authorize the attorney to proceed in behalf of the wife.[83] Where three attorneys are employed by several defendants, testimony of one attorney that one defendant had

69. In re Z——, 89 Mo. App. 426.
70. State v. Fourchy, 106 La. 743.
71. Rev. St. Mo. 1899, §§ 4924, 4930, 4931—In re Z——, 89 Mo. App. 426.
72. In re Cahill, 66 N. J. Law, 527.
73. Code, §§ 323, 324. A judgment in such terms is appealable—State v. Tracy, 115 Iowa, 71.
74. McNamee v. Steele (Idaho) 69 Pac. 319; Goode v. Steele (Idaho) Id.
75. The contempt consisted in procuring approval of a worthless appeal bond by a false affidavit—People v. O'Brien, 196 Ill. 250.
76. In re Simpson (N. D.) 93 N. W. 918.
77. In re Newton (Mont.) 70 Pac. 510.
78. In re Wellcome, 25 Mont. 131, 69 Pac. 836.
79. Treat v. Tolman (C. C. A.) 113 Fed. 892; Cyc. Law Dict. "Warrant of Attorney."
80. In re Hirshbach, 72 App. Div. (N. Y.) 79.
81. Cushman v. Masterson (Tex. Civ. App.) 64 S. W. 1031.
82. Sowles v. Hall, 73 Vt. 55.
83. Whitesell v. New Jersey Ferry Co., 68 App. Div. (N. Y.) 82.

not employed him is insufficient alone to establish that the other attorneys had no authority to appear for such defendant.[84]

Discharge and substitution.—A party may discharge his attorney or solicitor, and the latter has no further authority in the cause,[85] and notice thereof may be given by bringing an action to restrain the attorney from collecting a judgment obtained;[86] but parties dealing with the attorney are not affected by the discharge without notice.[87] After judgment, the attorney of record may be treated by the adversary as still in that relation, in absence of notice of change.[88] A client who allows an attorney to continue to act for him thereby withdraws notice of discharge.[89] An attorney who notifies his client that he will not proceed further, after verdict obtained is reversed on appeal, discharges himself, and cannot object.[90] A mother's retainer of an attorney to sue for injuries to her child does not bind her when, as guardian, she employs a different attorney to sue.[91]

A change of attorneys may be made at any time by securing the fees of those who have acted.[92] That an attorney had advanced expenses of an action brought on a contingent fee, and his client was unable to repay them, will not prevent substitution of another attorney by order of court on proper application and notice.[93] On dissolution of partnership of attorneys, one of them may be substituted for the firm on his client's consent if no lien of the firm at date of substitution is prejudiced.[94]

Mere delivery of a referee's report may be made by a new attorney without a substitution.[95]

Only reasonable notice of a motion for change of attorneys is necessary, no special mode being required.[96] On motion for substitution the court must consider a contract between the client and attorney for compensation on quantum meruit, where the client had authority to make the contract.[97] Where a second motion charges bad faith and alleges full payment for services, the question of bad faith already considered on the first motion need not be reconsidered.[98] When the matter of compensation will be within control of the court, apportionment of it may be reserved in the order of substitution until final determination of the case.[99]

§ 5. *Rights, duties, and liabilities between attorney and client generally; loyalty and good faith.*—The attorney for two parties cannot serve notice on one

84. Patterson v. Yancey (Mo. App.) 71 S. W. 845.
A reference may be had on the question of employment, where evidence is conflicting—In re Hammann, 37 Misc. Rep. (N. Y.) 417.

85. Lynch v. Lynch, 99 Ill. App. 454.

86. O'Neal v. Spalding, 23 Ky. Law Rep. 1729, 66 S. W. 11.

87. Milliken v. McBroom, 38 Mo. 342. The rule applies to the attorney of record, even after judgment—Belle City Mfg. Co. v. Kemp, 27 Wash. 111, 67 Pac. 580.

88. Belle City Mfg. Co. v. Kemp, 27 Wash. 111, 67 Pac. 580.

89. Steinson v. Board of Education, 78 N. Y. Supp. 703.

90. Fargo v. Paul, 35 Misc. Rep. (N. Y.) 568.

91. Bryant v. Brooklyn Heights R. Co., 64 App. Div. (N. Y.) 542.

92. If the attorneys have been guilty of misconduct, security is unnecessary—O'Sullivan v. Metropolitan St. Ry. Co., 39 Misc. Rep. (N. Y.) 268.

93. Substitution in ejectment suit where the attorney had no interest in the land under Code Civ. Proc. § 284—Gage v. Atwater, 136 Cal. 170, 68 Pac. 581.

94. Schneible v. Travelers' Ins. Co., 36 Misc. Rep. (N. Y.) 522.

95. Code Civ. Proc. N. Y. § 65, requiring thirty days' notice, and § 1019, requiring a referee's report to be filed within sixty days after submission—Agricultural Ins. Co. v. Darrow, 70 App. Div. (N. Y.) 413.

96. 2 Ball. Ann. Codes & St. Wash. § 4769—Schultheis v. Nash, 27 Wash. 250, 67 Pac. 707.

97. Authority of client to ask for substitution under 2 Ball. Ann. Codes & St. Wash. §§ 4769, 6402, 6405—Schultheis v. Nash, 27 Wash. 250, 67 Pac. 707.

98. 2 Ball. Ann. Codes & St. Wash. § 4769. The guardian moved for a change for bad faith, and, this failing, moved secondly for bad faith, and alleged full payment for services according to the statute—Schultheis v. Nash, 27 Wash. 250, 67 Pac. 707.

99. Bryant v. Brooklyn Heights R. Co., 64 App. Div. (N. Y.) 542.

on behalf of another.[1] The burden is on the attorney to show that his client was not prejudiced by adverse dealings, and that no information was withheld which he should have known.[2] Profits realized by an attorney in dealing with the assets of an estate may be recovered by the heirs, though he was not guilty of fraud. He may retain profits made by the purchase of stock from an administrator in regard to which he did not represent the estate.[3] An attorney may represent a bankrupt, and also serve the trustee in bankruptcy (collecting debts) if no adverse interests clash; hence fees paid cannot be recovered.[4] It is not fraud for the attorney of an administrator to bring suit for another to enforce specific performance of a contract by the decedent to will his estate to the plaintiff, where the suit affects only the residue after administration.[5] Where an attorney has reduced a claim sent to him to judgment, he may assert against the clients a prior mortgage from the debtor, though he did not notify his clients of the existence of such mortgage, where the failure to give them notice did not prejudice them.[6] Attorneys who prosecuted an action for an infant for a contingent fee were liable for fraud of their clerk in negotiating a settlement, whereby more money was retained from the amount paid than the agreed fee, though they acted honestly, and attempted to discharge their liability by refunding the excess to the clerk.[7] A failure to pay over money on demand which an attorney had collected for a client and deposited to his own credit is breach of contract and not conversion.[8]

Diligence.—An attorney is liable for lack of such skill and diligence as is commonly possessed and exercised by members of the profession, but not for mere mistake of judgment as to the law, if he employed ordinary care in learning the facts, and a bond for faithfulness does not extend this.[9] He is put on inquiry as to all proceedings had in respect to the matter of his engagement, which he has a right and opportunity to know, regardless of a practice not to give out information, and of the contributing negligence of one of several injured clients.[10]

Damages for negligence.—In an action for negligence of attorneys in failing to appear in another action, evidence of the amount involved in the later action, or of the costs paid, cannot be given on the question of damages.[11] The proportion which would have been a contingent fee will be deducted in assessing what might have been recovered but for negligence.[12]

Evidence of negligence.—A client suing an attorney for failure to bring an action must prove that a cause of action existed, and the negligence of the attorney.[13] On the question of negligent omission to proceed, it is relevant that like proceedings were successful.[14]

Dealings between attorney and client.—Though such dealings are regarded with suspicion, and will not stand against the prejudice of his client, the attorney may contract with his client or the adverse party concerning the subject-matter

1. Bennett v. Weed, 38 Misc. Rep. (N. Y.) 290.
An adverse dealing to one client's interests on behalf of another may be repudiated on returning what was received—Hare v. De Young, 39 Misc. Rep. (N. Y.) 366.
2. Vanasse v. Reid, 111 Wis. 303.
3. Beale v. Barnett, 23 Ky. Law Rep. 1118, 64 S. W. 838.
4. Keyes v. McKerrow, 180 Mass. 261.
5. McCabe v. Healy (Cal.) 70 Pac. 1008.
6. State v. Fidelity & Deposit Co., 94 Mo. App. 184.
7. In re McGuinness, 69 App. Div. (N. Y.) 606.
8. Jackson v. Moore, 72 App. Div. (N. Y.) 217.
9. Bonding him to faithfully act—Humboldt Bldg. Ass'n v. Ducker, 23 Ky. Law Rep. 1073, 64 S. W. 671.
10. Attorneys for importers protesting against imposition of customs must take notice of appraiser's adverse decision in time to act—Childs v. Comstock, 69 App. Div. (N. Y.) 160.
11. Cornelissen v. Ort, 9 Detroit Leg. News, 604.
12. Childs v. Comstock, 69 App. Div. (N. Y.) 160.
13. Keith v. Marcus, 181 Mass. 377. Sufficiency of evidence considered—Eberhardt v Harkless, 115 Fed. 816.
14. Childs v. Comstock, 69 App. Div. (N. Y.) 160.

of his employment.[15] An assignment of claims to an attorney will be set aside where he secured them by fraud.[16] Purchase of a judgment he has secured is presumptively void, and the attorney must show good faith and sufficient consideration.[17] A conveyance by client to attorney, fairly conducted on full consideration and without undue influence, is valid,[18] and, if made in settlement of fees and loans made by the attorney, is not presumptively fraudulent.[19] A settlement for services between an attorney and client is not void where the client fully understood the transaction, and was under no disability.[20] An attorney cannot sue a client on a bond which accompanied a mortgage held by the attorney on lands conveyed by the client, where the attorney had promised to release him in the deed and hold the grantee liable, and the client assumed and paid a mortgage on lands received in exchange.[21]

Accounting to client.—Attorneys must account for the moneys of clients in their hands, except a reasonable sum for fees and expenses.[22] One who acts as attorney, agent, and lender of money to an inexperienced woman and her minor children must keep an intelligent account of the transaction, and can acquire no advantage from failure to account.[23]

An account rendered of money received by an attorney on a decree will not bind the client where it is incorrect and unexplained.[24]

§ 6. *Remedies between the parties.*[25]—One client cannot sue an attorney to recover his share of joint moneys collected by the attorney for several.[26] An assignment of choses in action to an attorney creates him a trustee for his client, so that a demand before suit to recover the property is unnecessary.[27] Breach of a nonprofessional employment will be redressed by action.[28]

Pleading.—That failure of an attorney to perform certain acts was due to an honest mistake in judgment is pleadable as a matter of defense, and not by demurrer to a petition alleging that he might have known of the existence of the facts by the exercise of ordinary care.[29]

Summary proceedings or motions.—The court has summary power to compel the attorney to pay into court or to the client a fund received in settlement, though the settlement was made in another state.[30] After the client takes the attorney's note for the amount, they are debtor and creditor so that payment cannot be enforced by summary proceedings;[31] and they will lie to compel an attorney to pay disputed disbursements to assisting counsel employed on a contingent fee, when the attorney has fully accounted to both the client and the counsel.[32] Where an attorney was employed on a contingent fee, and there was a dispute as to whether it was agreed that associate counsel should be paid from proceeds of the suit before division, the attorney was not guilty of illegal conduct in so paying the asso-

15. Vanasse v. Reid, 111 Wis. 303.
16. Brooks v. Pratt (C. C. A.) 118 Fed. 725; Same v. Gray, Id.
17. Stubinger v. Frey (Ga.) 42 S. E. 713.
18. Tippett v. Brooks (Tex. Civ. App.) 67 S. W. 512.
19. Lindt v. Linder (Iowa) 90 N. W. 596.
20. Kidd v. Williams, 132 Ala. 140.
21. Aiken v. Van Wert, 38 Misc. Rep. (N. Y.) 379.
22. In re Keen, 39 Misc. Rep. (N. Y.) 374.
23. Brigham v. Newton, 106 La. 280.
24. In re Bolles, 78 App. Div. (N. Y.) 180.
25. Suit to compel attorney to pay over money received for client—In re Martin, 73 App. Div. (N. Y.) 505.
26. Jackson v. Moore, 72 App. Div. (N. Y.) 217.
27. Metz v. Abney, 64 S. C. 254.
28. In re Hammann, 37 Misc. Rep. (N. Y.) 417.
29. Suit against attorney employed to examine titles for failure to report existence of liens—Humboldt Bldg. Ass'n v. Ducker, 23 Ky. Law Rep. 1073, 64 S. W. 671.
Complaint held sufficient to sue attorney for negligence in advising guardian as to a loan of ward's money—Gardner v. Wood, 37 Misc. Rep. (N. Y.) 93.
30. Compensation may be determined—Lynde v. Lynde (N. J. Ch.) 50 Atl. 659.
31. In re Neville, 71 App. Div. (N. Y.) 102.
32. In re Dailey, 65 App. Div. (N. Y.) 523.

ciate counsel; hence the remedy at law should be pursued.[33] A motion to compel an attorney to pay over moneys improperly retained is entertained and allowed at the court's discretion,[34] though he was not guilty of bad faith in withholding it.[35] The security provided by statute as a condition precedent to compelling an attorney to account for moneys in his hands is not necessary before proceeding by motion to compel him to pay over the money.[36] It is properly heard in the county where judgment is rendered. The court may adjust any set-off or lien which the attorney may have on the money; and where, on such motion, a claim of set-off by the attorney was heard and fraudulently allowed, the allowance amounts to a verdict. Ex parte affidavits cannot be admitted on the motion.[37] A motion by attorneys, against whom a petition to compel payment of moneys retained has been filed, to remit the petitioner to an action or legal proceeding in order that they might plead a counterclaim, cannot be denied on the theory that there is no request to remit petitioner to an action at law.[38] Where the client applies for an order directing his attorney to pay over a judgment collected, and the attorney submitted his rights in the fund to the court for determination, he cannot object that a reference should have been had to determine his fees.[39]

Equity will entertain a bill by a client setting up fraud against his attorney in retaining more than the amount of his proper fees, and asking that he be compelled to account as trustee;[40] but an accounting in equity cannot be had to compel an attorney to pay over money collected on a claim.[41] A bill may be brought in equity to investigate fraudulent transactions between attorney and client and declare them void, and equity will always, at the instance of a client, treat such transactions as constructively fraudulent, unless the attorney, upon whom the burden of proof lies, shows their fairness and equity.[42] An injunction may issue to restrain an attorney from collecting a judgment, though he had a lien thereon for fees which he might have obtained by proper action.[43]

Criminal proceedings.—If he retains the money pending an agreement as to his compensation, he is not liable under a law providing a fine for refusal to turn over such money, less his proper fees.[44]

§ 7. *Compensation and lien; compensation.*—A husband's unauthorized retainer to sue for his wife is not sufficient.[45] An agreement for a percentage of the demands to be defeated is a contract of employment, under which the attorney must perform in a reasonable time to bind his clients.[46] While an attorney cannot hire an associate without consent, he may recover for full services performed, though he had an assistant under his employment, and is to divide fees.[47]

Public services, or those pertaining to the office of attorney, are not paid; hence an attorney cannot recover from the county for representing the public disbarment proceedings.[48]

Services not specified in contract.—An attorney employed for a certain pur-

33. Lynde v. Lynde (N. J. Ch.) 50 Atl. 659.
34. Keeney v. Tredwell, 71 App. Div. (N. Y.) 521.
35. Code Iowa, §§ 3826-3830—Union Bldg. & Sav. Ass'n v. Soderquist, 115 Iowa, 695.
36. Code Iowa, § 331—Union Bldg. & Sav. Ass'n v. Soderquist, 115 Iowa, 695.
37. Union Bldg. & Sav. Ass'n v. Soderquist, 115 Iowa, 695.
38. In re Pollock, 69 App. Div. (N. Y.) 499.
39. In re Borkstrom, 168 N. Y. 639.
40. Maloney v. Terry, 70 Ark. 189.
41. Pfau v. Fullenwider, 102 Ill. App. 499.
42. Robinson v. Sharp, 201 Ill. 86.
43. O'Neal v. Spalding, 23 Ky. Law Rep. 1729, 66 S. W. 11.
44. Hamel v. People, 97 Ill. App. 527.
45. Evidence held insufficient to show that husband's act was binding on wife—Whitesell v. New Jersey Ferry Co., 68 App. Div. (N. Y.) 82.
46. Wheeler v. Harrison, 94 Md. 147.
47. Kingsbury v. Joseph, 94 Mo. App. 298.
48. Code Iowa, §§ 323-329. Section 325 nowhere provides that the county shall pay fees to such attorney—Hyatt v. Hamilton County (Iowa) 90 N. W. 508.

pose may recover for all services required to that end;[49] but he cannot recover for unless labor performed through negligence or inexperience, nor for services in an action where the statute demands special evidence, if he has failed first to ascertain its existence.[50] Recovery cannot be had for services for which the attorney was not employed, and which were done without his client's knowledge or consent;[51] or for services of assistant counsel, employed without authority.[52] An agreement to prosecute a particular suit will not bind the attorney to defend a motion to vacate the judgment obtained.[53]

Implied contract.—A client who knew an attorney was rendering services for him, and did not dissent, is liable on an implied contract for fees; the result of a case in which he was employed, or the conditions of a distinct contract for other services, cannot affect the implied contract.[54] On an unauthorized statement to him that he was to appear, an attorney cannot do so and recover from a party who had no litigable interest in the suit.[55] Employment of one attorney by another to assist in a case raises an implied contract by the client to pay the second attorney's fees;[56] but the client's knowledge that assistant counsel were employed and were acting will not bind him where he believed that his attorneys were responsible for the fees.[57] An attorney who employs local counsel to conduct a suit in another county may charge the fees as expenses to the extent he would have expended had he gone in person.[58] A written contract between an attorney and client for compensation in certain litigation cannot affect the right to compensation of another attorney employed by the first attorney, with consent of his client, to conduct the argument on appeal, where the contract was unknown to the second attorney, and no arrangement was made concerning compensation.[59] Where an attorney employed to assist another in a suit is ignorant of an agreement that the first attorney should pay his fees, such agreement cannot be shown in an action against the client for such fees.[60]

Employment of several attorneys or by several clients.—Several employment of more than one attorney in the same cause entitles each to recover value of his own services.[61] Where it is shown that attorneys fully performed certain labors for several clients, and were prepared to defend all their rights, they may recover for fees on the contract, though no particular services were rendered as to one of the clients.[62]

Contingent fees and payment in property recovered.[63]—A contingent fee contract, not champertous, is valid where the costs are paid by the client, and binding between the parties as to the proportion of the amount recovered agreed to be paid;[64] but the contract must not offend public policy by stipulating against a

49. Investigation of title to lands in a foreign state—Brownrigg v. Massengale (Mo. App.) 70 S. W. 1103.

50. Leo v. Leyser, 36 Misc. Rep. (N. Y.) 549.

51. Preparation and filing of brief—Duckwall v. Williams (Ind. App.) 63 N. E. 232.

52. Dillon v. Watson (Neb.) 92 N. W. 156.

53. Foreclosure of mechanic's lien—Cranmer v. Brothers, 15 S. D. 234.

54. Davis v. Walker, 131 Ala. 204.

55. Appearing for casualty company insuring railroad company against injuries to employes in suit by indemnity company, insuring an employe as to injuries, against the railroad company—Lillis v. Pennsylvania Casualty Co., 9 Detroit Leg. News, 315, 91 N. W. 165.

56. The first attorney was the agent of his client in the employment—Miller v. Ballerino, 135 Cal. 566, 67 Pac. 1046, 68 Pac. 600.

57. McCarthy v. Crump (Colo. App.) 67 Pac. 343.

58. Dillon v. Watson (Neb.) 92 N. W. 156.

59. Allen v. Parrish (Kan.) 70 Pac. 351.

60. Miller v. Ballerino, 135 Cal. 566, 67 Pac. 1046, 68 Pac. 600.

61. MacDonald v. Tittmann (Mo. App.) 70 S. W. 502.

62. Wheeler v. Harrison, 94 Md. 147.

63. As to the rights of champertous contractors, consult Champerty and Maintenance.

64. This under the Pennsylvania law and the federal law—Muller v. Kelly, 116 Fed. 545.

Suing in forma pauperis does not show that attorney acts for contingent fee, and is partner in suit—Allison v. Southern R. Co., 129 N. C. 336.

settlement,[65] nor provide for an overreaching excessive portion.[66] Suit on a life policy may be so undertaken.[67]

A contract that attorney's fee shall be collected from proceeds of an insurance policy assigned to the client to secure notes containing a clause for fees is an equitable assignment pro tanto of the proceeds of the policy.[68]

Computing and assessing amount.—A fixed fee is not reduced because less labor was required than had been anticipated.[69]

In the absence of contract, the measure of fees is the reasonable value of the services,[70] to be determined by the usual charges for the same or similar services for competent persons, or reasonable compensation under the facts of the particular case, where no usual charge is established.[71] Professional standing of an attorney, his reputation in a special line, and the importance of his services, measured by the amount involved, the time taken, and the result, together with the conditions connected with the subject-matter, may be considered in determining his fees.[72] That he has been unsuccessful in his efforts will also be considered.[73] Where the contingent fee is based on an "award" for taking land made long after title was taken, it includes interest on the award.[74] An agreement to institute a suit for recovery of money for half of the amount recovered is proper if not induced by fraud, or if the fee is not so excessive as to show improper advantage.[75] A five hundred dollar fee certain, and one thousand dollars additional in case of success, is reasonable in collection of a claim, by suit, for nearly twenty thousand dollars.[76] The amount of property saved by the efforts of the attorney for his client should be considered in assessing fees on a contingent basis,[77] but the fees cannot exceed the agreed proportion of the amount actually received by the client from the judgment.[78]

Where an attorney, employed by an estate, improperly induced the heirs to enter a contract for collection of an insurance policy on the life of deceased at a large contingent fee, he was entitled to recover only reasonable compensation.[79]

Allowances by court.—In New York a judgment for costs only when collected on execution should be paid to the attorney to whom the costs belong, and not to his successful client.[80] An attorney commencing suit without authority cannot have costs.[81] A contract giving an attorney part of alimony recovered for his client, as fees, is void,[82] and none of it should be diverted to expenses if there is an allowance for that.[83]

Loss or forfeiture of compensation.—Fraud of the attorney,[84] and withdrawal

65. Davis v. Chase (Ind.) 64 N. E. 88.

66. Robinson v. Sharp, 201 Ill. 86. Half held proper—In re Fitzsimons, 174 N. Y. 15.

67. Robinson v. Sharp, 201 Ill. 86.

68. Blakey v. New York Life Ins. Co., 28 Ind. App. 428.

Construction of contract for conveyance of part of land recovered as attorney's compensation—Adams v. Hopkins (Cal.) 69 Pac. 228.

69. Employment by devisee to prevent sale of property by executors—Browder v. Long, 23 Ky. Law Rep. 2068, 66 S. W. 600.

70. Kingsbury v. Joseph, 94 Mo. App. 298.

71. Bingham v. Spruill, 97 Ill. App. 374.

72. Schlesinger v. Dunne, 36 Misc. Rep. (N. Y.) 529.

73. Germania Safety Vault & Trust Co. v. Hargis, 23 Ky. Law Rep. 874, 64 S. W. 516; Randall v. Packard, 142 N. Y. 47.

74. Bassford v. Johnson, 172 N. Y. 488, modifying order in Re Bassford, 71 App. Div. (N. Y.) 617.

75. In re Fitzsimons, 174 N. Y. 15.

76. Fox v. Willis, 24 Ky. Law Rep. 1773.

77. Employment to recover realty and to clear titles for contingent fee, based upon the value of the land under which the same was recovered for timber cut from the land by trespassers—Bowser v. Patrick, 23 Ky. Law Rep. 1578, 65 S. W. 824.

78. Leslie v. York, 23 Ky. Law Rep. 2076, 66 S. W. 751.

79. Robinson v. Sharp, 201 Ill. 86.

80. Adams v. Niagara Cycle Fittings Co., 10 N. Y. Ann. Cas. 401.

81. Whitesell v. New Jersey Ferry Co., 68 App. Div. (N. Y.) 82.

82. The rights under a decree for alimony are not assignable or capable of anticipation—Lynde v. Lynde (N. J. Err. & App.) 52 Atl. 694.

83. In re Bolles, 78 App. Div. (N. Y.) 180.

84. Claimed as set-off in action for the fraud—Harding v. Helmer, 193 Ill. 109.

without cause of an attorney employed generally,[85] will forfeit compensation; but his acting for the other party with his client's consent will not affect the right.[86] The contract for fees must not be unreasonable in amount.[87]

Frustration of performance.—Discharge for good cause will prevent recovery of compensation.[88] If the employment is without time, and the attorney is discharged without fault before complete performance, he may recover for services rendered.[89] Mere authority to bring a suit, being revocable by the client, entitles the attorney only to compensation for services performed before revocation.[90] An attorney discharged without cause while the litigation for which he was employed is still pending may recover for loss of compensation at once.[91] Abandonment of his enterprise by the client before services are rendered will not prevent recovery of a retainer by the attorney;[92] but an attorney engaged to assist in a trial can only recover the reasonable value of his services, where a compromise was made on the eve of the trial, though his services were to be gratuitous in case suit was unsuccessful.[93] Where the other party, on compromise and demurrer, agrees to pay an attorney, he is liable for reasonable fee under the attorney's contract, less a reasonable rate thereof as represented by the part of the attorney's duties still unperformed.[94] Payment by defendant of a certain sum without admitting plaintiff's cl . but merely to stop suit and annoyance, is not a settlement or recovery within an agreement by plaintiff to pay his attorney a certain fee on "settlement or recovery."[95]

Lien.—A law giving an attorney's lien cannot be applied retroactively to affect contracts containing no provision therefor.[96] An attorney acting before a county board sitting judicially appears in legal "proceedings," and has a lien for fees without filing a claim or giving notice as against the claimant represented.[97] An attorney who drew a will cannot retain possession of it until his fees for that and other services are paid, and may be compelled to produce the instrument.[98]

As a general rule there is no lien on the subject-matter of litigation; hence where, in a suit for divorce and alimony, and to set aside a fraudulent conveyance by the husband and wife to others, the husband defaulted, and, before the question of alimony was submitted, the wife dismissed her case, her attorneys had no lien.[99] The husband's attorney in divorce proceedings has no lien on money decreed to be paid by the wife in consideration of a transfer of his interest in their joint property, where the husband failed to comply with conditions giving him a like right to conveyance from her.[1]

The lien exists only for services concerning the particular fund on which it is sought,[2] and does not attach to funds which the attorney did not assist in creat-

85. Cahill v. Baird (Cal.) 70 Pac. 1061.
86. Brodie v. Parsons, 23 Ky. Law Rep. 831. See Strong v. Investment Union, 183 Ill. 97.
87. A fee of one-half the amount recovered in compelling an administratrix to account regarding a large estate, in which all the parties are interested, is excessive, and cannot be enforced—In re Fitzsimons, 77 App. Div. (N. Y.) 345.
88. Cahill v. Baird (Cal.) 70 Pac. 1061.
89. Union Surety & Guaranty Co. v. Tenney, 102 Ill. App. 95; judgment affirmed 200 Ill. 349.
90. Whitesell v. New Jersey Ferry Co., 68 App. Div. (N. Y.) 82.
91. Well v. Finneran, 70 Ark. 509.
92. Union Surety & Guaranty Co. v. Tenney, 200 Ill. 349.
93. Action of quantum merult against the attorneys by whom he was employed to recover fees—O'Neill v. Crane, 65 App. Div. (N. Y.) 358.
94. Bowser v. Patrick, 23 Ky. Law Rep. 1578.
95. Randel v. Vanderbilt, 75 App. Div. (N. Y.) 313.
96. Kendall v. Fader, 99 Ill. App. 104; judgment affirmed 199 Ill. 294.
97. Maloney v. Douglas County (Neb.) 89 N. W. 248.
98. In re Bracher (N. J. Prerog.) 51 Atl. 63.
99. Code Iowa, § 321—Keehn v. Keehn, 115 Iowa, 467, citing many cases with full discussion.
1. Canney v. Canney (Mich.) 91 N. W. 620.
2. Aber's Petition, 18 Pa. Super. Ct. 110.

ing, or of which he never had custody;[3] nor will it exist as against a fund in court which is consumed by a lien prior to the one which the attorney has enforced;[4] nor can a special lien be claimed on a fund recovered under a right adverse to that of the party represented by the attorney.[5] Funds of an estate in bank, and checks drawn before letters issued, are not subject to a lien for services respecting only the executor's share, and rendered before his appointment, which was made to avert a contest, and prejudiced some of the legatees.[6]

It exists to secure expenses as against a judgment,[7] or the amount of recovery for a minor,[8] or funds in the hands of the other party, where procured by proper notice before payment,[9] but not against a garnishment fund in favor of the attorney of the garnishment defendant,[10] nor on a fund resulting from settlement, after the plaintiff's death, of a suit for personal injuries,[11] nor on property for defending successfully a suit for its recovery,[12] nor on a homestead for services in a suit to recover it,[13] nor for representation of a defendant, where no counterclaim is alleged,[14] nor where such defendant claims no affirmative relief, but the attorney may be protected against fraudulent and collusive settlement.[15]

Attorney's fees cannot be made a lien on a homestead, though stipulated in a mortgage for improvements,[16] or in a contract giving a mechanic's and materialman's lien;[17] but in Louisiana fees for services in selling property of an insolvent are prior to the privilege of the vendor or lessor.[18] Fees in a foreclosure suit, in which the decree provides for payment, form part of the judgment, and, if not paid, go to the mortgagee in trust for the attorney; and the lien therefor may be enforced against property bought in the name of another, who purchased the decree from the mortgagee.[19] Where the fee is contingent, the lien is only prospective.[20] An agreement of heirs to pay a contingent fee in a partition suit does not create an equitable interest in or a lien upon property of an estate, so that the agreement may be enforced in the partition or on distribution of the property.[21]

The attorney's statutory lien on a judgment gives him only additional security, and does not destroy his rights in a judgment for costs only.[22] The lien of an attorney for plaintiff on his client's judgment for taxable costs and court charges is prior to defendant's right to set off another judgment held by him against plaintiff.[23] Parties who settle with the adverse party for less than the amount of a judgment obtained against them, on which attorneys have a lien, are personally liable for their fees.[24] A contract with attorneys for legal services in re-

3. Schmertz v. Hammond, 51 W. Va. 408.
4. Schmertz v. Hammond, 51 W. Va. 408.
5. Schmertz v. Hammond, 51 W. Va. 408.
6. Kerngood v. Jack, 38 Misc. Rep. (N. Y.) 309.
7. In re Dailey, 65 App. Div. (N. Y.) 523.
8. American Lead Pencil Co. v. Davis (Tenn.) 67 S. W. 864.
9. Gen. St. Minn. 1894, § 6194, providing a lien for attorney's fees on judgments or papers in possession of the attorney—Weicher v. Cargill, 86 Minn. 271.
10. Phillips v. Hogue, 63 Neb. 192.
11. The fund represents the damages suffered by the estate, and not by the deceased plaintiff—In re Carrig, 36 Misc. Rep. (N. Y.) 612.
12. St. Ky. § 107—Thompson v. Thompson, 23 Ky. Law Rep. 1535.
13. Exemption under Const. Tenn. art. 11, § 11, and Shannon's Code Tenn. § 3798—McBroom v. Whitefield, 108 Tenn. 422.
14. The lien under Code Civ. Proc. N. Y. § 66, cannot be made to extend to liability of plaintiff on an injunction bond—Fromme v. Union Surety & Guaranty Co., 39 Misc. Rep. (N. Y.) 105.
15. Lien given by Code Civ. Proc. N. Y. § 66—Saranac & L. P. R. Co. v. Arnold, 41 App. Div. (N. Y.) 482.
16. Harn v. American Bldg. & Sav. Ass'n (Tex.) 65 S. W. 176.
17. American Bldg. & Sav. Ass'n v. Daugherty (Tex. Civ. App.) 66 S. W. 131.
18. Salaun v. Creditors, 106 La. 217.
19. Loofbourow v. Hicks, 24 Utah, 49, 66 Pac. 602.
20. Anderson v. Itasca Lumber Co., 86 Minn. 480; Cameron v. Boeger, 102 Ill. App. 649.
21. Boyle v. Boyle, 116 Fed. 764.
22. Under Code Civ. Proc. N. Y. § 66—Adams v. Niagara Cycle Fittings Co., 10 N. Y. Ann. Cas. 401.
23. Pride v. Smalley, 66 N. J. Law, 578.
24. Flint v. Hubbard (Colo. App.) 66 Pac. 446; Fischer-Hansen v. Brooklyn Heights R. Co., 173 N. Y. 492.

gard to mining claims gives them no right of action against a subsequent purchaser of the property who did not know of the contract, where it gave such attorneys no interest in the proceeds of the sale until it was received by the owners.[25]

Loss of lien.—An attorney who authorized his client to commence action on a judgment obtained by him in another state loses his lien on the judgment as to the judgment debtor.[26] An attorney who notifies his client that he will not proceed further after the verdict obtained is reversed on appeal without payment of fees thereby discharges himself if the fees are not paid, so that he cannot object to susbstitution of another attorney on the ground of his lien.[27]

Protection of fees or lien in suit in which attorney is employed.—The attorney's lien may be enforced in the action in which the attorney served,[28] though it will not prevent dismissal by the client.[29] Contra in Georgia, where the party cannot withdraw a proceeding against objection of his attorney, when the proceeding, if successful, would result in recovery of property as to which the attorney would have a lien for fees.[30] Attorneys in an action for personal injuries, who are entitled to a portion of the recovery in lieu of fees, cannot object to plaintiff's dismissal without their consent, nor can they be made parties and continue the prosecution merely because of their lien.[31] After two trials without result, a dismissal by plaintiff without knowledge or consent of his attorney, and not based on settlement, or for the purpose of defrauding the attorney, is proper, though he agreed to give the attorney a third of the amount recovered and expenses, and that no settlement should be made without consultation.[32] But plaintiff in a personal injury suit assigned to attorneys cannot compromise with defendant, who knows that the suit was brought on a contingent fee, except as to the unassigned part of the claim.[33]

If the retainer agreed upon is not paid before time of trial, an attorney who has appeared and filed answer for defendant may withdraw from the case or fail to appear at trial.[34] Parties to a suit in which no counterclaim or affirmative defense is asked may discontinue after a first trial, and will not be compelled to go to trial again for the benefit of defendant's attorneys who served on the first trial and the appeal.[35]

The claim of an attorney for services in prosecuting a suit for personal injuries will not entitle him to intervene,[36] nor can he do so in a divorce suit.[37] A contract for a contingent fee in case of judgment or settlement will not entitle attorneys to be made parties, nor does it amount to an assignment of a part of the claim.[38]

A set-off of judgments will not be allowed to defeat the attorney's lien for tax-

25. Weiss v. Gullett (Colo. App.) 70 Pac. 442.

26. The attorney sent a transcript of the judgment on which to bring suit, and agreed to hold the client personally—Barnabee v. Holmes, 115 Iowa, 581.

27. Fargo v. Paul, 35 Misc. Rep. (N. Y.) 568.

28. Gen. St. Minn. 1894, § 6194—Welcher v. Cargill, 86 Minn. 271.

29. Cameron v. Boeger, 102 Ill. App. 649, jt. aff. 200 Ill. 84. Dismissal on appeal—Williams v. Miles, 63 Neb. 851.

30. Walker v. Equitable Mortg. Co., 114 Ga. 862.

31. Code Tenn. 1899, c. 243, § 1, providing a lien on the right of action from the date of filing the suit, gives no such right to the attorney—Tompkins v. Nashville, C. & St. L. R. Co. (Tenn.) 72 S. W. 116.

32. Anderson v. Itasca Lumber Co., 86 Minn. 480.

33. The contract empowered the attorney to sue in his own name—Texas Cent. R. Co. v. Andrews (Tex. Civ. App.) 67 S. W. 923.

34. Silver Peak Min. Co. v. Harris, 116 Fed. 439.

35. Saranac & L. P. R. Co. v. Arnold, 41 App. Div. (N. Y.) 482.

36. Southern Pac. Co. v. Winton, 27 Tex. Civ. App. 503.

37. Keehn v. Keehn, 115 Iowa, 467.

38. Cameron v. Boeger, 102 Ill. App. 649; judgment affirmed 200 Ill. 84. Not party in interest—Allison v. Southern R. Co., 129 N. C. 336.

able costs.[39] An attorney cannot have a discontinuance set aside because of failure to provide for costs, where his client is solvent and consents to the discontinuance.[40] An agreement whereby an attorney is to defend and receive costs taxed to his client, if successful, as fees, gives him no such interest as will prevent discontinuance by his client without costs, on stipulation with the other party.[41]

Remedies for enforcement of lien or recovery of compensation.—Fees of attorneys representing a minor cannot be fixed on ex parte application.[42] Where an attorney is substituted in a suit for another, who was to recover a contingent fee, the former attorney is entitled to be protected in the order of substitution, so that any compensation due him in the event of recovery may be withheld.[43] The attorney's lien on a client's cause of action cannot be enforced, after accord and satisfaction, without an order of the court.[44] A set-off cannot be allowed to the extent of an attorney's lien on a judgment recovered.[45]

An order permitting attorneys to enforce their lien by final judgment after a settlement between the parties cannot be had where it does not appear that their client was insolvent or refused to pay them. That a settlement was induced by fraud cannot affect the right of the attorneys of the other party to enforce their lien by final judgment, though their client was not guilty of fraud.[46]

In New York a statutory provision for enforcement of an attorney's lien does not prevent a suit in equity to enforce it,[47] though the cases seem to be in conflict as to the rights in equity;[48] but equity will enforce an attorney's lien on an award in eminent domain, where the distribution of the award is disputed.[49] An attorney may enforce in equity a lien against a judgment in foreclosure secured for a client who died pending the suit, where the executrix employed another attorney to obtain the judgment, and bought the mortgaged property.[50] The lien extends to proceeds of a cause of action and to the fund created by settlement, so that, if the other party, with actual notice of the lien, pays the fund to the client, he is liable in an equitable action for enforcement of the lien if the client is insolvent.[51]

Pleading and proof.[52]—An attorney may join in the same action a count for fees and a count for claims for witness' fees in the litigation duly assigned to him.[53] The attorney need not plead his admission,[54] nor can such objection be urged in arrest of judgment;[55] and he is not bound to show affirmatively that no fraud or lack of proper knowledge was present at formation of the contract of employment.[56] A verbal employment by corporate agents of an attorney for so

39. Collins v. Campbell, 97 Me. 23.
40. McKay v. Morris, 35 Misc. Rep. (N. Y.) 571.
41. Garvin v. Martin (Wis.) 93 N. W. 470.
42. American Lead Pencil Co. v. Davis (Tenn.) 67 S. W. 864.
43. Bryant v. Brooklyn Heights R. Co. 64 App. Div. (N. Y.) 542.
44. Code Civ. Proc. N. Y. § 66—Doyle v. New York, O. & W. R. Co., 66 App. Div. (N. Y.) 398.
45. Finney v. Gallop (Neb.) 89 N. W. 276.
46. Code Civ. Proc. N. Y. § 66—Young v. Howell, 64 App. Div. (N. Y.) 246.
47. Code Civ. Proc. N. Y. § 66—Fischer-Hansen v. Brooklyn Heights R. Co., 173 N. Y. 492; Skinner v. Busse, 38 Misc. Rep. (N. Y.) 265, 11 Ann. Cas. 156.
48. Lien given by Code Civ. Proc. N. Y. § 66—Fromme v. Union Surety & Guaranty Co., 39 Misc. Rep. (N. Y.) 105.
49. Deering v. Schreyer, 171 N. Y. 451.
50. Lien given by Code Civ. Proc. N. Y. § 66—Skinner v. Busse, 38 Misc. Rep. (N. Y.) 265, 11 Ann. Cas. 156.
51. Code Civ. Proc. N. Y. § 66—Fischer-Hansen v. Brooklyn Heights R. Co., 173 N. Y. 492.
52. As to the grounds which may be considered in computing the proper fee, see supra, this section, "Computing and Assessing Amount." Sufficiency of complaint in action by attorneys to enforce a lien against the judgment fraudulently satisfied by their insolvent client—Flint v. Hubbard (Colo. App.) 66 Pac. 446.
53. Flint v. Hubbard (Colo. App.) 66 Pac. 446.
54. Miller v. Ballerino, 135 Cal. 566, 67 Pac. 1046, 68 Pac. 600.
55. Kersey v. Garton, 77 Mo. 645.
56. Clifford v. Braun, 71 App. Div. (N. Y.) 432.

long as they should remain such agents, or the corporation should continue in business, was not definite in time, so that an action to recover fees at the contract rate from the time of the beginning of the contract should be brought, instead of a suit to recover full damages for breach of the contract.[57] A failure to allege that the attorney was licensed is cured by a finding, on general demurrer, that the services were performed by certain attorneys for defendant.[58] An executory stipulation, as part of an agreement with an attorney, that the client and another should fix the attorney's fees, is a defense to an action to recover such fees, where it is not shown that the client had repudiated the agreement, and such action cannot be supported on a quantum meruit without allegation that the client and his agent had repudiated the contract or refused to fix the compensation.[59] Recovery as upon a quantum meruit is not a material variance from a declaration for services on contract of employment.[60] Where a client attempts to recover damages for negligence of an attorney in bringing a suit without proper cause, in an action by the attorney for fees, the burden of proof to show negligence is on the client.[61] On petition for set-off of judgments, attorneys to whom a judgment recovered by them has been assigned cannot assert their lien for services in procuring it as against set-off claimed by the judgment debtor, unless they show the value of their services.[62] The record and proceedings in a suit may be admitted to show the value of the attorney's services therein,[63] and, where signed by the client, may be admitted to show also the client's knowledge and acceptance of services.[64] The fact that a judgment was not vacated is evidence that the case was properly tried; hence that defending motion to vacate was not necessitated by unskillfulness.[65] Expenses of the suit paid by a client cannot be shown in recoupment in an action by the attorney for fees, unless it appears that the attorney acted negligently in bringing the suit.[66] The attorney's own testimony as to the value of his services, though entitled to respect, is not conclusive, and the court may exercise its own judgment.[67] That a corporation, which had employed an attorney as general attorney, used printed matter and stationery on hand after his discharge, which contained his name as such attorney, was insufficient to show his right to salary for the period during which the printed matter and stationery was so used.[68] Cases are shown below where the sufficiency of evidence was considered.[69]

Verdict and judgment.—A finding that attorneys had lost their right to en-

57. Eberhardt v. Harkless, 115 Fed. 816.

58. The complaint is sufficient, under Code Civ. Proc. §§ 469, 475, providing that a mere variance, by which the adverse party is not misled, will not destroy the right of action —Kersey v. Garton, 77 Mo. 645.

59. Instructions held erroneous—Roche v. Baldwin, 135 Cal. 522, 65 Pac. 459, 67 Pac. 903.

60. Skinner v. Busse, 38 Misc. Rep. (N. Y.) 265, 11 Ann. Cas. 156.

61. Keith v. Marcus, 181 Mass. 377.

62. Aber's Petition, 18 Pa. Super. Ct. 110.

63. Duckwall v. Williams (Ind. App.) 63 N. E. 232.

64. Davis v. Walker, 131 Ala. 204.

65. Cranmer v. Brothers, 15 S. D. 234.

66. Keith v. Marcus, 181 Mass. 377.

67. Germania Safety Vault & Trust Co. v. Hargis, 23 Ky. Law Rep. 874.

68. Ostrander v. Capital Inv. Ass'n (Mich.) 89 N. W. 964.

69. Prima facie case in suit for fees—De Mund Lumber Co. v. Stilwell (Ariz.) 68 Pac. 543; evidence of contract for contingent fee in addition to certain fee already paid by client for all services in the case —In re Borkstrom, 168 N. Y. 639; as to the contract of employment and payment for services—Smith v. Norton, 114 Wis. 458; of employment and right to interest in a fund on account of attorney's fees—Blakey v. New York Life Ins. Co., 28 Ind. App. 428; of employment of attorney to negotiate a loan for a broker to entitle the attorney to compensation—Brennan-Love Co. v. McIntosh, 62 Neb. 522; to establish a prima facie contract of employment and right to compensation—Ottofy v. Keyes, 91 Mo. App. 146; to show a right to a contingent fee in addition to a certain fee—In re Borkstrom, 168 N. Y. 639; to show that attorney's fees would be fixed by the client and his agent—Roche v. Baldwin, 135 Cal. 522, 65 Pac. 459, 67 Pac. 903; to show that an attorney was employed personally as general attorney for a corporation, so that his sole right to unpaid salary was unaffected by subsequent entry into partnership with another attorney—Ostrander v. Capitol Inv. Ass'n (Mich.) 89 N. W. 964.

forcement of a lien for fees by laches cannot be considered in an action to enforce, where the client does not plead waiver or laches.[70] A verdict cannot be directed at plaintiff's close in an action for attorney's fees, where the attorney testifies to employment, performance of services, and the value thereof, which testimony is corroborated by other evidence.[71]

§ 8. *Authority of attorney to represent client.*[72]—Where a suit is filed by a duly-licensed attorney, his authority to act for a plaintiff not under disability is presumed,[73] and, after judgment, the opposite party may treat the attorney of record as his opponent's attorney, unless he has notice of change.[74] A complaint signed by the attorney need not show that he was attorney, his license and assumption of powers being sufficient.[75] A creditor's attorney may sign the creditor's name to and verify a petition in involuntary bankruptcy if he knows the facts stated therein.[76] Proof that an action was brought with consent of the plaintiff is insufficient to dispense with the statutory requirement that every attorney should file his warrant of attorney.[77] In the management of litigation he may stipulate that the deposition of one suing on account of injuries may be taken in advance of the trial, and may be read in an action by his personal representatives should he die before trial.[78] An attorney for three joint tort feasors cannot accept service for one of an appeal by the other two, which may subject the other to contribution.[79] It will not be presumed that an attorney securing a judgment has authority to have execution levied on land conveyed by the debtor as security before reconveyance to him.[80]

Knowledge of an attorney beyond the matter of his employment is not notice to his client;[81] otherwise of material information known at time of his employment, and which must have been in his mind when transacting the business.[82] An attorney representing an adverse party also, without his client's knowledge, and having personal interest in the proceedings, cannot bind his client by a knowledge of an unrecorded deed, especially where the attorney acquired the knowledge before employment by such client, and while representing another.[83] That an attorney received knowledge of the fraud of the debtor by reason of his friendship for the latter will not prevent notice attaching to his client, and excuse failure to sue, unless there was collusive fraud between the attorney and the debtor.[84]

70. Loofbourow v. Hicks, 24 Utah, 49, 66 Pac. 602. Sufficiency of finding as to value of services on conflicting expert evidence—Schlesinger v. Dunne, 36 Misc. Rep. (N. Y.) 529; finding in suit for fees in foreclosure—Dillon v. Watson (Neb.) 92 N. W. 156; sufficiency of amount of verdict for attorney's fees, based on highly conflicting expert evidence—Schlesinger v. Dunne, 36 Misc. Rep. (N. Y.) 529.

71. De Mund Lumber Co. v. Stilwell (Ariz.) 68 Pac. 543.

72. A statement in an affidavit that complainant is nonresident sufficiently shows the reason for verification by his attorney. Under Code Ala. p. 1205, rule 15, requiring the reason to be given—Guyton v. Terrell, 132 Ala. 66.

73. Bigham v. Kistler, 114 Ga. 453.
Sufficiency of evidence of authority given by a husband and wife to bring action in the name of wife for personal injuries—Whitesell v. New Jersey Ferry Co., 68 App. Div. (N. Y.) 82.

74. Belle City Mfg. Co. v. Kemp, 27 Wash. 111, 67 Pac. 580.

75. O'Brien v. Yare, 88 Mo. App. 489.

76. In re Herzikopf, 118 Fed. 101; In re Hunt, 118 Fed. 282

77. Act April 14, 1834, Pub. Laws Pa. 1833-1834, p. 354—Fisler v. Reach, 202 Pa. 74

78. Ludeman v Third Ave. R. Co., 72 App. Div. (N Y.) 26

79. In Montana, service by mail is not sufficient against a successful defendant whose attorney is disqualified by representing unsuccessful defendants from accepting service—Hayes v. Union Mercantile Co. (Mont.) 70 Pac. 975.

80. Parker v. Home Bldg. & Loan Ass'n, 114 Ga. 702.

81. A purchaser of lands employing an attorney to examine title is not bound by the latter's knowledge that the vendor is insolvent—Weil v. Reiss, 167 Mo. 125.

82. Deering v. Holcomb, 26 Wash. 588, 67 Pac. 240, 561.

83. Scotch Lumber Co. v. Sage, 132 Ala. 598.

84. Knowledge of fraudulent conveyance obtained in attempting to collect debt—Deering v. Holcomb, 26 Wash. 588, 67 Pac. 240, 561.

An attorney cannot compromise a claim without authority, but authority may be inferred from circumstances, such as a lapse of years without reassertion of the claim.[85] He is presumed to have authority to compromise a pending suit.[86] The apparent scope of authority of a general attorney for a railroad company to compromise a claim for damages does not include an agreement, without express authority or ratification, to employ a certain person for life as partial satisfaction.[87] The authority of an attorney to settle a case may be shown by proof that his client was present in court and allowed the attorney to treat for a settlement, and that the case was dismissed under a belief that offers made to the attorney would be fulfilled.[88]

He cannot transfer his client's property in satisfaction of fees of officers,[89] nor release a surety in a claim property bond,[90] but may authorize a constable and release property in his possession from an attachment writ.[91] The attorney of a divorced wife cannot waive her right in a written contract with her husband to secure to her the monthly rental of property in which she has a life estate, without her special authority.[92]

An attorney authorized to collect a claim has implied authority to indorse a draft received in order to cash it.[93] And if one employed to act for and collect the shares of several heirs and legatees was responsible for money collected, and had sole authority to receive it, he had authority to indorse checks received in payment and cash them.[94]

He may employ local counsel to try a case in another county,[95] but, when employed for a stated sum, cannot engage services of an associate without authority of the client.[96]

An attorney cannot purchase for his client property sold under execution against the client in proceedings defended by the attorney.[97] An attorney to defend an action for personal injuries has no authority to order payment of the claim after judgment.[98] That an attorney knew of a claim at the time he directed the execution of a lease between the parties will not warrant the inference that he had authority to bind his client to payment.[99]

Verbal admissions and conclusions of law of an attorney will not raise an estoppel pleaded by the adverse party against his client without evidence in the record supporting the admission.[1] An attorney under general retainer cannot bind his client by prejudicial admissions and advice to the adversary, unless authorized.[2] An attorney for one of several parties, who allows an attorney representing co-parties to waive objections to evidence in response to a request from their adversary, without attempting to object on behalf of his clients, thereby waives the objection as to them.[3]

§ 9. *Rights and liabilities as to third persons.*—An attorney acting in good

85. Bay v. Trusdell, 92 Mo. App. 377. Sufficiency of evidence of authority of attorney to compromise and settle the suit—Diamond Soda Water Mfg. Co. v. Hegeman, 74 App. Div. (N. Y.) 430.

86. Strattner v. Wilmington City Electric Co. (Del. Super.) 53 Atl. 436.

87. Nephew v. Michigan Cent. R. Co., 128 Mich. 599.

88. Strong v. Smith, 98 Ill. App. 522.

89. Property surrendered by client's debtor in consequence of disclosure was turned over to disclosure commissioner for fees—Davis v. Ferrin, 97 Me. 146.

90. Lowry v. Clark, 20 Pa. Super. Ct. 357.

91. Muir v. Orear, 87 Mo. App. 38.

92. Budlong v. Budlong (Wash.) 71 Pac. 751.

93. National Fire Ins. Co. v. Eastern Bldg. & Loan Ass'n, 63 Neb. 698. Contra, Chatham Nat. Bank v. Hochstadter, 11 Daly (N. Y.) 343.

94. National Bank v. Old Town Bank (C. C. A.) 112 Fed. 726.

95. Dillon v. Watson (Neb.) 92 N. W. 156.

96. In re Borkstrom, 168 N. Y. 639.

97. Fisher v. McInerney, 137 Cal. 28, 69 Pac. 622, 907.

98. Waterbury v. Waterbury Traction Co., 74 Conn. 152.

99. Callaway v. Equitable Trust Co., 67 N. J. Law, 44.

1. Harvin v. Blackman, 108 La. 426.

2. Lytle v. Crawford, 69 App. Div. (N. Y.) 273.

3. In re Ross, 136 Cal. 629, 69 Pac. 430.

faith is not liable for false imprisonment which he advised.[4] The client is not liable for injuries resulting from acts of the attorney without the scope of his employment.[5] On reversal of a judgment obtained by a creditor setting aside transfers of his debtor, prior to the latter's assignment, as fraudulent, an allowance of costs to the debtor's attorneys, based on the amount of the transfers instead of the judgment, should be refunded by the attorneys on motion of the creditor.[6]

§ 10. *Law partnerships and associations.*—An attorney may bind his partner for legal services without compensation, without the latter's knowledge.[7] On dissolution, one attorney may be substituted for the firm on his client's consent, if no firm lien for fees is prejudiced.[8] Where the ascertained value of services rendered in a certain case by a firm afterwards dissolved, and by two members of the dissolved firm on a retrial, cannot be paid in full, the fee collected should be divided pro rata between the dissolved firm and the two members; where undisposed-of cases are assigned to the several members, each is entitled to the returns from such cases prosecuted in good faith, and services of other members therein are gratuitous; such a settlement of the firm business for good consideration will be upheld.[9]

§ 11. *Public attorneys. A. Attorneys general.*— In Texas the attorney general may institute and direct suits in the district courts for enforcement of penalties for violation of the railroad laws.[10] Since it is the duty of the county attorney, in Kentucky, to respresent the state in proceedings to compel taxpayers to list omitted property, an attorney employed by the attorney general in such a proceeding instituted by an agent of the state auditor cannot recover from the state for his services.[11] Where the superintendent of banking reports to the attorney general that a savings, loan, and building association was in a condition unfit to continue business, the latter may begin proceedings for dissolution in the name of the people without a relator.[12] In Mississippi, neither the attorney general nor the district attorney is a necessary party to quo warranto to try right to office,[13] nor, in Washington, can the attorney general, on his own relation, institute proceedings by quo warranto to determine whether a corporation exercising a public franchise has usurped its authority in such exercise.[14]

B. District and state's or prosecuting attorneys.—Prosecuting attorneys should not act as inquisitors and extort admissions or confessions from those accused of crime.[15] On removal of a criminal case to another county, the attorney of that county must usually prosecute it.[16] An information filed by an assistant prosecuting attorney, where such an officer is authorized, will be presumed to have been filed by a proper official, duly appointed, unless the contrary appears from the record.[17]

4. Roth v. Shupp, 94 Md. 55.

5. An attorney for creditors of an insolvent bank will not render them liable for libelous matter published in an expert statement, though he had authority to make the statement—Hall v. Baker, 66 App. Div. (N. Y.) 131.

6. Shotwell v. Dixon, 66 App. Div. (N. Y.) 123.

7. Stone v. Hart, 23 Ky. Law Rep. 1777.

8. Schneible v. Travelers' Ins. Co., 36 Misc. Rep. (N. Y.) 522.

9. Lamb v. Wilson (Neb.) 92 N. W. 167.

10. Under Const. art. 5, § 21, and article 10, § 2, providing for duties of county attorneys and regulation of railroads—Moore v. Bell (Tex.) 66 S. W. 45.

11. The various Kentucky statutes regarding the authority of the state auditor and the attorney general as to omitted property construed—Coulter v. Denny, 23 Ky. Law Rep. 1619.

12. New York Banking Law, § 18, and Code Civ. Proc. N. Y. §§ 1785, 1786, 1808, construed—People v. Manhattan Real Estate Co., 74 App. Div. (N. Y.) 535.

13. Under Code 1892, §§ 3520, 3521—State v. Morgan, 80 Miss. 372.

14. Under the provisions of the constitution and statutes relating to such proceedings, the duty is that of the prosecuting attorney of the proper county—State v. Seattle Gas & Electric Co., 28 Wash. 488, 68 Pac. 946, 70 Pac. 114.

15. State v. Hagan, 164 Mo. 654.

16. Pol. Code Mont. §§ 4318, 4319—State v. Whitworth, 26 Mont. 107, 66 Pac. 748.

17. State v. Weeks, 88 Mo. App. 263.

Since special laws prevail over general ones, the special solicitor pro tem. in a county governed by such an act, and not one acting under general appointment, is recognized.[18] Counsel may be appointed to assist in prosecution of persons charged with crime, though prosecuting attorneys are provided for by statute; and the law providing for appointment of deputies by county officers and justices of the peace will not prevent appointment of assistant prosecuting counsel by the court.[19] A special counsel, assisting the district attorney, but not under official oath, cannot appear before the grand jury to assist it in investigation of criminal charges.[20] That one appointed as temporary state's attorney may have been privately retained by prosecuting witnesses in the case will not render him ineligible. A law providing for appointment by the circuit judge does not violate a constitutional provision that all state and county officers, not otherwise provided for, must be elected by the people or appointed by the governor.[21]

A county attorney cannot enter a voluntary appearance and confess judgment against the county, even on a resolution of the county board authorizing him to confess such judgment.[22] He may waive issuance and service of summons in error, as against the county, where he has appeared for it at the trial.[23]

A law giving a county attorney, who assists at prosecutions in the circuit court, a portion of judgments recovered, will not entitle him to such fee where his term expired before judgment, though he assisted at the trial.[24]

A commonwealth's attorney, taking a bribe to dismiss an indictment, may be indicted for malfeasance in office, or, under the statute, for taking a bribe, in either case the punishment being limited to that prescribed by the statute if the facts shown constitute the statutory offense. Impeachment is not necessary before indictment and punishment for such malfeasance.[25]

Decisions under various local laws, and for that reason peculiar, follow, arranged by states.

Arkansas.—The prosecuting attorney cannot claim a fee where present by deputy in an assault and battery case.[26]

Colorado.[27]—The district court, in its discretion, may appoint counsel to assist the district attorney in criminal cases, and the county must pay for his services. Allowance by the district court of fees to such attorney is at least prima facie evidence of the value of his services.[28] Under a law which applies to the emergency in case the district attorney fails to appear, the court cannot appoint an attorney to prosecute crime, at expense of the county, merely because the district attorney was disqualified because he had been attorney for defendant on a former trial before entering his office. The attorney general is empowered to

18. In prosecutions for misdemeanors in county court—The special act for Marengo county (Acts Ala. 1882-1883, p. 647) prevails over Code Ala. § 5537 et seq.—Douglass v. Prowell, 130 Ala. 580.

19. State v. Whitworth, 26 Mont. 107, 66 Pac. 748.

20. Under Code Crim. Proc. § 313, subd. 2, and §§ 262-264—People v. Scannell, 36 Misc. Rep. (N. Y.) 40.

21. Construction of Rev. St. § 1354, requiring only admission to the bar as qualification for temporary appointment, and Const. 1885, art. 3, § 27—King v. State (Fla.) 31 So. 254.

22. Custer County v. Chicago, B. & Q. R. Co., 62 Neb. 657.

23. Dakota County v. Bartlett (Neb.) 93 N. W. 192.

24. Ky. St. § 133—Spalding v. Hill, 24 Ky. Law Rep. 1802, 72 S. W. 307.

25. St. § 1366, Const. § 68—Commonwealth v. Rowe, 23 Ky. Law Rep. 1718.

26. Under Acts Ark. 1883, p. 301, § 2, Mansf. Dig. § 3233, Sand. & H. Dig. §§ 6010, 6011, and Act 1895, amending Sand. & H. Dig. above, all providing for deputy prosecuting attorneys and the fees in prosecutions by such deputies—State v. McNair, 70 Ark. 65.

27. Fixing compensation of deputy district attorney as constitutional—Merwin v. Board Com'rs of Boulder County, 29 Colo. 169, 67 Pac. 285.

28. Board Com'rs of Hinsdale County v. Crump (Colo. App.) 70 Pac. 159.

appoint special counsel to represent the state under another statute.[29] The judge of the district court may appoint an attorney to represent the state before the grand jury, where it appears that the district attorney has been involved in offenses without first proceeding to remove or prosecute the latter.[30] Where the supervisors of a county employed an attorney to collect certain money due the county from the state on a contingent fee, which he retained from the amount collected, the district attorney cannot sue for recovery of the contingent fee, as a claim allowed by the supervisors without authority of law.[31] The fees of a "district" attorney do not come within the sections of the constitution providing that the compensation of all county and precinct officers shall be as fixed by law, since he is a district officer, and the allowance of his fees for representing the state before justices of the peace is in the discretion of the county commissioners. The law providing for such allowance was not repealed by a subsequent law on the same subject.[32] A law giving county commissioners discretion in allowance of fees to district attorneys is not unconstitutional as depriving such attorneys of property without due process of law, nor as conferring judicial power on a body not included in the courts specified in the constitution, nor is the law invalid as conferring power in a proviso. In disallowing claims for such fees, the commissioners are not required to spread the reasons for disallowance on their records. The allowance is wholly discretionary, and not liable to review by the courts; but if the right of appeal were conceded, the court, on review, could not fix the amount of the fees,—that power residing wholly in the commissioners.[33] A district attorney, who allowed a county attorney to enter his appearance as attorney for the county commissioners in a suit on a county officer's bond, but performed no actual services in the suit, which was dismissed by the county attorney on compromise, is not entitled to his statutory fee for collections.[34]

Iowa.—The county attorney properly takes an appeal to the supreme court in a criminal case, and gives notice thereof, and the attorney general has no authority until the case has reached that court.[35] A former county attorney is not prevented from appearing, after expiration of his term, for a woman in an action for damages for a sale of liquor to her husband, merely because defendant was indicted during his term for a distinct sale.[36]

Kentucky.—The attorney for the commonwealth is not required to make the opening statement to the jury in a criminal trial; his statement that he omitted the facts of the charge because unfamiliar with them will be taken as true.[37]

29. Pen. Code, § 1130, does not provide for such emergency, Pol. Code, § 472, providing for appointment by the attorney general—Toland v. Ventura County, 135 Cal. 412, 67 Pac. 498.

30. People v. District Court, 29 Colo. 5, 66 Pac. 896.

31. Under St. Cal. 1897, p. 463, § 25, subd. 16, providing that the supervisors shall direct all suits in which the county is a party; and section 8, providing for suits by the district attorney to recover money paid by the supervisors without authority of law—Contra Costa County v. Soto (Cal.) 70 Pac. 1019.

32. Sess. Laws 1891, pp. 213, 214, § 8, and page 223, § 1, subd. 6, providing for such allowance, are not affected by Const. art. 14, §§ 7, 15; and the statute first mentioned was not repealed by the second, though on the same subject, their provisions not being repugnant—Merwin v. Board Com'rs of Boulder County, 29 Colo. 169, 67 Pac. 285.

33. Laws 1891, pp. 213, 214, construed in connection with Const. art. 2, § 25, and article 6, § 1—Merwin v. Board Com'rs of Boulder County, 29 Colo. 169, 67 Pac. 285; on the question of review by the courts, see, also, Board of Yuma County Com'rs v. Pendleton (Colo. App.) 67 Pac. 911, construing 3 Mills' Ann. St. § 1905.

34. Under Mills' Ann. St. § 1551, providing that the district attorney should represent counties in his district in suits, and section 1873, providing his fee for collections—McMullin v. Board Com'rs of Montrose County (Colo. App.) 70 Pac. 449.

35. Code, §§ 5448, 5449, and §§ 301, 208—State v. Grimmell, 116 Iowa, 596.

36. Under Code, § 305—Bellison v. Apland, 115 Iowa, 599.

37. Crim. Code Prac. § 220—Hendrickson v. Com., 23 Ky. Law Rep. 1191.

Louisiana.—The district attorney may represent the state in cases of assault in magistrates' courts, and his right to do so may be enforced by mandamus when denied by the magistrate.[38]

Missouri.[39]—The necessity for appearance by the prosecuting attorneys in criminal cases in the court of appeals, and their compensation for services and expenses, are to be settled by the county court when the claim is presented, or by the circuit court on appeal therefrom, as questions of fact from the evidence adduced;[40] hence evidence that he did so without an order of the county court is not admissible.[41]

New Hampshire.—Under the general course of legislation relating to duties and compensation of county solicitors and justices of the peace, a county solicitor, who was also a justice, cannot claim fees for drawing complaints and warrants in cases which it was his duty to prosecute, whether they were mentioned specifically in the statutes or not.[42]

New York.—Laws 1874, c. 323, § 2, providing for employment of counsel to assist the district attorney, impliedly repealed Laws 1872, c. 733.[43] The fees of an attorney who was employed to assist the county attorney in a criminal case, and who assisted on appeal to the court of appeals, on a motion for a new trial and for change of place of trial, and on a second trial before another justice in another county, cannot be certified by the latter justice in the court of appeals to enable him to maintin certiorari to review the action of the board of supervisors in reducing the amount so certified.[44] Where a particular county is exempted from operation of a law providing for payment by counties of fees and expenses of counsel to aid the district attorney, a certificate of a justice within such county for compensation of such counsel will impose no liability on the county.[45]

Oklahoma.—Territorial district courts cannot appoint a county attorney except in absence of the regular attorney, or on his inability to perform his office, or in case of a vacancy. The inability to perform duties must be from physical or mental incapacity, not mere lack of experience or incapacity to conduct a prosecution. The district court cannot restrict or supersede his authority except when he is disqualified or unable to perform his duties. He, and not the court, has power to appoint his assistants.[46] He should bring a suit within the county, for the public, to prevent misappropriation of funds by public officers.[47]

Tennessee.—The costs allowed a district attorney general in an inheritance tax suit must be turned over to the state.[48]

Texas.[49]—The district attorney for the county in which a suit is brought to

38. State v. Brown, 106 La. 437.

39. Informations given to the criminal court in a county of between 50,000 and 75,000 population must be made in the name of the assistant prosecuting attorney, appointed and paid by the prosecuting attorney himself. Under Rev. St. 1879, § 4975, providing for appointment of assistant, and section 4991—State v. Weeks, 88 Mo. App. 263.

40. Rev. St. 1899, § 4951—Meador v. Texas County, 167 Mo. 201.

41. Meador v. Texas County, 167 Mo. 201.

42. See the various statutes cited in the opinion as showing the course of legislation—Fletcher v. Merrimack County, 71 N. H. 96.

43. People v. Coler, 65 App. Div. (N. Y.) 217.

44. Under Laws 1892, c. 686, providing that the costs and expenses of such assistant shall be certified by the judge presiding at the trial—People v. Board Sup'rs of Genesee County, 168 N. Y. 640.

45. Under various statutes cited in the opinion, and construed with reference to the county of New York—People v. Coler, 65 App. Div. (N. Y.) 217.

46. The circumstances are limited to the conditions prescribed by St. 1893, c. 22, art. 5, § 9—Mahaffey v. Territory, 10 Okl. 213, 66 Pac. 342.

47. Board of Education v. Territory (Okl.) 70 Pac. 792.

48. Under Acts 1897, c. 41, fixing the compensation of district attorneys general, and providing that costs taxed against the losing party must be turned over to the state—Harrison v. Johnston (Tenn.) 70 S. W. 414.

49. See Black v. State (Tex. Cr. App.) 65 S. W. 906, for conduct of criminal trial

recover a penalty for violation of the railroad laws cannot appear for the county unless by request of the railroad commission, and appearing without such authority can recover no fees.[50]

AUCTIONS AND AUCTIONEERS.

License and regulation.[51]—Under laws requiring a license of transient merchants who would sell at auction, the merchant must be licensed, though another actually is the auctioneer, or though the merchant acts as agent for a mortgagee. The reasonableness of such an ordinance is for the court, and, in the absence of competent evidence to the contrary, it will be presumed that the tax is reasonable.[52] An auctioneer's license fee of $2,500 has been held unreasonable and illegal.[53]

Sale; fees; liability on bond.—Both purchaser and seller are bound by publicly proclaimed terms of an auction.[54] Purchasers at an auctioneer's sale are not entitled to recover part of the price paid, under an agreement with the auctioneer that the time of payment should be extended and a mortgage given for the remainder of the price, where no authority is shown in the auctioneer to give the extension and the purchasers have not complied with the contract as alleged by them.[55] Representations by the auctioneer, which the purchaser did not hear or rely upon in buying, cannot be urged by him as fraud to set aside the sale.[56] Under a law giving auctioneers a certain percentage of movable and immovable property as fees, where both movable and immovable property are sold together, the appraisement must be taken as the basis of computation.[57] The surety on an auctioneer's bond is liable for his failure to account for proceeds of a sale.[58]

BAIL IN CIVIL ACTIONS.

§ 1. *Occasion, necessity, kinds, and distinctions.*—Where special bail is demandable of a defendant who would make defense, he cannot oppose a motion for it by grounds which constitute a defense, e. g., defective service.[1]

§ 2. *The bail-piece; security or sureties.*—A bond omitting the name of defendant in the recitals is not invalid where the omission may be supplied with certainty from the instrument itself,[2] and may be a common-law bond if it does not comply in its conditions with the statute.[3] The bond is not affected by an omission to note on the writ, pursuant to a directory act, that the bond taken on mesne process has been filed.[4] The amount on execution against the person should

by prosecuting attorney, criticism, and explanation of duties.

50. Rev. St. arts. 4577, 4579—Moore v. Bell, 95 Tex. 151.

51. A real-estate auctioneer, in addition to specific tax, must pay an additional ¼ of % on the amount of the sale; statutes construed to determine which of two given modes of assessing license taxes shall be used (Act 1889-90, c. 244, §§ 44, 50)—Adams v. Walker (Va.) 42 S. E. 866.

52. Iowa City v. Newell, 115 Iowa, 55.

53. Margolies v. Atlantic City, 67 N. J. Law, 82.

54. Chandler v. Morey, 195 Ill. 596.

55. McKiernan v. Valleau, 23 R. I. 501.

56. Burnett v. Hensley (Iowa) 92 N. W. 78.

57. Under Acts La. 1896, No. 104—Barry v. American White Lead & Color Works, 107 La. 236.

58. Under Laws N. Y. 1897, c. 682, requiring licenses and bonds from auctioneers in cities of a certain size, which was extended to Greater New York without the approval of its officers, because in force when the new charter went into effect—Saul v. United States F. & G. Co., 71 App. Div. (N. Y.) 77. Sufficiency of complaint, in action against a surety on an auctioneer's bond for failure of the latter to account for proceeds of a sale, as to averments that the auctioneer was licensed for a certain year—Saul v. United States F. & G. Co., 71 App. Div. (N. Y.) 77.

1. Gen. St. § 957; Practice Act, § 1, makes such plea a "defense"—Bergkofski v. Ruzofski, 74 Conn. 204.

2. Reeg v. Adams, 113 Wis. 175.

3. Conditions required by Rev. St. Wis. 1898, § 3034, in bond of arrested debtor—Straw v. Kromer, 114 Wis. 91.

4. Construing Rev. St. Me. c. 85, § 1—S. N. Maxcy Mfg. Co. v. Bowie, 96 Me. 435.

not exceed $5,000.[5] The court may reduce the amount of bail, though it was given without objection or reservation of right to ask for reduction.[6]

§ 3. *Rights and liabilities; forfeiture, exoneration, and discharge.*—Bail for appearance of one arrested on a capias are his custodians and may take him where they wish and surrender him to the officer.[7] A bond to appear as a witness is satisfied if appearance be made by attorney on the first continuance, though no appearance was made thereafter.[8] The surety on an undertaking, for discharge of a defendant in an action for fraudulent conversion, who is liable under its terms for disobedience of any order of the court, requiring performance of acts specified in the order of arrest, is not liable for default as to directions which the court could not give, though execution against both property and person was returned without results.[9] It will not be presumed that money deposited in lieu of bail belongs to the person bailed, where it appears certainly that a third person paid the money and received a receipt from the sheriff.[10] Defendant cannot be discharged in trover, bail being required, on a mere finding that he cannot produce the property; it must appear that he cannot give security, and that his reasons for not producing the property are sufficient.[11] Discharge of one arrested under a capias, though erroneous, relieves him from restraint and his bail from liability.[12]

§ 4. *Enforcement of bail-piece; procedure.*—A complaint on a bail bond need not show that the sheriff delivered a copy of the bond to the plaintiff as required by statute.[13]

BAIL IN CRIMINAL PROCEEDINGS.

§ 1. Authority to Take and Right to Give Bail.
§ 2. Application for Bail.
§ 3 Making Recognizance and Sufficiency.
§ 4. Fulfillment and Forfeiture; Discharge; Rights and Liabilities of Sureties.
§ 5 Enforcement of Bond or Recognizance.
§ 6. Remission of Forfeiture and Return of Deposits.

§ 1. *Authority to take and right to give bail.*—The circuit court of appeals of the United States is empowered, and generally it is its duty, to admit to bail after conviction of a crime, not capital, pending a writ of error. The writ stays execution, but such stay does not concern the question whether defendant shall go at large on bail. The right will not be denied because defendant has been tried and convicted three times on the same indictment, but will be allowed for sufficient time only to insure the filing of a transcript in that court and the question of further bail should be left until such time has elapsed.[1] A United States commissioner may be admitted to bail when charged with contempt of a federal court.[2] Bail cannot be allowed after a conviction of a felony, unless for an extraordinary cause not growing out of the crime,[3] but may be allowed pending appeal from a conviction for manslaughter where the law governing its allow-

5. Sibley v. Smith, 67 App. Div. (N. Y.) 514.
6. Code Civ. Proc. N. Y. § 567—Sibley v. Smith, 67 App. Div. (N. Y.) 514.
7. People v. Hathaway, 102 Ill. App. 628.
8. Straw v. Kromer, 114 Wis. 91.
9. Bristol v. Graff, 79 App. Div. (N. Y.) 426.
10. Finelite v. Sonberg, 75 App. Div. (N. Y.) 455.
11. Shinholser v. Jordan, 115 Ga. 462.
12. People v. Hathaway, 102 Ill. App. 628.
13. The provision under Sanb. & B. Ann. St. § 2702, is merely to give plaintiff a chance to refuse the sureties—Reeg v. Adams, 113 Wis. 175.
1. Under 26 Sts. 829, § 11, Rev. St. 1007, and rule 38 of the circuit court of appeals, conviction for embezzlement of funds of national bank—McKnight v. United States (C. C. A.) 113 Fed. 451.
2. Under Rev. St. § 1014, and Act May 28, 1896—Castner v. Pocahontas Collieries Co., 117 Fed. 184.
3. Such as illness aggravated by imprisonment or strong reason for apprehension that imprisonment will result fatally—Ex parte Hill, 51 W. Va. 536.

ance was changed after conviction but before sentence.[4] A statute authorizing the city recorder to require bail for appearance before the court authorized to try the offense, where it appears that a prisoner is probably guilty, does not violate the 14th amendment of the federal constitution.[5] A bond taken as a bail bond by a sheriff without legal authority cannot be enforced as a common-law bond.[6] The supreme court of appeals of West Virginia may award habeas corpus solely to obtain bail and to grant bail in case of a felony.[7]

§ 2. *Application for bail.*—If one convicted of embezzling funds of a national bank is denied bail pending a writ of error, further application should be made to the appellate court unless great urgency exists.[8]

§ 3. *Making of recognizance and sufficiency.*[9]—A recognizance in a criminal appeal must require defendant to appear before the court to submit to judgment on appeal,[10] and if the bond is given after amendment of the code, it must conform thereto as to requirements for such appearance.[11] In misdemeanor cases the bond must show the amount of the fine assessed,[12] and whether defendant was ever convicted in any court of any offense, or charged with misdemeanor, what punishment was imposed, and whether the violation was of a city ordinance or a statute,[13] and, on appeal from the judgment of the county court dismissing a misdemeanor, appeal from the corporation court must state whether defendant has been convicted of a misdemeanor in any court, the amount of fine imposed and whether the case has been dismissed in the county court.[14] A condition in a recognizance requiring defendant's presence at the hearing of the motion for a new trial may be enforced.[15] An instrument, in form a recognizance, prepared and signed by the sureties before arrest and certified the next day by the justice as taken before him in due form, is void.[16] A recognizance requiring appearance at the next term of "the court of oyer and terminer and quarter sessions of the peace" is valid, where the offense may be tried in either court, whether it uses the word court in the plural or singular.[17] A condition that defendant shall pay any judgment rendered against him is not required in a recognizance on appeal from a case before a police judge for violation of a city ordinance and may be treated as surplusage.[18] A bond on appeal from a justice to the criminal district court, conditioned to appear at the present regular term instead of the next term of court as required, is insufficient.[19] If the court thinks a bond insufficient, it may order a new bond and place defendant in custody, if he fails to comply after notice,[20] but after persons charged with crime have entered

4. Territory v. Cooper, 11 Okl. 699, 69 Pac. 813.
5. Parks v. Nelms, 115 Ga. 242.
6. State v. Frazer, 165 Mo. 242.
7. Ex parte Hill, 51 W. Va. 536.
8. McKnight v. United States (C. C. A.) 113 Fed. 451.
9. Form for recognizance on appeal in misdemeanor—Horton v. State (Tex. Cr. App.) 68 S. W. 172. Sufficiency of showing to reduce bail from $3000 to $1500 on arrest for murder—Hernandez v. State (Tex. Cr. App.) 72 S. W. 840; to reduce bail from $2000 to $250 on arrest for assault with intent to murder—Sancedo v. State (Tex. Cr. App.) 70 S. W. 546.
10. Bolton v. State (Tex. Cr. App.) 69 S. W. 525.
11. Under Code Cr. Proc. art. 889, amended by the act of the 27th legislature which went into effect July 18th, 1901—Martin v. State (Tex. Cr. App.) 69 S. W. 508.
12. Under Code Cr. Proc. art. 887—Weber v. State (Tex. Cr. App.) 68 S. W. 269; De Valeria v. State (Tex. Cr. App.) 67 S. W. 1020.
13. Under Code Cr. Proc. art. 887—Horton v. State (Tex. Cr. App.) 68 S. W. 172; Roberts v. State, Id. 272; Bolton v. State (Tex. Cr. App.) 69 S. W. 525; Kapps v. State (Tex. Cr. App.) 70 S. W. 83; Bertoni v. State (Tex. Cr. App.) 71 S. W. 963.
14. Under Code Cr. Proc. art. 827—Roberts v. State (Tex. Cr. App.) 68 S. W. 272.
15. State v. Abel, 170 Mo. 59.
16. Clute v. Ionia Circuit Judge (Mich.) 91 N. W. 159.
17. Commonwealth v. Meeser, 19 Pa. Super. Ct. 1.
18. Under Rev. St. 1899, §§ 2784 and 5805—Howlett v. Turner, 93 Mo. App. 20.
19. The appeal will be dismissed—Marshall v. State (Tex. Cr. App.) 70 S. W. 550; Baxstrum v. State, Id. 748.
20. State v. Eyermann (Mo.) 72 S. W. 539.

recognizance for appearance at a certain term, to await the action of the grand jury, and have appeared, they cannot be required to enter a new recognizance for appearance at a subsequent term though the grand jury was not in session.[21] A justice has no authority to change the amount of a bail bond fixed by an order of the circuit court remanding one charged with seduction to custody to await the action of the grand jury.[22] An additional bail bond executed by defendant and surety under order of court abrogates the original bond, and defendant's compliance with the order waives arrest so that the surety cannot object that he was not in custody or under arrest when the new bond was given.[23]

§ 4. *Fulfillment or forfeiture; discharge; rights and liabilities of sureties.*—A bail bond is operative after appearance until all preliminary motions are settled so that trial may commence and flight of defendant before such settlement will render his sureties liable.[24] Failure of defendant to appear at a subsequent term to which a cause is continued, without renewal of a recognizance conditioned that the accused shall appear at the next term of the district court, is not a breach of the bond,[25] and failure of defendant to appear after reversal for failure of jurisdiction, and remand of the case for disposal according to law, is not a violation of an undertaking requiring him to surrender himself "in execution of the judgment, if affirmed or modified, or reversed and the case remanded for a new trial, or the appeal is dismissed."[26] A bond on appeal from a conviction in a justice court conditioned that defendant would prosecute the appeal with effect and pay the fine and costs adjudged against him cannot be forfeited as to the sureties while he stands ready to meet such obligations.[27] Persons who enter a recognizance to appear at a certain term to await the action of the grand jury on a criminal charge fulfill the condition if they appear though the grand jury was not in session, and the court could not compel them to enter a recognizance to appear at a subsequent term.[28] A judgment of forfeiture cannot be entered against one who asked and was promised the court's indulgence because of absence of his counsel without giving him a reasonable opportunity to procure counsel.[29] Sureties on a recognizance on appeal from a conviction for a misdemeanor cannot relieve themselves from liability by surrendering the defendant,[30] and surrender of accused by his surety in another parish from the one in which the bond was given cannot discharge the surety.[31] Failure of the record to show that the court did not have jurisdiction of defendant, or that the proceeding for forfeiture of the recognizance was dismissed as to him, will not affect the validity of the judgment of forfeiture as against the surety.[32] The amount of forfeiture need not be stated in the judgment,[33] and where an additional bond was given, the original being abrogated, a declaration of forfeiture need not specify which bond was

21. Recognizance given before justice—In re Tomer (Del.) 3 Pennewill, 31.
22. Hall v. State, 130 Ala. 139.
23. Under Rev. St. 1899, § 2543—State v. Eyermann (Mo.) 72 S. W. 539.
24. Applications for change of venue, a continuance, and a demurrer to the jurisdiction decided against defendant were passed upon but the decision as to continuance and the demurrer were not entered or announced, under Code Cr. Proc. arts. 635, 641, 303-310, 577, 591—Fossett v. State (Tex. Cr. App.) 67 S. W. 322.
25. The order is limited to the term at which continuance is given—Perkins v. Milton (Neb.) 90 N. W. 756.
26. State v. Candland (Utah) 70 Pac. 403.
27. Humphries v. State (Tex. Cr. App.) 69 S. W. 527.
28. Recognizance taken before justice—In re Tomer (Del.) 3 Pennewill, 31.
29. Humphries v. State (Tex. Cr. App.) 69 S. W. 527.
30. Code Cr. Proc. arts. 310, 318, 324, 327 authorizing such surrender applies only to bail bonds—Talley v. State (Tex. Cr. App.) 69 S. W. 514.
31. Under Rev. St. § 1033—State v. Miller (La.) 33 So. 57.
32. State v. Eyermann (Mo.) 72 S. W. 539.
33. Under Rev. St. 1899, § 2800—State v. Eyermann (Mo.) 72 S. W. 539.

forfeited.[34] Failure to mark a recognizance as filed and to note the fact on the quarter session's docket will not render an adjudication of forfeiture void in an action on the recognizance.[35] A default of a recognizance entered by action of the prosecuting attorney, after final adjournment of the term and on reassembling of the court in the night, may be set aside or vacated in a direct proceeding as a fraud, and a cross complaint in an action on the bond setting up such facts, is such a direct proceeding;[36] but the forfeiture cannot be attacked collaterally in an action on the bond by answering that the forfeiture was not taken during the term, but after adjournment and during vacation, where the record does not show that it was not taken during the term.[37] Calling of defendant and forfeiture of his recognizance can be performed in term time only.[38]

§ 5. *Enforcement of bond or recognizance.*[39]—Recovery on a bail bond is not prevented by the omisssion of the clerk to record the forfeiture on the day it is adjudged.[40] A suit to recover on a forfeited bond must be brought in the quarter sessions court and an affidavit of defense may be required,[41] and a statement containing an exact copy of the recognizance and a reference to the place where the record of forfeiture may be found, as "the office of the clerk of the said court," is a sufficient reference to the records sued on.[42] In an action on the bond, the action of the circuit court in the taking of a recognizance will be presumed regular and it will be presumed that the instrument is valid.[43] Where no alias writ of scire facias was issued as to the principal on a forfeited recognizance, and he was not found, and the court did not dismiss as against him, it may proceed to judgment against sureties who have been served and have answered.[44] Execution on scire facias may be ordered against the defaulting defendants in a joint and several recognizance at one time, and against the defendant who goes to trial at another time, and the recognizance of record and judgment of forfeiture are competent and sufficient evidence under the appropriate averments in scire facias to authorize judgment of execution.[45] On appeal from a suit on a forfeited bond, the court may consider an indorsement on the bond in the record which shows the date of forfeiture.[46]

§ 6. *Remission of forfeiture and return of deposit in lieu of bail.*—On discharge, all money deposited by the accused in lieu of bail must be paid to defendant and not to one who furnished it.[47] Where on affirmance of a judgment against one for wife abandonment requiring him to pay a certain amount weekly for her support, he surrenders and moves that the money deposited with the city chamberlain instead of a bond be returned to him, he will be discharged, but the amount will be retained for the wife's support and the costs charged against him.[48] One

34. State v. Eyermann (Mo.) 72 S. W. 539.
35. It is to be presumed that the recognizance was before the court when the adjudication was made—Commonwealth v. Meeser, 19 Pa. Super. Ct. 1.
36. Under Burns' Rev. St. 1901, § 1443—State v. Hindman (Ind.) 65 N. E. 911.
37. State v. Hindman (Ind.) 65 N. E. 911.
38. Under Burns' Rev. St. 1901, §§ 1790, 1791, and Rev. St. 1881, §§ 147, 148 (Horner's Rev. St. 1901, §§ 1721, 1722)—State v. Hindman (Ind.) 65 N. E. 911.
39. Form of judgment after default in performance of the conditions of a recognizance; it need not be a money judgment—Burrall v. People, 103 Ill. App. 81. Sufficiency of scire facias on a recognizance under Rev. St. 1899, §§ 2543, 2549—State v. Abel, 170 Mo. 59.
40. The omission may be cured by amendment—Commonwealth v. Meeser, 19 Pa. Super. Ct. 1.
41. Commonwealth v. Meeser, 19 Pa. Super. Ct. 1.
42. Commonwealth v. Meeser, 19 Pa. Super. Ct. 1.
43. State v. Eyermann (Mo.) 72 S. W. 539.
44. Under Rev. St. §§ 2800, 2556—State v. Abel, 170 Mo. 59.
45. The procedure on scire facias in such case was not changed by Cr. Code, div. 3, § 17—Burrall v. People, 103 Ill. App. 81.
46. Commonwealth v. Meeser, 19 Pa. Super. Ct. 1.
47. For the purpose of the proceeding the money belonged to defendant and could not be subjected to the claim of his creditor—People v. Gould (N. Y.) 38 Misc. Rep. 505.

convicted in a city police court, governed by a charter providing that certiorari shall not be allowed on conviction for a violation of a city ordinance until the fine and all the costs are deposited in the city treasury, is entitled to have his money returned, if final decision on certiorari is in his favor.[49] Defendant cannot sue to recover money deposited in lieu of bail immediately after deposit because the conviction was not void but merely erroneous.[50] Interest cannot be recovered on the deposit on appeal from a conviction in a police court for violation of a city ordinance until after decision in the case and demand by defendant.[51]

BAILMENT.[1]

§ 1. *The contract of bailment.*—The distinction between a bailment and a sale lies in the obligation to restore the specific article.[2] A seller may before delivery be regarded as a depository for hire,[3] but a purchaser to whom a machine was shipped to be set up in running order, or his administrator, is not a bailee entitled to a lien on the machine for freight and expenses.[4] An innocent party to whom goods are delivered as part of a fraudulent scheme is not a bailee for the true owner.[5] The owner of a bath house is a bailee for hire of valuables deposited in the office at his direction.[6] One remaining in possession of a chattel after the expiration of a contract for its use is not a tenant from month to month.[7] If, after a bill of sale of crops to a creditor, the seller agrees to protect the crops and place them in a marketable condition subject to the order, the seller is a bailee of the buyer.[8]

§ 2. *Rights and liabilities between bailor and bailee.*[9]—The bailee of a horse for treatment is not liable for conversion where it appears that it was stolen without negligence.[10] One agreeing to take care of teams, who allows articles to be left in the office of his stable, is liable for their unexplained loss.[11] The burden is on the bailee to show that a loss or injury to property in his exclusive custody was not occasioned by his negligence.[12] Where goods delivered to be made up

48. People v. Burke (N. Y.) 38 Misc. Rep. 566.

49. The deposit is in lieu of a bond—Mayor, etc., of Savannah v. Kassell, 115 Ga. 310.

50. Mayor, etc., of Savannah v. Kassell, 115 Ga. 310.

51. Mayor, etc., of Savannah v. Kassell, 115 Ga. 310.

1. Other titles specially treating of special kinds of bailments should be consulted. See Animals (Agistment), Banking and Finance, Factors, Pledge.

2. Fleet v. Hertz, 98 Ill. App. 564. A receipt for wheat "to be paid for at market price on demand" may be construed to evidence a sale—Hagey v. Schroeder (Ind. App.) 65 N. E. 598.

3. Rev. St. § 3252 makes the provision that the seller is bound to keep the property with ordinary care and is responsible for loss by negligence—Strong v. Morgan (Idaho) 67 Pac. 1123.

4. James Smith Woolen Mach. Co. v. Holden, 73 Vt. 396.

5. Swindlers ordered goods of the plaintiff and had them sent to the defendants who were in good standing. Then one of them telephoned defendants in plaintiff's name stating that the goods had been delivered by mistake and should be delivered to a person who would call for them, and defendants delivered the goods to a stranger presenting an order purporting to be signed by plaintiff—Krumsky v. Loeser (N. Y.) 37 Misc. Rep. 504.

6. Sulpho Saline Bath Co. v. Allen (Neb.) 92 N. W. 354.

7. Lighting apparatus—Bruckman v. Hargadine-McKittrick Dry Goods Co., 91 Mo. App. 454.

8. Trover will not lie without demand in the absence of evidence of actual conversion—Baston v. Rabun, 115 Ga. 378, 41 S. E. 568.

9. **Pleading and evidence in action for damages.** Petition is sufficient which states a contract to restore an animal on demand, alleges demand and refusal to return, and payment of charges and demands judgment for the value of the animal—Dixon v. McDonnell, 92 Mo. App. 479. In trover value stated by bailor of a wagon left for repair is the proper amount of recovery less the price of the repairs, where there is no other evidence—Bain v. Ganzer (N. Y.) 74 App. Div. 621.

10. Dalley v. Black, 92 Mo. App. 228.

11. McKillop v. Reich (N. Y.) 76 App. Div. 334.

12. Hislop v. Ordner (Tex. Civ. App.) 67 S. W. 337; Sulpho Saline Bath Co. v. Allen (Neb.) 92 N. W. 354.

are stolen from a tailor before their return, he cannot recover for work done as against the manufacturer's counterclaim for value, on mere evidence that he had nothing to do with the theft.[13] Where the packages are returned intact by the bailee, the burden shifts.[14] The bailee may by contract exempt himself from liability for fire.[15] Where the bailee agrees to repay the value of property damaged or destroyed, he is liable, though the loss does not result from his negligence.[16] A bailee may be liable for a conversion, where he makes a wrongful use of the property.[17] A bailee of a wagon for repair, who dismantles it and loans its wheels, is liable for its value on refusal of a demand for the return of the property in the condition received.[18]

Where a check is left with a bailee, he is not authorized to negotiate it and appropriate the proceeds by reason of the fact that he has claims against the payees.[19] Where a landlord allowing goods to be stored on his premises reserves no right to retain them at the end of the term or to demand payment on removal, he has no lien for unpaid storage.[20] A bailee cannot hold adversely to the bailor until the bailor has notice of the inconsistent claim of title.[21]

§ 3. *Rights and liabilities of third persons.*—Property in the hands of the bailee is subject to garnishment for the bailor's debts,[22] but is not liable for the bailee's debts.[23] A bailor of property for sale has a right of possession enabling him to maintain replevin against a wrongful purchaser.[24]

BANKING AND FINANCE.

§ 1. The Occupation in General, Regulation, Supervision, Control.

§ 2. Associated or Incorporated Bankers.—Corporate Existence; Stock; Dividends; Powers; Personal Liability of Officers; Representation of Bank by Officers; Insolvency; Winding up and Reorganization; Enforcement of Stockholder's Individual Liability.

§ 3. National Banks.—Officers and Examiners; Powers; Violations of Banking Act; Stock; Receivership; Stockholder's Liability; Control of State Courts; Usury.

§ 4. Savings Banks.—Powers; Liabilities of Directors; Rules; Deposits; Pass Books.

§ 5. Loan, Investment and Trust Companies.

§ 6. Deposit and Repayment thereof, Checks, Drafts, Certifications, Receipts, Credits.—Relation of Bank and Depositor; Evidence of Deposit; Certificates; Cashier's Checks; Repayment; Forged Checks; Unauthorized Checks; Application of Deposit to Debt Due Bank; Deposits after Insolvency; Special Deposits; Slander of Credit; Actions for Deposits; Notes Payable at Bank; Certifications.

§ 7. Loans and Discounts.—Generally; Discounts against Bills of Lading.

§ 8. Collections.—Generally; Preservation of Rights of Parties; Drafts with Bill of Lading Attached; Actions.

§ 9. Offenses Against Banking Laws: Penalties.—Receipt of Deposits When Insolvent; Evidence; Instructions.

§ 1. *The occupation in general; regulation, supervision, control.*—In determining whether a corporation is a banking institution, the court will consider

13. Rothoser v. Cosel (N. Y.) 39 Misc. Rep. 337.

14. As where stored liquor is lost by leakage—Taussig v. Bode & Haslett, 134 Cal. 260, 66 Pac. 259, 54 L. R. A. 774. Sufficiency of evidence to show lack of proper care in permitting a horse to be overdriven—Pelton v. Nichols, 180 Mass. 245. Evidence held insufficient to show that death of a horse was caused by bailee's negligence—Hislop v. Ordner (Tex. Civ. App.) 67 S. W. 337. Evidence held insufficient to show neglect in case of horse under contract of agistment—Dixon v. McDonnell, 92 Mo. App. 479.

15. A provision that a miller shall not be responsible for a loss of a deposit of wheat covers a loss of flour in which form the deposit was to be returned—Wells v. Porter, 169 Mo. 252.

16. Where leased fire extinguishers were burned—Rapid Safety Fire Extinguisher Co. v. Hay-Budden Mfg. Co. (N. Y.) 37 Misc. Rep. 556.

17. As where wheat left with a miller to be returned or purchased when the owner is ready to sell is ground into flour by the miller without the owner's consent—Mayer v. Springer, 192 Ill. 270.

18. Bain v. Ganzer (N. Y.) 74 App. Div. 621.

19. Keiner v. Folsom, 113 N. Y. State Rep. 1099.

20. As where after the expiration of the lease, the tenant is allowed to leave his goods for a certain sum payable monthly—Webster v. Keck (Neb.) 89 N. W. 410.

21. Rice v. Connelly, 71 N. H. 382.

22. Construing Pub. St. c. 245, § 19, and holding liable one having in his possession money taken from an intoxicated person for safe keeping—Canning v. Knights, 71 N. H. 404.

23. Horses in the hands of a trainer cannot be attached by his creditors though entered in the races in his name—Anderson v. Heile, 23 Ky. Law Rep. 1115, 64 S. W. 849.

the articles of incorporation, the character of its business and any not unwarranted construction which the officers have placed on its charter powers.[1]

State aid.—A bank is not liable on state bonds issued in its aid,[2] but may purchase them as an investment,[3] and does not thereby extinguish them.[4]

Statutes against the issuance of circulating mediums do not prevent issuance of checks to employees payable in merchandise at a company's store.[5]

§ 2. *Associated or incorporated bankers; corporate existence generally.*[6]—Constitutional provisions relating to the formation of corporations, include banking corporations though there are provisions of the constitution relating specially thereto.[7] By-laws remain operative after expiration of the original charter where it is renewed by a direction that the period of its existence shall be extended as fully as if provided in the original charter.[8]

Stock subscriptions must be paid in cash where there is no statutory provision otherwise.[9] If choses in action are accepted, the directors are bound to the exercise of ordinary care in ascertaining that they are of the value for which they are taken.[10] Creditors may enforce payment of the par value of stock though the bank has no cause of action, and without showing what has been done with stock notes,[11] and directors of an adjudged insolvent bank may make assessments without leave of court.[12] Certificates of deposits issued shareholders on reduction of capital stock are without consideration where the liabilities exceed assets.[13] There can be no recovery thereon against the bank's receiver,[14] and payments thereon may be recovered by him.[15]

Dividends paid a stockholder in an insolvent bank in disobedience of the banking act may be recovered by the corporation, and on its failure to do so, a

24. A bailee of law books has not a right of possession against his principal so as to defeat such an action—Lucas v. Rader, 29 Ind. App. 287.

1. A corporation which receives money on deposit, pays it on checks, buys and sells commercial paper and forwards exchange under articles of incorporation stating the general nature of the business to be to negotiate loans, purchase and sell notes, stocks and bonds, borrow money, receive money on deposit and execute drafts is a bank and its stockholders are liable for its debts. (Const. art. 11b, § 7)—Hamilton Nat. Bank v. American L. & T. Co. (Neb.) 92 N. W. 159.

2. The banking department of the Citizens' Bank of Louisiana created under the act of 1853 is not liable for the bonded debt of the state incurred in 1836 in aid of the bank—Hope v. Board of Liquidation, 108 La. 315.

3. Banking department of the Citizens' Bank of Louisiana created under acts 1853, No. 246 has such power—Hope v. Board of Liquidation, 108 La. 315.

4. The Citizens' Bank of Louisiana is to the same extent as other persons entitled to benefits of a funding scheme under act Jan. 24, 1874, for such bonds held by it—Hope v. Board of Liquidation, 108 La. 315.

5. Construing Sand. & H. Dig., c. 18—Martin-Alexander Lumber Co. v. Johnson, 70 Ark. 215.

6. A new corporation is created by Acts 1853, No. 246, for the reorganization of the Citizens' Bank of Louisiana after the adoption under such act of the articles of association by the creditors—Hope v. Board of Liquidation, 108 La. 315.

7. Construing Const. 1846, art. 8, §§ 1-3, 4, 7—Barnes v. Arnold, 169 N. Y. 611.

8. So held in a suit by the receiver of a bank against its directors—Campbell v. Watson, 50 N. J. Eq. 396.

9. Payment in notes, judgments, etc., cannot be permitted—Coddington v. Canaday, 157 Ind. 243.

10. Coddington v. Canaday, 157 Ind. 243.

11. Stock certificates were assessed by the bank at less than par, by agreement and the bank accepted the shareholder's proportion of fictitious profits in discharge of his liability to pay money for the stock—Gager v. Paul, 111 Wis. 638.

12. Banking Act of 1895, St. 1895, p. 175—Union Sav. Bank v. Dunlap, 135 Cal. 628, 67 Pac. 1084.

13. Where the capital stock and indebtedness of a bank are considerably in excess of its assets, certificates of deposit issued to stockholders to the amount of one-half the original capital on reduction of the capital stock one-half, will be regarded as without consideration as against the receiver and creditors—State v. Bank of Ogallala (Neb.) 90 N. W. 961.

14. A bank holding stock as collateral which surrenders it under such agreement is in the same position as an ordinary stockholder—State v. Bank of Ogallala (Neb.) 90 N. W. 961.

15. Action may be brought at any time within four years—State v. Bank of Ogallala (Neb.) 90 N. W. 961.

creditor may proceed in equity.[16] Banking corporations are subject to the joint and several liability imposed on directors of corporations in general, who pay dividends before full payment of the capital stock, when the corporation is insolvent or in danger of insolvency, without reason to believe that there were profits sufficient to pay such dividends without diminishing the capital.[17]

Transfer of stock.—If a bank has notice of an assignment of capital stock, it is not entitled to deal with the former holder as a stockholder, though there has been no effort to secure a formal transfer of stock on the corporate books. Otherwise in the absence of notice.[18] The bank's charter may validly provide that shareholders who have failed to respond to calls or who are indebted to the bank cannot transfer stock without permission.[19]

Lien on stock.—A bank may have a superior lien on stock to the extent of an authorized loan, though it has violated its charter by making a loan greater in amount than authorized to the stockholder.[20] Though a loan to a stockholder is greater than authorized by its charter, an assignee of the stock cannot insist that it be transferred to him until all the indebtedness of the assignor contracted prior to notice of the assignment is paid, in case he is not willing to pay such an amount as will discharge the lien on the stock given the bank by its charter.[21] The assignee cannot insist that payment made by the assignor should be applied otherwise than as directed by him, and on an action to determine whether the indebtedness to the bank has been fully paid, authorizing the assignee to demand a transfer of the stock on the books of the bank, the only question involved is whether payments by the assignor have been applied as directed, or if no direction has been made, applied as required by law.[22]

General powers.—A corporation exercising banking powers may guaranty bonds of a railroad company in which it owns the majority of the stock,[23] may issue certificates of deposit payable at a day fixed, with interest,[24] or may collect and remit money payable under a lease.[25] The maker of a note cannot defend against a banking corporation thereon, on the ground that the bank had no authority to purchase it.[26]

Personal liability of directors and officers.—Bank directors are liable for losses and waste of money and property occurring through their gross inattention to the business of the bank or their willful violation of their duties,[27] as where they have allowed over-drafts by a cashier,[28] or failed to discover abstractions extending over several years which could have been discovered by a mere adjustment of accounts.[29] They are not excused by reliance upon statements of the officers and occasional

16. Rev. St. 1898, § 2024, subsec. 40—Gager v. Paul, 111 Wis. 638.

17. Construing R. S. 1898, § 1765—Williams v. Brewster (Wis.) 93 N. W. 479.

18. Charter provided that an assignment of its stock should not be valid against it unless a formal transfer was made on its books—People's Bank of Talbotton v. Exchange Bank of Macon (Ga.) 43 S. E. 269.

19. Lyman v. State Bank of Randolph, 114 N. Y. St. Rep. 901.

20. Charter provisions limiting the amount of loans to any one person to one-tenth of the paid up capital stock and also that the shares of any stockholder shall be bound to the bank for dues or indebtedness of the stockholder to the bank and conferring a lien thereon superior to all other liens—People's Bank of Talbotton v. Exchange Bank of Macon (Ga.) 43 S. E. 269.

21. People's Bank of Talbotton v. Exchange Bank of Macon (Ga.) 43 S. E. 269.

22. People's Bank of Talbotton v. Exchange Bank of Macon (Ga.) 43 S. E. 269.

23. Central R. & B. Co. v. Farmers' L. & T. Co., 114 Fed. 263, 52 C. C. A. 149.

24. Though Civil Code, § 576, expressly vested such power in savings banks—Abbott v. Jack, 136 Cal. 510, 69 Pac. 257.

25. Knapp v. Saunders, 15 S. D. 464.

26. Black v. First Nat. Bank, 96 Md. 399.

27. Construing Burns' Rev. St. 1894, §§ 2922-2925, 2927, 2929, 2934—Coddington v. Canaday, 157 Ind. 243.

28. Evidence held sufficient to show negligence on the part of directors rendering them liable for moneys abstracted by the cashier and overdrafts permitted after notice from the bank examiner—Campbell v. Watson, 62 N. J. Eq. 396.

29. Campbell v. Watson, 62 N. J. Eq. 396.

examination by the state officials,[30] especially where they have failed to appoint a committee to examine the bank's affairs every three months as required by a by-law,[31] though ignorant of the by-law,[32] or though it has been long disregarded.[33] Officers and directors of a bank are not responsible for depreciation of the value of its stock due to their errors in judgment and not to negligence. Directors who by reason of absence from the state or sickness failed to have knowledge of a hazardous loan made by the vice-president and manager and who make all reasonable efforts to collect the loan after discovering it are not liable to stockholders for depreciation in the stock.[34] A loan may be made by the manager of a bank to an insolvent corporation under such circumstances that the cashier who enters the amount of the loan to the credit of the corporation with knowledge of its insolvency may not be negligent so as to render himself liable to the stockholders for depreciation in the value of the stock.[35] Where a bank director has had knowledge of insolvency, he may be personally liable to subsequent depositors. To relieve himself, he must warn individual depositors of insolvency or proceed through the board of directors, superintendent of the banking department, or cashier to discontinue the taking of deposits.[36] His knowledge is established by evidence of an inspection of books at a director's meeting showing the surplus to be gone and the capital to be impaired.[37] Where a prima facie case of fraud is made, the burden of explaining is on the director.[38]

An action against wrong doing directors which would ordinarily be brought by the corporation may be brought by the stockholders affected, where the present directors are the ones charged with the misconduct.[39] A shareholder whose stock has been sold on failure to pay assessments necessitated by negligent loans of the directors may maintain an action in behalf of himself and others in the same position, to compel the directors to repay him the value of his stock as it was before their acts of negligence. Such action may be brought within ten years.[40] A bank's creditors after its insolvency,[41] or a receiver given power to take charge of a bank's property and prosecute all actions necessary in the discharge of his duties, may sue the directors for negligence,[42] and the receiver may assert on behalf of creditors claims which the stockholders could not.[43] Action may be brought before the total losses have been determined and the limit of the director's liability fixed.[44]

Powers of officers and right to represent bank.—One who has taken advantage of the acts of bank officers is estopped to deny the authority to make them,[45] and the

30. Campbell v. Watson, 62 N. J. Eq. 396.
31. Campbell v. Watson, 62 N. J. Eq. 396.
32. Campbell v. Watson, 62 N. J. Eq. 396.
33. Campbell v. Watson, 62 N. J. Eq. 396.
34. Warren v. Robison (Utah) 70 Pac. 989.
35. A cashier's contract of employment provided that he should not be charged with the responsibility of making loans and selecting securities. The manager of a bank without knowledge of the cashier negotiated a loan to the corporation and took its note indorsed by a solvent firm—Warren v. Robison (Utah) 70 Pac. 989.
36. It is not a defense that the director has expressed an opinion that deposits should not be received and there has been an arrangement which was not carried out for their receipt under proper restrictions—Cassidy v. Uhlmann, 170 N. Y. 505.
37. It may be shown as part of the res gestae that after insolvency checks were drawn at a director's meeting in favor of certain persons with whom the bank was in close relations, for more than the visible assets of the bank and were paid through the clearing house—Cassidy v. Uhlmann, 170 N. Y. 505.
38. Cassidy v. Uhlmann, 170 N. Y. 505.
39. So held in an action by share holders to recover damages resulting from a sale of stock on non-payment of an assessment, necessitated by negligent loans of the directors—Hanna v. People's Nat. Bank, 35 Misc. Rep. (N. Y.) 517.
40. Hanna v. People's Nat. Bank, 35 Misc. Rep. (N. Y.) 517.
41. Campbell v. Watson, 62 N. J. Eq. 396.
42. Construing Burns' Supp. 1897, § 2938, Burns' Rev. St. 1901, § 1242—Coddington v. Canaday, 157 Ind. 243.
43. As where the stockholders have authorized the directors to accept doubtful judgments and notes in payment of subscriptions—Coddington v. Canaday, 157 Ind. 243.
44. Campbell v. Watson, 62 N. J. Eq. 396.
45. A borrower of money cannot deny

bank may be estopped to deny the legitimacy of acts which it has permitted its president to perform.[46] Officers other than the cashier may have authority to receive deposits.[47] Such authority must be determined by the actual facts and not the opinions of other officers.[48] The president of a bank may contract to loan money for the purchase of specific property, and may testify thereto.[49] He cannot bind the bank by false representations, of which it has not actual knowledge when acting for himself,[50] or by a statement on an application for a bond by its cashier from a surety company.[51] *Cashiers* are in the same status as to agency as other persons in a fiduciary relation.[52] A cashier may cancel an indemnifying bond and accept a new one.[53] He has power to sign certificates of deposit from power to sign all papers connected with the business.[54] Evidence of authority to issue certificates of deposit.[55] A bank may be liable for the acts of its cashier and general manager in undertaking to make investments.[56] In an action on a note, the cashier need not make express proof of his authority.[57] The *teller* has no implied authority to certify checks in the absence of a custom to certify and subsequent payment of certified checks by the bank.[58]

Unauthorized acts.—Acts of an officer outside the usual scope of his authority to which the bank is not a party and of which it has no notice are not binding on it.[59] They must be acts within the reasonable or apparent scope of his authority or which are done with the knowledge and approval of the directors or are similar to those which have been so done or which have been afterwards ratified by the bank's acceptance of benefits thereunder,[60] but a bank to escape liability for fraud of its officers cannot deny their authority to represent it in the usual course of

authority of president to make the loan or dictate its terms—Roe v. Bank of Versailles, 167 Mo. 406.

46. Arrangement of a loan of money for the purchase of stock—Roe v. Bank of Versailles, 167 Mo. 406.

47. As where an officer of a bank who generally attended the loan department and who had authority to sign and indorse checks and certificates of deposit in the absence of the cashier received a check at the ordinary window and turned it over to the teller—Burnell v. San Francisco Sav. Union, 136 Cal. 499, 69 Pac. 144.

48. Burnell v. San Francisco Sav. Union, 136 Cal. 499, 69 Pac. 144.

49. Roe v. Bank of Versailles, 167 Mo. 406.

50. The president with another was surety on a bond given for the performance of a railroad contract and on the contractors being about to abandon the work, informed the other surety that if he would make a note, the president had a contract with the railroad company which would protect them and that the first money paid under the contract should be applied to the note, which was desired merely to show the bank examiner, and it was held that the bank having advanced money on the note could hold the co-surety liable therefor—National Bank of Cleburne v. Carper (Tex. Civ. App.) 67 S. W. 188.

51. United States F. & G. Co. v. Muir (C. C. A.) 115 Fed. 264.

52. Campbell v. Manufacturers' Nat. Bank, 67 N. J. Law, 301.

53. A surety on the first bond pleaded that the bond had been surrendered and cancelled and another one taken and plaintiff denied the authority of its cashier in such matters. The cashier was by a by-law given general charge of books, papers and property of the bank and generally determined the rate of discount and looked after the securities and had general charge of the lending of the money. The bond was one indemnifying the bank against all discount, etc., of the paper of a certain corporation—German Am. Bank v. Schwinger, 75 App. Div. (N. Y.) 393.

54. Abbott v. Jack, 136 Cal. 510, 69 Pac. 257.

55. Semi-annual statements of the bank's cashier and evidence of the custom of the bank in issuing certificates of deposit are admissible—Abbott v. Jack, 136 Cal. 510, 69 Pac. 257.

56. The cashier exhibited statements to the depositor taken from the books of the bank which purported to show that investments were made by the bank for the depositor—Bobb v. Sav. Bank of Louisville, 23 Ky. Law Rep. 817, 64 S. W. 494.

57. Battersbee v. Calkins (Mich.) 8 Detroit Leg. N. 778, 87 N. W. 760.

58. Muth v. St. Louis Trust Co., 94 Mo. App. 94.

59. Jones v. First Nat. Bank (Neb.) 90 N. W. 912. A bank is not liable for a draft fraudulently issued by cashier to pay his own debt, where it is not shown that there is any authorization or ratification by the directors and the president and directors could not have discovered the fraud by the exercise of any care—Campbell v. Manufacturers' Nat. Bank, 67 N. J. Law, 301.

60. Hill v. Bank of Seneca, 87 Mo. App. 590.

business,[61] so it may be liable to a third person for a draft on a correspondent signed by its cashier and entered at less than its face.[62] Ratification may result from acceptance of benefits,[63] and an unauthorized act cannot thereafter be questioned.[64] There can be no authorization or ratification of unknown and concealed fraudulent acts,[65] and if a draft and the entry on the stub of the draft book are regular on their face, there is no evidence of negligence in the officers of the bank in failing to discover its fraudulent character from an inspection so as to raise an implied ratification.[66] Where the cashier of a banking corporation directs another bank to apply the corporation's deposit to his own indebtedness, a defense of estoppel in an action by the corporation to recover the deposit need not be based on defendant's ignorance of the cashier's authority, there being positive evidence that defendant knew nothing of the misappropriation of the money, and no proof of knowledge of his want of authority.[67]

Official or individual capacity.—It is to be presumed that the acts of an officer are done officially rather than individually.[68] They should be at the usual place of business of the bank unless otherwise authorized or ratified.[69] If a cashier is dealt with as an individual, it cannot afterward be claimed that it was a bank transaction.[70] There is no presumption that a cashier has official authority with regard to a transaction relative to his own business,[71] and if the act is known to be an individual one, the burden is on the other party to show that it was authorized by the bank or ratified.[72] Representations made by a cashier for the purpose of enabling its debtor to continue in business may be regarded as for the benefit of the bank.[73] A bank may be liable in tort to a person injured by a false statement in a certificate of deposit, of the source from which a deposit arose, made by the cashier in the interest of the bank, though not expressly authorized by the board of directors.[74] A bank is not responsible for representations of a defaulting officer made, after the bank has gone into the hands of the comptroller, for the

61. Acts of president and cashier in collecting money, depositing it to the credit of a customer and paying checks against it—Citizens' Bank v. Fromholz (Neb.) 89 N. W. 775.

62. Where a cashier has been allowed to overdraw and make drafts for his personal use and has power to sign drafts on a correspondent, the bank cannot recover from the payee of a draft, the difference between its face and the amount for which it was fraudulently entered on the bank's books—Campbell v. Upton, 171 N. Y. 644.

63. Ratification of the surrender by a cashier of a bond given to indemnify the bank against certain discounts is shown by the fact that the bank officials knew that the discounts were in excess of the amount secured by the bond and in endeavoring to recover for the discounts sued on the substituted bond first—German Am. Bank v. Schwinger, 75 App. Div. (N. Y.) 393. See as to sufficiency of evidence of ratification of a contract by cashier for the threshing of wheat on which a bank held a mortgage—Hill v. Bank of Seneca, 87 Mo. App. 590.

64. Arrangement for a loan of money for the purchase of stock—Roe v. Bank of Versailles, 167 Mo. 406.

65. Campbell v. Manufacturers' Nat. Bank, 67 N. J. Law, 301.

66. Action by receiver to recover money paid on the draft—Campbell v. Manufacturers' Nat. Bank, 67 N. J. Law, 301.

67. Iron City Nat. Bank v. Fifth Nat. Bank (Tex. Civ. App.) 71 S. W. 612.

68. A cashier receiving money on a lease and depositing it subject to the check of the person to whom it is due—Knapp v. Saunders, 15 S. D. 464.

69. Jones v. First Nat. Bank (Neb.) 90 N. W. 912.

70. As where he so acts in securing a draft—Campbell v. Manufacturers' Nat. Bank, 67 N. J. Law, 301.

71. Campbell v. Manufacturers' Nat. Bank, 57 N. J. Law, 301.

72. Campbell v. Manufacturers' Nat. Bank, 57 N. J. Law, 301.

73. As where the cashier advised one about to sell goods to an insolvent indebted to the bank, who was engaged on government contract work that the insolvent's note would be paid, though the bank did not realize any profit from the sale of the goods to the insolvent—Taylor v. Commercial Bank, 68 App. Div. (N. Y.) 458.

74. As where the cashier certifies to a state insurance commissioner that an insurance company has on deposit a sum paid in as the full amount of its capital stock, where the deposit in fact consisted largely of the proceeds of notes given in payment for stock discounted on the company's indorsement and for which the stock was held as collateral security, the certificate being made to enable the bank to secure a deposit from the company or to sell the stock held as collateral—Hindman v. First Nat. Bank, 112 Fed. 931, 50 C. C. A. 623.

purpose of obtaining collateral securities from a third person.[75] Where a bank cashier makes a sale in which he and another are jointly interested and deposits the entire proceeds in his own name and converts them to his own use, no one connected with the bank having anything to do with the transaction or having any knowledge of the third person's interest, the bank occupies no trust relation towards such person.[76] Where a broker receives a draft to be used in speculation, drawn by the cashier of the bank payable to himself, the broker is placed on inquiry as to the ownership of the funds.[77] A broker who receives drafts drawn by the cashier of a bank to his own order for use in speculation may be liable to the true owner for the funds used, though he had no knowledge of the ownership, but may be given credit for the proceeds of money repaid by him which may be traced into the hands of the owner, though he cannot have credit for moneys merely traced to the cashier.[78]

Notice to bank from knowledge of officers.—A bank is chargeable with the knowledge of its agent.[79] Knowledge of a bank cashier concerning acts done in the scope of his authority must be imputed to the bank,[80] as when acquired by the cashier in the reception of a deposit.[81] The bank is not chargeable with notice of fraudulent acts of an officer for his personal ends and outside the scope of his authority,[82] such as knowledge of its cashier that he has no authority to pledge a certificate of stock indorsed in blank for his personal debt,[83] and so knowledge gained by a cashier as president of another corporation is not imputed to the bank where he is acting, as for the bank in his own interests.[84] Notice to a director privately or received by him through sources open to persons generally, and which he has not communicated, is notice to the bank.[85] Change in officers does not affect notice previously acquired.[86]

Insolvency.—A creditor who appears and makes no objection on the hearing of a receiver's report recommending the allowance of claims cannot afterwards contend that certain of the claims were invalid.[87] Failure of consideration may be urged against an action by a receiver.[88] Claims purchased after its insolvency cannot be set off against a debt owing a bank.[89] On a contention that claims sought to be set off against defendant's note were purchased after insolvency, a stipulation that a bank went into insolvency expresses a positive and affirmative act on the part of the bank.[90]

75. Tecumseh Nat. Bank v. Chamberlain Banking House, 63 Neb. 163.

76. Bank of Overton v. Thompson (C. C. A.) 118 Fed. 798.

77. Mendel v. Boyd (Neb.) 91 N. W. 860.

78. Mendel v. Boyd (Neb.) 91 N. W. 860.

79. Where he has knowledge that the notes and mortgage securing them are fraudulent and without consideration, the bank cannot hold notes as collateral—Baldwin v. Davis (Iowa) 91 N. W. 778.

80. Such as knowledge of the condition of stock which he purchased as cashier—Farmers' & Merchants' Bank v. Loyd, 89 Mo. App. 262.

81. As where a married woman deposits a conveyance of her property with the bank's cashier to be delivered on payment of the purchase money and on receipt of the purchase money the cashier in violation of his agreement places it to the credit of the woman's husband—Rhinehart v. People's Bank, 89 Mo. App. 511.

82. Jones v. First Nat. Bank (Neb.) 90 N. W. 912. A bank is not chargeable with notice of the fraudulent purpose of a director in obtaining a loan from his mere capacity as a director—Southern Commercial Sav. Bank v. Slattery's Adm'r, 166 Mo. 620.

83. Brady v. Mt. Morris Bank, 65 App. Div. (N. Y.) 212.

84. Note of a corporation received by it without consideration and discounted by the cashier after consultation with the directors —People's Sav. Bank v. Hine (Mich.) 9 Detroit Leg. N. 283, 91 N. W. 130.

85. Black v. First Nat. Bank, 96 Md. 399.

86. United States Nat. Bank v. Forstedt (Neb.) 90 N. W. 919.

87. There was advertisement for the presentation of claims and filing of objections. The claims in controversy were asserted to represent an illegal deposit of public funds —Baker v. Williams, etc., Banking Co. (Or.) 70 Pac. 711.

88. As where notes are given for accommodation to swell the apparent assets of a bank—Chicago Title & Trust Co. v. Brady, 165 Mo. 197.

89. Dyer v. Sebrell, 135 Cal. 597, 67 Pac. 1036.

90. Dyer v. Sebrell, 135 Cal. 597, 67 Pac. 1036.

Winding up.—In order that directors acting as trustees in statutory proceedings to wind up the affairs of a bank be removed, the petition must show malfeasance or nonfeasance sufficient to warrant the same.[91]

Reorganization.—Creditors who acquiesce in proceedings for reorganization may by the acceptance of benefits be estopped from denying their validity.[92]

Stockholders' individual liability.—A law imposing a liability on stockholders may affect stockholders of a bank organized prior to its passage,[93] though statutes providing for procedure to enforce stockholders' liability do not apply to actions actually pending,[94] and may operate on stockholders becoming such either before or after the time when they take effect.[95] In order to impose an individual liability on its stockholders, the corporation need not exercise all the functions of a banking corporation.[96] Acceptance of stock issued is not essential to fix liability on the person who allows it to stand on the corporate books in his name.[97] Under statutes providing for continuation of liability after assignment of stock the liability is limited to creditors at the time of transfer,[98] and notice of transfer need be given only where the stockholder is liable for an existing debt.[99] Liability exists for deposits.[1] Stockholders' individual liability under certain statutes may only be enforced by the creditors.[2] The court may authorize the receiver to compromise, it being within his authority to compound bad or doubtful debts.[3] Where stockholders of an insolvent bank are made liable as such for one year after the transfer of stock, liability continues one year beyond the time fixed for the payment of debts in proceedings for reorganization.[4] Action is regarded as begun at the time of service of summons.[5] A demand is not necessary before suit,[6] and

91. A petition which fails to state extravagance, negligence or delay in performance of the duties by the trustees, or that they have violated any law or contract, done any wrong or withheld any right or threatened any such thing is insufficient—Sands v. Gund (Neb.) 93 N. W. 990.

92. As where creditors accept certificates of deposit after the organization under L. 1897, c. 89 without questioning the validity of the re-organization, they cannot state that it was void because based on a petition formerly dismissed by a judge other than the one granting the order but without his knowledge—Hunt v. Roosen, 87 Minn. 68. Evidence held to show acquiescence of creditors in proceedings for re-organization of an insolvent bank—Hunt v. Roosen, 87 Minn. 68.

93. Construing L. 1882, c. 409, Banking Law 1892, § 52, and statutory construction law, § 31—Hagmayer v. Alten, 36 Misc. Rep. (N. Y.) 59.

94. Under L. 1897, c. 441, amending L. 1892, c. 689, § 52, requiring proceedings to be conducted only in the name and behalf of a receiver on dissolution of a bank, actions actually pending are not affected, nor does it apply to defendants not yet served in an action actually pending—Mahoney v. Bernhard, 169 N. Y. 589.

95. Banking Law 1892, § 52—Hagmayer v. Alten, 36 Misc. Rep. (N. Y.) 59.

96. Const. art. 11b, § 7—Hamilton Nat. Bank v. American L. & T. Co. (Neb.) 92 N. W. 189.

97. A wife may be regarded as having been an owner notwithstanding on being notified of the issue of stock to her she refused to receive it and assigned it to her husband, but continued to appear as holder on the books—Construing Civil Code, § 322, defining the term "stockholder" to include equitable owners as well as those evidenced as owners on the books of the corporation—Abbott v. Jack, 136 Cal. 510, 69 Pac. 257.

98. Construing Rev. St. 1898, § 2024, subsec. 16, and holding that an action must be commenced within six months after the transfer—Gager v. Paul, 111 Wis. 638.

99. So held construing charter of a state bank providing that stockholders shall be liable as sureties to the extent of the par value of their stock at the time of the creation of the debt, and Code 1882, § 1496, and exempting from liability as to debts subsequently contracted without reference to his holding one who for a short time held stock as collateral—Brunswick Terminal Co. v. National Bank of Baltimore, 112 Fed. 812.

1. Under Stock Corporation Law (L. 1890, c. 564, § 58), providing that stockholders shall not be liable for corporate debts not payable within two years from the time they are contracted or unless the corporation is sued within two years after they become due—Barnes v. Arnold, 169 N. Y. 611.

2. Cannot be collected by corporate officer or receiver. Const. art. 11b, § 7—Hamilton Nat. Bank v. Am. Loan & Trust Co. (Neb.) 92 N. W. 189.

3. Where liability was denied and stockholders were insolvent (Comp. St. c. 8, § 35)—State v. German Sav. Bank (Neb.) 91 N. W. 414.

4. Construing Laws 1897, c. 89, § 4—Hunt v. Roosen, 87 Minn. 68.

5. Rev. St. 1898, § 4239—Gager v. Paul, 111 Wis. 638.

6. Parker v. Adams (N. Y.) 38 Misc. Rep. 325.

the receiver need not have secured the return nulla bona of executions against himself on all claims.[7] The stockholders cannot defend on the ground that he has unreported assets,[8] or because of failure to collect all of a first assessment, or the sale of a large part of the assets at a low price under order of court.[9] The number of shares defendant held, the total number of the shares, and the amount and date of the debts, should be shown.[10] On an issue of insolvency, the receiver appointed after the voluntary closing of a bank may testify to the steps taken to collect paper coming into his hands and state that he is unable to say when any of it will be paid, and a witness may testify that his note, long overdue, was accommodation paper and his written assumption of its payment executed concurrently may be introduced.[11] *Interest* from the date of judgment only may be allowed.[12] A stockholder may be liable for interest from the time of closing to the time of payment, in excess of the amount of deposit and contractual interest to the time of the closing.[13] Payments by a stockholder by reason of his indorsement of the bank's paper in excess of his statutory liability may be pleaded as an equitable set-off.[14]

§ 3. *National banks; officers and examiners.*—The liabilities of directors of national banks may be shifted by them to sub-committees.[15] A bank examiner is not the agent of the bank in its negotiations tending towards a resumption of business.[16]

Powers.—National banks have no powers except those expressly granted or incidental to the business for which they are established.[17] They cannot become sureties in a replevin suit.[18] They may purchase bonds issued by a city board of education.[19] A bank has power to lease ground under an agreement that it will erect a building thereon and may erect a building more than sufficient for its own use, if adapted to make the property most productive. The lease may be for a term exceeding its corporate life, and the aggregate rental may exceed the capital stock.[20] A national bank may be substituted to the rights of a surety who has taken a mortgage on real estate though the bank itself has no power to take such a mortgage.[21]

7. Brinkworth v. Hazlett (Neb.) 90 N. W. 537.

8. Brinkworth v. Hazlett (Neb.) 90 N. W. 537.

9. Beckham v. Hague (N. Y.) 38 Misc. Rep. 606.

10. Under 1 Mills' Ann. St. § 518, declaring stockholders of a banking corporation individually liable for all its debts contracted while they were stockholders equally and ratably to the extent of their shares —Richardson v. Boot (Colo. App.) 70 Pac. 454.

11. State v. Stevens (S. D.) 92 N. W. 420.

12. If the recovery is not made greater than the par value of the stock. Construing L. 1892, c. 689—Mahoney v. Bernhard (N. Y.) 45 App. Div. 499.

13. Parker v. Adams (N. Y.) 38 Misc. Rep. 325.

14. Strauss v. Denny, 95 Md. 690.

15. As where discounting and examining committees are appointed, which permit the cashier during the period of three years to discount doubtful notes for a certain person to the extent of two-thirds of the capital. It is held that the committees were liable to the injured stockholders—Hanna v. People's Nat. Bank (N. Y.) 35 Misc. Rep. 517.

16. So his representations in regard to the liability of a defaulting officer of the bank and as to the value and condition of the securities already furnished by him are not binding on the bank and one who furnishes collateral security to a defaulting officer for his indorsements on paper previously sold by him to the bank cannot rely on such representation as a defense in an action by the bank to foreclose its lien on such securities —Tecumseh Nat. Bank v. Chamberlain Banking House, 63 Neb. 163.

17. Bailey v. Farmers' Nat. Bank, 97 Ill. App. 66.

18. Bailey v. Farmers' Nat. Bank, 97 Ill. App. 66.

19. Rev. St. U. S. § 5136; Comp. Sts. U. S. 1901, p. 3455—Newport Nat. Bank v. Board of Education, 24 Ky. Law Rep. 876, 70 S. W. 186.

20. The lessor of land to a bank is not accountable to the stockholders or creditors of the bank because the bank exceeded its powers in the expenditure of money in erection of a building thereon which was to become part of the realty and more than was required by the terms of the lease, and such excessive expenditure is not a lien on the property after it has returned to the hands of the lessor—Brown v. Schleier (C. C. A.) 118 Fed. 981.

21. Magoffin v. Boyle Nat. Bank, 24 Ky. Law Rep. 585, 69 S. W. 702.

Violation of banking act.—An action by the shareholders against directors for violation of the national banking act may be maintained where the bank fails to bring an action against the directors after request, and it may be brought before dissolution of the bank, in behalf of all shareholders, and the bank made a party. One shareholder cannot maintain such an action for his benefit alone while the bank is a going concern.[22]

Stock.—A transfer of national bank stock is not void for reason that at the time of the transfer, the assets of the bank are unequal to the discharge of its liabilities, if such fact is unknown to the seller, though he has knowledge that the bank has less than the legal reserve, and the fact that the purchaser of bank shares is insolvent, where the seller has no knowledge of such fact, does not render the sale void on a subsequent suspension of the bank.[23] The directors of a national bank are not authorized to make an assessment to pay a deficiency in the capital stock but an assessment for such purpose, under Rev. St. § 5205, must be made by the shareholders.[24]

Lien on stock.—The indorser of a note to a national bank is not released by the fact that the bank allowed the maker to part with his stock, since the national bank has no lien on such stock.[25] The bank may hold its stock as collateral security for a portion of its purchase price.[26] A lien on stock for indebtedness to the bank created after receipt of notice of pledge is inferior to the rights of the pledgee.[27]

Receivership.—The appointment of a receiver on insolvency of a national bank, by the comptroller, does not end its legal existence so as to render it unable to sue and be sued.[28] The receiver has no rights in excess of those of the bank, its stockholders, and creditors.[29] He does not have all the powers of the United States in its sovereign capacity.[30]

Enforcement of stockholders' liability.—On voluntary liquidation of a national bank, the individual liability of stockholders may be enforced only by a proceeding in equity in the nature of a creditor's suit in behalf of all the creditors brought in the district in which the bank is located, and, if ancillary proceedings are necessary against nonresident stockholders, they should be authorized by the court of original jurisdiction and brought by the receiver or some person appointed by the court.[31] Where the comptroller of the currency fixes the amount of personal liability of a stockholder in an insolvent bank and decides that it is necessary to enforce it, the claim may be sold or assigned by the receiver as other assets of the bank. The comptroller's decision as to the necessity of instituting proceedings cannot be questioned in other litigation.[32] Where transfer by the receiver

22. Zinn v. Baxter, 65 Ohio St. 341.

23. R. S. U. S. § 5191, U. S. Comp. St. 1901, p. 3486, does not cause a reduction of the reserve below the legal requirement to create a presumption of inability to continue business—Earle v. Carson, 188 U. S. 42.

24. Weinhard v. Commercial Nat. Bank, 68 Pac. 806, 41 Or. 359; Williams v. Same, Id.

25. Smith v. First Nat. Bank, 115 Ga. 608.

26. Rev. St. U. S. § 5201, U. S. Comp. St. 1901, p. 3494—Brown v. Ohio Nat. Bank, 18 App. D. C. 598.

27. Curtice v. Crawford County Bank (C. C. A.) 118 Fed. 390.

28. So where the legal title but not the exclusive ownership of a note is in the name of the bank, a suit on the note may be maintained in the bank's name—Camp v. First Nat. Bank (Fla.) 33 So. 241.

29. He cannot set aside, on the ground of ultra vires, an executed contract or have property charged with a lien for money expended under such a contract; as where property has been leased, money expended in the erection of a banking house and the building subsequently surrendered to the owner of the land and the lease cancelled—Brown v. Schleier (C. C. A.) 112 Fed. 577.

30. He cannot maintain an action based on the ultra vires character of a contract made ten years prior to his appointment and not at the time objected to by the United States or stockholders—Brown v. Schleier (C. C. A.) 118 Fed. 981.

31. Williamson v. American Bank (C. C. A.) 115 Fed. 793.

32. Waldron v. Alling (N. Y.) 73 App. Div. 86.

to plaintiff is established, it will be presumed that the formalities requisite to the validity of a transfer had been complied with.[33] A special authority conferred by the comptroller on the receiver of a national bank to bring actions for an assessment is not revoked by a general authority to compromise or settle all the claims or assets of the bank.[34] A second assessment may be made by the comptroller where the first is insufficient to meet the debts if the two do not exceed the amount of liability.[35] The stock register is not conclusive as to persons liable to assessment after insolvency of a national bank.[36] The complaint in a proceeding to recover an assessment need not directly allege the amount of capital stock.[37]

The limitation of actions to enforce liability begins to run from the time the assessment is levied,[38] and the action may be barred notwithstanding Act June 30, 1876, § 2, 19 Sts. 63, ch. 156, provides that an action to enforce the individual liabilities of a shareholder in a national bank, under Rev. Sts. U. S. § 5151, shall not be barred as long as there are outstanding claims against the bank. Such actions are within the meaning of a limitation act relating to actions on contracts not in writing, expressed or implied or on a liability created by statute.[39] Uncontradicted evidence of the receiver that he made personal demand on the stockholder who admitted having received notice of the assessment is sufficient to show notice and demand.[40]

State interference and powers of state courts.—Where the charter of a national bank has expired and it is in process of liquidation, the officers may, by the supreme court of a state, be compelled to allow an examination by the stockholders of its books, papers, and assets.[41] An application for the issuance of a new certificate by a stockholder who has lost a certificate of stock in a national bank may be made to a state court.[42] A state law prescribing a penalty on national banks receiving deposits when insolvent is invalid.[43] The receiver is bound by state laws concerning fraudulent conveyances if he attempts to enforce them in a state court.[44] A national bank, whether solvent or insolvent, is not subject to an attachment before judgment.[45] A bank may intervene in an attachment in a state court without becoming a party so as to necessitate a dismissal of the suit, but where a bank intervenes in an attachment suit, and plaintiff brings a subsequent action against the bank and also attaches the property involved, the attachment should be dissolved.[46] The privilege of a national bank against attachment does not prevent a suit in equity in attachment against a bank and one who sold the bank a bill of lading with a draft attached, for breach of contract and for a return of the money from the bank.[47]

33. Waldron v. Alling (N. Y.) 73 App. Div. 86.

34. McClaine v. Rankin (C. C. A.) 119 Fed. 110.

35. Studebaker v. Perry, 184 U. S. 258, 46 Law. Ed. 528.

36. The presumption arising therefrom may be rebutted by evidence of a sale of stock in good faith, and the performance of all duties imposed on the seller to secure transfer on the bank's register—Earle v. Carson, 188 U. S. 42.

37. Allegations of the existence of five hundred shares, par value $100, and a ratable assessment at $100 per share amounting to $50,000 are sufficient—McClaine v. Rankin (C. C. A.) 119 Fed. 110.

38. Construing Code Civ. Proc. § 394—Beckham v. Hague (N. Y.) 38 Misc. Rep. 606.

39. McDonald v. Thompson, 184 U. S. 71, 46 Law. Ed. 437.

40. McClaine v. Rankin (C. C. A.) 119 Fed. 110.

41. Tuttle v. Iron Nat. Bank, 170 N. Y. 9.

42. Application to the supreme court under stock corporation law (L. 1892, c. 688, §§ 50, 51), held to be within the meaning of 22 St. 1882, c. 290, § 4; U. S. Comp. St. 1901, p. 3458—Matter of Hayt (N. Y.) 39 Misc. Rep. 356.

43. Iowa Code, §§ 1884, 1885—Easton v. State of Iowa, 188 U. S. 220.

44. Watts v. Dubois (Tex. Civ. App.) 66 S. W. 698.

45. And the statute making such provision is not repealed by implication, by the Act of Congress July 12, 1882, 22 Sts. 102. R. S. U. S. § 5242—Van Reed v. People's Nat. Bank, 173 N. Y. 314.

46. Willard Mfg. Co. v. Merchants' Nat. Bank, 130 N. C. 609; Willard Mfg. Co. v. George H. Tirney & Co., Id. 611.

47. Action by purchaser of merchandise—

Usury by national banks.—Action to recover a penalty for exaction of usurious interest may be maintained in any state court, and is a civil action of which the chancery court may have jurisdiction.[48] The remedy given by Rev. St. U. S. § 5198, is exclusive.[49] Twice the amount of the entire interest and not twice the amount of the excess interest is the amount to be recovered.[50] There can be no recovery of interest on the amount.[51] The legal interest allowed on foreclosure, a deduction having been made of interest in excess of the legal rate, cannot be recovered in double amount under Rev. St. § 5198.[52] Usurious interest actually paid on discounting and loaning a series of notes cannot be applied to the satisfaction of the principal of the debt by the bank.[53] A petition showing that an action to recover usurious interest is not begun within two years from the time the transactions occurred, is not rendered good as against a demurrer by an allegation that the charge and reservation of the usurious interest were without plaintiff's knowledge or consent.[54]

§ 4. *Savings banks.*—The question of the status of a bank as a savings bank may be for the jury.[55] Where a savings bank is by special act changed to a bank having a capital stock representing guaranty funds to the depositors, the holders of which had no power to elect trustees or share in the management of the institution, a double liability is not imposed on such stock on insolvency.[56] Provisions that capital stock of a savings bank shall be security to non-stockholding depositors do not give them priority over general creditors.[57]

Powers.—Persons dealing with banks must take notice of their limited powers.[58] A savings bank may agree as to the time and amount of interest payments.[59] A contract by a savings bank to borrow money to pay deposits is not enforceable against non-stockholding depositors and is ultra vires.[60] A savings bank may be estopped to deny liability to repay money expended for its benefit at its request.[61]

Liabilities of directors.—Directors of a savings bank who appropriate its funds willfully to sustain another bank controlled by them by pretending to purchase its worthless paper are liable to creditors and stockholders for misappropriation. A depositor's assignee may bring an action therefor, as may one who becomes a creditor after the misappropriation, or any one creditor though he has not obtained a judgment against the bank, and a specific demand for an accounting need not be made.[62]

Russel v. Smith Grain Co., 80 Miss. 688, 32 So. 287; Searles v. Same, Id.

48. Construing Acts 1887, c. 97—McCreary v. First Nat. Bank (Tenn.) 70 S. W. 821.

49. Charleston Nat. Bank v. Bradford, 51 W. Va. 255. Cash payments cannot be set off in an action on the note—Haseltine v. Cent. Nat. Bank, 183 U. S. 132, 46 Law. Ed. 118. Usury obtained by a national bank in discounting notes drawing interest only after maturity cannot be set up by way of cross-bill in an action by the bank on notes—First Nat. Bank v. Hunter (Tenn.) 70 S. W. 371.

50. First Nat. Bank v. Watt, 184 U. S. 151, 46 Law. Ed. 475.

51. Rev. St. U. S. § 5198; U. S. Comp. St. 1901, p. 3493—McCreary v. First Nat. Bank (Tenn.) 70 S. W. 821.

52. Talbot v. First Nat. Bank, 185 U. S. 172, 46 Law. Ed. 857.

53. Construing Rev. St. U. S. §§ 5197, 5198—Charleston Nat. Bank v. Bradford, 51 W. Va. 255.

54. Talbot v. Sioux Nat. Bank, 185 U. S. 182, 46 Law. Ed. 862.

55. As where it is sought to determine whether interest is paid on deposits not subject to checks—Dottenheim v. Union Sav. Bank & Trust Co., 114 Ga. 788.

56. Gen. L. 1867, Sp. L. 1873, c. 117—State v. Sav. Bank of St. Paul, 87 Minn. 473.

57. Act April 11, 1862, for the incorporation of savings banks—Laidlaw v. Pac. Bank (Cal.) 67 Pac. 897.

58. So failure to loan money on mortgage security is not a cause of action where there is no report by two members of the investment board as provided by Sts. 1894, ch. 317, § 21, cl. 1—Gilson v. Cambridge Sav. Bank, 180 Mass. 444.

59. Act 1889, p. 280, confers additional powers on savings banks generally without regard to the time of their incorporation—Dottenheim v. Union Sav. Bank & Trust Co., 114 Ga. 788.

60. Act April 11, 1862, § 10, and Act March 12, 1864—Laidlaw v. Pac. Bank, 137 Cal. 392, 70 Pac. 277.

61. Construing Act April 11, 1862, § 10, Amendatory Act of March 12, 1864—Laidlaw v. Pac. Bank (Cal.) 67 Pac. 897.

Rules.—The adoption of rules and regulations may be evidenced by their long use with the knowledge and approval of the trustees.[63] The agreement of a depositor to the regulations of a savings bank may be shown by his conduct and need not be evidenced by his signature to the pass book.[64] Rules adopted after a person becomes a depositor do not affect him, though he agrees that notices as to deposits shall be regarded as personal notices and the rule has been posted for many years before the depositor's death.[65] A rule for the protection of a savings bank adopted on account of the inability of the officers to identify every depositor does not apply where by reasonable diligence the officers may be able to protect the depositor's interest.[66]

Deposits and repayment.—The relationship between a savings bank and its depositors is the ordinary one of debtor and creditor, where there is no limitation of liability by by-law or regulation.[67] Accounts subject to check are to be paid without limitation or restriction except that the check must be presented within banking hours on banking days.[68] There may be a joint tenancy in savings deposits.[69] A deposit in an alternative name may be repaid to the executor of one of the persons mentioned.[70] Payment may be properly made to the domiciliary administrator of a nonresident depositor, if before notice of the prior appointment of a domestic administrator.[71]

Reliance on pass book.—Conversion of the pass book does not pass title to the deposit.[72] The negligence of a depositor in losing his pass book does not relieve the officer of the bank from the exercise of reasonable care in payment of the deposit, though a by-law requires immediate notice of the loss of the book to the bank.[73] In the absence of such a regulation, no question of negligence can arise where payment is made on forged orders accompanied by the deposit book which has been lost and the bank not notified.[74] The fact that payment to an impostor is in the form of a check on another bank payable to the real depositor does not exempt the savings bank from liability.[75] A bank may be justified in payment to a person presenting the savings book and orders purporting to be signed by the owner where it has no notice that the book has been lost.[76]

62. Construing Const. art. 12, § 3, Civ. Code, §§ 571, 574—Winchester v. Howard, 136 Cal. 432, 69 Pac. 77.

63. Affecting the contractual relations between the savings bank and its depositors—Ladd v. Augusta Sav. Bank, 96 Me. 510.

64. Ladd v. Augusta Sav. Bank, 96 Me. 510.

65. Rule forbidding gifts of deposits except by assignment in writing duly acknowledged—Ranney v. Bowery Sav. Bank (N. Y.) 39 Misc. 301.

66. Where a by-law permits money to be withdrawn by the depositor or any person duly authorized to receive it, the decision of the officers of the bank as to the sufficiency of the authority is at their peril—Ladd v. Augusta Sav. Bank, 96 Me. 510.

67. Ladd v. Androscoggin County Sav. Bank, 96 Me. 520.

68. Construing Act 1889, p. 180—Dottenheim v. Union Sav. Bank & Trust Co., 114 Ga. 788.

69. So held where a mother and daughter made a deposit in their joint name, allowing the survivor to take the deposit—In re Barefield (N. Y.) 36 Misc. Rep. 745.

70. The demand was accompanied by presentation of pass book and testamentary letters and the other person mentioned had never deposited or withdrawn any money or had possession of the pass book—Grafing v. Irving Sav. Inst., 69 App. Div. (N. Y.) 566.

71. It was not shown that there were local creditors whose claims would be lost—Maas v. German Sav. Bank, 73 App. Div. (N. Y.) 524.

72. Newman v. Munk (N. Y.) 36 Misc. Rep. 639. See as to sufficiency of evidence of lack of authority and fraud in the withdrawal of deposits—City Sav. Bank v. Enos, 135 Cal. 167, 67 Pac. 52.

73. The fact that a person to whom payment is made had possession of the bank book is not a defense, if the payment could have been avoided by a comparison of the recipient's signature with the signature on file—Ladd v. Augusta Sav. Bank, 96 Me. 510. A by-law attempting to exempt a savings bank from liability for loss, where notice is not given of loss or theft of the pass book and deposit is paid on presentation of the book, is not a defense where payment is on presentation of the pass book and forged orders—Kingsley v. Whitman Sav. Bank, 182 Mass. 252.

74. Ladd v. Androscoggin County Sav. Bank, 96 Me. 520.

75. Ladd v. Augusta Sav. Bank, 96 Me. 510.

76. A book contained a statement that it was the order of withdrawal and that pay-

§ 5. *Loan, investment, and trust companies.*—A trust company may be estopped to deny its banking powers.[77] Agency of a paying teller of a trust company in certifying a check may be established by previous similar acts.[78] A loan and trust company cannot guaranty a note given between third persons and not negotiated by it.[79] In New York, trust companies have no power to loan, discount, or purchase commercial paper.[80] A trust company may pay a certificate of deposit though it has been assigned.[81] Where a trust company receives and pays money deposited to the credit of another on the checks and drafts of a depositor, it must pay interest thereon.[82] Legal interest may be allowed on preferred claims under the charter of a trust company on dissolution, though the fund thereby be exhausted as against general creditors and though before dissolution they received less than legal interest.[83]

§ 6. *Deposits and repayment thereof; checks, drafts, certifications, receipts, credits. Relation of banker and depositor.*—The relation between a bank and its depositors is that of debtor and creditor,[84] and the bank becomes the absolute owner of the actual deposit.[85] A bank cannot claim that it is a gratuitous bailee bound only to use the lowest degree of diligence.[86] The relation of banker and depositor is not created by the deposit of a sum in the nature of indemnity against advances to be made on checks of the depositor's agent given on purchase of goods.[87]

Evidence of deposit.—An entry in a pass book is prima facie evidence of the receipt of a deposit.[88] The fact that a bank enters a check left for collection to the depositor's credit as cash is not conclusive.[89] On garnishment against a deposit, the name in which it stands is presumptive but not conclusive evidence of ownership.[90] A written assignment of deposit found among a deceased husband's papers does not conclusively show an assignment of the wife's deposit.[91]

Certificates of deposit and cashier's checks.—Certificates of deposit may be called in after the expiration of the time limit or, on notice, the rate of interest may be reduced.[92] Interest is waived by withdrawal before expiration of the time limit.[93] A cashier's check cannot be countermanded by the payee after indorsement, it being similar to a bill of exchange drawn by the bank on itself

ments to persons producing the book should be deemed valid as to depositors—Winter v. Williamsburgh Sav. Bank (N. Y.) 68 App. Div. 193.

77. As where it has fully entered into a banking business it cannot deny capacity to certify checks on the ground that it was not chartered as a bank—Muth v. St. Louis Trust Co., 88 Mo. App. 596.

78. Muth v. St. Louis Trust Co., 88 Mo. App. 596.

79. Such a transaction is ultra vires a corporation organized under Comp. L. of Kansas, 1885, p. 260, c. 23, for the purpose of transacting the business of a loan and trust company and for buying and selling personal property including commercial paper with power to enter into any obligation or contract essential to the transaction of its ordinary affairs—Ward v. Joslin, 186 U. S. 142, 46 Law. Ed. 1093.

80. L. N. Y. 1893, c. 696, L. N. Y. 1892, c. 689, §§ 55, 163—Jenkins v. Neff, 186 U. S. 230, 46 Law. Ed. 1140.

81. Code Civ. Proc. § 1909—Zander v. N. Y. Security & Trust Co. (N. Y.) 39 Misc. Rep. 98.

82. Muth v. St. Louis Trust Co., 88 Mo. App. 596.

83. People v. American Loan & Trust Co. (N. Y.) 36 Misc. Rep. 355.

84. Quattrochi v. Farmers' & M. Bank, 89 Mo. App. 500.

85. In the absence of special agreement —Camp v. First Nat. Bank (Fla.) 33 So. 241.

86. Campbell v. Watson, 62 N. J. Eq. 396.

87. Armour v. Greene County State Bank (C. C. A.) 112 Fed. 631.

88. Quattrochi v. Farmers' & M. Bank, 89 Mo. App. 500.

89. Where the bank has not been negligent or the depositor misled, the check may be charged back on its proving to be worthless—Union Safe Deposit Bank v. Strauch, 20 Pa. Super. Ct. 196.

90. Bessemer Sav. Bank v. Anderson, 134 Ala. 343.

91. Dodge v. Lunt, 181 Mass. 320.

92. Bank of Commerce v. Harrison (N. M.) 66 Pac. 460.

93. Bank of Commerce v. Harrison (N. M.) 66 Pac. 460.

and accepted in advance by its issuance; the rights of the parties are those of parties to a negotiable note payable on a demand.[94]

Repayment of deposits.—Receipt of a deposit creates an agreement to repay to any one holding a check if at the time of presentation the drawer has such sum on deposit.[95] Deposits may be repaid to person making them, though made by him as attorney.[96] A bank can refuse repayment on the ground that the depositor's title is defective or that the deposit belongs to another,[97] but knowledge of an outstanding draft will not justify a refusal.[98] Where a bank has notice that money deposited is not the property of the depositor, repayment to the depositor or the person in whose name the deposit is entered will not relieve it from liability, though it cannot be required to hold the deposit more than a reasonable time to allow a third person to protect his rights. Notice of the third person's claim need not be given by him personally, if the bank acquired it of other parties.[99] On payment of a portion of the deposit on a valid check, the bank is no longer liable therefor to the depositor or his administrator.[1] A bank is not liable for failure to reserve the proceeds of drafts drawn against goods purchased to the payment of a check for the purchase price which has been presented at a time when there were no funds to meet it.[2] Want of authority to collect a deposit is waived by failure to urge it as a ground of objection at the time of demand.[3] The bank may be estopped to deny liability for the amount of a check.[4] A check may be revoked by the drawer at any time before presentation for payment,[5] but if given for a valuable consideration, it may be paid after notice of revocation, though the burden is thrown on the bank of showing that it operated as a valid assignment of the funds.[6] A check is revoked by the death of the drawer,[7] and the bank pays at its peril after notice.[8] After having refused to pay any portion of a check in excess of the amount on deposit, the bank has no right to pay it.[9]

Forged or altered checks and drafts.—A bank is not justified in paying to the mere holder of a check without identification or evidence of the genuineness of an indorsement.[10] Variation between the name of the payee and that indorsed should place it on its guard.[11] If it pay on a forged indorsement, it is not entitled to repayment from the drawer or to retain the check.[12] A bank without notice is not liable for the payment of a check to one securing it under a ficti-

94. Drinkall v. Movius State Bank (N. D.) 88 N. W. 724.

95. Brown v. Schintz, 98 Ill. App. 452; Petrue v. Wakem, 99 Ill. App. 463.

96. Where the bank has no notice of intended misappropriation—Pennsylvania Title & Trust Co. v. Meyer, 201 Pa. 299.

97. Nehawka Bank v. Ingersoll (Neb.) 89 N. W. 618. The bank may be compelled to pay to the real owner—Hanna v. Drovers' Nat. Bank, 194 Ill. 252.

98. Nehawka Bank v. Ingersoll (Neb.) 89 N. W. 618.

99. Drumm-Flato Com. Co. v. Gerlack Bank, 92 Mo. App. 326.

1. Raesser v. Nat. Exch. Bank, 112 Wis. 591.

2. Perry v. Bank of Smithfield, 131 N. C. 117.

3. Officers at the time of demand stated that they would not pay interest and would look into the question of paying the principal—Atlanta T. & B. Co. v. Close, 115 Ga. 939.

4. Evidence held sufficient for such purpose though the funds had been garnished—Rostad v. Union Bank, 85 Minn. 313.

5. Weiand's Adm'r v. State Nat. Bank, 23 Ky. Law Rep. 1517, 65 S. W. 617, 66 S. W. 26.

6. Raesser v. Nat. Exch. Bank, 112 Wis. 591.

7. A bank paying after notice of the drawer's death is liable to his estate—Pullen v. Placer County Bank, 138 Cal. 169, 71 Pac. 83.

8. Weiand's Adm'r v. State Nat. Bank, 23 Ky. Law Rep. 1517, 65 S. W. 617, 66 S. W. 26.

9. Especially where notified of the death of the drawer and directed not to make payment—Weiand's Adm'r v. State Nat. Bank, 23 Ky. Law Rep. 1517, 65 S. W. 617, 66 S. W. 26.

10. Western Union Tel. Co. v. Bimetallic Bank (Colo. App.) 68 Pac. 115.

11. Payee "Daley," indorsement "Daily" —Western Union Tel. Co. v. Bimetallic Bank (Colo. App.) 68 Pac. 115.

12. Garthwaite v. Bank of Tulare, 134 Cal. 237, 66 Pac. 326.

tious name,[13] and may pay on a forged indorsement if the person who receives the money is the one whom the maker believes to be the payee named,[14] but where a check is by mistake delivered to a person other than the payee, the bank cannot rely on such fact where it paid on an indorsement different from the name of the payee and without knowledge of the error in delivery, relying on the indorsement.[15] The maker of a check is not bound to so prepare it that it cannot be altered,[16] but must exercise reasonable care to detect alteration or forgery by the comparison of his vouchers returned with the record of checks issued.[17] Where checks are raised by an employee of the depositor, the depositor is charged with knowledge which would have been disclosed by a comparison of the checks with the stubs of the check book, though the comparison is made by the guilty employee,[18] and if he fail to examine checks returned, the bank is relieved from responsibility for raised checks paid after the account was balanced, in the absence of negligence on its part,[19] but it is contributory negligence to pay a plainly altered check preventing the bank from taking advantage of the depositor's negligence.[20] Failure to verify returned vouchers or to discover and notify the bank of forgery does not estop the depositor from claiming forgery though he may be liable for the damage occasioned thereby to the bank.[21] Failure to examine a statement showing an application of deposits and notify the bank within reasonable time of a misapplication will preclude a recovery.[22] One who has received the proceeds of a check or allowed the proceeds to be deposited to her credit cannot deny that the check was signed by her or by her authority.[23] Where two banks both pay a forged check without discovering the forgery, the latter bank relying on the indorsement of the bank first paying, may on discovery of the forgery, recover the money paid the first, unless a change has taken place in the remedies available to the parties.[24]

Checks drawn without authority.—A bank is not liable for payment in good

13. In this case, one securing a loan under false representations as to his name took a check therefor in the assumed name, indorsed it as such and in his real name, and secured payment thereon—Meyer v. Indiana Nat. Bank, 27 Ind. App. 354.

14. As where an executor on the faith of letters purporting to be signed by a legatee bought a draft for the amount of the legacy payable to the legatee and forwarded it to his address, and the legatee being in fact dead the writer of the letters secured the draft and obtained payment by forgery of the name of the legatee—States v. First Nat. Bank, 17 Pa. Super. Ct. 256, 203 Pa. 69.

15. The doctrine that where two persons are equally innocent the one failing to act on his knowledge must bear the loss, does not apply though the drawer was not satisfied that he had delivered the check to the actual payee and took a receipt from him—Western Union Tel. Co. v. Bimetallic Bank (Colo. App.) 68 Pac. 115.

16. Failure to subsequently discover alterations on the part of a depositor does not relieve the bank's liability for payment before the account was balanced—Critten v. Chemical Nat. Bank, 171 N. Y. 219, 57 L. R. A. 529.

17. Critten v. Chemical Nat. Bank, 171 N. Y. 219, 57 L. R. A. 529.

18. Critten v. Chemical Nat. Bank, 171 N. Y. 219, 57 L. R. A. 529.

19. Critten v. Chemical Nat. Bank, 171 N. Y. 219, 57 L. R. A. 529.

20. Payment of a check apparently altered by the insertion of the word "cash" instead of the name of the payee and having the amount written over an erasure—Critten v. Chemical Nat. Bank, 171 N. Y. 219, 57 L. R. A. 529.

21. Critten v. Chemical Nat. Bank, 171 N. Y. 219, 57 L. R. A. 529.

22. Where plaintiff's cashier directed an application of its deposit to his individual debt, and a statement furnished by defendant was examined by the bookkeeper and one director of plaintiff, and the director questioned the cashier with regard thereto, receiving unsatisfactory answers, and on the cashier's disappearance six months later action was brought to recover a deposit wrongfully applied—Iron City Nat. Bank v. Fifth Nat. Bank (Tex. Civ. App.) 71 S. W. 612.

23. Phoenix Nat. Bank v. Taylor, 23 Ky. Law Rep. 2307, 67 S. W. 27.

24. A drawee bank paying a forged check without discovery thereof, relying on the indorsements of another bank which has paid the amount of the check without identification of the person or inquiry, may recover the amount thereof from the latter bank on discovery of the forgery, if such bank has not been placed in a worse position than it would have been had the drawee bank refused payment on the first presentation—Canadian Bank v. Bingham, 30 Wash. 484, 71 Pac. 43.

faith of checks wrongfully drawn by an agent, though under an arrangement to cash checks given for a certain purpose,[25] and it is not bound to see that the checks are drawn pursuant to the agreement.[26] Where a bank is given signature cards containing the names of the president and treasurer to guide it in repayment of deposit of a corporation, it cannot pay checks signed by treasurer alone;[27] otherwise if the signature card bear only the name of the treasurer.[28] It is negligence for a bank to pay an unsigned check of a depositing corporation though to its bookkeeper, and no estoppel can arise because the corporation has failed to warn the bank of the forged checks.[29]

Set-off of debts due bank against deposit.—Generally a bank may appropriate funds on deposit to a debt of the depositor of a bank.[30] Some states hold that individual deposits may be set off against a firm debt.[31] In Louisiana, it is held that there must be a special mandate from the depositor to allow the deposit to be diverted to a debt of the bank.[32] A depositor may, after insolvency of a bank, have his deposit set off against notes due the bank, though they were not due at the time of suspension.[33] The surety cannot insist on an application by the bank of a depositor's credit balance to the satisfaction of a debt due it, in the absence of an instruction or agreement between the bank and the depositor, and where the debt is not included in the account between them.[34]

Deposits received after insolvency.—A petition alleging that a deposit was made when the bank was insolvent and known to be such by its president sufficiently shows fraud where an order is sought requiring the receiver to pay over the deposit.[35] Such a petition must offer to return a certificate of deposit received therefor.[36] It is sufficient prima facie to prove receipt of deposits during insolvency and one day before suspension.[37]

Special deposits.—A deposit evidenced by a certificate payable in current funds is general and on insolvency the depositor will be regarded as a general creditor.[38] A deposit of funds of an estate knowingly received is special.[39] A deposit by a tenant to secure a landlord in the performance of a lease is special and must be kept intact for the purposes named.[40] Trust funds remain such though deposited by the trustee in his own name.[41] They cannot be appropriated to the individual debt of the trustee to the bank and a bank is liable for such conversion.[42] Where a trust fund deposited is appropriated to the customer's

25. The negligence is that of the principal who by his selection of agent has made the loss possible—Armour v. Greene County State Bank, 112 Fed. 631, 50 C. C. A. 399. Where the arrangement is to pay checks drawn by a purchasing agent in payment of goods, the principal is bound to notify the bank on receipt of the first check bearing irregular and fictitious indorsements and until the receipt of such notice, the bank is not negligent in paying such checks—Armour v. Greene County State Bank, 112 Fed. 631, 50 C. C. A. 399.

26. Armour v. Greene County State Bank, 112 Fed. 631, 50 C. C. A. 399.

27. Shoe Lasting Mach. Co. v. Western Nat. Bank, 70 App. Div. (N. Y.) 588.

28. Shoe Lasting Mach. Co. v. Western Nat. Bank, 70 App. Div. (N. Y.) 588.

29. Kenneth Inv. Co. v. Nat. Bank of Republic, 96 Mo. App. 125.

30. Globe Sav. Bank v. Nat. Bank of Commerce (Neb.) 89 N. W. 1030.

31. Owsley v. Bank of Cumberland, 23 Ky. Law Rep. 1726, 66 S. W. 33.

32. Succession of Gragard, 106 La. 298.

33. Thompson v. Union Trust Co. (Mich.) 9 Detroit Leg. N. 101, 90 N. W. 294.

34. Camp v. First Nat. Bank (Fla.) 33 So. 241.

35. Rev. St. 1898. § 4541—Hyland v. Roe, 111 Wis. 361.

36. Hyland v. Roe, 111 Wis. 361.

37. Jernberg v. Mix, 100 Ill. App. 264.

38. Woodhouse v. Crandall, 99 Ill. App. 552.

39. Officer v. Officer (Iowa) 90 N. W. 826.

40. Receipt issued stated that the bank was to pay the landlord damages sustained through the tenant's default and was to hold the whole sum to the credit of the landlord after expiration of a certain time and on the conditions of the lease—Woodhouse v. Crandall, 197 Ill. 104.

41. Union Stock Yards Bank v. Haskell (Neb.) 90 N. W. 233.

42. Nehawka Bank v. Ingersoll (Neb.) 89 N. W. 618.

debt, the bank, if it has knowledge, is liable for a conversion.[43] Where a bank permits a deposit for a specific purpose in the account of a third person, it is liable if it allow a withdrawal of the deposit for other than the specified purpose by the person in whose name it stands.[44] Deposits made subsequent to an agreement that they should be applied to a note cannot be claimed as subject to check, though made when the note was not yet due.[45] Trust funds received with notice may be followed on insolvency, though mingled with other funds, if they may be identified or have swelled the bank's funds.[46] A check payable to the order of the bank does not sufficiently show that it received the funds represented thereby.[47] Where a deposit is made by the purchaser of a firm's goods to be divided among several creditors of the firm, as their interest might appear, the bank cannot after involuntary bankruptcy of the firm apply the deposit to notes of the firm held by it without the consent of the depositor or the bankrupts.[48]

Slander of credit or damages for failure to pay checks.—Parol demand will not support an action for slander of credit,[49] but a petition which states the existence of a deposit in defendant bank and a refusal to honor a check and repay a deposit on demand states a cause of action.[50] Plaintiff's insolvency at commencement of a suit for damages based on a refusal to honor checks is immaterial,[51] and it cannot be shown that a third person offered to buy plaintiff's claim.[52] In an action for the wrongful refusal to honor a check, recovery may be had for the time lost, expenses incurred, or for any loss of credit, business, etc., but an allowance cannot be made for humiliation or mortification of feelings.[53] Where the bank has funds to meet a check, the payee has a right of action thereon.[54] A bank may make a valid agreement to honor checks for the purchase of goods to be secured by a draft and bill of lading on the goods when shipped, and where it has received sufficient funds on the draft is liable for payment of the checks, though the drawers are already indebted to the bank on other transactions.[55]

Actions to recover deposits. Parties.—Where an alleged donee sues to recover a deposit in a savings bank, the administrator of the depositor may be made a party without showing that the administrator's claim is well founded.[56]

Demand is sufficiently established by plaintiff's evidence if not contradicted.[57] One to whose credit money is deposited need not present a receipt or check as precedent to an action to recover an amount not received because of mistake in settlement.[58] Deposits are properly demanded after receivership by drawing a check on the bank and demanding payment of the receiver.[59] See note as to sufficiency of petition.[60]

43. Globe Sav. Bank v. Nat. Bank of Commerce (Neb.) 89 N. W. 1030.

44. Deposit by son in his father's account to pay son's note, withdrawal by the father before the note is presented but after its maturity—Weitzel v. Traders' Nat. Bank, 18 Pa. Super. Ct. 615.

45. Roe v. Bank of Versailles, 167 Mo. 406.

46. Officer v. Officer (Iowa) 90 N. W. 826.

47. Action for the conversion of bonds. Check represented the amount borrowed on them as collateral and the officer in whose charge the bonds were testified that no part of the proceeds of the check went to the bank. The indorsement was such as would appear on the check in the natural course of business—Griffin v. Mechanics' & Traders' Bank, 61 App. Div. (N. Y.) 434.

48. In re Davis, 119 Fed. 950.

49. Hanna v. Drovers' Nat. Bank, 194 Ill. 252.

50. Kloepfer v. First Nat. Bank, 65 Kan. 774, 70 Pac. 880.

51. Hence a motion by defendant requiring plaintiff to give security for costs cannot be introduced—Roe v. Bank of Versailles, 167 Mo. 406.

52. Roe v. Bank of Versailles, 167 Mo. 406.

53. American Nat. Bank v. Morey, 24 Ky. Law Rep. 658, 69 S. W. 759.

54. Falls City State Bank v. Wehrlie (Neb.) 93 N. W. 994.

55. Evidence held sufficient to show an agreement to honor checks given in payment of the purchase of goods—Falls City State Bank v. Wehrlie (Neb.) 93 N. W. 994.

56. Banking L. § 115; L. 1882, c. 409, § 259; L. 1892, c. 689—McGuire v. Auburn Sav. Bank, 78 App. Div. (N. Y.) 22.

57. Cole v. Charles City Nat. Bank, 114 Iowa, 632.

Defenses.—Payment of checks drawn by a trustee on a trust fund in reliance on his apparent title and in good faith, to be availed of as a defense, must be pleaded in an action for trust funds deposited to the trustee's own account.[61] Instructions in actions to recover deposits should be applicable to the evidence.[62] In an action to recover deposits where plaintiff denies that check was signed by her or by her authority, the jury should not by instruction be instructed that they must find that plaintiff herself signed the check before they can find for defendant.[63] Plaintiff's negligence in not discovering a mistake in settlement is for the jury.[64] Plaintiff may recover *interest* from the date of the institution of his suit.[65]

Notes payable at bank.—Where there has been a direction to apply deposits to the payment of a note though it is not due, an action cannot be maintained for failure to honor subsequent checks where the maker has not money on deposit in excess of the amount of the note.[66] Authority to credit a draft to the payment of a certain note does not authorize a cashier to credit the account of the payee of the note when the note is beyond his control and cannot be indorsed with the payment.[67]

Certifications.—Certification is equivalent to acceptance, may be by any natural or artificial person on whom the check is drawn, and thereafter laches in making demand of payment cannot be imputed to the holder.[68] After certification of a check a bank is estopped to deny the possession of funds to pay the same.[69] Where on the same day that a note is certified, the certifying bank informs the bank holding it that the certification was by mistake, but the note is nevertheless sent through the clearing house, an action by the certifying bank to recover from the second bank may be maintained without an application for a re-settlement of accounts at the clearing house.[70] Sufficiency of evidence of fraud in withholding presentation of a certified check.[71] A bank's liability on negligent certification of a raised draft may rest on estoppel rather than on the certification.[72] After negligent certification of a raised draft which another bank pays when deposited with it, the first bank cannot recover the amount paid as money paid by mistake.[73] The question of good faith in paying a raised draft which has been certified by another bank and sent through the clearing house is one for the jury.[74]

58. Cole v. Charles City Nat. Bank, 114 Iowa, 632.

59. Wylie v. Commercial & Farmers' Bank, 63 S. C. 406.

60. A petition is sufficient which states that the plaintiff having executed a note to defendant bank, credit for the amount thereof was entered on a page in his pass book which had been fully settled and balanced, that a subsequent deposit by a third person without plaintiff's knowledge to plaintiff's credit of an equal sum was entered in the proper place, that plaintiff was informed that such deposit had not been made and was not given credit for one of the sums—Cole v. Charles City Nat. Bank, 114 Iowa, 632.

61. Union Stock Yards Bank v. Haskell (Neb.) 90 N. W. 233.

62. In an action to recover a deposit made by plaintiff bank and applied by it to a loan made to plaintiff's cashier, there was no evidence that there was any understanding between the cashier and any of defendant's officers when the deposit was made that it should be so applied. Held, that an instruction as to the effect of such intention or understanding should not be given—Iron City Nat. Bank v. Fifth Nat. Bank (Tex. Civ. App.) 71 S. W. 612.

63. Phoenix Nat. Bank v. Taylor, 23 Ky Law Rep. 2307, 67 S. W. 27.

64. Cole v. Charles City Nat. Bank, 114 Iowa, 632.

65. Bobb v. Sav. Bank of Louisville, 23 Ky. Law Rep. 817, 64 S. W. 494.

66. Roe v. Bank of Versailles, 167 Mo. 406.

67. Kunze v. Tawas State Sav. Bank (Mich.) 9 Detroit Leg. N. 211, 90 N. W. 668.

68. Muth v. St. Louis Trust Co., 88 Mo. App. 596.

69. Jackson Paper Mfg. Co. v. Commercial Nat. Bank, 199 Ill. 151.

70. Construing Const. N. Y. Clearing House—Mt. Morris Bank v. Twenty-third Ward Bank, 172 N. Y. 244.

71. Muth v. St. Louis Trust Co., 94 Mo. App. 94.

72. As where a bank pays another bank in which a raised draft, negligently certified by it, has been deposited, and the latter bank, relying thereon, pays the deposit—Continental Nat. Bank v. Tradesmen's Nat. Bank, 173 N. Y. 272.

73. Continental Nat. Bank v. Tradesmen's Nat. Bank, 173 N. Y. 272.

74. To be determined on the clearing-house rules, and the evidence—Continental Nat.

§ 7. *Loans and discounts.*—A bank has power to loan deposits for its customers unless its charter prohibits it.[75] A bank authorized to loan a deposit for a depositor is bound only to the exercise of good faith and reasonable diligence, but if it loan without authority, is absolutely responsible.[76] A loan evidenced by the books of a bank will be presumed to have been with the bank's knowledge of its essential features and with its approval, if there is no evidence to the contrary.[77] A bank in discounting a negotiable note is not bound to the exercise of care in the ascertainment of defenses.[78] The validity of notes discounted by a bank's cashier in excess of the amount which a national bank may legally loan one person is not affected by the fact that the cashier was prosecuted and punished for misapplying the bank funds, and the maker of the note for aiding and assisting him, and that the amount of the penalty of the cashier's bond had been recovered by the receiver.[79]

Advances against bills of lading.[80]—A bank which advances money to an agent for the purchase of property for a firm and accepts a draft on the firm attached to a bill of lading on the property, which is shipped in the firm name, is entitled to it as against an attachment against the agent, no fraud being shown, and it does not release its lien by obtaining a guaranty of payment of the draft from the consignee.[81] On sale of property consigned, with notice that a draft has been drawn against it, the brokers are liable to the holder of the draft for the net amount realized from the sale after the charges have been deducted.[82]

§ 8. *Collections.*—Bankers are liable for failure to exercise due diligence in the collection of notes which they have undertaken.[83] They are not liable for negligence of a correspondent unless negligent in its selection.[84] A check should not be sent to the drawee bank.[85] It is negligence to send a second note to a correspondent, where a note previously sent has not been reported on at maturity, without making inquiry as to such note, or to fail to make inquiry concerning the former notes until after several weeks from their maturity, during a period of financial disturbance.[86] Where a draft indorsed for deposit is transmitted for collection the collecting bank becomes the agent of the receiving bank and cannot be held liable by the depositor for delay in presentation.[87] It will be presumed that the drafts were forwarded for collection in the same manner as in a prior course of

Bank v. Tradesmen's Nat. Bank, 173 N. Y. 272.

75. Bobb v. Sav. Bank of Louisville, 23 Ky. Law Rep. 817, 64 S. W. 494.

76. Watson v. Fagner, 99 Ill. App. 364.

77. Roe v. Bank of Versailles, 167 Mo. 406.

78. A bank is not charged with notice that a partnership signs merely as surety, by the fact that the firm name is signed under the name of a partner—Warren Deposit Bank v. Younglove, 23 Ky. Law Rep. 1969, 66 S. W. 749.

79. In re Edson, 119 Fed. 487.

80. Stock purchased under an agreement by which the bank advances the money, making a charge of $2 a car and taking the bills of lading therefor with drafts attached, becomes the property of the buyer and not of the bank—Clary v. Tyson (Mo. App.) 71 S. W. 710.

81. Shaffer v. Rhynders, 116 Iowa, 472.

82. Defendants promised to honor a draft for cattle to a certain amount if two cars were consigned them. Plaintiff discounted the draft with knowledge that but one car was consigned to defendant. On sale of such car by defendant, they received the net sum over and above the charges less than the draft, though the gross sum was in excess thereof, and it was held on their refusal to pay anything on the draft that they were liable for the net amount received—First State Bank v. Thuet (Minn.) 93 N. W. 1.

83. A petition which states the undertaking to collect, failure to exercise diligence, and damage to plaintiff, is sufficient—Coleman v. Spearman, etc., Co. (Neb.) 93 N. W. 983.

84. Second Nat. Bank v. Merchants' Nat. Bank, 23 Ky. Law Rep. 1255, 65 S. W. 4, 55 L. R. A. 273. It seems that it is not negligence to send notes of a corporation for collection to a bank, of which the secretary and treasurer of the corporation is cashier—Second Nat. Bank v. Merchants' Nat. Bank, 23 Ky. Law Rep. 1255, 65 S. W. 4, 55 L. R. A. 273.

85. Carson, etc., Co. v. Fincher (Mich.) 8 Detroit Leg. N. 1108, 89 N. W. 570.

86. Second Nat. Bank v. Merchants' Nat. Bank, 23 Ky. Law Rep. 1255, 65 S. W. 4, 55 L. R. A. 273.

87. Morris v. First Nat. Bank, 201 Pa. 160.

business.[88] A bank which is the collecting agent of another does not cease to be such because drafts drawn on it are forwarded it for collection.[89] Where the collecting bank gives credit for the proceeds and holds them for some time they will not be regarded as trust funds.[90] An agreement for a prompt transmittal of the proceeds of collections will be interpreted by the understanding of the parties as evidenced by the usage and course of business.[91] Where a bank presents checks of its depositors to a trust company on which they are drawn, and accepts the check of the trust company in payment, the liability to its depositors becomes fixed, and the checks presented cannot be recovered from the assignee for creditors of the trust company.[92] Where a bank having made a collection and drawn a draft on another bank for the purpose of transmitting the proceeds thereof fails, the person for whom the collection is made has no right to reach the proceeds of the collection as a trust fund, payment of the draft having been refused by the bank on which it was drawn.[93] Where the holder of a note delivers it for collection, the bank may properly pay the proceeds over to him in the absence of actual notice that they belong to a third person, notwithstanding the note has been assigned.[94] The collecting bank may apply the proceeds of a draft to the overdrawn account of the transmitting bank, though the transmitting bank has suspended payment, if the collecting bank has no knowledge of such fact or notice that the draft which is indorsed in blank was held by the transmitting bank merely for collection and not as owner.[95] Where the transmitting bank becomes insolvent before the presentation of a draft for payment by the correspondent bank, the drawee of the draft may recover the proceeds of collection from the correspondent, the amount not being credited by the receiving bank or credited by the correspondent to the receiving bank until after payment, when the correspondent credited the receiving bank's account, it having no notice of its insolvency.[96]

Duty to preserve rights of parties.—A bank's duty with regard to paper delivered it for collection is to forward it and make a proper demand of payment and on nonpayment to take the proper steps to charge the indorser.[97] The collecting bank is bound to use reasonable care and diligence to protect the rights of the forwarding bank in respect to the liability of the indorser and drawer of the check forwarded for collection, and its failure to do so relieves the forwarding bank from liability after the collecting bank has paid it.[98] An instruction to protest requires

88. As where a bank sends drafts to another bank having a correspondent at the place of payment, it will be presumed that the drafts so forwarded were sent and received for collection, such having been a former course of business—National Revere Bank v. Nat. Bank of Republic, 172 N. Y. 102.

89. National Revere Bank v. Nat. Bank of Republic, 172 N. Y. 102.

90. Where it was a business custom to give an agent transmitting notes of a corporation for collection, credit for the proceeds and sometimes to retain the proceeds for two months before remitting, the corporation is an ordinary creditor—McCormick Harvesting Mach. Co. v. Yankton Sav. Bank, 15 S. D. 196.

91. McCormick Harvesting Mach. Co. v. Yankton Sav. Bank, 15 S. D. 196.

92. Farmers' & Mech. Nat. Bank v. Cuyler, 18 Pa. Super. Ct. 434.

93. A draft was sent for collection, which, when presented by the receiving bank, was paid by check on such bank, the drawee having money on deposit sufficient to meet such check, and the amount thereof was charged to his account and a draft issued on another bank and mailed to plaintiff—Peters Shoe Co. v. Murray (Tex. Civ. App.) 71 S. W. 977.

94. Bank of Laddonia v. Friar, 88 Mo. App. 39.

95. American Exch. Nat. Bank v. Theummler, 195 Ill. 90.

96. Nash v. Second Nat. Bank, 67 N. J. Law, 265.

97. A bank to which drafts are transmitted by another in the ordinary course of business and which mails them to its correspondent undertakes the duty of collecting them and paying over the proceeds or returning them with the liability of the parties unimpaired in case they are not paid, there being no special agreement—National Revere Bank v. Nat. Bank of Republic, 172 N. Y. 102. A bank is liable for failure to demand payment or protest for non-payment a note held by it for collection on which it is liable as indorser—Louisville Banking Co. v. Asher, 23 Ky. Law Rep. 1180, 65 S. W. 133.

98. Ft. Dearborn Nat. Bank v. Security Bank, 87 Minn. 81.

the taking of necessary steps to bind indorsers,[99] but the bank need not see that a notary performs his duty as to notice of dishonor.[1] Where a receiving bank cashes a check and forwards it for collection and the drawer is discharged by failure of the collecting bank to protest, the receiving bank is damaged prima facie to the amount of the check, but the damages may be reduced by showing the insolvency of the persons discharged from liability.[2] Where the collecting bank fails to properly charge an indorser, the presumption is that the indorser was solvent.[3]

Drafts with bill of lading attached.—The collecting bank is not liable for defects in the goods against which the drafts were drawn,[4] or for the drawer's failure to pay freight as agreed on and as shown by the invoice attached to the draft.[5] Negligence of the bank with regard to delivery of the goods may be waived.[6] The indorsement on a draft attached to a bill of lading may be sufficient to charge the drawee with notice that it is held for collection only.[7]

Actions.[8]—Where collections are sought to be held as a trust fund against a receiver, it may be shown that certain preferred creditors of the bank have recovered judgments entitling them to share pro rata in the funds on hand at the time of the insolvency.[9] Sufficiency of petition as identifying funds sought to be recovered after insolvency as proceeds of collection.[10]

§ 9. *Offenses against banking laws; penalties. Receipt of deposits when insolvent.*—Penal statutes punishing receipt of deposits when insolvent do not apply to private bankers.[11] A corporation may be a de facto corporation if at the time of an indictment for receiving deposits after insolvency, there is a statute permitting its organization, though at the time of the attempted organization there was no such statute.[12] Insolvency means an inability to pay depositors as banks usually do and to meet liabilities becoming due in the ordinary course of business.[13] An intent to injure and defraud the bank must be charged in the indictment and proved in proceedings under Rev. St. § 5209.[14]

Evidence.[15]—That a transaction charged to be embezzlement by a bank officer

99. Note forwarded for collection—Williams v. Parks, 63 Neb. 747.

1. Since such is to be regarded as an official act of the notary—Williams v. Parks, 63 Neb. 747.

2. Ft. Dearborn Nat. Bank v. Security Bank, 87 Minn. 81.

3. National Revere Bank v. Nat. Bank of Republic, 172 N. Y. 102.

4. Commerce Mill. & Grain Co. v. Morris, 27 Tex. Civ. App. 553; Gregory v. Sturgis Nat. Bank (Tex. Civ. App.) 71 S. W. 66.

5. Gregory v. Sturgis Nat. Bank (Tex. Civ. App.) 71 S. W. 66.

6. Where a draft with bill of lading attached is forwarded for collection with instructions to allow ten days to the drawee for examination of the goods, the drawer waives any negligence of the bank in delivering the goods for examination without requiring payment of the draft by writing the drawee to pay the draft at once, when they are notified by the bank of the drawee's refusal after the expiration of ten days to pay the draft or return the goods and are requested to give further instructions—Flood v. First Nat. Bank, 24 Ky. Law Rep. 661, 69 S. W. 750.

7. "Pay to the order of American Nat. Bank," indorsed by the American Nat. Bank, "Pay any bank or banker or order American Nat. Bank"—Gregory v. Sturgis Nat. Bank (Tex. Civ. App.) 71 S. W. 66.

8. See as to sufficiency of evidence to show partnership ownership of a draft drawn to the order of one partner and indorsed by him individually for deposit—Morris v. First Nat. Bank, 201 Pa. 160. See as to sufficiency of pleading to raise the issue as to forwarding bank's negligence in failing to inquire concerning a cause of delay and notify the owner of the notes thereof—Second Nat. Bank v. Merchants' Nat. Bank, 23 Ky. Law Rep. 1255, 65 S. W. 4, 55 L. R. A. 273.

9. McCormick Harvesting Mach. Co. v. Yankton Sav. Bank, 15 S. D. 196.

10. It is sufficient to state the deposit of a check the day before the appointment of a receiver, the bank's officers having knowledge of its insolvency, and that the drawee held a portion of the check for a time after the receivership before it was paid over—Hyland v. Roe, 111 Wis. 361.

11. Penal Code, §§ 601, 609—Hall v. Baker, 66 App. Div. (N. Y.) 131.

12. State v. Stevens (S. D.) 92 N. W. 420.

13. Comp. Laws, § 6850—State v. Stevens (S. D.) 92 N. W. 420.

14. A refusal to instruct as to necessity of finding such intent is error, though the instructions define embezzlement as fraudulent appropriation by defendant of the funds of the bank to his own use—McKnight v. U. S., 111 Fed. 735, 49 C. C. A. 594.

15. Sufficiency of showing of knowledge of affairs of bank on prosecution under Starr & C. Ann. St. c. 38, § 168—Paulsen v. People,

was without the knowledge or consent of the directors or discount committee need not be proved specifically, if the transaction which the evidence tended to show was one to which it would not be presumed the directors or committee would consent.[16] In a prosecution under Rev. St. § 5209, against a national bank officer or clerk for embezzlement or making of false entries with intent to injure or defraud the bank or to deceive, the burden of rebutting intent is placed on defendant after proof of acts charged, and he must satisfy the jury beyond a reasonable doubt that there was no guilty intent in the transaction.[17]

Where the charge is embezzlement in causing a bank's money to be paid to persons known to be insolvent for the purpose of bribery and with intent to defraud the bank, the persons having executed a note to the bank, the *instructions* should not ignore the question of the insolvency of the persons to whom the loan is made.[18]

BANKRUPTCY.

§ 1. Validity of Act.
§ 2. Supercession of State Laws.
§ 3. Occasion for Proceeding and Acts of Bankruptcy.—A. General Assignment. B. Insolvency. C. Transfer of Property in Fraud of Creditors. D. Preferential Transfer of Property.
§ 4. Persons Who May be Adjudged Bankrupt and Who May Petition.
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§ 13. Rights of Trustees in Pending Actions by and Against Bankrupt.—Jurisdiction of State Courts.
§ 14. Management of the Property and Reduction to Money.—A. Deposits and Payments. B. Sale.
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§ 16. Right to and Setting off Bankrupt's Exemptions.
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§ 18. Referees; Proceedings Before Them and Review Thereof.
§ 19. Modification and Vacation of Orders in Bankruptcy.
§ 20. Trustees' Bonds; Actions Thereon.
§ 21. Accounting and Settlement of Trustee.
§ 22. Discharge of Bankrupt.—A. Procedure to Obtain—Vacation Thereof. B. Grounds for Refusal. C. Liabilities Released. D. Pleading Discharge.

§ 1. *Validity of act.*—That the bankruptcy act of July 1, 1898, permits others than traders to be adjudged bankrupts,[1] or because bankrupts are allowed the state statutory exemptions,[2] or because it fails to require notice to creditors of the filing of a petition in voluntary proceedings,[3] or personal service of notice of application for discharge in such proceedings,[4] does not render it unconstitutional.

195 Ill. 507. In a prosecution under Starr & C. Ann. St. c. 38, § 168, defendant may testify that he believed the bank was solvent, though, if the proof of knowledge to the contrary is great, failure to permit him so to do is harmless—Paulsen v. People, 195 Ill. 507.

16. A charge of embezzlement in paying out money on a note known to be worthless with intent to injure and defraud the bank—McKnight v. U. S. (C. C. A.) 115 Fed. 972.

17. United States v. German, 115 Fed. 987.

18. McKnight v. U. S. (C. C. A.) 115 Fed. 972.

1. Hanover Nat. Bank v. Moyses, 186 U. S. 181, 46 Law. Ed. 1113.

2. Such provision not being an attempt to delegate legislative powers—Hanover Nat. Bank v. Moyses, 186 U. S. 181, 46 Law. Ed. 1113.

3. Hanover Nat. Bank v. Moyses, 186 U. S. 181, 46 Law. Ed. 1113.

4. It does not deprive creditors of their property without due process of law—Hanover Nat. Bank v. Moyses, 186 U. S. 181, 46 Law. Ed. 1113.

§ 2. *Supersession of state laws.*—The passage of the federal bankrupt act suspended the operation of state bankruptcy acts,[5] except as to persons and cases which are not within the purview of the act;[6] and a state statute relating to insolvent mining corporations,[7] and permitting proceedings against a farmer,[8] are not superseded. Pending proceedings under the state laws were not barred by the passage of the federal act,[9] and a voluntary assignment for the benefit of creditors before the passage of the bankrupt act is a pending proceeding.[10]

§ 3. *Occasion for proceeding and acts of bankruptcy. A. General assignment.*—It is an act of bankruptcy for a debtor to make a general assignment for the benefit of creditors, irrespective of his solvency.[11]

B. Insolvency.—One is not insolvent within the act if his assets are sufficient to pay his debts.[12] In determining the question of insolvency, only such transfers as were made to defraud creditors should be excluded as assets,[13] and property mortgaged may be included, though it does not appear that the mortgage was so intended.[14] The mere submission of a corporation to the appointment of a receiver by a state court is not of itself an act of bankruptcy,[15] nor is an application by a partnership for dissolution and the appointment of a receiver, though the action was instituted for the purpose of preventing bankruptcy proceedings;[16] and an answer in proceedings in a state court for the appointment of a receiver admitting insolvency is not an admission in writing of inability to pay debts or a willingness to be adjudged a bankrupt.[17] That the petitioner sent a post-dated check and a note to a creditor and afterward renewed the note, which was finally paid a little less than four months before his application, is insufficient to show his insolvency.[18]

C. Disposition of property with intent to hinder, delay, or defraud creditors.—An actual intent to hinder, delay, and defraud must exist before any of the acts specified in the law shall constitute an act of bankruptcy,[19] and an intent involves a purpose wrongfully or unjustifiably to prevent, obstruct, embarrass, or postpone creditors in the collection or enforcement of their claims.[20] Intent will be presumed when one does any act which he knows will produce that result.[21] The doing or permitting of any of the things specified in such section with intent not to become a bankrupt is not necessarily doing or permitting them with intent to hinder, delay, or defraud creditors.[22] It is not permitting a "removal" of property by the debtor within the above section where he had neither the power nor

5. Carling v. Seymour Lumber Co. (C. C. A.) 113 Fed. 483; In re Storck Lumber Co., 114 Fed. 360; R. H. Herron Co. v. Superior Ct. of City & County of San Francisco, 136 Cal. 279, 68 Pac. 814; Littlefield v. Gay, 96 Me. 422.

6. R. H. Herron Co. v. Superior Ct. of City & County of San Francisco, 136 Cal. 279, 68 Pac. 814; Littlefield v. Gay, 96 Me. 422; Old Town Bank v. McCormick, 96 Md. 341; Rosenfeld v. Siegfried, 91 Mo. App. 169.

7. R. H. Herron Co. v. Superior Ct. of City & County of San Francisco, 136 Cal. 279, 68 Pac. 814; Littlefield v. Gay, 96 Me. 422.

8. Bankruptcy Act, § 4a, excepts "a person engaged chiefly in farming or the tillage of the soil"—Old Town Bank v. McCormick, 96 Md. 341.

9. Where the proceedings were pending, an action to set aside conveyances as fraudulent cannot be maintained by the trustee of the insolvent appointed under the bankruptcy act—Hood v. Blair State Bank (Neb.) 91 N. W. 701, 706.

10. Osborn v. Fender (Minn.) 92 N. W. 1114.

11. Day v. Beck & Gregg Hardware Co. (C. C. A.) 114 Fed. 834.

12. In re Henry Zeltner Brewing Co., 117 Fed. 799.

13. § 1, subd. 15—Posey v. McManis (Tex. Civ. App.) 67 S. W. 792.

14. Posey v. McManis (Tex. Civ. App.) 67 S. W. 792.

15. In re Henry Zeltner Brewing Co., 117 Fed. 799.

16. In re Varick Bank, 119 Fed. 991.

17. Bankruptcy Act, § 3a (5)—In re Wilmington Hosiery Co., 120 Fed. 180.

18. In re Chappell, 113 Fed. 545.

19. Bankruptcy Act, § 3a (1)—In re Wilmington Hosiery Co., 120 Fed. 180.

20. In re Wilmington Hosiery Co., 120 Fed. 180.

21. In re Wilmington Hosiery Co., 120 Fed. 180.

22. Bankruptcy Act 1898, § 3a (1)—In re Wilmington Hosiery Co., 120 Fed. 180.

the right to prevent its removal,[23] as where possession was taken by a receiver appointed by a state court[24] after admission of insolvency by answer in the proceedings in the state court.[25]

D. A preferential transfer of property while insolvent to a particular creditor or creditors is an act of bankruptcy,[26] irrespective of knowledge on the part of the creditor of an intention to prefer him.[27] If legal proceedings result in a preference and the debtor fails to discharge or vacate such preference, it will constitute an act of bankruptcy and there need be no intent on the part of the debtor to prefer the creditor, nor need he participate in bringing about the preference.[28]

§ 4. *Persons who may be adjudged bankrupt and who may petition.*—A farmer,[29] a wage earner, earning less than $1,500 per year,[30] a carrier,[31] mining[32] or laundry corporation,[33] or an incorporated social club,[34] or a corporation which had never acted under its charter authorizing it to engage in mercantile pursuits,[35] is not subject to involuntary proceedings.

Voluntary proceedings may be instituted by a debtor who owes less than $1,000,[36] and an unliquidated claim for a personal tort is not a debt which can be included in his schedule,[37] since the word "debt" in section 4 of the act is limited to a debt, demand, or claim, provable in bankruptcy, as defined in section 1, subd. 11.[38] An insane person is not qualified to file a petition in voluntary proceedings.[39]

Involuntary proceedings may be instituted by a creditor who holds an unsurrendered preference,[40] but a creditor whose claim is disputed and unliquidated[41] or who is enforcing his claim by action in a state court[42] cannot. While a debtor owing less than $1,000 cannot be adjudged a bankrupt,[43] yet jurisdiction is not lost where other petitioners join their claims bringing the amount up to the limit;[44] but the requisite number of petitioners against a corporation cannot be made up by one creditor assigning a part of his claim to two other persons, the other creditors being unwilling to file the petition.[45] A petition in involuntary bankruptcy proceedings against a corporation cannot be filed by creditors who became such by an assignment of a part of the creditor's claim to them.[46]

23. "Removal" as used in that section means an actual or physical change in the possession or locality of the property—In re Wilmington Hosiery Co., 120 Fed. 180.

24. In re Wilmington Hosiery Co., 120 Fed. 180.

25. In re Wilmington Hosiery Co., 120 Fed. 180.

26. Bankruptcy Act 1898, § 3a—Boyd v. Lemon & Gale Co., 114 Fed. 647. Evidence held sufficient to show insolvency at the time of making a preferential transfer which was averred as the act of bankruptcy—In re Coddington, 118 Fed. 281.

27. Act 1898, § 3a (2). Deed of trust as security—Boyd v. Lemon & Gale Co., 114 Fed. 647.

28. Bankruptcy Act, § 3a (3)—White v. Bradley Timber Co., 119 Fed. 989.

29. Evidence held sufficient to show that a person was not "engaged chiefly in farming" within section 4 of the Bankruptcy Act—In re Drake, 114 Fed. 229.

30. In re Pilger, 118 Fed. 206.

31. In re Philadelphia & Lewes Transp. Co., 114 Fed. 403.

32. R. H. Herron Co. v. Superior Ct. of City & County of San Francisco, 136 Cal. 279, 68 Pac. 814.

33. Bankruptcy Act, § 4—In re White Star Laundry Co., 117 Fed. 570.

34. In re Fulton Club, 113 Fed. 997.

35. In re Tontine Surety Co., 116 Fed. 401.

36. Littlefield v. Gay, 96 Me. 422.

37. Where the only debt which the petitioner scheduled was a judgment for malicious injury to the person, from which an appeal was pending, the adjudication will be set aside—In re Yates, 114 Fed. 365.

38. In re Yates, 114 Fed. 365.

39. § 59a—In re Eisinberg, 117 Fed. 786.

40. In re Herzikopf, 118 Fed. 101.

41. His claim must first be liquidated as required by § 63b—In re Big Meadows Gas Co., 113 Fed. 974.

42. By attachment—Buckingham v. Schuylkill Plush & Silk Co. (N. Y.) 38 Misc. Rep. 305.

43. R. H. Herron Co. v. Superior Ct. of City & County of San Francisco, 136 Cal. 279, 68 Pac. 814; Littlefield v. Gay, 96 Me. 422.

44. In re Ryan, 114 Fed. 373. Evidence held sufficient to show that petitioner was entitled to damages to the jurisdictional amount—In re Stern (C. C. A.) 116 Fed. 604; Appeal of Manhattan Ice Co., Id.; In re Manhattan Ice Co., 114 Fed. 399.

45. Under Bankruptcy Act 1898, § 59, three creditors must petition to have a corporation declared bankrupt—In re Independent Thread Co., 113 Fed. 998.

46. In re Independent Thread Co., 113 Fed. 998.

§ 5. *Procedure for adjudication. A. Involuntary.*—The petition must allege that the defendant is not a wage earner nor a person engaged chiefly in farming.[47] It must aver that payments while insolvent were made with intent to prefer the creditor.[48] If based on a concealment of money with intent to hinder, defraud, and delay creditors, it need not set forth the manner and details of the concealment.[49] An averment that one of petitioner's claims was fraudulently contracted may be stricken out as impertinent.[50] If proceedings are sought to be instituted against a partnership, the petition should be specifically directed against the partnership and not against the individuals composing it,[51] and the partnership as such is not brought before the court by a petition against the individuals composing it.[52] It is not necessary that a petition against a corporation aver the nature of the company's business.[53] The bankruptcy act does not require that a petition shall be verified by a formal or any affidavit.[54] It may properly be verified by the attorney or agent of the petitioner,[55] who has knowledge of the facts,[56] and if verified by the attorney his authority is sufficiently shown if it appear that he is admitted to practice in the circuit or district courts pursuant to bankruptcy order 4.[57] If it is signed and verified by a person in behalf of a corporation, he must state under oath that he was authorized to so sign and verify.[58]

The last day should be included in computing the time to answer.[59]

The general power of the court to permit amendments is not abrogated or restricted by bankruptcy rule 11,[60] and is by rule 6, by implication, limited to where earlier acts of bankruptcy are to be included.[61] The petition may be amended at any stage of the proceedings.[62] Unless a failure to state an act of bankruptcy in the original petition is excused, and unless an amendment would be in furtherance of justice, an amended petition will not be entertained,[63] and if the proceedings are against the members of a partnership, it cannot be amended so as to call for an adjudication against the partnership.[64] A clerical error in the jurat of a duplicate original petition may be cured by amendment.[65]

Objections to the petition[66] and to the jurisdiction of the bankruptcy court over the person and estate of the debtor are waived by his appearance and giving testimony on the hearing of the petition.[67]

On proper demand made therefor, the bankrupt may have jury trial on the question whether he had made a general assignment.[68]

The bankrupt may be examined on the question of his solvency at the time of the alleged preferential transfer.[69] The proof must affirmatively show that the

47. In re Bellah, 116 Fed. 69.
48. In re Ewing, 115 Fed. 707.
49. In re Bellah, 116 Fed. 69.
50. In re Ewing, 115 Fed. 707.
51. In re Mercur, 116 Fed. 655.
52. In re Mercur, 116 Fed. 655.
53. Where a petition alleges that the corporation had had its principal place of business within the district for the greater portion of six months next preceding the date of the filing of the petition and had property within said district and owed debts to the amount of $1,000, it is sufficient, especially where the demurrer was filed as a part of the answer on which the parties went to final hearing—In re Stern (C. C. A.) 116 Fed. 604; Appeal of Manhattan Ice Co., Id.
54. In re Bellah, 116 Fed. 69.
55. In re Herzikopf, 118 Fed. 101.
56. In re Hunt, 118 Fed. 282.
57. In re Herzikopf, 118 Fed. 101.
58. In re Bellah, 116 Fed. 69.
59. Day v. Beck & Gregg Hardware Co. (C. C. A.) 114 Fed. 834.
60. In re Bellah, 116 Fed. 69.
61. In re Sears (C. C. A.) 117 Fed. 294.
62. In re Mercur, 116 Fed. 655.
63. White v. Bradley Timber Co., 116 Fed. 768.
64. Proceedings held to be against the individual members of a partnership and not against the latter—In re Mercur, 116 Fed. 655.
65. In re Bellah, 116 Fed. 69.
66. Objection that the attorney or agent had no authority to verify the petition—In re Herzikopf, 118 Fed. 101.
67. In re Smith, 117 Fed. 961.
68. Day v. Beck & Gregg Hardware Co. (C. C. A.) 114 Fed. 834.
69. Bankruptcy Act 1898, § 3d—In re Coddington, 118 Fed. 281.

person sought to be adjudged an involuntary bankrupt is not within the exceptions of the act.[70]

An adjudication made on the tenth day after the filing of the petition in default of an answer is premature, since the time of answering does not expire until the expiration of the tenth day.[71] The mere adjudication of the partners of a firm as bankrupts, is not an adjudication against the partnership.[72] If the petition is dismissed, the respondent, not having been deprived of possession of his property, will not be allowed counsel fees or damages.[73] Want of jurisdiction is ground for collateral attack.[74] A judgment of a court of bankruptcy on a verdict of not guilty by jury can be reviewed only by writ of error.[75]

B. Voluntary.—If a partnership is seeking a discharge from firm as well as individual liability, separate petitions should be filed and subsequent proceedings should be conducted separately.[76] On default of a partner after service of the petition by his co-partner, the proceedings will be deemed voluntary on the part of both.[77] Since the bankruptcy act does not give a creditor the right to contest voluntary proceedings, he cannot intervene for the purpose of showing that the petitioner is solvent,[78] nor can he petition to vacate an adjudication,[79] and even if he had the right to intervene, that the facts stated in opposition by him came to his knowledge only recently will not excuse a delay of eight months.[80] There is no presumption from the adjudication that the bankrupt was insolvent at any period previous to the filing of his petition.[81] An order sustaining a demurrer to a petition on an application to vacate an adjudication in voluntary proceedings can be reviewed only by petition and not by appeal.[82]

§ 6. *Conflict between voluntary and involuntary proceedings.*—That a petition in involuntary proceedings has been filed will not bar a voluntary petition,[83] but the latter will be given priority without prejudice to the rights of the creditors in the former.[84]

§ 7. *Protection and possession of the property pending the appointment of trustee; receivers.*—A warrant for the seizure of property of an alleged bankrupt will not be issued except on a strict compliance with the provisions of section 69 of the bankruptcy act, and it will not be issued on the affidavit of the bankrupt alone waiving all preliminaries.[85] A receiver will be appointed only pending the filing of a bond by the petitioners;[86] he is entitled to possession of the property as against a mortgagee who took possession thereof under the mortgage subsequent to the adjudication.[87] A court of bankruptcy has jurisdiction to restrain the enforcement of claims against the bankrupt's property pending the appointment of a trustee,[88] as where a sale is attempted of property fraudulently conveyed by the

70. In re Pilger, 118 Fed. 206.

71. Sts. at Large, p. 544, §§ 18b and 18e—Day v. Beck & Gregg Hardware Co. (C. C. A.) 114 Fed. 834.

72. Bankruptcy Act, § 5h, cannot be construed into affirmative authority for the administration of firm assets in individual proceedings against all the parties—In re Mercur, 116 Fed. 655.

73. § 3 (5) e applies only when his property has been taken from his possession—In re Morris, 115 Fed. 591; In re Williams, 120 Fed. 34.

74. The validity of bankruptcy proceedings may be collaterally attacked in the state court on the ground of insufficiency of the property of the petitioning creditors—Buckingham v. Schuylkill Plush & Silk Co. (N. Y.) 38 Misc. Rep. 305; Matter of O'Donnell, Id.

75. Elliott v. Toeppner, 187 U. S. 327.

76. In re Farley, 115 Fed. 359.

77. In re Carleton, 115 Fed. 246.

78. In re Carleton, 115 Fed. 246.

79. In re Ives (C. C. A.) 113 Fed. 911.

80. In re Ives (C. C. A.) 113 Fed. 911.

81. In re Chappell, 113 Fed. 545.

82. Bankruptcy Act, § 24b—In re Ives (C. C. A.) 113 Fed. 911.

83. In re Stegar, 113 Fed. 978.

84. In such case the involuntary proceedings will be stayed to be renewed subsequently if necessary—In re Stegar, 113 Fed. 978.

85. In re Sarsar, 120 Fed. 40.

86. Bankruptcy Act, § 3e—Beach v. Macon Grocery Co. (C. C. A.) 116 Fed. 143.

87. In re Gutman, 114 Fed. 1009.

88. Beach v. Macon Grocery Co. (C. C. A.) 116 Fed. 143; In re Smith, 113 Fed. 993. Actions by creditors against an insolvent cor-

debtor,[89] or under a mortgage, it appearing that the mortgage was void.[90] The petition for an injunction to restrain proceedings in a state court may be signed and verified by the attorney for the creditors.[91]

§ 8. *Creditors' meetings; appointment of trustee; removals.*—In voluntary proceedings where the schedule shows no assets and no creditor appears at the first meeting, a trustee need not be appointed,[92] and there are no assets where all the scheduled property is exempt.[93] The referee in proceedings for the appointment of a trustee should entertain objections to claims to determine whether they are presented in good faith and the right of the claimants to vote.[94] Allowable claims cannot be considered at a meeting for the election of a trustee if the creditors are not present,[95] or the power of attorney of his proxy is sufficient.[96] The notary's certificate of acknowledgment to a power of attorney to proxy of a bankrupt's creditor is sufficient though it contains no venue.[97] If the attorney for creditors is appointed as trustee and he accepts the office, his relation as attorney for the creditors in the court terminates.[98] The approval by the referee of the trustee, appointed by the creditors, should be evidenced by an order in writing on which the parties may be heard by the judge.[99] In case of disapproval of the trustee selected, the referee has not power to appoint another trustee,[1] but he should call another meeting,[2] and give the creditors an opportunity to appoint a new trustee.[3]

§ 9. *Compositions.*—Neither the creditor nor the bankrupt can be compelled to pay receivers and attorneys' fees on the composition,[4] and in the absence of such an agreement, the composition fails and the estate will proceed as if no composition had been attempted.[5] A composition should be confirmed when it is for the best interests of creditors.[6] A dismissal of bankruptcy proceedings after confirmation of a composition will discharge all ordinary claims provable in bankruptcy, though the holders did not prove the same or participate in the proceeding,[7] and the bankrupt cannot assert the creditors' rights as against a contract made by him, valid as between himself and the claimant.[8]

poration commenced in the state court, will not be restrained, but proceedings on the judgment will be enjoined, it being uncertain whether creditors can enforce stockholders' liabilities before their claims had been reduced to judgments—In re Remington Automobile & Motor Co., 119 Fed. 441.

89. In re Miller, 118 Fed. 360.

90. Under Ga. Code, § 2878, providing that a creditor cannot collect usurious interest from an insolvent debtor to the prejudice of other creditors, a sale under a deed in fact a mortgage void as usurious, may be restrained—In re Miller, 118 Fed. 360; In re Ball, 118 Fed. 672.

91. If the moving papers state why it is made by the attorney it is sufficient—In re Goldberg, 117 Fed. 692. Sufficiency of petition, by creditors to restrain attachment proceedings in the state court, to show that the bankruptcy proceedings were pending in the district wherein the petition was filed—In re Goldberg, 117 Fed. 692. That the property attached was sold without proper notice, under order of sale by the state court, to the attaching creditor's son for one-tenth the appraised value warrants the issuance of an injunction restraining further interference pending the bankruptcy proceedings—In re Goldberg, 117 Fed. 692.

92. And Rule 15 in bankruptcy so providing is within Bankruptcy Act, § 30, empowering the U. S. supreme court to prescribe necessary rules—Smalley v. Laugenour, 30 Wash. 307, 70 Pac. 786.

93. Smalley v. Laugenour, 30 Wash. 307, 70 Pac. 786.

94. In re Malino, 118 Fed. 368. He should permit an investigation into the relations between an attorney, who had been attorney for the bankrupt and at the meeting represented certain creditors, for the purpose of ascertaining whether any of the claims he represented were held in the interest of the bankrupt—In re Dayville Woolen Co., 114 Fed. 674.

95. In re MacKellar, 116 Fed. 547.

96. In re Henschel (C. C. A.) 113 Fed. 443.

97. If the proxy complies with the form prescribed, pursuant to Bankruptcy Act 1830, it is sufficient—In re Henschel (C. C. A.) 113 Fed. 443.

98. In re Evans, 116 Fed. 909.

99. In re Hare, 119 Fed. 246.

1. In re MacKellar, 116 Fed. 547; In re Hare, 119 Fed. 246.

2. In re MacKellar, 116 Fed. 547.

3. In re Hare, 119 Fed. 246.

4. In re Slomka, 117 Fed. 688.

5. In re Slomka, 117 Fed. 688.

6. A composition confirmed by the court as being for the best interests of creditors—In re Arrington Co., 113 Fed. 498.

§ 10. *Property and rights passing to trustee.*[9] *A. Particular kinds of property or rights.*—A seat in a stock exchange having a vendable value,[10] policies of life insurance having a cash surrender value payable to the bankrupt[11] or to his wife if she survives him and to his representatives in case he survives her,[12] though the laws of the state exempt the avails of all life insurance,[13] passes to the trustee. A vested remainder in realty passes to the trustee of the remainderman during the existence of the life estate,[14] and improvements placed on land by a vendee under contract to convey on payment of the purchase money pass to his trustee whether the same are fixtures or not.[15] Partnership assets do not pass to the trustee of one of the members of the firm,[16] though the proceedings against the members and firm were instituted simultaneously and by the same creditor,[17] nor do goods obtained by false pretenses pass as a part of the bankrupt's estate.[18] The title to exempt property,[19] or to public lands which after the adjudication against the bankrupt reverted to the state on nonperformance of the contract of sale,[20] does not pass.

Property fraudulently conveyed by the debtor passes to his trustee whether or not creditors could have attacked the conveyance,[21] or where by subsequent acts they would be barred from attacking it,[22] and this though the transfers were made more than four months previous to the adjudication,[23] except where the fraudulent grantee had transferred it to a bona fide purchaser.[24] Under act 1867, a fraudulent conveyance made within one month previous to the institution of voluntary bankruptcy proceedings was void.[25]

B. *Nature of trustee's title in general.*—The trustee takes the same but no better title than the bankrupt had,[26] subject to all legal and equitable claims[27] and

7. Glover Grocery Co. v. Dorne (Ga.) 42 S. E. 347.

8. Where the bankrupt effected a compromise with his creditors, there being no adjudication against him, the court of bankruptcy may in summary proceedings direct a surrender of property to one claiming title under a writing claimed to be void under a state statute as a secret lien—In re Winship Co. (C. C. A.) 120 Fed. 93.

9. Merely because through the efforts of a bankrupt corporate officer the stock has been enhanced in value will not warrant a recovery of the stock by his trustee, and this though his wife owned all the stock except one share—Campbell v. Thompson (Colo. App.) 70 Pac. 161.

10. Page v. Edmunds, 187 U. S. 596.

11. In re Holden (C. C. A.) 114 Fed. 650.

12. Under the laws of Washington, the wife's interest in such insurance is made her separate property and is assignable—In re Holden (C. C. A.) 114 Fed. 650.

13. Bankruptcy Act, § 70a (5)—In re Holden (C. C. A.) 114 Fed. 650.

14. In re Haslett, 116 Fed. 630.

15. A vendor in Pennsylvania under contract to convey on payment of purchase money has no lien aside from his legal estate in the land—In re Clark, 118 Fed. 358.

16. Ludowici Roofing Tile Co. v. Pa. Inst. for Instruction of Blind, 116 Fed. 661.

17. Ludowici Roofing Tile Co. v. Pa. Inst. for Instruction of Blind, 116 Fed. 661.

18. And replevin may be obtained against the trustee for such goods—Bloomingdale v. Empire Rubber Mfg. Co., 114 Fed. 1016; Goodyear Rubber Co. v. Schreiber, 29 Wash. 94, 69 Pac. 648; In re Burkle, 116 Fed. 766. The seller to recover the goods from the trustee need not show that the purchaser did not, at the time of the purchase, intend to pay for them—In re Hamilton F. & C. Co., 117 Fed. 774. Evidence held sufficient to show fraud by the bankrupt in procuring goods, entitling the sellers to reclaim—In re O'Connor, 114 Fed. 777.

19. In re Seabolt, 113 Fed. 766.

20. Snodgrass v. Posey (Tex. Civ. App.) 70 S. W. 984.

21. Sheldon v. Parker (Neb.) 92 N. W. 923. Evidence held sufficient to show a sale by a bankrupt valid as against his trustee in bankruptcy—Weeks v. Fowler, 71 N. H. 518.

22. It is not a defense to an action by the trustee to recover property fraudulently transferred that the action was brought on the instigation of other creditors who pursuant to an agreement had ceased to prosecute actions against the bankrupt and would testify to the value of the property received by defendants—Frank v. Musliner, 76 App. Div. (N. Y.) 616.

23. In re Schenck, 116 Fed. 554.

24. In such case the judgment in the action to set aside the conveyance should be for damages against the fraudulent grantee and it should not set aside the conveyance—Skillin v. Maibrunn, 75 App. Div. (N. Y.) 588.

25. Hallyburton v. Slagle, 130 N. C. 482.

26. Logan v. Nebraska Moline Plow Co. (Neb.) 92 N. W. 129; In re Kellogg (C. C. A.) 118 Fed. 1017; In re Rabenau, 118 Fed. 471; Snodgrass v. Posey (Tex. Civ. App.) 70 S. W. 984; In re Standard Laundry Co. (C. C. A.) 116 Fed. 476. Where a chattel mortgagee purchased the chattels and thereafter sold them to a third person who purchased subject to the mortgage, the second purchaser and his trustees are estopped from question-

liens existing at the time of the filing of the petition,[28] which title vests as on the day of adjudication.[29] Under the bankrupt act, 1867, section 14, the bankrupt's property did not pass to the assignee until after he had qualified and it had been assigned by the judge or register.[30]

C. The trustee takes title free from liens acquired by legal proceedings within four months prior to the filing of the petition in voluntary or involuntary proceedings,[31] by a judgment,[32] or by an execution issued on a judgment obtained more than four months before but levied on property purchased by the debtor while insolvent and within four months,[33] irrespective of whether the debt would be released by the bankrupt's discharge;[34] by proceedings supplementary to execution;[35] by distraint for rent,[36] garnishment[37] or attachment,[38] and this applies to liens against exempt as well as nonexempt property;[39] but he takes subject to a lien acquired by legal proceedings commenced more than four months prior to the petition, though its enforcement depends on a judgment obtained within four months, as by attachment,[40] or by the commencement of a judgment creditor's action,[41] and subject also to a mechanic's lien acquired within four months of the bankruptcy of the debtor, since it is not acquired by legal proceedings.[42]

Funds on deposit in bank pass to the depositor's trustee free from any lien of the bank for the payment of unmatured notes held by it against the bankrupt,[43] and this though the funds were under the control of the bankrupt's assignee for the benefit of creditors and though the notes matured after the assignment and before the petition in bankruptcy was filed,[44] and particularly where the fund was deposited in trust for the benefit of certain creditors.[45]

D. Whether chattel mortgages executed by the bankrupt are valid liens will be determined by the laws of the state of the making.[46] The trustee takes free from any lien where the mortgagor was allowed to retain possession,[47] with the

ing the validity of the mortgage—In re Standard Laundry Co. (C. C. A.) 116 Fed. 476.

27. Duplan Silk Co. v. Spencer (C. C. A.) 115 Fed. 689.

28. South End Imp. Co. v. Harden (N. J. Ch.) 52 Atl. 1127.

29. In re Gutman, 114 Fed. 1009.

30. Leathem & Smith Lumber Co. v. Nalty, 109 La. 325. And the assignment by the register to the trustee operated as a conveyance of land though not scheduled—Hallyburton v. Slagle, 130 N. C. 482.

31. Section 67f; Mencke v. Rosenberg, 202 Pa. 131; In re Beals, 116 Fed. 530. Bankruptcy Act 1898, § 67f, should be construed in connection with U. S. Comp. St. 1901, p. 3418, § 1—Gabriel v. Tonner, 138 Cal. 63, 70 Pac. 1021.

32. Kinmouth v. Braeutigam, 63 N. J. Eq. 103; Mencke v. Rosenberg, 202 Pa. 131.

33. In re Darwin (C. C. A.) 117 Fed. 407. A lien on specific land cannot be acquired by the filing of an execution in a county other than that in which the judgment was rendered within four months, though the judgment was rendered more than four months before the adjudication of the defendant as a bankrupt.

34. In re Benedict, 37 Misc. Rep. (N. Y.) 230.

35. Property discovered in such proceedings passes to his trustee in bankruptcy—Rodgers v. Forbes, 23 Ohio Cir. Ct. R. 438.

36. In re Duble, 117 Fed. 794.

37. In re Beaver Coal Co. (C. C. A.) 113 Fed. 889.

38. In re Tune, 115 Fed. 906.

39. In re Tune, 115 Fed. 906.

40. In re Beaver Coal Co. (C. C. A.) 113 Fed. 889; Wakeman v. Throckmorton, 74 Conn. 616.

41. Ninth Nat. Bank v. Moses, 39 Misc. Rep. (N. Y.) 664; Metcalf v. Barker, 187 U. S. 165. Injunction issued by referee restraining proceedings in state court on a judgment and entered more than four months before the adjudication of the judgment debtor as a bankrupt is without authority—White v. Thompson (C. C. A.) 119 Fed. 868.

42. Holland v. Cunliff, 96 Mo. App. 67. The filing of mechanic's lien against the bankrupt after adjudication for a credit due within four months before the adjudication gives the lien claimant no greater rights than ordinary creditors—Lazzari v. Havens, 39 Misc. Rep. (N. Y.) 255.

43. Bankruptcy Act, §§ 63, 68, relating to mutual debts or mutual credits and the right of set-off, must be interpreted as applicable to proceedings in bankruptcy and to the incidental proof and allowance of claims, and not as intended to change the principles of set-off in actions—Pearsall v. Nassau Nat. Bank, 74 App. Div. (N. Y.) 89.

44. Pearsall v. Nassau Nat. Bank, 74 App. Div. (N. Y.) 89.

45. The trustee of a bankrupt, certain of whose creditors had deposited in the bank proceeds of his property sold by them and which was to be prorated among creditors, is entitled to possession of such funds as against the bank asserting an adverse claim thereto—In re Davis, 119 Fed. 950.

46. In re Josephson, 116 Fed. 404.

47. Bankruptcy Act 1898, § 70e; New York Laws 1897, c. 417—Skillen v. Endelman, 39

right to sell and replace goods sold,[48] though the mortgage provided that the proceeds of the sale of the goods should be used in payment of the mortgage and other debts and required daily deposits with the mortgagee.[49] There is no lien against the trustee where the mortgage was not recorded pursuant to an agreement,[50] or where prejudice resulted to creditors from the failure.[51] If executed before but recorded within four months of the adjudication,[52] or on the day before filing the petition,[53] or if recorded after the mortgagor had made a general assignment for the benefit of creditors and before the institution of bankruptcy proceedings against him,[54] it is not a lien. A recorded bill of sale executed to secure advancements to aid the bankrupt in the conduct of his business is a valid lien.[55]

The trustee takes such rights of the bankrupt, holding under a contract of sale with a reservation of title in the seller, as the bankrupt could have transferred or creditors have levied on or subjected to debts.[56]

E. Property transferred while insolvent and within four months of the filing of the petition shall be deemed a preference which passes to the trustee,[57] and whether an intent to prefer on the part of the bankrupt is essential has been the subject of conflicting decisions.[58] It must appear, however, that the bankrupt was insolvent at the time of the transfer,[59] and knowledge on the part of the creditor,[60] such as would induce a reasonable belief of the insolvency—not a mere cause to suspect the insolvency—is sufficient to render the transfer within four months a preference and void.[61] It is not necessary to show a specific agree-

Misc. Rep. (N. Y.) 261; In re Jones, 116 Fed. 431.

48. In re Hull, 115 Fed. 858.

49. Egan State Bank v. Rice (C. C. A.) 119 Fed. 107.

50. In re Josephson, 116 Fed. 404.

51. Deland v. Miller & Chaney Bank (Iowa) 93 N. W. 304; Texas Brew. Co. v. Mallette (Tex. Civ. App.) 67 S. W. 441.

52. Babbitt v. Kelley, 96 Mo. App. 529.

53. In re Jones, 116 Fed. 431.

54. Laws Wis. 1901, c. 207, provides that an assignee for the benefit of creditors represents the rights and interests of creditors in respect to transfers or liens, fraudulent or void as to creditors—In re Andrae Co., 117 Fed. 561.

55. In re Durham, 114 Fed. 750.

56. To constitute such reservation a lien it is essential that the contract be recorded (R. S. Mo. 1899, § 3412)—In re Fraizer, 117 Fed. 746; In re Rabenau, 118 Fed. 471; In re Kellogg (C. C. A.) 118 Fed. 1017; In re Garcewich (C. C. A.) 115 Fed. 87. Nebraska Comp. St. c. 32, § 26—Logan v. Nebraska Moline Plow Co. (Neb.) 92 N. W. 129. In Rhode Island property held under a conditional contract of sale and under which the bankrupt purchaser had no legal title, does not pass to his trustee—In re Smith, 119 Fed. 1004. Contract between consignor and bankrupt consignee construed and held a conditional sale to the latter and void under the Missouri statute and that the consignor has merely the rights of an ordinary creditor—In re Rabenau, 118 Fed. 471. Contract construed and held to constitute a bailment and not a conditional sale and the bailor entitled to the property as against the trustee of the bailee—In re Galt (C. C. A.) 120 Fed. 64.

57. Bankruptcy Act 1898, § 60.

58. In New York it has been held that such intent is essential—Benedict v. Deshel, 77 App. Div. (N. Y.) 276; but in California it has been held contra—Gabriel v. Tonner, 138 Cal. 63, 70 Pac. 1021.

59. Mortgage—In re Soudan Mfg. Co. (C. C. A.) 113 Fed. 804. Facts held to show that the bankrupt was not an insolvent at the time of making certain payments to creditors and within four months previous to the filing of his petition—In re Chappell, 113 Fed. 545.

60. Sherman v. Luckhardt, 65 Kan. 610, 70 Pac. 702; In re Harpke (C. C. A.) 116 Fed. 295. Evidence held insufficient to show knowledge of an intended preference after defendant, a clerk of the bankrupt, had received a preference by being paid money, the proceeds of a sale of the bankrupt's entire stock of goods—Dunlop v. Thomas, 28 Wash. 521, 68 Pac. 909. The giving of an insolvent firm's note indorsed by a third person secured by delivery of the firm's collaterals to secure a bank and who discounted for the firm its accepted drafts, the transaction being conducted by the senior partner of the firm who was also an officer of the bank who had knowledge of the firm's insolvency, constitutes a preference though the bank's cashier had no reason to believe that the preference was intended and the accommodation indorser acted in good faith—Crooks v. People's Nat. Bank, 72 App. Div. (N. Y.) 331.

61. Sirrine v. Stover-Marshall Co., 64 S. C. 457; Rosenfeld v. Siegfried, 91 Mo. App. 169; Harmon v. Feldheim (Mich.) 9 Detroit Leg. N. 421, 91 N. W. 744; Lampkin v. People's Nat. Bank (Mo. App.) 71 S. W. 715; Gans v. Weinstein, 37 Misc. Rep. (N. Y.) 209; Stedman v. Bank of Monroe (C. C. A.) 117 Fed. 237; Johnson v. Cohn, 39 Misc. Rep. (N. Y.) 189; Marden v. Sugden, 71 N. H. 274. Evidence held insufficient to show knowledge or reasonable cause to believe that a grantee

ment between the parties to prefer.[62] The question whether the creditor receiving a preference had reasonable cause to believe the debtor to be insolvent is one of fact.[63] The day on which the transfer was made should be excluded and that on which the petition in bankruptcy was filed should be included, in determining whether a transfer was made within four months preceding the filing of the petition.[64] A transfer within four months of the adjudication of the debtor as a bankrupt, neither party at the time believing that he was insolvent,[65] or if in fact insolvent, the corporation debtor being at the time a going concern,[66] or an oral agreement between the owner of a building and the contractor that materials already delivered shall stand as security for advancements, where by the terms of the contract the owner has a general lien on all materials delivered for the fulfillment of the contract, though the contract was not recorded,[67] or the mere giving of a renewal chattel mortgage within four months of the bankruptcy to the mortgagor,[68] or a conveyance in consideration of money previously loaned, executed eight months before, though by mistake not recorded until within four months of the filing of the petition,[69] or an equitable transfer of fire insurance policies to a creditor more than four months before the transferee was adjudicated a bankrupt, though not delivered until after or within four months of the adjudication,[70] is not a preference void as to the trustee. The distribution of the assets of a partnership among individual partners within four months and while the firm was insolvent,[71] the giving of notes to a retiring partner for his interest,[72] a deposit in bank subject to the debtor's draft,[73] are preferential transfers.

The giving of collateral security to creditors while insolvent and within four months of the debtor's bankruptcy constitutes a preference;[74] but merely because

was insolvent at the time of execution of the conveyance to his sister or that he intended it as a preference—Congleton v. Schreihofer (N. J. Ch.) 54 Atl. 144. Evidence held insufficient to show a sale at such an inadequate price as will put the purchaser upon inquiry as to the intent of the transfer by the bankrupt—Dunlop v. Thomas, 28 Wash. 521, 68 Pac. 909; Hackney v. Hargreaves (Neb.) 92 N. W. 626.

62. Gabriel v. Tonner, 138 Cal. 63, 70 Pac. 1021.

63. Harmon v. Walker (Mich.) 9 Detroit Leg. N. 439, 91 N. W. 1025; Deland v. Miller & Chaney Bank (Iowa) 93 N. W. 304; Boudinot v. Hamann (Iowa) 90 N. W. 497; Sherman v. Luckhardt, 96 Mo. App. 320. Under the evidence in this case the question whether a certain transaction was a preference should have been determined by the court—Hackney v. Hargreaves (Neb.) 92 N. W. 626.

64. Whitley Grocery Co. v. Roach, 115 Ga. 918.

65. The grantor caused property to be conveyed to the wife in consideration of money previously loaned to her under an agreement that he would convey to her property of equal value—Pearsall v. Nassau Nat. Bank, 74 App. Div. (N. Y.) 89. The husband was not the agent of the wife merely because he directed a conveyance of land purchased by him direct to his wife and so charged her with notice of his insolvency—Pearsall v. Nassau Nat. Bank, 74 App. Div. (N. Y.) 89; Congleton v. Schreihofer (N. J. Ch.) 54 Atl. 144.

66. Mortgage to secure money advanced to pay outstanding liabilities—In re Soudan Mfg. Co. (C. C. A.) 113 Fed. 804.

67. Bankruptcy Act 1898, § 70—Duplan Silk Co. v. Spencer (C. C. A.) 115 Fed. 689.

68. Deland v. Miller & Chaney Bank (Iowa) 93 N. W. 304.

69. Conveyances by husband to wife which were delivered to the wife's attorney to be recorded, and who by oversight failed to record one of them and the other he recorded only ten days before the petition was filed—Dean v. Plane, 195 Ill. 495. Failure of attorneys of a wife to whom the husband had made a conveyance eight months before his adjudication in bankruptcy, the evidence being sufficient to show that she had no knowledge of his insolvency or that he might become insolvent, to record the conveyance will not justify a conclusion of fraud—Dean v. Plane, 195 Ill. 495.

70. McDonald v. Daskam (C. C. A.) 116 Fed. 276.

71. Such disposition gives a preference to individual creditors—In re Head, 114 Fed. 489.

72. In re Denning, 114 Fed. 219.

73. Act 1898, §§ 1 (5), 60—In re Stege (C. C. A.) 116 Fed. 342.

74. In re Belding, 116 Fed. 1016; In re Jones, 118 Fed. 673; In re Ed. W. Wright Lumber Co., 114 Fed. 1011. A chattel mortgage covering goods owned by the bankrupt, together with goods purchased at the time of the execution thereof and within four months of the commencement of the proceedings, is valid as against the trustee only as to the goods purchased at the time of the execution—In re Hull, 115 Fed. 858. The execution of a mortgage by a partner of a firm, to his son, within four months of the filing of his petition in voluntary bankruptcy, which was given as collateral security for a note, given by the son to secure overdrafts by the firm, held not to constitute a prefer-

a creditor demanded or accepted security for his claim is insufficient to show that he had reasonable grounds for believing his debtor insolvent and that he was receiving a preference thereby;[75] nor will knowledge of the debtor's insolvency be presumed where the security was for a debt six-sevenths of which constituted a present loan.[76] The taking of collateral security for a present loan within four months of the bankruptcy of the borrower is not of itself the acceptance of a preference.[77] Giving possession of and a lien on future acquired property, under an agreement made while the owner was insolvent and within four months, to secure advances, constitutes a preference.[78]

F. Preferential payments.—The entry of a judgment by a creditor and part collection thereof under execution within four months of the adjudication of defendant in bankruptcy,[79] or the repayment of a part of a loan made within four months of an adjudication against the borrower,[80] or giving a post-dated check payable on the day of the insolvency of the drawer and deposited by the creditor on the same day in another bank, which received payment on the day following through the clearing house,[81] or a fraudulent secret preference to a creditor on a composition with the bankrupt made more than four months before the bankruptcy of the debtor,[82] are preferences. In the latter case, it is a preference to the extent of the excess over the amount he should have received under the composition,[83] which must be surrendered before the creditor can prove an independent debt.[84] A transfer of property in payment of a first mortgage debt is not a preference where the mortgaged property was ample to pay it and also the second mortgage thereon.[85] A payment made by a third party to the creditor of a bankrupt is not a preference to the creditor.[86]

The payment of a part of the claim within four months of the petition in bankruptcy,[87] as a payment of a part of a running account, constitutes a preference;[88] but a payment of a part of a credit balance before a claim for conversion arose is not a preference which must be surrendered before the latter can be proved,[89]

ence within the bankruptcy act—Crooks v. People's Nat. Bank, 72 App. Div. (N. Y.) 331.

75. Perry v. Booth, 114 N. Y. Rep. 706; Laundy v. First Nat. Bank (Kan.) 71 Pac. 259; Congleton v. Schreihofer (N. J. Ch.) 54 Atl. 144.

76. Stedman v. Bank of Monroe (C. C. A.) 117 Fed. 237.

77. Harmon v. Feldheim (Mich.) 9 Detroit Leg. N. 421, 91 N. W. 744; Young v. Upson, 115 Fed. 192; In re Soudan Mfg. Co. (C. C. A.) 113 Fed. 804. So held where the bankrupt was engaged in a canning business, and advances were made to him by a bank which took up drafts attached to bills of lading for cans, and mortgages were subsequently executed, and further advances made for the purchase of raw material—In re Durham, 114 Fed. 750.

78. Mathews v. Hardt, 79 App. Div. (N. Y.) 570.

79. In re Metzger Toy & Novelty Co., 114 Fed. 957.

80. A loan was made to a corporation by a creditor within four months and the payments were made after the creditor had obtained a representation on the board of directors and during the period of the making of the loan and the part payments other creditors had put merchandise into the bankrupt's estate on credit—In re Colton Exp. & Imp. Co., 115 Fed. 158. Since an oral agreement that the loan should be repaid from a particular fund does not create a lien, payment made out of such fund and within four months of the borrower's bankruptcy constitutes a preference—Torrance v. Winfield Nat. Bank (Kan.) 71 Pac. 235.

81. In re Lyon, 114 Fed. 326.

82. In such case the creditor will be charged with the note given as a preference at its face value regardless of the amount actually received—In re Chaplin, 115 Fed 162.

83. In re Chaplin, 115 Fed. 162.

84. In re Chaplin, 115 Fed. 162.

85. Posey v. McManis (Tex. Civ. App.) 67 S. W. 792.

86. Money advanced by a bank to the bankrupt under agreement that it was to be used only for a particular purpose, but was later returned to the bank in payment of the check not having been so used, does not constitute a preferential payment—Dressel v. North State Lumber Co., 119 Fed. 531.

87. In re Meyer, 115 Fed. 997.

88. In re Graff, 117 Fed. 343. Discount of the debtor's note on account is a preferential payment—In re Wiessner, 115 Fed. 421.

89. Withdrawal of a part of a credit balance after purchase of corporate stock by bankrupt brokers for claimant on the day of the purchase, it being presumed, there being no evidence of the time of the conversion of the stock by the brokers, that it was converted after the withdrawal—In re Graff, 117 Fed. 343.

nor is a payment to close up an existing account, made within four months of the petition in bankruptcy of the debtor, a preference which must be surrendered before subsequent credits can be proved.[90] A payment to the holder of notes by the bankrupt maker made while insolvent and within four months of the bankruptcy proceedings is a preference to the payee,[91] though the note was secured by solvent indorsers,[92] and though the payments were made to the payee's pledgee;[93] but a payment to the payee does not constitute a preference to the accommodation comakers or sureties,[94] or to one who in good faith and in the ordinary course of business discounted the note.[95]

§ 11. *Collection, reduction to possession, and protection of the property. A. Discovery.*—A trustee appointed under the state insolvency laws more than four months previous to the adjudication of the insolvent as a bankrupt may be examined by the trustee in bankruptcy concerning his disposition of the bankrupt's assets.[96]

B. Compelling surrender by bankrupt.—It is within the jurisdiction of a court of bankruptcy to determine whether or not the bankrupt has under his control or possession certain assets,[97] but he is entitled to be heard, and to have reasonable time to produce evidence.[98] Section 7 of the bankruptcy act does not deprive the bankrupt of his constitutional right to claim the privilege of a witness,[99] and he cannot, therefore, be compelled, on his examination, to answer questions,[1] or to disclose certain papers which might tend to incriminate him.[2] A court of bankruptcy has no broader powers in punishment for contempt than are possessed by other federal courts.[3] On failure of the bankrupt to comply with an order directing the bankrupt to surrender assets, the court may commit him as a for a contempt,[4] but before committing him the court should be satisfied, beyond a reasonable doubt from the evidence, of his ability to comply with the order.[5] If on his examina-

90. In re Seay, 113 Fed. 969; Kimball v. Rosenham Co. (C. C. A.) 114 Fed. 85; Morey Mercantile Co. v. Schiffer (C. C. A.) 114 Fed. 447; Jaquith v. Alden (C. C. A.) 118 Fed. 270. A contract to loan money to be advanced from time to time as required by the borrower, the amount of each advance to be secured by notes and a transfer of accounts, held as between the lender and the borrower's trustee in bankruptcy a continuous transaction and that the proceeds of the notes and accounts be first applied to the payment of a note for which the account stood and the excess applied generally on the indebtedness—Young v. Upson, 115 Fed. 192. Payments of profits by a bankrupt stockbroker to a customer held not such a preference as would have to be surrendered before the latter could present his claims—In re Topliff, 114 Fed. 323. Payment of notes in full of account which were discounted by the creditors—In re Bullock, 116 Fed. 667; In re Wiessner, 115 Fed. 421.

91. In re Waterbury Furniture Co., 114 Fed. 255; In re Wiessner, 115 Fed. 421; In re Bullock, 116 Fed. 667; Swarts v. Fourth Nat. Bank (C. C. A.) 117 Fed. 1.

92. Swarts v. Fourth Nat. Bank (C. C. A.) 117 Fed. 1.

93. In re Meyer, 115 Fed. 997.

94. Swarts v. Fourth Nat. Bank (C. C. A.) 117 Fed. 1; Swarts v. Siegel, 114 Fed. 1001; In re New, 116 Fed. 116.

95. In re Wyly, 116 Fed. 38.

96. Bankruptcy Act, § 21—In re Pursell, 114 Fed. 371.

97. In re De Gottardi, 114 Fed. 328.

98. Boyd v. Glucklich (C. C. A.) 116 Fed. 131.

99. In re Nachman, 114 Fed. 995.

1. In re Shera, 114 Fed. 207; In re Nachman, 114 Fed. 995.

2. Bankruptcy Act, § 7, subd. 9—In re Franklin Syndicate, 114 Fed. 205.

3. The procedure to hold for contempt and what constitutes a defense should be the same as in the other United States courts—Boyd v. Glucklich (C. C. A.) 116 Fed. 131.

4. In re De Gottardi, 114 Fed. 328. Evidence held sufficient to show a failure of bankrupt to surrender all his property—In re Shachter, 119 Fed. 1010. It is not a defense that thieves broke into his store and stole a greater portion of his goods where it appeared that after he continued .business with the balance for about four months, he deserted the store and left the goods in such a condition that any one might take them, and it further appeared that he informed certain parties that practically nothing was taken at time of robbery—In re Levin, 113 Fed. 498; In re Wilson, 116 Fed. 419.

5. He cannot be ordered to surrender property not in his possession or under his control—Boyd v. Glucklich (C. C. A.) 116 Fed. 131; In re De Gottardi, 114 Fed. 328. A bankrupt committed for failure to surrender assets concealed, discharged from further imprisonment—In re Taylor, 114 Fed. 607.

6. In re De Gottardi, 114 Fed. 328. Admissibility of evidence on the issue of an alleged loss of assets by reason of burglary.

tion he admits having had, a short time previous to his bankruptcy, certain assets, he has the burden of accounting therefor,[6] and on failure to do so an order directing its surrender is proper.[7]

C. Property in possession of officers appointed by state courts.—The trustee in bankruptcy is entitled to possession of the bankrupt's property in the hands of a receiver appointed by a state court, in proceedings suspended by the operation of the bankruptcy act,[8] and where he had not converted the property into money, an order of the state court directing a surrender on condition of payment of receiver's and attorney's expenses and fees is erroneous;[9] otherwise where the receiver had converted the assets into money.[10] The order of surrender may properly direct the court of bankruptcy to pay such expenses and fees.[11] Where the state court had jurisdiction to complete pending mortgage foreclosure proceedings, its receiver is entitled to possession of the property covered by the mortgage,[12] but as to property not so covered and as to the surplus arising from the sale the trustee is entitled to possession.[13] Generally, the trustee should first apply to the state court which appointed the receiver for an order directing the surrender of the bankrupt's property.[14]

D. Summary proceedings against third persons; jurisdiction.—A court of bankruptcy has jurisdiction in a summary manner to require a third person to pay over money or surrender property in his possession belonging to the bankrupt's estate to which no adverse title is asserted.[15] The court may, however, determine whether a real or pretended adverse claim exists,[16] and if it does exist and the respondent does not consent,[17] or if questions of fact will be involved in determining whether the claim is real, the court should decline jurisdiction.[18] A claim which arose subsequent to the filing of the petition in bankruptcy,[19] or a claim as trustee under a trust mortgage,[20] or claims as between trustees of different estates, are not such claims as would defeat the proceeding.[21] The respondent consents to jurisdiction by appearing and defending,[22] or by appearing for the purpose of review;[23] but a consent is not shown where the respondent demurred to the petition for want of jurisdiction and sufficient facts though he also filed an answer on the merits.[24]

Service of an order to show cause on persons not parties and without the district does confer jurisdiction in personam.[26] An order to show cause why assets belonging to one adjudged a bankrupt in the district court of New York should not

7. In re De Gottardi, 114 Fed. 328. An order directing bankrupts to turn over money to their trustees held justified by the evidence.

8. Wilson v. Parr, 115 Ga. 629.

9. Hanson v. Stephens (Ga.) 42 S. E. 1028. An application in the federal court for an order that if the state court modified such order, so as to allow the property to be turned over to the trustee without first requiring the fees so to be paid, and the trustee ordered to sell enough of the estate to pay off such fees and expenses, and making them a first lien, was denied—In re Rogers, 116 Fed. 435.

10. Wilson v. Parr, 115 Ga. 629.

11. State v. German Exchange Bank, 114 Wis. 436.

12. Pleading in mortgage foreclosure proceedings construed and held not to have been a pleading under the state insolvency laws and the receiver entitled to retain possession —Carling v. Seymour Lumber Co. (C. C. A.) 113 Fed. 483.

13. Carling v. Seymour Lumber Co. (C. C. A.) 113 Fed. 483.

14. Carling v. Seymour Lumber Co. (C C. A.) 113 Fed. 483.

15. In re Davis, 119 Fed. 950; In re Michie, 116 Fed. 749.

16. In re Baird, 116 Fed. 765; In re Davis, 119 Fed. 950; In re Michie, 116 Fed. 749, In re Waukesha Water Co., 116 Fed. 1009.

17. In re Baird, 116 Fed. 765; In re Michie, 116 Fed. 749. Where the property is in actual possession of an adverse claimant, a receiver should not be appointed nor should a summary order of sale be made--Beach v. Macon Grocery Co. (C. C. A.) 116 Fed. 143.

18. In such case the right of contestant should be determined in a plenary action—In re Tune, 115 Fed. 906.

19. In re Davis, 119 Fed. 950.

20. In re Waterloo Organ Co., 118 Fed. 904.

21. In re Rosenberg, 116 Fed. 402.

22. In re Durham, 114 Fed. 750.

23. Philips v. Turner (C. C. A.) 114 Fed. 726.

24. In re Michie, 116 Fed. 749.

26. In re Waukesha Water Co., 116 Fed. 1009.

be surrendered was granted by the district court for the district of Pennsylvania.[27] A summary order directing the surrender of assets should not include interest.[28]

E. Actions to collect or reduce the property to the trustee's possession.[29]—The trustee alone can avoid a conveyance made by the bankrupt in fraud of his creditors,[30] or sue to recover unpaid subscriptions to stock in the bankrupt corporation.[31] His remedy is an action to recover property levied on under judgments rendered invalid by the adjudication in bankruptcy and not by a proceeding to set aside the judgments,[32] and he is entitled to all the remedies to reach property fraudulently conveyed and all the relief that can be afforded to any other individual.[33] It is not a condition precedent to the action by the trustee to avoid fraudulent conveyances that the claims against the estate shall have been filed and allowed,[34] or that the trustee shall have reduced them to judgment;[35] but it must appear that the assets in his hands are insufficient to satisfy the debts.[36] If the action is not barred when the petition was filed, it is not barred until the lapse of two years after the estate has been closed.[37] By the recovery from a fraudulent transferee of personalty, the bankrupt's trustee is not precluded from following the proceeds of the goods received by the bankrupt in the hands of preferred creditors.[38] The bankrupt is not a necessary party to an action by his trustee to avoid a transfer in fraud of creditors,[39] nor is a fraudulent transferee who had transferred the property to another fraudulent transferee.[40]

Jurisdiction of courts.—In the absence of a consent, the federal court has not jurisdiction of an action by a trustee to recover assets.[41] A suit by a trustee to set aside a fraudulent foreclosure sale of the bankrupt's property must be brought within the county wherein the foreclosure decree was entered.[42]

Pleading.—The declaration or statement of claim in an action by a trustee to avoid a transfer must aver that the bankrupt intended to give a preference, and that the creditor had reasonable cause to believe that he intended to give a preference,[43] and that if the transfer be permitted to stand, a greater percentage of the debt will be allowed to the transferee than other creditors of the same class.[44]

Evidence.—In actions by trustees to reduce the bankrupt's assets to his possession, the persons denying the authority of a trustee have the burden of proving want of authority.[45] The trustee has the burden of proving insolvency of the bankrupt at the time of the alleged preference,[46] and the referee in bankruptcy may be permitted to testify as to the amount of claims allowed for the purpose of

27. In re Peiser, 115 Fed. 199.
28. In re Davis, 119 Fed. 950.
29. Summons in an action by a trustee defectively describing him as plaintiff, held cured by allegations in the complaint annexed—Newland v. Zodikow (N. Y.) 39 Misc. Rep. 541.
30. Bankruptcy Act, § 70e—Barnes Mfg. Co. v. Norden, 67 N. J. Law, 493; Barker v. Franklin (N. Y.) 37 Misc. Rep. 292.
31. Falco v. Kaupisch Creamery Co. (Or.) 70 Pac. 286.
32. Gage v. Bates Machine Co., 71 N. H. 884; King v. Same, Id.; Fulton Pulley Co. v. Same, Id.
33. Sheldon v. Parker (Neb.) 92 N. W. 923. Since Ala. Code, § 1818 authorizes a suit in equity by creditors the trustee may maintain the suit—Andrews v. Mather, 134 Ala. 358.
34. Schmitt v. Dahl (Minn.) 93 N. W. 665.
35. Hood v. Blair State Bank (Neb.) 91 N. W. 701, 706.
36. Deland v. Miller & Chaney Bank (Iowa) 93 N. W. 304.
37. Schreck v. Hanlon (Neb.) 92 N. W. 625; Sheldon v. Parker, Id. 923.
38. Lampkin v. People's Nat. Bank (Mo. App.) 71 S. W. 715.
39. Frank v. Musliner (N. Y.) 76 App. Div. 616.
40. Skillen v. Endelman (N. Y.) 39 Misc. Rep. (N. Y.) 261.
41. McIntyre v. Malone (Neb.) 91 N. W. 246; Stelling v. G. W. Jones Lumber Co. (C. C. A.) 116 Fed. 261; Boudinot v. Hamann (Iowa) 90 N. W. 497.
42. W. C. Belcher Land Mortg. Co. v. Bush (Tex. Civ. App.) 67 S. W. 444.
43. Peck v. Connell, 21 Pa. Super. Ct. 22.
44. Schreyer v. Citizens' Nat. Bank (N. Y.) 74 App. Div. 478.
45. Oliver v. Hilgers (Minn.) 92 N. W. 511.
46. In re Chappell, 113 Fed. 545.

showing insolvency,[47] or the proceedings before him properly certified may be admitted for that purpose,[48] or the bankrupt may be permitted to testify that at the time of the making of the transfer he considered himself in failing circumstances.[49] In an action in the state court to set aside a preference by the bankrupt, the testimony given by the bankrupt on his examination in bankruptcy proceedings is admissible only as affecting his credibility as a witness.[50] On the question of whether a transfer was made in contemplation of insolvency, a voluntary conveyance made on the day following the transfer in question is admissible in evidence.[51] In an action by a trustee to recover property fraudulently conveyed, a certified copy of the order adjudicating the debtor a bankrupt is admissible to prove a collateral matter.[52] If the trustee's petition sets up a transfer by way of preference and fraudulent conveyance, evidence that the transfer was colorable is not admissible.[53] Evidence of what certain property brought at auction is admissible on the question of value.[54] Parol evidence is admissible to show that certain persons nominally partners were not so in fact.[55]

Judgment.—In an action by a trustee to set aside a fraudulent conveyance of realty, where the property had passed to a bona fide purchaser, the damages may be decreed against the fraudulent grantee under the prayer for general relief, though no judgment could be entered setting aside the conveyance.[56]

Costs allowed in actions by the trustees in state courts being subject to general rules will be treated elsewhere,[57] though in some states by statute the trustee may be compelled to give security for costs to entitle him to maintain the action.[58]

Interest on recovery.—On recovery by the trustee of preferential payments, interest will be allowed from the date of demand,[59] and in case no demand had been made, from the date of the suit.[60]

§ 12. *Protection of trustee's title and possession. A. Restraining interference.* —The court of bankruptcy may properly restrain a pending action against the trustee, where it tends to embarrass the administration of the estate, and where it is clear that his taking of the property was not wrongful.[61] An injunction is properly issued restraining an attachment suit in the state court, which refuses to recognize the adjudication in bankruptcy,[62] or the marshal may be directed to seize property attached by the state court.[63]

47. Cullinane v. State Bank (Iowa) 91 N. W. 783. Admissibility of evidence in action to avoid bill of sale executed within four months before the filing of a petition—Frank v. Musliner (N. Y.) 76 App. Div. 616.

48. Bankruptcy Act, § 21d—Spratlin v. Colson, 80 Miss. 278.

49. Supplee v. Hall, 75 Conn. 17. In an action by a trustee to recover money paid as a preference, declarations of the bankrupt held admissible—Tredway v. Kaufman, 21 Pa. Super. Ct. 256.

50. Congleton v. Schreihofer (N. J. Eq.) 54 Atl. 144.

51. Supplee v. Hall, 75 Conn. 17.

52. Rosenfeld v. Siegfried, 91 Mo. App. 169.

53. In re Michie, 116 Fed. 749.

54. Harmon v. Walker (Mich.) 9 Det. Leg. N. 439, 91 N. W. 1025. In an action by a trustee to recover the value of goods under a void sale by the bankrupt, the admission of evidence that the goods had subsequently enhanced in value is not prejudicial, where the value allowed was as of the date of the bill of sale—Frank v. Musliner (N. Y.) 76 App. Div. 616.

55. Marden v. Sugden, 71 N. H. 274.

56. Skillin v. Maibrunn (N. Y.) 75 App. Div. 588. Conditional judgment in action to avoid sale by bankrupt within four months held proper—Frank v. Musliner (N. Y.) 76 App. Div. 616.

57. See Costs. To avoid the action by the trustee to recover goods transferred within four months before the adjudication, an offer to surrender the goods to the trustee must be absolute and without condition—Frank v. Musliner (N. Y.) 76 App. Div. 616.

58. A defendant in an action by a trustee is entitled to security for costs only where the cause of action existed prior to the adjudication in bankruptcy. N. Y. Code Civ. Proc. § 3268—Kelley v. Kremer (N. Y.) 74 App. Div. 456; and causes of action to recover preferential payments and to set aside fraudulent conveyances do not accrue prior to the appointment of the trustee—Kronfeld v. Liebman (N. Y.) 78 App. Div. 437. Facts held sufficient to show that a cause of action arose prior to the appointment of the trustee —Joseph v. Makley (N. Y.) 73 App. Div. 156.

59. Tredway v. Kaufman, 21 Pa. Super. Ct. 256.

60. Tredway v. Kaufman, 21 Pa. Super. Ct. 256.

61. In re Gutman, 114 Fed. 1009.

62. In re Tune, 115 Fed. 906.

B. Actions affecting trustee's title.—State courts have concurrent jurisdiction with federal courts of all actions to determine title to goods held by the trustee as property belonging to the bankrupt,[64] and trover not being a possessory action may be maintained against trustees in bankruptcy in the state court,[65] but replevin cannot be maintained.[66] Proceedings in suits brought by the trustee in the district court against third parties, of which the federal court would not have had jurisdiction except on consent, cannot be reviewed by the circuit court of appeals on petition,[67] but only by appeal.[68]

§ 13. *Rights of trustee in pending actions by and against bankrupt; jurisdiction of state courts.*—Any cause of action which would survive a deceased plaintiff will pass to his trustee,[69] and where rights sought to be enforced in pending actions passed to the trustee, the bankrupt's right to prosecute terminates,[70] even though the action was not scheduled,[71] and the adoption of the bankrupt's pleading or the filing of a pleading therein by his trustee makes the latter a party to the action.[72] A default against a bankrupt may, on application of his trustee, be opened at the term succeeding the term at which it was entered.[73] The jurisdiction of state courts in pending actions on claims which will be released by a discharge of the defendant is ousted by his bankruptcy, except for the purpose of staying the action,[74] and the state court is the proper court to stay the suit,[75] either on petition of the defendant or by his creditors;[76] but this does not apply to actions commenced prior to the passage of the bankruptcy act,[77] or to actions to enforce valid liens acquired against a bankrupt's property prior to the filing of the petition in bankruptcy,[78] or to actions to try title,[79] though the creditor proved up his claim.[80]

§ 14. *Management of the property and reduction to money.*—The estate funds should be deposited to the credit of the trustee as such designating the estate,[81] and on failure of the trustee to so deposit them and to pay out in the manner prescribed by the rules, he will not be allowed therefor.[82] Checks drawn by the trustee in payment of dividends made payable to the persons whose names are not on the dividend sheet and which do not show what claims are covered or authority of payee to receive them are not such vouchers as will be approved.[83]

63. In re Tune, 115 Fed. 906.

64. Truda v. Osgood, 71 N. H. 185; Cooke v. Scovel (N. J. Law) 53 Atl. 692.

65. Weeks v. Fowler, 71 N. H. 518.

66. Weeks v. Fowler, 71 N. H. 221.

67. Power to review by original petition extends only to orders made in bankruptcy proceedings—In re Rusch (C. C. A.) 116 Fed. 270.

68. Stelling v. G. W. Jones Lumber Co. (C. C. A.) 116 Fed. 261; Walter Scott & Co. v. Wilson (C. C. A.) 115 Fed. 284.

69. Bankruptcy Act 1898, § 70—Cleland v. Anderson (Neb.) 92 N. W. 306.

70. Scruby v. Norman, 91 Mo. App. 517; Scheidt v. Goldsmith, 103 Ill. App. 623.

71. Scruby v. Norman, 91 Mo. App. 517.

72. If the defendant has not filed an answer and the bankrupt files an answer purporting to adopt the answer of the defendant, though no verdict is rendered against the trustee, judgment may be entered against him—Kingsbury v. Waco State Bank (Tex. Civ. App.) 70 S. W. 551.

73. Though under Iowa Code, § 3790, a default can be opened only on application being made at the same term, since the application by the trustee is an intervention in behalf of creditors—First Nat. Bank v. Flynn (Iowa) 91 N. W. 784.

74. Bankruptcy Act, § 11a—First Nat. Bank v. Flynn (Iowa) 91 N. W. 784; In re Tune, 115 Fed. 906. The state court cannot set aside a sale under the attachment and order a resale on proceedings instituted by a junior attaching creditor—Levi v. Goldberg (N. Y.) 76 App. Div. 210. Judgment cannot be entered after the petition has been filed—First Nat. Bank v. Flynn (Iowa) 91 N. W. 784. Holding contra—State v. Superior Ct. of King County, 28 Wash. 35, 68 Pac. 170.

75. McIntyre v. Malone (Neb.) 91 N. W. 246.

76. McIntyre v. Malone (Neb.) 91 N. W. 246.

77. Creditor's action to avoid a fraudulent conveyance against the bankrupt—Metcalf v. Barker, 187 U. S. 165; Pickens v. Roy, 187 U. S. 177.

78. Creditor's action—National Bank of Republic of N. Y. v. Hobbs, 118 Fed. 626; South End Improvement Co. v. Harden (N. J. Ch.) 52 Atl. 1127.

79. In re Wells, 114 Fed. 222.

80. Pickens v. Roy, 187 U. S. 177.

81. In re Carr, 117 Fed. 572.

82. In re Hoyt, 119 Fed. 987.

83. In re Carr, 116 Fed. 556.

Sale by trustee.—Property of a bankrupt subject to liens may be sold free from such liens and the rights thereunder be transferred to the proceeds.[84] Under act 1867, a trustee had authority to sell the bankrupt's real property without order of the court,[85] and a voluntary bankrupt had the right to purchase his property at the trustee's sale,[86] and the assignee's deed conveyed title though not under seal.[87] All the rights of a trustee pass to his purchaser at a sale under order of the court.[88] A purchaser of interests in certain transferred contracts, which transfer was void as a preference, has a cause of action therefor.[89] The failure of a seller of chattels to a bankrupt to demand a separate sale of such chattels at a sale by the trustee of the purchaser is a waiver of his lien thereon.[90] An agreement by lienors to submit the priority of their liens for adjudication and no sale of the property be made until such adjudication, is a waiver of objections to a sale free from their liens;[91] and by so consenting they are estopped to question the validity of the sale.[92] A trustee waives his right to question the validity of a mortgage by selling the property subject to the mortgage.[93] A subsequent offer of a better price than realized at the sale will not alone warrant setting it aside.[94] To prevent a resale of property where the trustee had purchased at his own sale, it is sufficient to account for the value of the property as of the time of the purchase, where it appears that it had not increased in value.[95] The undisclosed agency of a bidder at a public auction sale by a trustee in bankruptcy to whom the property was struck off, which if it had been known to others they would have bidden a better price held sufficient ground to avoid the sale.[96]

§ 15. *Claims against the estate and proof and allowance. A. Claims provable.*—Since only claims absolutely due at the time of the petition are provable, attorney's fees stipulated in an unmatured note,[97] or a claim for damages for breach of covenants occurring subsequent to the filing of the petition,[98] cannot be proved. The decisions on the question whether the bankruptcy of a tenant terminates the lease and whether rent subsequently accruing can be proved are conflicting as will appear from the footnotes.[99] A claim for damages for breach of an

84. In re Waterloo Organ Co., 118 Fed. 904. An order directing a sale but "without prejudice to the rights of lien creditors to claim from a fund derived from sale amount of their respective liens" is proper and fully protects the loaners' right and they need not except to the return of the sale—Geo. Carroll & Bro. Co. v. Young (C. C. A.) 119 Fed. 576. Where the mortgage covered the mortgagor's property together with whatever property he may subsequently acquire and it was determined by the referee in bankruptcy the amount of property which the mortgagor owned at the time of the execution of the mortgage but not the validity of the latter as to the after acquired property, a sale may be made of the property free from all liens, the lien to be transferred to the proceeds and in case of purchase by the mortgagee he will be required to give the trustee of the bankrupt mortgagor security to pay the value of the property subsequently found not subject to the lien—In re Waterloo Organ Co., 118 Fed. 904. A trustee who held the property under trust mortgage to secure bondholders of the bankrupt and who purchased the property at the trustee's sale, the lien being transferred to proceeds, permitted to give bond for the purchase price—In re Waterloo Organ Co., 118 Fed. 904.

85. Hallyburton v. Slagle, 130 N. C. 482.

86. Hallyburton v. Slagle, 130 N. C. 482.

87. Westfelt v. Adams, 131 N. C. 379.

88. Bryan v. Madden (N. Y.) 38 Misc. Rep. 638.

89. Complaint in an action by the purchaser's grantee to set aside the transfer as in fraud of creditors held sufficient—Bryan v. Madden (N. Y.) 38 Misc. Rep. 638.

90. In re Klapholz, 113 Fed. 1002.

91. Chauncey v. Dyke Bros. (C. C. A.) 119 Fed. 1.

92. Chauncey v. Dyke Bros. (C. C. A.) 119 Fed. 1.

93. O'Neil v. International Trust Co. (Mass.) 66 N. E. 424.

94. In re Ethier, 118 Fed. 107.

95. In re Hawley, 117 Fed. 364.

96. In re Ethier, 118 Fed. 107.

97. In re Garlington, 115 Fed. 999.

98. Bankruptcy Act, § 63—In re Pennewell (C. C. A.) 119 Fed. 139.

99. The adjudication of a lessee bankrupt does not of itself terminate the lease—In re Pennewell (C. C. A.) 119 Fed. 139; Woodworth v. Harding (N. Y.) 75 App. Div. 54. Contra—In re Hays, Foster & Ward Co., 117 Fed. 879. A claim for rent accruing after the adjudication (Bernhardt v. Curtis, 109 La. 171), though the bankrupt executed notes therefor, cannot be proved—In re Hays, Foster & Ward Co., 117 Fed. 879. A statu-

executory contract may be proved though the time for full performance had not expired.[1] A claim under a contract based on several elements, some of which are unliquidated, cannot be proved until liquidated.[2] One who holds a claim against a bankrupt under an assignment[3] in such form as would estop the assignor from avoiding it, may prove the claim.[4] A claim acquired by the wife of the bankrupt by subrogation may be proved against his estate,[5] or a claim for her separate property which entered into the estate,[6] and a final judgment for alimony may be proved.[7] A claim barred by the statute of limitations though scheduled by the bankrupt,[8] or a judgment against the bankrupt which has abated,[9] or a claim which claimant is enforcing by attachment proceedings in a state court cannot be proved.[10] The consideration paid for a transfer of property made with intent to defraud creditors cannot be made the basis of a claim against the estate.[11] A claim for local taxes may be proved.[12]

A contract executed by individual members of a partnership cannot be proved against the estate of the partnership in bankruptcy.[13] That the claimant entered into a void agreement of partnership will not affect his right to prove a previous existing claim against the firm.[14] If the partnership assets were exhausted before bankruptcy and before individual debts of the partners were contracted, the partnership creditors are entitled to share ratably with the individual creditors in the individual assets of the partners,[15] or after the dissolution and a sale of the partnership property, a partnership creditor may share in the estate of the partner subsequently declared a bankrupt, where it does not appear that there is a solvent partner or that other equities exist in favor of individual creditors.[16]

B. Proof of claims.—Amendment of proof of claims is granted with great liberality,[17] and may be made after the expiration of the year allowed for proving claims,

tory lien given a landlord on goods and chattels of the tenant as against creditors for rent for the unexpired term may be enforced—In re Mitchell, 116 Fed. 87. If the landlord of a bankrupt tenant under a lease for a term of years containing a stipulation that if the lessee should become a bankrupt, the whole rent for the whole term shall be taken to be due and payable forthwith, desires to avail himself of such stipulation for the purpose of securing a preference for one year's rent, he is bound to conform to the contract as a whole, and if he attempts to secure such a preference and at the same time retain his interest as landlord unimpaired in the residue of the term by taking exclusive possession of the premises, he was properly allowed rent due at the time of the filing of the petition in bankruptcy as a preferred debt under the state statute and also the rental rate during the time the trustee retained possession—Wilson v. Pennsylvania Trust Co. (C. C. A.) 114 Fed. 742.

1. The amount of damages being readily ascertainable—In re Stern (C. C. A.) 116 Fed. 604; Appeal of Manhattan Ice Co., Id.

2. Bankruptcy Act, §§ 57b and 63b (5)—In re Big Meadows Gas Co., 113 Fed. 974.

3. In re Miner, 114 Fed. 998.

4. The assignor's certificate in record stating the assignment is sufficient within the statute of frauds and to estop the assignor—In re Miner, 117 Fed. 953.

5. As surety for him she had paid the debt, it not being a contract between the husband and wife in violation of the Mass. Statutes—In re Nickerson, 116 Fed. 1003. Wife held to have acquired her bankrupt husband's notes given to her testator, by subrogation where by the will she was not to share in the decedent's estate if her husband was indebted to deceased and where she acquired the notes as a part of her share of the estate—In re Nickerson, 116 Fed. 1003.

6. Though she did not register the claim as such under the Oregon statutes since the register thereof is not conclusive either way as to her right—In re Miner, 117 Fed. 953.

7. Arrington v. Arrington, 131 N. C. 143.

8. In re Wooten, 118 Fed. 670. Holding contra—In re Gibson (Ind. T.) 69 S. W. 974.

9. In re Farmer, 116 Fed. 763.

10. Buckingham v. Schuylkill Plush & Silk Co. (N. Y.) 38 Misc. Rep. 305; Matter of O'Donnell, Id.

11. In re Lansaw, 118 Fed. 365; Johnson v. Cohn (N. Y.) 39 Misc. Rep. 189.

12. The assets are subject to taxes in the district where they would have been taxed had not bankruptcy proceedings been instituted. Bankruptcy Act 1898, § 64a—In re Sims, 118 Fed. 356.

13. Chattel Mortgage—In re Jones, 116 Fed. 431. Nothing appearing on the face of the note, to indicate that it was given for a partnership debt—In re Jones, 116 Fed. 431.

14. Ultra vires contract of partnership by corporation with existing firm—In re R. T. Ervin & Co., 114 Fed. 596.

15. In re Conrader, 118 Fed. 676.

16. Bankruptcy Act 1898, § 5, does not apply where a partner became bankrupt after a dissolution of partnership and a sale of its property—In re Greene, 116 Fed. 118.

17. In re Moebius, 116 Fed. 47.

if there is sufficient to amend by in the original proof,[18] but not if it in effect will be an allowance of proof after such time.[19] Since a payment to a secured creditor is not a payment of a dividend,[20] it is not necessary that such a creditor prove his claim before intervening for the purpose of establishing a lien on a particular fund,[21] and he need only prove his claim as in an ordinary suit,[22] though a failure of the secured creditor to present his claim will not release the surety.[23]

C. Contest of claims.—It is the duty of a trustee to plead the state statute of limitations against a debt scheduled by the bankrupt.[24] Creditors whose claims have not been allowed cannot contest the claims of others.[25] All objections to claims should be specific,[26] but it is not necessary that they be verified by oath.[27] Failure of a creditor to object to the allowance of claims is a waiver of a right to a re-examination thereof on the ground of preferences received,[28] but the failure on the part of a trustee to contest a claim when presented will not bar his action to avoid it as a preference,[29] nor is the allowance of the claim by the referee conclusive as against him.[30] The bankrupt's attorney should not act for a creditor whose claim is contested.[31] A creditor has the burden of proving his claim, if objected to, by a preponderance of evidence,[32] and proof that it arose in a different manner from that stated in the verified claim is insufficient to support it.[33] As evidence of the existence and amount of the claim, a judgment of a state court is not conclusive until the expiration of the time of right of appeal therefrom.[34] In estimating the amount of a claim for conversion of goods, their value at the time of the filing of a petition in bankruptcy may be taken.[35]

D. Surrender of preferences and effect thereof.—A preferential transfer must be surrendered before the creditor can prove any of his several claims of the same class,[36] whether the claim is made by the creditor or his transferee.[37] The holder of two series of obligations made by the bankrupt, who received a preferential payment on the second series, cannot prove the first until he shall have surrendered such payment.[38] On surrender of preferential payments by the claimant, the creditor will be allowed the full amount of his valid claim.[39] A claim for a balance due on a current account is a single claim which can be divided into separate claims in determining a preference.[40] It is the duty of the trustee to institute such proceedings against a creditor who held unsurrendered collateral security as he may deem best or on advice of counsel or creditors,[41] and the court

18. Hutchinson v. Otis (C. C. A.) 115 Fed. 937; In re Hutchinson, Id.
19. In re Moebius, 116 Fed. 47.
20. In re Goldsmith, 118 Fed. 763.
21. In re Goldsmith, 118 Fed. 763.
22. He is not required to follow Bankruptcy Act 1898, § 57—In re Goldsmith, 118 Fed. 763.
23. Levy v. Wagner (Tex. Civ. App.) 69 S. W. 112.
24. In re Wooten, 118 Fed. 670.
25. Dressel v. North State Lumber Co., 119 Fed. 531.
26. In re Wooten, 118 Fed. 670.
27. In re Wooten, 118 Fed. 670.
28. In re Hamilton Furniture Co., 116 Fed. 115.
29. Buder v. Columbia Distilling Co., 96 Mo. App. 558.
30. Buder v. Columbia Distilling Co., 96 Mo. App. 558.
31. In re Wooten, 118 Fed. 670.
32. Evidence that the claimant is a near relative of the bankrupt will be given the same weight as in ordinary cases—In re Wooten, 118 Fed. 670. Evidence held insufficient to support a claim presented—In re Grant, 118 Fed. 73.
33. In re Lansaw, 118 Fed. 365.
34. In re Freeman, 117 Fed. 680.
35. The time of the conversion of corporate stock purchased by bankrupt brokers for a customer being uncertain—In re Graff, 117 Fed. 343.
36. Swarts v. Fourth Nat. Bank (C. C. A.) 117 Fed. 1.
37. Swarts v. Fourth Nat. Bank (C. C. A.) 117 Fed. 1.
38. Swarts v. Fourth Nat. Bank (C. C. A.) 117 Fed. 1.
39. Swarts v. Fourth Nat. Bank (C. C. A.) 117 Fed. 1. If the amount paid by the surety, together with the dividends, amounts to more than the obligation, the creditor will hold the surplus in trust for the surety—Swarts v. Fourth Nat. Bank (C. C. A.) 117 Fed. 1.
40. Kimball v. E. A. Rosenham Co. (C. C. A.) 114 Fed. 85; C. S. Morey Mercantile Co. v. Schiffer (C. C. A.) 114 Fed. 447.
41. In re Baber, 119 Fed. 520.

will not, nor should the referee, entertain a petition by him asking for advice.[42] Creditors who had without fraud received preferences which were not surrendered may prove their claims against the surplus remaining after payment of all unpreferred creditors in full.[43]

Credits given before preferential payments are not available as a set-off against such payments,[44] but only such credits thereafter extended for property which subsequently became a part of the assets will be allowed,[45] though the property transferred is not recoverable by the trustee as a preference under section 60b, and though the creditor had not ground to believe that the transfer was intended as a preference,[46] and this is not limited to a case where the trustee sues to recover the preference.[47] Accepting the bankrupt as a debtor by having him assume the liability and take the goods sold to another in consideration of a part payment therefor is not extending credit, which could be set off against a preferential payment to the creditor.[48] Goods transferred to the bankrupt who assumed liability therefor to the original seller are not property passing to the bankrupt's estate, the liability for which is available as a set-off against a preferential payment.[49]

E. Priorities.—The rights of creditors to share in the estate will be determined by the status of their claims at the time the petition was filed,[50] and the test of classification of claims is the percentage that they will receive from the estate.[51] Creditors secured by indorsement or guaranty of third persons will share the same as unsecured creditors.[52] Trust funds held by the bankrupt,[53] and a lien for wages given by a state statute though not earned within three months previous to the commencement of the bankruptcy proceedings are entitled to priority.[54] Bankruptcy Act, § 5b, providing that if one partner only is adjudged a bankrupt, the partnership property shall not be administered in bankruptcy except on consent of the other partners, has no application to a case where a partner sold out before the remaining partner's bankruptcy,[55] and in such case the partnership property at the time of the dissolution should be first applied to the payment of firm creditors and the bankrupt's separate estate should be applied first to the payment of his separate debts and any surplus from either source should be distributed according to the bankruptcy act.[56] A claim for taxes against a partnership is entitled to

42. In re Baber, 119 Fed. 520.
43. In re Morton, 118 Fed. 908.
44. Carleton Dry Goods Co. v. Rogers (C. C. A.) 120 Fed. 14.
45. Gans v. Ellison (C. C. A.) 114 Fed. 734.
46. C. S. Morey Mercantile Co. v. Schiffer (C. C. A.) 114 Fed. 447.
47. Kahn v. Cone Export & Commission Co. (C. C. A.) 115 Fed. 290.
48. Carleton Dry Goods Co. v. Rogers (C. C. A.) 120 Fed. 14.
49. Carleton Dry Goods Co. v. Rogers (C. C. A.) 120 Fed. 14.
50. Swarts v. Fourth Nat. Bank (C. C. A.) 117 Fed. 1. Facts held to show that a creditor had waived his lien on a particular fund by mistake and was entitled to have it restored—In re Hutchinson (C. C. A.) 115 Fed. 937.
51. Swarts v. Fourth Nat. Bank (C. C. A.) 117 Fed. 1.
52. Swarts v. Fourth Nat. Bank (C. C. A.) 117 Fed. 1.
53. Under Ky. Sts. and Bankruptcy Act 1898, § 64b. cl. 5, giving priority to "debts owing by any person who by the laws of the state or the United States is entitled to priority" and funds held as guardian are within the above statute—In re Crow, 116 Fed. 110. The party claiming that a part of the estate in the hands of the trustee was a trust fund has the burden of proving that the fund in some form was a part of the estate when it passed to the trustee—In re O'Connor, 114 Fed. 777; In re Globe Refinery Co., Id. It was presumed that the balance of the proceeds of corporate stock, sold by a pledgee of bankrupt stockbrokers who had purchased a part of the stock pledged for a customer and which had been fully paid for by the latter, was the proceeds of the customer's stock and that he was entitled thereto as against the bankrupt and the general creditors—In re Graff, 117 Fed. 343. From the facts it was presumed that a part of corporate stock sold by the receiver of bankrupt stockbrokers was bought for a customer who had paid for the same who was entitled to the proceeds in the trustee's hands as against creditors—In re Graff, 117 Fed. 343.
54. Bankruptcy Act, § 64b (4), gives priority of wages earned within three months before the date of the commencement of the proceedings. (5) provides that debts owing to any person who by the laws of the states or of the United States is entitled to priority —In re Slomka, 117 Fed. 688.
55. In re Denning, 114 Fed. 219.
56. In re Denning, 114 Fed. 219.

priority of payment from the estate of the bankrupt partners.[57] A trustee may oppose a petition by a creditor to be awarded a lien on certain assets in his hands without pleading thereto.[58]

The bankruptcy court has jurisdiction to determine priorities between liens on the bankrupt's property in its custody,[59] and lienors who had not proved their claims, but who agreed that the priority of their liens be submitted and that no sale be made until the adjudication thereby confer jurisdiction to determine how the proceeds of the sale be distributed among rival claimants.[60]

F. Expenses of the proceeding.—The referee will not be allowed for notices sent to creditors in general on the re-examination of a claim,[61] or where no distribution of money requiring notice to creditors has ever been had,[62] or for investigation and finding in the ordinary and usual way in cases of specific liens,[63] or for expenses of a stenographer not employed on application of the trustee and in the absence of stipulation or deposit of money therefor.[64] Secured claims or claims entitled to priority of payment are not dividends within the bankruptcy act on which a referee is entitled to commission.[65] Fees in addition to statutory fees cannot be allowed referees even with the consent of the attorneys for the parties.[66] In allowing a trustee commissions for selling, the court will follow the rules of allowance in cases of masters' commissions,[67] and dividends on which he will be allowed commissions are the surplus remaining after the payment of taxes and priority claims in full.[68] The clerk, referee, and trustee in bankruptcy are entitled to separate fees to be charged against the estate of each of the petitioning partners as well as against the partnership estate seeking discharge from individual as well as firm liabilities.[69] The allowance by a referee of fees to himself and the trustee may be reviewed on the final settlement of the estate, where they have not been passed upon by the district judge or court.[70] The allowance of attorney's fees out of the estate is within the discretion of the court,[71] and if petitioning creditors refuse to pay the fee and he is entitled thereto, the court will allow it out of the fund,[72] but they will not be allowed where the attorneys make an exorbitant charge therefor, even though recommended by the referee,[73] or where the attorney was also appointed trustee.[74]

57. Iowa Code, § 1307, provides that "any individual of a partnership is liable for taxes due for the firm"—In re Green, 116 Fed. 118.

58. In re Mulligan, 116 Fed. 715.

59. Chauncey v. Dyke Bros. (C. C. A.) 119 Fed. 1. It may enforce a lien given by stock exchange rules to members for debts due from a defaulting member on the proceeds of his seat by proving their claims to a committee while the fund remains in their hands—Hutchinson v. Otis (C. C. A.) 115 Fed. 937.

60. Chauncey v. Dyke (C. C. A.) 119 Fed. 1.

61. In re Mammoth Pine Lumber Co., 116 Fed. 731.

62. In re Mammoth Pine Lumber Co., 116 Fed. 731.

63. In the absence of a provision in the bankruptcy act or general orders—In re Mammoth Pine Lumber Co., 116 Fed. 731.

64. Bankruptcy Act, § 38a, cl. 5, Gen. Order No. 10—In re Mammoth Pine Lumber Co., 116 Fed. 731.

65. Bankruptcy Act, §§ 40a, 48a, 64a, 64b and 65a—In re Mammoth Pine Lumber Co., 116 Fed. 731.

66. Dressel v. North State Lumber Co., 119 Fed. 531.

67. In re Mammoth Pine Lumber Co., 116 Fed. 731.

68. §§ 40a, 48a, 64a, 64b and 65a.—In re Mammoth Pine Lumber Co., 116 Fed. 731.

69. In re Farley, 115 Fed. 359.

70. Bankruptcy Act, Gen. Order, No. 26—In re Mammoth Pine Lumber Co., 116 Fed. 731.

71. In re Carr, 117 Fed. 572.

72. Rule for allowance of attorneys' fees as laid down by the District Court for E. D. N. Carolina, "For preparing petition in involuntary bankruptcy, and superintending the filing thereof, and in the issuance of subpoena thereon, and preparing schedules, in case such duty falls on the petitioning creditors, a fee of not exceeding $50, in the discretion of the court, where the same is payable out of the estate of the bankrupt; and no further fee shall be allowed such attorney where there is no contest or trial before the court touching the adjudication in bankruptcy; and in case the defendant therein contests the adjudication, necessitating a trial before the court or referee of such issue, such further fee as the court may find to be reasonable in the particular case. And for the allowance of this fee the attorney asking for such fee must disclose his deal-

G. Expenses of receivers and assignees appointed prior to bankruptcy proceedings.—A claim for services rendered as a general assignee of the bankrupt in the preservation of his estate may be allowed,[75] but not a claim for commissions.[76] Where the assets of a bankrupt in the hands of a receiver appointed by a state court had not been converted into money, the receivership and attorney's fees should be made the basis of a claim in the bankrupt court.[77] The bankrupt's assignee by accepting appointment as receiver of the bankrupt's estate submits the fund and his right to compensation as assignee to the jurisdiction of the court of bankruptcy by turning over to himself such fund as receiver without retaining compensation,[78] but he does not confer jurisdiction on such court by filing his account of disbursements within four months of the adjudication therein for allowance, where he objects to jurisdiction before the entry of a final order.[79]

§ 16. *Exemptions.*—The right of the bankrupt to have property set apart as exempt from liability will be determined by the laws of the state of his residence,[80] and the decisions of the state court declaring certain specific property exempt will be followed.[81] The particular property, however, which the bankrupt wishes to retain under the state exemption laws must be set up in his schedule,[82] and he must follow the procedure required by the state statute.[83]

The bankrupt may claim as exempt a seat in a stock exchange,[84] or property not paid for by him where the seller had no lien thereon,[85] or the proceeds of property which had been assigned by him for the benefit of his creditors in the hands of his trustee,[86] but exemptions cannot be claimed out of property recovered by the trustee which had been transferred as a preference,[87] nor can the individual partners of a firm dissolved within four months prior to the adjudication against the firm claim exemptions in the firm property.[88] The debtor loses his exemption rights if under a waiver creditors will receive the benefit thereof,[89] or where he had made a fraudulent disposition of his property.[90]

A building occupied chiefly for business purposes but also occupied as a residence and not exceeding the statutory value limit may be claimed as a homestead.[91] The debtor's homestead exemption is not lost because he changed his

ings with his client, that the court may act intelligently"—In re Carr, 117 Fed. 572.

73. In re Carr, 116 Fed. 556.

74. In re Evans, 116 Fed. 909.

75. In re Klein, 116 Fed. 523.

76. In re Mays, 114 Fed. 600.

77. Hanson v. Stephens (Ga.) 42 S. E. 1028.

78. In re Klein, 116 Fed. 523.

79. In re Klein, 116 Fed. 523; In re Jackson, 116 Fed. 46.

80. In re Staunton, 117 Fed. 507. The bankrupt may select as part of his exemption, the proceeds of property sold by his assignee for the benefit of creditors before the institution of the bankruptcy proceedings, since under the laws of Pennsylvania he may select articles of personal property including cash—In re Staunton, 117 Fed. 507.

81. In re Stone, 116 Fed. 35.

82. In re Duffy, 118 Fed. 926.

83. Merely claiming the benefit of the statute held insufficient—In re Garner, 115 Fed. 200.

84. Pennsylvania court decisions so holding followed—Page v. Edmonds, 187 U. S. 596.

85. In re Butler, 120 Fed. 100.

86. In re Talbott, 116 Fed. 417.

87. In re Long, 116 Fed. 113. But where he had transferred a judgment to a trustee for certain creditors, and the trustee did not assume ownership and it was paid to the trustee in bankruptcy the bankrupt may claim exemption therein—Bashinski v. Talbott (C. C. A.) 119 Fed. 337.

88. Under the laws of Arkansas, a partner cannot claim exemptions from the firm property—In re Head, 114 Fed. 489.

89. In re Garner, 115 Fed. 200.

90. In re Taylor, 114 Fed. 607; In re Evans, 116 Fed. 909. As where he carried on a business in the name of another as agent, and nearly all the indebtedness was created within five months preceding his bankruptcy and the better portion of the stock was sold off at auction, the balance being worth less than the exemption—In re Williamson, 114 Fed. 190. Sufficiency of evidence to show that the bankrupt was not chargeable with fraud in concealing property from creditors, such being the ground of forfeiture of exemptions under Georgia Code, § 2830—In re Stephens, 114 Fed. 192; In re Boorstin, 114 Fed. 696; In re Thompson, 115 Fed. 924. Evidence held insufficient to show a fraudulent disposition of property by a bankrupt so as to effect a forfeiture of his exemptions under the state law—In re Duffy, 118 Fed. 926.

91. So held under the state decisions—In re Stone, 116 Fed. 35.

homestead within four months prior to the adjudication in bankruptcy,[92] nor because he established it after insolvency and in contemplation of bankruptcy.[93]

Claims enforceable against the homestead are also to be determined by the laws of the state of the debtor's residence.[94] Court costs cannot be enforced against the bankrupt's exemptions,[95] nor can a court of bankruptcy subrogate the trustee to the right of a creditor who had acquired a lien on the bankrupt's exempt property.[96]

If the trustee failed to follow the statute in setting aside the exemption to which the bankrupt is entitled, he will not be allowed the payment.[97] Where no trustee has been appointed, the bankruptcy court has jurisdiction to set apart particular property belonging to the bankrupt as exempt;[98] if the only assets of a voluntary bankrupt were exempt and there was no necessity for the appointment of a trustee, the court still had jurisdiction to order it set apart,[99] and the order relates back to the time of the filing of the petition,[1] and it is an adjudication that there are no existing liens thereon.[2]

After specific property has been set apart to the bankrupt as exempt and he has taken possession, it is no longer within the jurisdiction of the bankruptcy court,[3] therefore the court cannot entertain a petition after the discharge of the bankrupt for a readjustment of the exemptions,[4] or to enforce a special lien against it,[5] or a lien not affected by the bankrupt's discharge.[6]

§ 17. *Death of bankrupt pending proceedings.*—The allowance to the widow of the deceased bankrupt will be governed by the laws of the state of his residence.[7] On the death of the bankrupt after a determination of the right to exemptions in personalty, but before the same had been set apart, the property to be set apart passes to his administrator and not to the trustee.[8]

§ 18. *Referees, proceedings before them, and review thereof.*—Without a certificate of the clerk showing inability of the district court to act or a division of the district, the referee has no jurisdiction to compel a state officer to surrender a bankrupt's property by summary process.[9] The rules of equity practice of the federal

92. Huenergardt v. John S. Brittain Dry Goods Co. (C. C. A.) 116 Fed. 31.

93. In re Stone, 116 Fed. 35.

94. In Vermont debts existing prior to the establishment of the homestead may be enforced against it—In re Gordon, 115 Fed. 445. Where the bankrupt had transferred his property, taking a promissory note therefor, on his application to have the proceeds of the note set apart to be invested in a new homestead, it will be charged with a proportionate part of the discount of the note which had been sold by the bankrupt and which sale was accepted by the trustee—In re Johnson, 118 Fed. 312. A lien unavoided by the discharge in bankruptcy cannot be enforced against the property set apart by the bankrupt court as exempt—Evans v. Rounsaville, 115 Ga. 684.

95. In re Hines, 117 Fed. 790.

96. In re Rosenberg, 116 Fed. 402.

97. Bankruptcy Act, § 47, subd. 11, makes it the duty of the trustee to set aside exemptions of the bankrupt and "report the same to the court"—In re Hoyt, 119 Fed. 987.

98. Though § 47 (11) makes it the duty of the trustee to set it apart—Smalley v. Laugenour, 30 Wash. 307, 70 Pac. 786. In ejectment brought by a purchaser under execution sale three days after the defendants filed a petition in bankruptcy, the defendants may show an order made by the bankruptcy court setting aside the particular property as exempt—Smalley v. Laugenour, 30 Wash. 307, 70 Pac. 786.

99. Smalley v. Laugenour, 30 Wash. 307, 70 Pac. 786..

1. Smalley v. Laugenour, 30 Wash. 307, 70 Pac. 786.

2. Smalley v. Laugenour, 30 Wash. 307, 70 Pac. 786.

3. In re Seydel, 118 Fed. 207.

4. If the creditor had notice of the claim of exemptions and failed to appear and object to the allowance he would at any rate be precluded by laches to have the proceedings re-opened after discharge of the bankrupt and the exemption re-adjusted—In re Reese, 115 Fed. 993.

5. In re Seydel, 118 Fed. 207.

6. White v. Thompson (C. C. A.) 119 Fed. 868.

7. Bankruptcy Act 1898, § 8. In Ohio she is entitled to reside a year in his mansion house if dower is not sooner assigned. Rev. Sts. § 4188, and to the articles set out in Rev. Sts. §§ 6038-6039, 6040, but she will not be allowed the exemptions to which decedent would have been entitled—In re Parschen. 119 Fed. 976.

8. In re Seabolt, 113 Fed. 766.

9. Bankruptcy Act 1898, § 38 gives the referee the right to exercise the powers of a

courts should govern the hearing before the referee.[10] On re-examination of a claim it is not necessary that the referee give notice to all the creditors.[11] A witness cannot be compelled to attend before a referee in bankruptcy at a distance more than one hundred miles from where he resides, though within the state of his residence.[12] The referee is not empowered to excuse a witness from answering questions on objections thereto.[13] Questions of privilege and competency of witnesses and the admissibility of evidence not being peculiar to proceedings before referees will be treated in another subdivision of this subject.[14] The referee should base his findings on the evidence taken before him.[15] He is not precluded from changing a finding made before the evidence has been transcribed to conform to the evidence when read after it has been transcribed,[16] and a finding against a person not a party to a subsequent proceeding is not conclusive therein.[17] The rules of equity practice will govern as to the review of the hearing.[18] Exceptions to rulings on evidence must be specific,[19] and the referee should make all excluded testimony a part of his record with his rulings thereon and the exceptions taken thereto.[20] Formal exceptions however to the findings are not essential to a review thereof.[21] Generally, the referee's findings are conclusive on the court,[22] and will not be interfered with on questions of fact except when clearly erroneous;[23] if the court's attention is called to particular testimony which the referee had overlooked it will review his findings,[24] and the weight to be given to the findings is dependent on the character of the evidence.[25] The judge on review of a referee's decision may determine the issue de novo on the competent evidence in the record or he may recommit the proceeding for further hearing.[26]

§ 19. *Modification and vacation of orders of bankruptcy court.*—Interlocutory orders may be altered, modified, or vacated, by a federal court sitting in bankruptcy after the term of the regular court at which they were entered,[27] if no rights have become vested under them.[28]

§ 20. *Trustee's bonds; actions thereon.*—A United States district court has jurisdiction of an action by a trustee on the bond of a former trustee.[29]

§ 21. *Accounting and settlement of trustee.*—A final settlement by the trustee will not be ordered until the records of the entire proceeding shall have been made in accordance with the requirements of the statutes and rules of court.[30] A trustee's balance sheet and vouchers should correspond with the statement of the depositary.[31] If he takes possession of a fund belonging to another than the bankrupt and retains it after it has been adjudged to such party pending an appeal by him, he will not be charged interest in the absence of a showing that he

judge in taking possession on the issuance of a certificate by the clerk showing absence from the district, sickness or inability of the judge or a division of the district—Woodward v. McDonald (Ga.) 42 S. E. 1030.

10. In re De Gottardi, 114 Fed. 328.

11. In re Mammoth Pine Lumber Co., 116 Fed. 731.

12. Bankruptcy Act, § 41—In re Hemstreet, 117 Fed. 568.

13. Dressel v. North State Lumber Co., 119 Fed. 531.

14. See § 11 B.

15. The referee can not base the determination of the same issue on findings made in the previous proceeding which was dismissed or state any of the evidence taken therein except on consent of the parties—In re Rosenburg, 116 Fed. 402.

16. The referee before changing his findings should give counsel notice so that they may be heard—In re Hawley, 116 Fed. 429.

17. In re De Gottardi, 114 Fed. 328.

18. In re De Gottardi, 114 Fed. 328.

19. Dressel v. North State Lumber Co., 119 Fed. 531.

20. General Order, No. 37—In re Lipset, 119 Fed. 379; In re De Gottardi, 114 Fed. 328.

21. In re Miner, 117 Fed. 953. In the Massachusetts District—In re Swift, 118 Fed. 348; In re Hawley, 116 Fed. 428.

22. In re Grant, 118 Fed. 73; In re West, 116 Fed. 767; In re Miner, 117 Fed. 953; Wakeman v. Throckmorton, 74 Conn. 616.

23. In re West, 116 Fed. 767.

24. In re Grant, 118 Fed. 73.

25. In re Swift, 118 Fed. 348.

26. In re De Gottardi, 114 Fed. 328.

27. In re Henschel, 114 Fed. 968.

28. In re Ives (C. C. A.) 113 Fed. 911.

29. United States v. Union Surety & Guaranty Co., 118 Fed. 482.

30. In re Carr, 116 Fed. 556.

31. In re Carr, 116 Fed. 556.

received interest,[32] nor will he be allowed payments directed by the referee not empowered to authorize them.[33]

§ 22. *Discharge of bankrupt; its effect and how availed of. A. Procedure to obtain discharge and vacation thereof.*—The bankruptcy court has not jurisdiction to entertain a petition for a discharge filed more than 18 months after the adjudication.[34]

Specifications in opposition to a discharge must be signed and sworn to by each of the opposing creditors and not alone by the attorney or counsel,[35] but a member of the partnership opposing, authorized to sign the firm name, may verify.[36] If verified by an attorney or other agent, it should have been authorized by an order of the court[37] stating the reason for such verification,[38] and the reason therefor should be also stated in the verification.[39] A failure to except to the signature or verification is a waiver of the objection.[40]

It is necessary to aver in the specification to oppose a bankrupt's discharge that he "knowingly and fraudulently" made the false oath,[41] and if based on the ground that the bankrupt had failed to keep books of account must aver that the failure was with fraudulent intent.[42] It is within the discretion of the court to amend specifications[43] by permitting substituted specifications, merely enlarging the original ones, to be filed after the expiration of the required time in which to file,[44] and the exercise of this discretion may be reviewed by the circuit court of appeals.[45] Objections to the specifications in opposition to a bankrupt's discharge unless taken in the district court are waived.[46] After specifications in opposition are filed, no further pleading on the part of the bankrupt is necessary,[47] and the allegations contained therein cannot be taken as confessed for want of an answer,[48] nor is their sufficiency admitted by failure to demur or object;[49] and if the allegations are vague or general or unauthorized, the bankrupt may move to have them stricken out, or may rely upon his defense at the time of the hearing.[50]

The burden is on the objecting creditors to establish the averments contained in their specifications,[51] but they need not be proven beyond a reasonable doubt.[52] Testimony given by the bankrupt on his original examination in the proceedings cannot be used against him on his application for a discharge.[53] Objections to evidence on the trial of specifications are waived by not raising them before the referee.[54]

The referee is entitled to be allowed for expenses incurred in the publication of

32. A claimant through mistake had waived his lien on the fund and without objection allowed it to be paid to the trustee—In re Hutchinson (C. C. A.) 115 Fed. 937.
33. Bankruptcy Act, Gen. Order No. 29—In re Mammoth Pine Lumber Co., 116 Fed. 731.
34. In re Fahy, 116 Fed. 239.
35. In re Glass, 119 Fed. 509. Bankruptcy Act, § 18c—In re Baerncopf, 117 Fed. 975. Form of verification to specifications in opposition to a discharge by individual or corporate creditors—In re Glass, 119 Fed. 509.
36. In re Glass, 119 Fed. 509.
37. In re Glass, 119 Fed. 509.
38. In re Glass, 119 Fed. 509.
39. In re Baerncopf, 117 Fed. 975.
40. In re Baerncopf, 117 Fed. 975.
41. Bankruptcy Act, §§ 14, 29—In re Blalock, 118 Fed. 679; In re Beebe, 116 Fed. 48. Specification held bad for indefiniteness—In re Blalock, 118 Fed. 679.
42. In re Blalock, 118 Fed. 679.
43. In re Glass, 119 Fed. 509.
44. In re Osborne (C. C. A.) 115 Fed. 1.
45. In re Carley (C. C. A.) 117 Fed. 130.
46. In re Osborne (C. C. A.) 115 Fed. 1. In the northern district of New York, it is a practice that all objections to sufficiency of specifications be made within a specified time and by motion—In re Baldwin, 119 Fed. 796.
47. In re Crist, 116 Fed. 1007.
48. In re Crist, 116 Fed. 1007.
49. In re Crist, 116 Fed. 1007.
50. In re Crist, 116 Fed. 1007.
51. In re Crist, 116 Fed. 1007.
52. Evidence that the bankrupt for the purpose of obtaining a credit had made a written statement which failed to disclose debts to relatives, which he afterwards claimed to owe and paid while insolvent held sufficient to cast on him the burden of explaining—In re Greenberg, 114 Fed. 773.
53. In re Leslie, 119 Fed. 406.
54. In re Baldwin, 119 Fed. 796.

a notice of application for discharge,[55] and for stationery,[56] but not for services in making copies of the petition for the discharge.[57]

The mere omission of a debt from the schedule is not ground for setting aside his discharge,[58] and an order vacating the discharge and permitting the addition made without notice to the creditor is void.[59] Where the actual facts did not warrant the discharge and there was fraud on the part of the bankrupt in sending notice of application for his discharge to a creditor at a wrong address, the discharge will be vacated.[60]

B. Grounds for refusal.—It is not ground for refusing a discharge that the bankrupt omitted creditors from the schedule,[61] nor because he had made a false oath in bankruptcy proceedings against a corporation in which he was an officer,[62] nor will bad faith be presumed from a mere under or over statement of debts.[63]

The willful and fraudulent concealment of property by the bankrupt will deprive him of his right to a discharge,[64] and it is such a concealment for the bankrupt to fail to schedule an interest as a cestui que,[65] or a contract under which he was to receive money, though nominally assigned to another, where it was treated by the bankrupt and the assignee as belonging to the former,[66] or to schedule only a portion of shares of corporate stock claimed as exempt when he had a contract by which he was to receive a larger number of shares;[67] but the mere omission of exempt property,[68] or a failure to name certain corporate stock in his schedule or that he undervalued it,[69] or that he omitted a conveyance of land which might have been subjected to the payment of the creditor's debts, made more than three years before the passage of the bankruptcy act,[70] or that he undervalued certain real interests,[71] or that there had been a large shrinkage in the property of the bankrupt previous to filing of petition[72] is not alone sufficient to show a concealment. The bankrupt has the burden of proving that money received by him after the appointment of the trustee was paid to the trustee.[73] The charge of fraudulent concealment of property should be supported by a fair preponderance of credible evidence.[74]

Failure to keep books of account.—The omission of sales from books of account,[75] or loans to the bankrupt though made a few months before the bankruptcy

55. In re Dixon, 114 Fed. 675.
56. In re Dixon, 114 Fed. 675.
57. In re Dixon, 114 Fed. 675.
58. The creditor not having knowledge of bankruptcy proceedings in time to have proved his claim since in such case he is not prejudiced—In re Monroe, 114 Fed. 398; In re Hawk (C. C. A.) 114 Fed. 916.
59. In re Hawk (C. C. A.) 114 Fed. 916.
60. Facts held to show a fraudulent concealment of property and fraud in sending notice of applications of discharge warranting a vacation of the discharge—In re Roosa, 119 Fed. 542.
61. In re Blalock, 118 Fed. 679; In re Monroe, 114 Fed. 398.
62. Bankruptcy Act 1898, §§ 14, 29, subd. b (2)—In re Blalock, 118 Fed. 679.
63. Sufficiency of evidence to show bad faith in the statement of indebtedness—In re Miner, 114 Fed. 998. Evidence held insufficient to show that the bankrupt had made false oath with respect to a claim against which he scheduled—In re Miner, 117 Fed. 953.
64. In re Leslie, 119 Fed. 406.
65. Hudson v. Mercantile Nat. Bank (C. C. A.) 119 Fed. 346. Though advised by an attorney that he had been divested of all interest therein—In re Stoddart, 114 Fed. 486.
66. In re Semmel, 118 Fed. 487.
67. In re Semmel, 118 Fed. 487.
68. In re Semmel, 118 Fed. 487.
69. In re Semmel, 118 Fed. 487.
70. In re Countryman, 119 Fed. 639; Paxton v. Scott (Neb.) 92 N. W. 611.
71. It appeared that the bankrupt did not know his exact interest in certain land, and in the schedule claimed a half interest when in fact he had a life interest—In re Blalock, 118 Fed. 679.
72. In re Leslie, 119 Fed. 406.
73. Evidence held sufficient to show that money received by the bankrupt after filing of petition had not been paid over to his trustee—In re Leslie, 119 Fed. 406.
74. In re Leslie, 119 Fed. 406; In re Salsbury, 113 Fed. 833. Weight to be given to bankrupt's testimony—In re Baldwin, 119 Fed. 796. Evidence held sufficient to show a fraudulent concealment of assets—In re Baerncopf, 117 Fed. 975; In re Blalock, 118 Fed. 679; In re Schenck, 116 Fed. 554; In re Lesser (C. C. A.) 114 Fed. 83; In re Holstein, 114 Fed. 794; In re Otto, 115 Fed. 860; Fields v. Karter (C. C. A.) 115 Fed. 950. To show fraud in listing creditors as would justify a refusal to set aside a judgment released by the bankrupt's discharge as provided by N. Y. Code Civ. Proc. § 1268—In re Mollner, 75 App. Div. (N. Y.) 441.
75. Bankruptcy Act, § 14b (2). Though the bankrupt kept full books of accounts, but

act was passed,[76] and though entered in private books continually in the bankrupt's possession and concealed by him,[77] is not the keeping of proper books of account within § 14, b, (2). Where the bankrupt's condition for at least a year prior to his failure was one of such hopeless insolvency that he would be presumed to have known it, a failure to keep the requisite books of account will be considered to have been in contemplation of bankruptcy.[78] The destruction of books material to the proper condition of the bankrupt, though the books were the books of account of a firm of which bankrupt had been a member, is ground for refusal of his discharge.[79]

C. Liabilities released.—Choses in action which by operation of the act passed to the trustee, though not scheduled or reduced to the trustee's possession, are barred by a discharge in bankruptcy[80] where the creditor had actual knowledge of the proceedings,[81] otherwise where he had no notice of the proceeding until too late to prove the claim.[82]

A valid lien acquired more than four months before the filing of a petition in bankruptcy,[83] and not proved against the estate, is not affected by the bankrupt's discharge,[84] whether the lien was contracted or judicial,[85] or statutory, as a mechanic's lien;[86] and such a lien is acquired by the commencement of a judgment creditor's suit before the bankruptcy of the judgment debtor,[87] or an action to establish a special lien on the property,[88] and a lien of garnishment.[89] Therefore, after the discharge in bankruptcy, the stay of an attachment may be vacated and judgment rendered against the attached property,[90] or the plaintiff may take a judgment with a perpetual stay.[91] An attachment lien acquired pending bankruptcy proceedings does not survive the defendant's discharge in bankruptcy.[92]

Under the act of 1898, a cause of action for a debt created by fraud is not barred by a discharge of defendant in bankruptcy,[93] which is not limited to common law actions of fraud or deceit,[94] nor need it have accrued while the bankrupt was acting as an officer or in some fiduciary capacity,[95] nor is it barred by filing proof thereof with the trustee, though the claimant may have waived the cause of action for the tort,[96] and a failure to return an overpayment made by mistake on

failed to produce them until compelled to do so, and then produced but one book which omitted certain sales, and his explanation that the omitted ones were made to his son under an agreement that he should offset them against previous shortages in other sales—In re McBachron, 116 Fed. 783.

76. In re Feldstein (C. C. A.) 115 Fed. 259; In re Greenberg, 114 Fed. 773.

77. In re Feldstein (C. C. A.) 115 Fed. 259.

78. In re Feldstein (C. C. A.) 115 Fed. 259.

79. In re Conley, 120 Fed. 42.

80. Especially where the creditors whose debts were discharged received nothing from the estate—Scruby v. Norman, 91 Mo. App. 517.

81. Zimmerman v. Ketchum (Kan.) 71 Pac. 264; Graham v. Richerson, 115 Ga. 1002.

82. In re Monroe, 114 Fed. 398.

83. Bankruptcy Act 1898 merely takes away from the lien creditor the right to proceed against the debtor in personam—Evans v. Rounsaville, 115 Ga. 684; Wenhamm v. Mallin, 103 Ill. App. 609.

84. Philmon v. Marshall (Ga.) 43 S. E. 48; Evans v. Rounsaville, 115 Ga. 684.

85. Paxton v. Scott (Neb.) 92 N. W. 611.

86. Such a lien is not acquired by legal proceedings within § 67b—Holland v. Cunliff, 96 Mo. App. 67.

87. Within N. Y. Code Civ. Pro. § 1268 authorizing the cancellation of judgments against discharged bankrupts except "where the judgment was a lien on real property owned by the bankrupt before he was adjudged bankrupt," and the judgment creditor who had brought the suit is entitled to have the judgment stand for the purpose of enforcing the lien as acquired—Arnold v. Treviranus (N. Y.) 78 App. Div. 589.

88. McCall v. Herring (Ga.) 42 S. E. 468.

89. Holland v. Cunliff, 96 Mo. App. 67.

90. Wakeman v. Throckmorton, 74 Conn. 616.

91. Elder v. Prussing, 101 Ill. App. 655.

92. Graham v. Richerson, 115 Ga. 1002.

93. Bankruptcy Act, § 17a (2)—Frey v. Torrey (N. Y.) 70 App. Div. 166. Judgments held to have been rendered in an action for fraud within the bankruptcy act—Matter of Bullis (N. Y.) 68 App. Div. 508.

94. The words "fraud," "embezzlement" and "misappropriation" in Bankruptcy Act 1898, § 17a (4), refer to one acting in a fiduciary capacity, and not to individual debtors referred to in (2) excepting judgments in actions for fraud—Matter of Bullis (N. Y.) 68 App. Div. 508.

95. Frey v. Torrey (N. Y.) 70 App. Div. 166.

96. Frey v. Torrey (N. Y.) 70 App. Div. 166.

demand is not a fraud within the act.[97] Under the amendment of 1903, however, a claim based on fraud while acting as an officer or in a fiduciary capacity alone is excepted,[98] and technical trusts and not implied trusts are embraced within the term "fiduciary capacity;"[99] therefore a claim against the bankrupt as administrator,[1] or for the conversion of the proceeds of property sold under a deed of trust by the trustee,[2] or to enforce a trust in land of the bankrupt held by another,[3] or for trust funds deposited with the bankrupt banker merely for transmission to parties entitled thereto are not barred;[4] but a claim for goods procured by fraudulent representations is.[5] Whether the action was for fraud is conclusively determined by the judgment in the state court,[6] though the entire record may be examined.[7] Interest collected on funds in the hands of one acting in a fiduciary capacity is not barred by his discharge in bankruptcy.[8]

A decree for alimony entered in a state court previous to the bankruptcy of the defendant,[9] or a judgment for damages for the alienation of a wife's affections are not released by the discharge.[10] A judgment entered by consent after the discharge of the defendant in bankruptcy in an action pending before the institution of the proceedings will not be vacated on the ground that the debt was discharged by the bankrupt,[11] but a judgment on the common money counts is barred by the discharge of the judgment debtor in bankruptcy.[12]

A cause of action for conversion,[13] or a pending action of trover to try title is not barred by the discharge of defendant in bankruptcy.[14]

The discharge of a bankrupt principal will not affect the liability of his surety or co-debtor,[15] but will render his co-obligors liable for debt,[16] therefore statutory liabilities of stockholders are not released by the discharge of the corporation in bankruptcy.[17]

D. Pleading and evidence.—A plea of a discharge in bankruptcy must be filed within the time prescribed by court rules and in the manner and form required by statute,[18] and a failure to plead or prove the discharge is a waiver of the benefit thereof.[19] A plea of general denial and discharge in bankruptcy are not inconsistent pleas.[20] Bankruptcy of an appellant may be shown in the appellate court by evidence dehors the record.[21]

97. The exceptions from a release by a discharge in section 17a, cl. 4, of debts created by fraud, embezzlement, etc., "fraud" will not include an implied fraud or fraud in law but a positive, or fraud in fact—Western Union Cold Storage Co. v. Hurd, 116 Fed. 442.

98. § 17a (4).

99. Stickney v. Parmenter, 74 Vt. 58.

1. Stickney v. Parmenter, 74 Vt. 58.

2. In such case the bankrupt acted in a fiduciary capacity—Ruff v. Milner, 92 Mo. App. 620.

3. Evans v. Staale (Minn.) 92 N. W. 951.

4. Predmore v. Torrey (N. Y.) 38 Misc. Rep. 127.

5. No fiduciary relations exist between seller and purchaser of merchandise, such relation being necessary to except a judgment for fraud from the operation of the discharge, under § 17 of the Bankruptcy Act—Harrington v. Herman (Mo.) 72 S. W. 546; Morse & Rogers v. Kaufman, 4 Va. Sup. Ct. Rep. 172, 40 S. E. 916.

6. Harrington v. Herman (Mo.) 72 S. W. 546.

7. Matter of Bullis (N. Y.) 68 App. Div. 508.

8. Stickney v. Parmenter, 74 Vt. 58.

9. Welty v. Welty, 195 Ill. 335.

10. Exline v. Sargent, 23 Ohio Cir. Ct. R. 180. Such a judgment being for willful and malicious injuries to the person and property of another and excepted by § 17 of the Bankruptcy Act—Leicester v. Hoadley (Kan.) 71 Pac. 318.

11. Stevens v. Meyers (N. Y.) 72 App. Div. 128.

12. Barnes Mfg. Co. v. Norden, 67 N. J. Law, 493.

13. Watertown Carriage Co. v. Hall (N. Y.) 75 App. Div. 201; contra, In re Benedict (N. Y.) 37 Misc. Rep. 230.

14. Berry v. Jackson, 115 Ga. 196.

15. Elder v. Prussing, 101 Ill. App. 655; Holland v. Cunliff, 96 Mo. App. 67; Bernhardt v. Curtis, 109 La. 171.

16. Seymour v. O. S. Richardson Fueling Co., 103 Ill. App. 625.

17. Elsbree v. Burt, 24 R. I. 322.

18. Griffith, Turner & Co. v. Adams, 95 Md. 170. Sufficiency of petition for leave to file a supplemental answer setting up the discharge of defendant in bankruptcy—Balk v. Harris, 130 N. C. 381.

19. Wakeman v. Throckmorton, 74 Conn. 616. As where the bankrupt first calls attention to it by motion of arrest three weeks after verdict nearly seven months after verdict—Lane v. Holcomb, 182 Mass. 360.

20. Ruff v. Milner, 92 Mo. App. 620.

21. Scruby v. Norman, 91 Mo. App. 517.

BASTARDS.

§ 1. *Legal elements and evidences of illegitimacy.*—To establish illegitimacy in the offspring of a lawfully married woman, the impossibility that the husband be the father must be shown.[1] A wife cannot bastardize her children born while she is living with a husband not shown to be impotent.[2] "Cohabiting" in statutes declaring the presumption of legitimacy means ostensible living together as man and wife.[3]

Parish records of a foreign country may be prima facie evidence of illegitimacy,[4] and are not overcome by the presumption of legitimacy or legitimization by marriage of parents.[5]

§ 2. *Rights and duties of and in respect to bastards.*—Statutes requiring the father to support his minor children do not require him to support his illegitimate child.[6] An agreement by him to pay for support and expenses is supported by the withdrawal of the mother's claim for support to the overseer of the poor.[7] Damages awarded the mother of a bastard by arbitrators will be upheld, the mother being liable for support.[8]

The mother may transfer her right of custody to the putative father, though such transfer may be void as against the child if contrary to his interests.[9]

Illegitimate children referred to in an application for insurance as adopted children and who lived with insured may recover under a benefit certificate limited to wife, children, dependents, or blood relatives.[10]

Inheritance.—Between acknowledged and unacknowledged collateral heirs, the former inherit.[11] Under statutes rendering bastards capable of inheritance and transmission of inheritance through the mother, they may inherit from a brother of the mother dying after her.[12]

§ 3. *Procedure to ascertain paternity and compel support.*—Where the statute provides for a proceeding by an "unmarried" woman she need not be unmarried at the time of complaint.[13]

A minor prosecutrix may dismiss of her own motion,[14] though in Nebraska it is held that prosecutrix cannot compromise a judgment.[15] Dismissal on provision for maintenance is a bar to a second prosecution.[16]

1. Adger v. Ackerman, 115 Fed. 124, 52 C. C. A. 568.

2. Since Code Civ. Proc. § 1962, subd. 5, raises an indisputable presumption of legitimacy of issue of a wife cohabiting with her husband, who is not impotent, the wife cannot testify that children are illegitimate, though Civ. Code, § 195, provides that illegitimacy may be proved like any other fact when legitimacy is disputed by husband or wife, and Code Civ. Proc. § 1879, provides that all persons may be witnesses though parties and persons in interest—In re Mills' Estate, 137 Cal. 298, 70 Pac. 91.

3. Code Civ. Proc. § 1962, subd. 5—In re Mills' Estate, 137 Cal. 298, 70 Pac. 91.

4. Recitals that a child was born to a spinster in a parish record kept under laws requiring a record of all children whether legitimate or not are prima facie evidence under Rev. St. 1898, § 4160, giving such effect to "material facts" in parish records of births, marriages or deaths—Sandberg v. State, 113 Wis. 578.

5. There was evidence that the mother, less than two years after the birth, left the country under her maiden name and without company of a husband—Sandberg v. State, 113 Wis. 578.

6. 18 Del. Laws, c. 230—State v. Miller (Del.) 52 Atl. 262.

7. Beach v. Voegtlen (N. J. Sup.) 53 Atl. 695.

8. Damages against a priest fixed by the ecclesiastical court—Poggenburg v. Conniff, 23 Ky. Law Rep. 2463, 67 S. W. 845.

9. An instrument expressing such transfer will not be annulled where there was no sufficient showing of fraud, undue influence, or mistake, and the interest of the children was promoted—Ousset v. Euvrard (N. J. Ch.) 52 Atl. 1110.

10. Hanley v. Supreme Tent, 38 Misc. Rep. (N. Y.) 161.

11. Bourriaque v. Charles, 107 La. 217.

12. Rev. St. 1899, § 2916—Moore v. Moore, 169 Mo. 432.

13. Comp. St. c. 37, § 1—Parker v. Nothomb (Neb.) 91 N. W. 395.

14. Consent of the county attorney is not required if she enter of record an admission of provision for support—State v. Baker, 65 Kan. 117, 69 Pac. 170.

15. State v. McBride (Neb.) 90 N. W. 209.

16. An admission of provision secured without fraud is binding on both prosecutrix and the state—State v. Baker, 65 Kan. 117, 69 Pac. 170.

Evidence.—Paternity need not be established beyond a reasonable doubt.[17] Proof of birth creates a presumption of birth alive.[18] The child may be offered in evidence to prove paternity by resemblance.[19] Defendant may show association of prosecutrix with other men with opportunity for sexual intercourse at about the time of conception.[20]

Judgment and damages.—Prosecutrix is not entitled to a sum awarded generally as costs.[21] A judgment for support against the putative father may be enforced after he has married the mother.[22]

Bonds.—The fact that no expenditures were made by the municipality is not defense to an action on a bastardy bond.[23]

§ 4. *Legitimation, recognition, adoption.*—Provisions for formal acknowledgment of bastards are not exclusive.[24] Statutes enabling bastards to inherit from the father, if acknowledged in writing by him, allow writings executed before their passage to capacitate the bastard as heir.[25] If they require that the child be received into the father's family, if the father is living with a woman whom he holds out as his wife and has a home, the child must be received therein.[26] Under certain statutes there need be no express intention of making the child an heir.[27]

Recognitions but not denials of paternity made by a person deceased are admissible.[28] A recognition in writing may be in letters from the father to the illegitimate.[29]

Where a minor bastard is legitimized by the marriage of his parents under the laws of their domicile, such status follows him.[30]

BETTING AND GAMING.

It is not proposed to treat of the keeping of lotteries,[1] or the validity of wagering contracts.[2]

§ 1. *The offense and criminal prosecutions. A. The offense. Validity of regulations.*—The legislature is ordinarily held to have plenary power to regulate or prohibit gaming. Thus prohibition of gaming in any place barred or made difficult of access to the police,[3] betting on races through a turf exchange,[4] bookmaking and pool selling,[5] the selling of wagers on the drawing of numbers,[6] have been upheld, and the prohibition may be directed only to the proprietors of the

17. Preponderance of evidence sufficient—Priel v. Adams (Neb.) 91 N. W. 536. Evidence held insufficient, there being a showing of intercourse with others than defendant—People v. McKay, 72 App. Div. (N. Y.) 527.

18. Priel v. Adams (Neb.) 91 N. W. 536.

19. Kelly v. State, 133 Ala. 195.

20. Where the state has proved defendant's association with prosecutrix at about such time—Kelly v. State, 133 Ala. 195.

21. Barry v. Niessen, 114 Wis. 256.

22. Though the child is thus legitimized—Alderson v. Alderson's Guardian, 24 Ky. Law Rep. 595, 69 S. W. 700.

23. Code Cr. Proc. § 883, makes proof of such expenditures unnecessary—New York v. Buechel, 71 App. Div. (N. Y.) 507.

24. Civ. Code, art. 203, does not exclude arts. 207, 208—Bourriaque v. Charles, 107 La. 217.

25. Acknowledgment in writing before witnesses, of paternity, by a nonresident alien, in 1877, prior to Code, § 3403, makes on his death, after passage of such section, the child heir as to his realty in South Dakota—Moen v. Moen (S. D.) 92 N. W. 13.

26. Civ. Code, § 230. Acknowledgment and gifts of small sums of money are not sufficient—Garner v. Judd, 136 Cal. 394, 68 Pac. 1026.

27. Comp. St. c. 23, § 31—Thomas v. Thomas' Estate (Neb.) 90 N. W. 630.

28. Action under Code, § 3385, permitting an illegitimate to inherit from the father if recognized publicly and notoriously or in writing—Britt v. Hall, 116 Iowa, 564.

29. Code, § 3385. Evidence held sufficient—Britt v. Hall, 116 Iowa, 564.

30. Fowler v. Fowler, 131 N. C. 169.

1. "Lotteries."

2. "Gambling Contracts."

3. In re Ah Cheung, 136 Cal. 678, 69 Pac. 492.

4. Shreveport v. Maloney, 107 La. 193. And see People v. Bennett, 113 Fed. 515, in which Laws N. Y. 1895, c. 570, requiring, under penalty, all wagers on horse races to be recorded at the track, is upheld.

5. People v. De Bragga, 73 App. Div. (N. Y.) 579.

6. People v. Flynn, 72 App. Div. (N. Y.) 67.

game.[7] A statute making bookmaking punishable as a felony except where another punishment is provided by law does not provide two penalties for the same offense.

Cards and other table games.—Craps is not a banking or table game, though the owner of the table acts as stakeholder and receives a commission.[8]

Racing and race tracks.—Betting on the result of a horse race is legal in Louisiana.[9] Bookmaking in New York is illegal though not carried on at a race track.[10] A telegraph company transmitting messages as to the result of races is not liable.[11]

Slot machines.—A slot machine paying prizes in cigars is illegal.[12]

Gaming at public place.—The back yard of a building where liquor is sold,[13] or the second story of a building the lower floor of which is used for the sale of liquor,[14] is within a statute prohibiting gaming "at" a store, etc., where liquor is sold. A room adjoining a saloon and partitioned off therefrom is within the statute.[15] A remote field sometimes resorted to for the purpose of card playing is not a public place,[16] but a room to which persons went at will without invitation may be found by the jury to be,[17] and the front yard of a dwelling forty feet from a highway is a public place.[18]

B. Indictment or information and trial procedure.—Indictment for playing at a hotel need not allege that it was not a private residence,[19] but an indictment for pool selling must allege that it was not at a race course authorized by statute.[20] If the indictment alleges that the place was not a private residence, it need not be designated.[21] The particular location of a pool room need not be specified.[22] An indictment for keeping a pool room must allege the presence therein of the books and apparatus mentioned in the statute.[23] An indictment charging gambling by three persons is variant from evidence that one of them gambled with persons not named.[24] Information in general terms sufficient.[25]

See note for holding as to materiality of certain evidence or sufficiency of proof.[26]

7. It is not class legislation because the patrons are not punished—State v. Woodman, 26 Mont. 348, 67 Pac. 1118.

8. Cummings v. State (Tex. Cr. App.) 72 S. W. 395; Campbell v. State (Tex. Cr. App.) 72 S. W. 396.

9. Shreveport v. Maloney, 107 La. 193.

10. Under Pen. Code, § 351, though Laws 1895, c. 570, relates only to the recording of wagers at the track—People v. Levoy, 72 App. Div. (N. Y.) 55. Pen. Code, § 351, Laws 1895, c. 570, provided for civil liability only for book making at race tracks—People v. Stedeker, 75 App. Div. (N. Y.) 449.

11. Com. v. Western Union Tel. Co., 23 Ky. Law Rep. 1633, 67 S. W. 59.

12. Laws 1901, p. 166, prohibits slot machines "for money, checks, credits, or any representative of value, or for any property or thing whatever"—State v. Woodman, 26 Mont. 348, 67 Pac. 1118.

13. James v. State, 133 Ala. 202.

14. Kicker v. State, 133 Ala. 193; Osborn v. State (Tex. Cr. App.) 72 S. W. 592.

15. Douthit v. State (Tex. Cr. App.) 73 S. W. 809.

16. Russ v. State, 132 Ala. 20. See Williams v. State (Tex. Cr. App.) 72 S. W. 192, for a conviction on similar facts, under a statute prohibiting gaming at any place except a private residence.

17. Cartiledge v. State, 132 Ala. 17.

18. Lee v. State (Ala.) 33 So. 894.

19. That being the exception in the statute—Wilkerson v. State (Tex. Cr. App.) 72 S. W. 850; Hodges v. State (Tex. Cr. App.) 72 S. W. 179.

20. People v. Stedeker, 175 N. Y. 57.

21. Russell v. State (Tex. Cr. App.) 72 S. W. 190; Hankins v. State (Tex. Cr. App.) 72 S. W. 191.

22. People v. Stedeker, 175 N. Y. 57.

23. People v. Stedeker, 175 N. Y. 57.

24. Pullen v. State (Ga.) 42 S. E. 774.

25. The information alleged that one C did at a certain place use and allow rooms to be used for gambling—People v. Wyatt, 39 Misc. Rep. (N. Y.) 456.

26. Evidence that another participant in the game has left the county is inadmissible—James v. State, 133 Ala. 208. On a trial for permitting a minor to play, evidence that at some previous time defendant requested the minor not to come is inadmissible—Alexander v. State (Tex. Cr. App.) 67 S. W. 319.

Sufficiency: To convict of keeping a gaming house—White v. State, 115 Ga. 570. To convict of playing for money; witness saw only checks used and did not see them cashed—State v. Brooks (Mo. App.) 67 S. W. 942. A conviction on the testimony of one who said he was pretty sure he saw defendant playing but might be mistaken was sus-

One indicted for keeping gaming table is entitled to instruction that he must be interested in the gain or loss thereof.[27] Betting need not be defined on trial for bookmaking.[28] Where all the evidence is that the play was in a pasture, an instruction as to the burden of proving that it was not at a private residence is properly refused.[29]

Gambling with cards is a misdemeanor in Idaho.[30]

§ 2. *Penalties and seizure of implements.*—Act authorizing destruction of gambling implements does not deprive of property without due process of law.[31] An instrument which may be used for an innocent purpose cannot be seized by the police as a preventative measure.[32] Absence of preliminary affidavits cannot be objected to where no search is made.[33] The court may order a trial before ordering the destruction of a slot machine.[34] Statute providing penalty is to be strictly construed,[35] and will be limited to gambling within the state.[36]

§ 3. *Recovery back of money lost.*—Where the action is in name of third person, defendant may show it is really in interest of loser,[37] and this may be shown under the general issue,[38] but it has been held that collusion between the loser and the person suing is no defense.[39] Action must be brought in county where loss occurred.[40] Giving of notes is not a payment which may be recovered back, nor is payment by sureties on supersedeas bond given on appeal from judgment on such notes.[41]

BIGAMY.

The offense.—Belief in a divorce is no defense, nor is a divorce after the second marriage.[1] The fact that the first wife had married defendant within the time when divorced persons were forbidden to remarry in the state where the marriage was performed is no defense where the divorce was granted elsewhere.[2]

Indictment.—The indictment need not negative a divorce from the first wife,[3] nor state time and place of first marriage or negative exception as to absence of spouse and belief in death.[4] In Oregon, the information must allege that the first wife was living at the time of the cohabitation.[5] Variance between indictment and marriage certificate as to name of first wife is not fatal.[6]

tained—Simmons v. State (Tex. Cr. App.) 72 S. W. 586. Sufficient to show a room in hotel rented by month but under general supervision of defendant, who was hotel keeper; bed in room, but no evidence that any one slept therein; gambling appliances in room—Hodges v. State (Tex. Cr. App.) 72 S. W. 179.

27. Jones v. State, 80 Miss. 181.

28. People v. Levoy, 72 App. Div. (N. Y.) 55.

29. Williams v. State (Tex. Cr. App.) 72 S. W. 192.

30. The minimum punishment is fixed by Act Feb. 6, 1899; the maximum by Rev. St. § 6313—In re Rowland (Idaho) 70 Pac. 610.

31. Garland Novelty Co. v. State (Ark.) 71 S. W. 257.

32. Musical slot machine—Wagner v. Upshur, 95 Md. 519.

33. Garland Novelty Co. v. State (Ark.) 71 S. W. 257.

34. Garland Novelty Co. v. State (Ark.) 71 S. W. 257.

35. Jacob v. Clark, 24 Ky. Law Rep. 2120, 72 S. W. 1095.

36. Jacob v. Clark, 24 Ky. Law Rep. 2120, 72 S. W. 1095.

37. Staninger v. Tabor, 103 Ill. App. 330; Kizer v. Walden, 198 Ill. 274.

38. Staninger v. Tabor, 103 Ill. App. 330.

39. Kizer v. Walden, 198 Ill. 274.

40. Staninger v. Tabor, 103 Ill. App. 330.

41. Jacob v. Clark, 24 Ky. Law Rep. 2120, 72 S. W. 1095.

1. Rogers v. Com., 24 Ky. Law Rep. 119, 68 S. W. 14.

2. State v. Bentley (Vt.) 53 Atl. 1068.

3. Rogers v. Com., 24 Ky. Law Rep. 119, 68 S. W. 14. An indictment that defendant married a certain woman and cohabited with her, his first wife being living at the time of such marriage and cohabitation, is sufficient—State v. Steupper (Iowa) 91 N. W. 912.

4. Ferrell v. State (Fla.) 34 So. 220. Indictment negativing exception in general terms held sufficient—State v. Damon, 97 Me. 323.

5. The statute (Bel. & C. Ann. Codes & St. § 1918) forbids cohabitation with another as husband or wife while first spouse is living. Information alleging that defendant while first wife was living married another and "subsequently cohabited with her" held insufficient—State v. Durphy (Or.) 71 Pac. 63.

6. It was shown that the certificate was

Evidence and instructions.—The license issued for the first marriage is admissible.[7] Evidence of continued cohabitation is admissible.[8] An instruction requiring a finding of marital cohabitation only is erroneous.[9]

BLACKMAIL.

The sending of blackmailing letters is a postal crime.[1]

BONDS.

§ 1. **The Instrument; Essentials and Validity.**—Consideration; Execution and Delivery; Fraud.
§ 2. **Rights of Parties and Transferees.**
§ 3. **Terms and Conditions in General.**
§ 4. **Remedies and Procedure.**—Pleading; Evidence; Judgment.

§ 1. *The instrument; essentials and validity.*—A bond not within the intendment of a statute may be sustained as a common law contract,[1] but not a bond in compliance with an unconstitutional statute,[2] unless there is a consideration independent of the statute.[3]

Consideration is not required for a statutory bond,[4] and statutes providing that want of consideration shall be a defense to actions on notes, bonds, etc., do not apply to penal bonds.[5] A bond for the performance of a contract under a void franchise is without consideration.[6]

Execution.—A signature of the secretary for the purpose of attesting the signature and seal of the vice-president on the back of the secretary's surety bond cannot be regarded as a signing of the bond.[7]

Delivery to the attorney of an interested party is sufficient,[8] or a placing in the hands of a third person to be delivered to the obligees.[9]

Fraud with which the obligee is not connected will not avoid a bond.[10]

§ 2. *Rights of parties and transferees.*—The obligors of a forged bond are

erroneous—Kuehn v. State (Tex. Cr. App.) 69 S. W. 526.

7. De Lucenay v. State (Tex. Cr. App.) 68 S. W. 796.

8. The indictment alleged a marriage in another state and the evidence offered was of continued cohabitation in Iowa—State v. Steupper (Iowa) 91 N. W. 912. **Evidence held sufficient**—Ferrell v. State (Fla.) 34 So. 220. Failure of the clergyman to identify the parties to the first marriage is immaterial if there is other evidence—Kuehn v. State (Tex. Cr. App.) 69 S. W. 526. Conviction reversed where first wife testified to ceremony but clerk certified that there was no return thereof on file—People v. Goodrode (Mich.) 94 N. W. 14.

9. State v. St. John, 94 Mo. App. 229.

1. Act Cong. Mar. 2, 1889, amending R. S., § 5480, directed against "schemes to defraud"—Horman v. United States (C. C. A.) 116 Fed. 350.

1. State v. Paxton (Neb.) 90 N. W. 983. An appeal undertaking insufficient to comply with the statute may bind the sureties as a common law undertaking, if there was an actual stay of execution thereon. The sureties were charged with notice that they were not merely executing a cost bond by the fact that they were required to justify in the sum of $2,000 and undertake to pay costs and damages to the amount of $250, together with the amount of the judgment, if it was affirmed and the bond was treated by counsel as sufficient—Coughran v. Hollister, 15 S. D. 318.

2. Bond stating that it was given under Code Civ. Proc. § 1203, from a building contractor for the protection of materialmen—Shaughnessy v. American Surety Co., 138 Cal. 543, 71 Pac. 701.

3. Statute afterward declared unconstitutional—Stevenson v. Morgan (Neb.) 93 N. W. 180.

4. State v. Paxton (Neb.) 90 N. W. 983.

5. Rev. St. 1874, c. 98, § 9. A plea of no consideration is not a defense in an action on a penal bond for the payment of a materialman—Chicago, etc., Mfg. Co. v. Haven, 195 Ill. 474.

6. Bond given by grantee of franchise—Kirkwood v. Meramec Highlands Co., 94 Mo. App. 637.

7. Laws 1895, p. 105, § 4, provides that the surety of an officer of a building association should be approved by the board of directors. A bond not otherwise signed by the secretary, bore on its back, after recital of such approval by the board, the signature of the vice-president, followed by the corporate seal and the words "Attest, John C. Obert, Secretary." Held, that it was not a sufficient signature of his bond—North St. Louis Bldg. & L. Ass'n v. Obert, 169 Mo. 507.

8. Several months later the attorney made a delivery to the obligee—Wylie v. Commercial & Farmers' Bank, 63 S. C. 406.

9. Bonds were placed in the hands of a third person to be delivered at the death of the obligor, the obligor parting with all dominion over them—Frank v. Frank (Va.) 42 S. E. 666.

10. False representations of one not the agent of the obligee, which he did not participate in or have knowledge of—Feigenspan v. Wilson (N. J. Sup.) 52 Atl. 233.

not made liable by the fact that the obligees have accepted it in good faith and incurred liability in reliance thereon.[11] A purchaser with notice after maturity from a bona fide holder for value before maturity and without notice is entitled to the rights of the latter,[12] and the fact that an intermediate owner of negotiable bonds could not have enforced them does not affect a bona fide purchaser.[13] A default in payment of interest does not cause a purchaser to take with notice of dishonor.[14]

Purchasers of non-negotiable mortgage bonds take them subject to equities between the parties existing before notice of assignment,[15] and are in the position of assignees of non-negotiable instruments.[16] The obligor may be estopped to deny a trustee's authority to pledge the bonds for its own debt,[17] though estoppels are not favored and must be clearly made out.[18] A trust company holding bonds, executed to it as trustee, to be sold, can confer no rights on one to whom it pledges the bonds for its own debt.[19]

§ 3. *The terms and conditions in general; interpretation, legal effect, breach.*[20]—The substance rather than the form will be given importance in the interpretation of a bond.[21]

Where a corporate officer by statute is to hold office at the pleasure of the board of directors, his bond is not limited to the first year of his employment, though the minutes of the meeting at which he is appointed read that he is appointed until the next annual election.[22]

A condition for the honest and proficient performance of duties covers negligence though co-employes are also negligent.[23] A bond for faithful performance of an attorney's duties adds nothing to his liability under the law.[24]

§ 4. *Remedies and procedure.*—Where a bond imposes a primary liability, the doctrine of laches does not apply.[25] Compliance with provisions for payment in

11. Terrill v. Tillison (Vt.) 54 Atl. 187.

12. Central R. & B. Co. v. Farmers' L. & T. Co., 116 Fed. 700.

13. Central R. & B. Co. v. Farmers' L. & T. Co., 114 Fed. 263, 52 C. C. A. 149.

14. Negotiable bonds—Central R. & B. Co. v. Farmers' L. & T. Co., 116 Fed. 700.

15. A covenant by the obligor that the land is free from incumbrance cannot be asserted against him by the transferee as an estoppel if made on faith of the obligee's agreement to discharge such incumbrance with a portion of the amount secured by the mortgage, and the obligor is liable only for the amount actually received by him—Macauley v. Louisville Banking Co., 24 Ky. Law Rep. 1, 67 S. W. 843.

16. The obligor may make any defense against the assignee of bonds payable to a trust company, "trustee," or bearer that he might have made against the original payee—Rodd v. Louisville Banking Co., 24 Ky. Law Rep. 55, 67 S. W. 63.

17. As where he has stated that the trustee has settled with him in full, and that he owed all outstanding bonds, and the pledgee has taken on the faith of such statement—Rodd v. Louisville Banking Co., 24 Ky. Law Rep. 55, 67 S. W. 63.

18. Hence having no reason to believe that the bonds would be transferred before the money is furnished, the obligor is not estopped to plead that he did not receive the consideration which was to be advanced during the erection of a house—Macauley v. Louisville Banking Co., 24 Ky. Law Rep. 1, 67 S. W. 843.

19. The pledgee for its own debt to a trust company to whom bonds are payable, "trustee" or bearer acquires no lien—Rodd v. Louisville Banking Co., 24 Ky. Law Rep. 55, 67 S. W. 63.

20. A bond conditioned to be void in case a building contracted to be erected by the vendee on land conveyed will not be regarded as securing the payment of the purchase price, though the land without the erection of the building would have been inadequate security for mortgages thereon, one of which was assumed by the vendee and the other executed by him as part of the contract of sale—Sachs v. American Surety Co., 72 App. Div. (N. Y.) 60.

A bond for the satisfaction of a mortgage within six months will not be regarded as one for liquidated damages, and is satisfied by satisfaction of the mortgage though after the period mentioned, no damages being shown—McDaniels v. Gowey, 30 Wash. 412, 71 Pac. 12.

21. More regard will be paid to the general purpose as shown by the provisions of the bond as a whole and the interests of the parties in the subject-matter than to the words implied—Northern Assur. Co. v. Borgelt (Neb.) 93 N. W. 226.

22. The bond of a cashier of a savings bank mentioned no time during which it was to be operative and no other bond was given, though the cashier was re-appointed at successive annual meetings—Ida County Sav. Bank v. Seidensticker (Iowa) 92 N. W. 862.

23. A bank officer is liable though directors have not used due diligence—Fiala v. Ainsworth (Neb.) 94 N. W. 153.

24. Humboldt Bldg. Ass'n v. Ducker's Ex'x, 23 Ky. Law Rep. 1073, 64 S. W. 671.

25. Bond required before appointment of

accord with the mechanic's lien law is not a condition precedent to enforce the contractor's bond for performance of the contract.[26]

After 20 years there is a presumption that a bond has been paid.[27]

Action to enforce a bond should be in the name of the obligees,[28] though the assignee or pledgee of a negotiable bond may sue in his own name.[29]

Pleading.—Where the condition is set out and breaches specifically assigned, non damnificatus is not a good plea.[30] Such plea does not answer an alleged breach of a bond to perform a particular act.[31] Where the answer is not sworn to, the execution of the bond is admitted.[32] Striking of a plea of non est factum to an amended declaration carries with it former pleas of the same nature, allowing the bond to be admitted in evidence without preliminary proof of execution.[33]

Evidence.—In an action for breach of a bond to erect a building by the vendee, evidence as to the value of the premises had there been performance is admissible.[34]

Rulings and instructions.—A ruling proper as to sureties but erroneous as to the principal defendants should be refused if there is no distinction between the two classes of parties.[35] Instructions should conform to the evidence.[36]

Judgment and damages.—On breach of a bond for the erection of a building by the vendee of land, the loss of profits may be the measure of damages.[37]

Where a bond is treated as for the payment of money, a judgment cannot be modified so as to provide that it shall stand as security for further breaches, the statute allowing judgment in such form applying only to bonds not conditioned for the payment of money.[38]

If the damages exceed the penalty of the bond, the amount of the penalty with interest may be recovered.[39] By statute, interest may be made not allowable

an employe, conditioned to be void in case of a competent and honest performance of services—Walker v. Brinkley, 131 N. C. 17.

26. Central Lumber Co. v. Kelter, 201 Ill. 503.

27. Such evidence is not rebutted by proof of insolvency not shown to have continued through the term or by proof of payments shown to have been on other accounts—Guillou v. Redfield (Pa.) 54 Atl. 886.

28. Sister Mary Nonna v. Conlan (N. J. Sup.) 52 Atl. 210.

29. Mills' Ann. Code, § 3. The nature of his title or the consideration paid by him is not material—Board of Com'rs of Lake County v. Schradsky (Colo.) 71 Pac. 1104.

30. The breaches should be traversed with a conclusion to the country—Dime Sav. Inst. v. American Surety Co. (N. J. Sup.) 53 Atl. 217.

31. Where the condition is for anything except mere indemnity, performance must be averred—Fidelity & Deposit Co. v. West Chicago St. R. Co., 99 Ill. App. 486.

32. Campbell v. Harrington, 93 Mo. App. 315. Rev. St. c. 110, § 34—Central Lumber Co. v. Kelter, 102 Ill. App. 333.

33. Central Lumber Co. v. Kelter, 201 Ill. 503.

34. Sachs v. American Surety Co., 72 App. Div. (N. Y.) 60.

Sufficiency of evidence: To show validity of a bond over a contention that it was fraudulent—Tatum v. Tatum's Adm'r (Va.) 43 S. E. 184. In an action on the bond of an assistant bank cashier for negligence in aiding a misappropriation of funds—Fiala v. Ainsworth (Neb.) 94 N. W. 153. In an action on a contractor's bond, evidence that it cost over $1400 to complete the building after the contractor abandoned it, will sustain a judgment against the sureties for $1374.42—Central Lumber Co. v. Kelter, 201 Ill. 503.

35. Curtiss v. Curtiss, 182 Mass. 104.

36. An instruction as to the burden of proof of a change in a bond should be denied where the only evidence goes to show a forgery—Terrill v. Tillison (Vt.) 54 Atl. 187.

37. On a sale of land for $190,000, the vendee assumed a mortgage for $120,000 and gave a mortgage for $70,000. The vendor agreed to advance $100,000 as a building loan, and the vendee gave a bond to erect certain buildings. In an action on the bond $30,000 were held to be the measure of damages, it appearing that the premises were worth $160,000, and that a deficiency resulted on foreclosure of the purchase-money mortgage which would not have been occasioned had the buildings been erected—Sachs v. American Surety Co., 72 App. Div. (N. Y.) 60.

38. Rev. St. 1899, §§ 464-477. Held that an action on a bond conditioned for the payment of monthly alimony, in which the prayer was for judgment for penalty of the bond, and that execution issue for a fixed amount then in arrears as damages, regarded the bond as conditioned for the payment of money—Burnside v. Wand, 170 Mo. 531.

39. Damages in an action on a bond to secure damages in eminent domain proceedings were properly made up of the amount of the penalty with interest from the date of the breach of the bond—Pennell v. Card, 96 Me. 392. From the time in which payment was due under the pleadings until the time for entering judgment—Camden v. Ward, 67 N. J. Law, 558.

if it cause the recovery to exceed the penalty of the bond except where the bond is for the payment of money.[40]

BOUNDARIES.

§ 1. **Rules for Locating or Identifying.**—Generally; Conflicts Between Course and Distance and Monuments; Between Plats, Maps and Monuments; Government Surveys; Surveys or Descriptions of Different Dates; Lost or Omitted Monuments; Highways, Streets or Ways as Boundaries.
§ 2. **Riparian or Littoral Boundaries.**—Meander Lines.
§ 3. **Conflicts and Ambiguities in Terms Defining Boundaries.**
§ 4. **Establishment by Agreement of Adjoiners.**
§ 5. **Establishment by Arbitration, Action or Statutory Mode.**—Right of Action; Burden of Proof; Admissibility and Sufficiency of Evidence; Instructions; Verdict, Judgment and Decree; Incidental Relation; Setting Aside.
§ 6. **Offenses Against Land Marks.**

§ 1. *Rules for locating or identifying. In general.*—Courses and distances are to be run by the magnetic meridian.[1] A line referred to as a boundary will be regarded as meaning a continuous line.[2] Omission of a connecting word between calls of a deed is immaterial.[3] Calls made under a mistake may be disregarded.[4] Interior lines need not be found where one of a block of several tracts may be located by adjoiners.[5]

Conflict between course and distance and natural or artificial monuments.—Courses and distances yield to natural and ascertained objects,[6] but they must be clearly identified and not in conflict with other natural objects called for in the description.[7] Natural monuments control measurements,[8] so a location by monument will control one by distance.[9] The actual location of lines on the ground will control courses and distances,[10] hence actual location will control calls for a straight line.[11] Where lines fixed by course and distance do not correspond with calls for marked corners, they must run straight between the corners,[12] and if a course cannot be made to touch all the natural objects called for, that course should be taken which will satisfy most of them.[13] A call for distance may control an artificial monument.[14]

40. Under Code Civ. Proc. § 1915, interest from the breach of a bond to erect a building cannot be recovered where there is a judgment for the full amount of the penalty —Sachs v. American Surety Co., 72 App. Div. (N. Y.) 60.

1. Ayers v. Huddleston (Ind. App.) 66 N. E. 60.

2. A line shown on a plat made by a commissioner of delinquent lands will control lines from the margins of the tract extending partially through them but which if extended would not meet—Jackson v. Land Ass'n, 51 W. Va. 482.

3. Omission of "thence," the sense being apparent—Johnson v. Harris, 24 Ky. Law Rep. 449, 68 S. W. 844.

4. As where one of two sets of calls must be disregarded and one is found to have been made under a mistake as to the relative position of surveys—Sellman v. Sellman (Tex. Civ. App.) 73 S. W. 48.

5. Lehigh Val. Coal Co. v. Beaver Lumber Co., 203 Pa. 544.

6. Leonard v. Forbing (La.) 33 So. 203. Where the call of a description is "thence up said branch with its meanders as follows: N. 130 vrs.; N., 45 deg. W., 150 vrs.; N. 360 vrs., and lyn brs. N., 70 deg. W., 2 vrs.," the meandering of the branch must be taken as a boundary to the end of the call—Griffin v. Barbee (Tex. Civ. App.) 68 S. W. 698. The jury cannot be instructed to disregard calls for natural objects because the objects are not found on the course or at the distance, if there is evidence tending to show that they exist and to justify a finding that they are those seen and called for by the surveyor, though they vary greatly from the courses and distances and make the survey much smaller than stated—Watkins v. King (C. C. A.) 118 Fed. 524.

7. Bell County Land & Coal Co. v. Hendrickson, 24 Ky. Law Rep. 371, 68 S. W. 842.

8. Hall v. Caplis (La.) 33 So. 570.

9. Hammond v. George (Ga.) 43 S. E. 53.

10. Trinwith v. Smith (Or.) 70 Pac. 816. Conveyance "to the lot recently conveyed to A." where A. had erected a fence and the grantee understood that he was purchasing only to A.'s lot—Long v. Shields, 20 Pa. Sup. Ct. 559.

11. The actual location is a question for the jury—Johnson v. Harris, 24 Ky. Law Rep. 449, 68 S. W. 844.

12. The ground marks were identified—Sloan v. King (Tex. Civ. App.) 69 S. W. 541.

13. Kentucky Land & Immigration Co. v. Crabtree, 24 Ky. Law Rep. 743, 70 S. W. 31.

14. Where the lateral line between lots is described as beginning at a certain number of feet from a street corner and passing through the center of a party wall, the call for distance will control, though placing the

Conflicts between plats and maps and monuments.—A boundary marked by objects will control a map,[15] so lines on a plat are not conclusive as to the actual location of lines on the ground,[16] and a plan made from a survey marked on the ground is controlled by lines and corners fixed by the ground marks,[17] though not affected by unidentified ground marks;[18] hence a special description of a lot by monuments controls a general description by number,[19] and a survey ascertained by monuments on the ground controls a recorded plat.[20]

Government surveys.—The lines established by a government survey, if possible of ascertainment, control as to a controverted section line,[21] and corners and monuments fixed by it control all other surveys,[22] and cannot be altered whether properly placed or not.[23] The official plat controls field notes of a meander line.[24] Where a corner is not found or its location satisfactorily proven, the field notes of the government survey control and are prima facie evidence of the true line,[25] though the plats and field notes may be overcome by other evidence,[26] such as monuments in the ground marking corners.[27]

Conflicts between surveys or descriptions of different date.[28]—Courses and distances in a senior survey control marked lines of a junior survey, where there is no evidence of the original junior survey or of possession or acquiescence.[29] Location of a junior survey over an older survey does not give the land of the older survey to the junior one.[30] A former grant will control a subsequent overlapping grant by the same grantor, there being a description by metes and bounds.[31]

Lost or omitted monuments.[32]—Adjoiners fix the location if they correspond to the calls, where the marks and monuments on the ground cannot be found to

line four inches beyond the center of the party wall—Ehrenreich v. Froment (N. Y.) 73 App. Div. 213.

15. Where a patent of pueblo lands issued to the city of San Francisco excepted the Presidio military reservation, but did not fix the boundaries thereof in courses and distances, though a map showing the boundaries was attached to and made a part of the patent, evidence of original location of the boundary of the reservation as marked by monuments on the ground before the map was made is admissible—Wheeler v. Benjamin, 136 Cal. 51.

16. The question of the location of a starting point is for the jury, where there was evidence as to land marks determining its location and also as to its location by means of distances from a range line determined only by a plat—Ayers v. Huddleston (Ind. App.) 66 N. E. 60.

17. Coleman v. Lord, 96 Me. 192.

18. If a deed conveys a lot by number according to a plan which is referred to, and gives the boundaries which correspond exactly with those appearing on the plan, the lines and surveys of the plan govern though there are unidentified stakes on the ground not corresponding with the survey—Coleman v. Lord, 96 Me. 192.

19. The land from which lots were sold was monumented and also laid out by map—Stanwood v. Beck (N. J. Ch.) 52 Atl. 353.

20. Survey of a city addition—Olson v. Seattle, 30 Wash. 687.

21. It is the duty of the court to ascertain if possible the monuments established by the government survey and the line as indicated—McGray v. Monarch Elevator Co. (S. D.) 91 N. W. 457.

22. Clark v. Thornburg (Neb.) 92 N. W. 1056; Knoll v. Randolph (Neb.) 92 N. W. 195.

23. Trinwith v. Smith (Or.) 70 Pac. 816.

24. Hanson v. Rice (Minn.) 92 N. W. 982.

25. Knoll v. Randolph (Neb.) 92 N. W. 195; Clark v. Thornburg (Neb.) 92 N. W. 1056.

26. Testimony that lines run from an original corner as marked on the ground show the plats and field notes grossly inaccurate and that extensive improvements had been made according to the corners as marked—Rowell v. Weinemann (Iowa) 93 N. W. 279. Evidence of four old surveyors as to finding and locating on the ground the original corners of a government survey and of nine witnesses as to finding such monuments, together with evidence that improvements had been made and highways established for many years according to such location, is sufficient to overcome the plats and field notes of the government survey—Rowell v. Clark (Iowa) 93 N. W. 280.

27. Rowell v. Weinemann (Iowa) 93 N. W. 279.

28. Surveyors' markings within the township are more reliable as to the location of a section line than the markings of an adjoining township surveyed a year later—Hall v. Caplis (La.) 33 So. 570.

29. Hornberger v. Giddings (Tex. Civ. App.) 71 S. W. 989.

30. Lehigh Val. Coal Co. v. Beaver Lumber Co., 203 Pa. 544.

31. Sandy River Cannel Coal Co. v. Whitehouse Cannel Coal Co., 24 Ky. Law Rep. 1653, 72 S. W. 298.

32. On a conveyance by metes and bounds, a corner not marked by a monument will be determined by courses and distances—Ayers v. Huddleston (Ind. App.) 66 N. E. 60.

establish the location of individual surveys of a block of surveys, and when the monuments cannot be found and the adjoiners do not correspond with the calls, courses and distances govern.[33]

Highways, streets, or ways as boundaries.—A state grant of land bordering on a highway is presumed to convey title to the center thereof.[34] Where a way is made a boundary, a grantee takes to the center of it with a right of way over the entire surface.[35] The presumption that a description limiting a tract by an existing road carries the fee to the center may be supported by other circumstances,[36] and there must be an express exclusion to overcome it.[37] The inclusion or exclusion may be indicated by the description.[38] If a stone monument is called for on the side of a street, the street as well as the stone becomes a monument.[39] In Illinois, the purchaser of a platted lot takes to the center of a street, where the lot is described by reference to the plat, though there has been no effectual statutory dedication of the streets and alleys described,[40] though in New York it is held that the street must have been opened or used.[41] A street named as a boundary will be presumed to mean the street as actually opened and in use.[42]

§ 2. *Riparian or littoral boundaries.*—Where a stream, navigable in fact, is the boundary, title extends to its center, unless there is an expressed intent otherwise;[43] the same is true of a non-navigable stream,[44] but not where there is an express call for low water mark.[45] Where title to land along a navigable river extends only to the original low water mark, by the law of the state, the low water mark remains the boundary on the addition of gradual accretions, but where there is a cutting of a natural channel by the stream suddenly, the title to the abandoned channel remains in the state.[46] There is a rebuttable presumption that an owner bordering on a canal has title to the center of the stream.[47]

33. Lehigh Val. Coal Co. v. Beaver Lumber Co., 203 Pa. 544.

34. Paige v. Schenectady R. Co. (N. Y.) 77 App. Div. 571.

35. A way is made a boundary by a description "running northerly of said road four rods, thence easterly by a way twenty feet wide, nineteen rods," though the distance indicated on the road does not quite reach to the way, and the fact that the way is not laid out at the time of the conveyance is immaterial, as are other facts relative to the utility of such way—LeMay v. Furtado, 182 Mass. 280.

36. Recital of purpose to dispose of entire estate—Van Winkle v. Van Winkle (N. Y.) 39 Misc. Rep. 593.

37. Van Winkle v. Van Winkle (N. Y.) 39 Misc. Rep. 593.

38. A description of land as on the side of a highway beginning at a certain point and thence by courses and distances, the first being along said highway a certain distance, excludes the highway, and further evidence of such exclusion may be found in that the description by courses and distances conveys the purported amount without including the highway—Kennedy v. Mineola, H. & F. Traction Co. (N. Y.) 77 App. Div. 484. The deed to a tract starting at a point on the northerly side of a street, thence northerly a certain distance and at right angles a certain distance, thence southerly to the northerly side of the said street, thence westerly along the northerly side to the place of beginning, does not convey any part of the street—Jacquemin v. Finnegan (N. Y.) 39 Misc. Rep. 628. Where one platted certain property conveyed a lot by description, "northerly till it strikes the southerly line of" a street mentioned in the plat beginning, "thence to the line of the said street easterly," the title to the south half of the street being in the grantor, the deed carried title to the middle thereof—Healey v. Kelly (R. I.) 54 Atl. 588.

39. It was held that under a conveyance making such a call the land to the street was conveyed though the stone monument by error had been placed a few feet distant from the edge of the street. The land had also been laid out by map, and upon the map the street was the boundary of the lots conveyed, and reference to the lots by number as indicated on the map was made in the conveyance—Stanwood v. Beck (N. J. Ch.) 52 Atl. 353.

40. Thompson v. Maloney, 199 Ill. 276.

41. Where on a map lots and streets were designated, but a lot marked as a street had never been opened or used as such, the grantee of an adjacent lot did not obtain any easement therein or take to the center of it, though his lot was described as extending "to land marked street"—Downes v. Dimock & Fink Co. (N. Y.) 75 App. Div. 513.

42. Southern Iron Works v. Central of Georgia R. Co., 131 Ala. 649.

43. Webster v. Harris (Tenn.) 69 S. W. 782; Chesbrough v. Head, 23 Ohio Cir. Ct. R. 427.

44. McBride v. Whitaker (Neb.) 90 N. W. 966.

45. Webster v. Harris (Tenn.) 69 S. W. 782.

46. Stockley v. Cissna (C. C. A.) 119 Fed. 812.

Meander lines.—The stream and not the meander line indicated on a public survey is the boundary of the riparian owner,[48] and a United States grant of land bordering on a navigable meandered river conveys title to high water mark.[49] Government lands bordering on a non-navigable stream are bounded by the thread of the stream,[50] though in certain states high water mark is the boundary.[51] The body of water may be one that should not have been meandered in the government survey,[52] but where there is no adjacent body of water proper to be meandered, the meander line if consistent with other calls and distances may be the boundary of a fractional lot.[53]

Unsurveyed islands in a non-navigable stream lying between the thread of the stream and the shore line, or parts of islands so lying, belong to the grantee of the government whose grant is bounded by a survey showing a meandered line along the river bank.[54] In Iowa, if meandered waters dry up, the title of the shore owners does not extend beyond the boundaries fixed by the original patent, except as to accretions or relictions.[55] Lateral boundaries of lands between the meander line and the shore of a meandered inland navigable lake are fixed by extending the side lines of the contiguous lots on a deflected course from their intersection with the meander line toward a point in the center of the lake.[56]

§ 3. *Conflicts and ambiguities in terms defining boundaries.*[57]—Where adjoining tracts are conveyed together, the omission in describing one of the tracts of the line which would constitute the division line between them is not material.[58]

§ 4. *Establishment by agreement of adjoiners.*—A practical location of a boundary may be established by agreement and acquiescence of the interested parties,[59] and a line established by consent is binding in the absence of fraud, unfair

47. Warren v. Gloversville, 114 N. Y. State Rep. 912.

48. Johnson v. Tomlinson, 41 Or. 198, 68 Pac. 406; Hendricks v. Feather River Canal Co., 138 Cal. 423, 71 Pac. 496. Meander lines being run merely for the purpose of determining the amount of land—Chesbrough v. Head, 23 Ohio Cir. Ct. R. 427.

49. In a case where the meander line was above high water mark, and the bank of the river was perpendicular, there being no distinction between high and low water marks and no shore line, the state has no title to land created by erosion and filling which it may grant to a person other than the government patentee—Washougal & L. Transp. Co. v. Dallas, P. & A. Nav. Co., 27 Wash. 490, 68 Pac. 74.

50. Construing R. S. U. S. §§ 2396, 2397—Kirby v. Potter, 138 Cal. 686, 72 Pac. 338.

51. Where the government survey shows a meander line, and lots adjacent to a non-navigable stream are conveyed by number according to the government plat, the land between the meander line and high water mark is conveyed. Following the Iowa decisions—In re Valley, 116 Fed. 983.

52. Carr v. Moore (Iowa) 93 N. W. 52; Bryan v. Same, Id.

53. Security Land & Exploration Co. v. Burns, 87 Minn. 97; Same v. Weckey, Id. One holding title from the government to land in the south half of a section, the south section being the southern boundary, and the northern boundary being indicated by a meander line, cannot claim similar land lying between the meander line and the half section line on the theory that the lateral line is the northern boundary—Schlosser v. Hemphill (Iowa) 90 N. W. 842.

54. McBride v. Whitaker (Neb.) 90 N. W. 966.

55. Carr v. Moore (Iowa) 93 N. W. 52; Bryan v. Same, Id.

56. Such lands are owned as if accretions or relictions—Hanson v. Rice (Minn.) 92 N. W. 982.

57. Other calls, lines, etc., in a description may be resorted to if it is contended that a tree has been mistakenly designated as the northeast instead of the northwest corner—White v. Smith (Tex. Civ. App.) 67 S. W. 1028. Where land is described as running to the top of a mountain, thence along the top of a mountain to certain steep rocks, thence along such rocks so as to include all stone that falls, an intention is indicated to convey only to the top of the mountain; and a description of an eastern boundary as being along the east bluff of the steep part of the mountain, and as running along the top of the mountain, indicates an intention to include land to the bluff—Weiant v. Rockland Lake Trap Rock Co. (N. Y.) 61 App. Div. 383. Where a call was for an outcrop of conglomerate rock, a ledge over one thousand feet in length which closes the boundary may be held to be the call, though there was another ledge two hundred feet long which did not close the boundary and was a spur from the large one—Miller v. Cure, 205 Pa. 168.

58. Johnson v. Harris, 24 Ky. Law Rep. 449, 68 S. W. 844.

59. Sufficiency of evidence to show boundary by agreement—Egan v. Light (Neb.) 93 N. W. 859. Acquiescence in a boundary line for the period of limitations establishes a practical location—Benz v. St. Paul (Minn.) 93 N. W. 1038. Where a boundary has been

dealing, or superior knowledge of one party,[60] though the agreed boundary is not the true line;[61] but there must not have been a mutual mistake.[62] Grantees are also bound.[63] The question of establishment may be for the jury.[64]

Where one with knowledge of the true line allows another party to encroach and subject himself to expense, as would not have been done had the line been in dispute, a practical location may be established,[65] but it is not sufficient to establish a boundary by estoppel that a fence be built on what is supposed to be the true line.[66] A vendor who points out boundaries is estopped from disputing their location, the purchaser taking in reliance thereon.[67]

An adjoining owner may claim to the true line, though he has by mistake previously conformed to an erroneous one.[68]

The acts of a surveyor in accepting possession from a sheriff in a former suit do not create an estoppel on his employer.[69] An agreement to have an existing line resurveyed is not an admission of its incorrectness,[70] nor is abandonment of a survey shown by a petition for a resurvey to have the line actually run on the ground.[71]

§ 5. *Establishment by arbitration, action, or statutory mode. Right of ac-*

intentionally established by the adjoining owners and maintained for more than twenty years, it cannot be questioned—Wentworth v. Braun (N. Y.) 38 Misc. Rep. 702. Especially where a fence and subsequently a brick wall had been built on the same line—Wentworth v. Braun (N. Y.) 78 App. Div. 634. An injunction may be had against the removal of a fence on a line established for more than twenty years, and plaintiff is not restricted to a suit at law on the ground that the controversy involved a disputed boundary line, defendant having torn the fence down and erected a new one on plaintiff's land, claiming that it was on the true line—F. H. Wolf Brick Co. v. Lonyo (Mich.) 9 Detroit Leg. N. 566, 93 N. W. 251. Occupancy in accordance with a fence recognized as a division line for more than ten years causes the line established to become the division line—Lawrence v. Washburn (Iowa) 93 N. W. 73; Clark v. Thornburg (Neb.) 92 N. W. 1056. Twenty-five years—Graham v. Gorman (Iowa) 93 N. W. 595. Twenty years—F. H. Wolf Brick Co. v. Lonyo (Mich.) 9 Detroit Leg. N. 566, 93 N. W. 251. Where a brick wall is erected, supposedly corresponding to the line of a lot, and both parties acquiesce in the line established for seventeen years, they are bound, though there is a slight error and though the brick wall did not extend the entire length of the lot—O'Callaghan v. Whisenand (Iowa) 93 N. W. 579. Where after an agreement as to a division line between adjoining owners they hold in acquiescence therewith for fourteen years, the line becomes established and an adjoining owner is entitled to have his deed reformed so as to make the established line the boundary—Thiessen v. Worthington, 41 Or. 145, 68 Pac. 424.

60. Grogan v. Leike, 22 Pa. Super. Ct. 59. An agreement that a hedge is a boundary line is conclusive as between the adjoining owners—Brown v. Johnson (Tex. Civ. App.) 73 S. W. 49. A dividing line established by parol agreement, accompanied by occupancy in accordance therewith for more than the period of limitation, and the maintenance of a fence on the line, is binding on the parties and their successors—Dierssen v. Nelson, 138 Cal. 394, 71 Pac. 456.

61. Lynch v. Egan (Neb.) 93 N. W. 775; Egan v. Light (Neb.) 93 N. W. 859.

62. Where there has been an encroachment by a building resulting from a mistake as to a boundary line, a conveyance of a strip of land to the encroacher for the purpose of giving him title to the land occupied by his building does not amount to a practical location, both parties supposing they know the location of the true boundary line, and where the strip as conveyed contained a part of the lot already owned by the encroaching owner—Benz v. St. Paul (Minn.) 93 N. W. 1038.

63. Alexander v. Parks, 24 Ky. Law Rep. 2113, 72 S. W. 1105.

64. Though there is no conflict of evidence as to the agreement, where there is a conflict as to whether one party did not make false and fraudulent representations as to what were the true boundaries and a conflict also as to the advisability of land marks—Perry v. Hardy, 71 N. H. 151. Where after the purchase of adjoining tracts separately the owner digs a canal at a point other than the former division line, and there is evidence that he regarded the portion of land on either side as separate tracts and designated them by terms as implied in his will, the question of whether a new boundary was created is for the jury—Harper v. Anderson, 130 N. C. 538. Where an agreement to submit the location of a boundary to surveyors appointed by each of the parties is controverted, the question is for the jury—Francois v. Taylor, 71 N. H. 222.

65. Benz v. St. Paul (Minn.) 93 N. W. 1038.

66. In this case there was no showing that there had been a dispute or that it was known that there was an uncertainty as to the line—Peters v. Reichenbach, 114 Wis. 209.

67. Government subdivisions—Rowell v. Weinemann (Iowa) 93 N. W. 279.

68. Patton v. Smith (Mo.) 71 S. W. 187.

69. Hornberger v. Giddings (Tex. Civ. App.) 71 S. W. 989.

70. Interrupting a claim of adverse possession—Baty v. Elrod (Neb.) 92 N. W. 1032.

71. Petition in 1808 by owner of a block of tracts to have lines run in compliance

tion.—Proceedings for location of the boundaries of a common landing place cannot be resorted to for the purpose of determining its legal existence, though if disputed the boundaries may nevertheless be located without prejudice to the right to determine the existence.[72] Findings of the county surveyor in proceedings to establish boundaries are not binding if it appear from the facts that the boundary in question is not uncertain or unestablished.[73] There must be a request for a proper and legal survey and an opportunity for compliance therewith before the court may be asked to establish a line between adjoining owners.[74]

An application for the establishment of a boundary by public authorities may be required by statute to be in writing.[75] The jurisdiction cannot be objected to after an answer without demurrer.[76]

Burden of proof.—The presumption of the correctness of lines established may, by a lapse of time, become, if not conclusive, rebuttable only by clear and satisfactory proof.[77] If the government corners cannot be found, the burden is on the person seeking to establish them at a point other than called for by the field notes,[78] and so the burden is on one asserting that a stream mentioned as a boundary has disappeared and does not correspond to existing streams in the vicinity of the land.[79]

Admissibility of evidence.—Holdings as to the admissibility of particular classes of evidence, such as field notes, plats, surveyors' reports and opinions, are grouped below.[80] Evidence of the reputation of a boundary as existing as an ancient line is admissible[81] if not too recent.[82]

with act of 1785—Lehigh Val. Coal Co. v. Beaver Lumber Co., 203 Pa. 544.

72. R. S. L. c. 48, § 102—Gardner v. Essex County Com'rs (Mass.) 66 N. E. 793.

73. B. & C. Comp. §§ 4907, 4909, 4910—Egan v. Finney (Or.) 72 Pac. 133.

74. Ayers v. Huddleston (Ind. App.) 66 N. E. 60.

75. A proceeding under Civ. Code, § 3244, for the processioning of land may be dismissed for insufficiency of proceeding where there is no written application—Ballard v. Haines, 115 Ga. 847.

76. Bill to enjoin the removal of a line fence—F. H. Wolf Brick Co. v. Lonyo (Mich.) 9 Detroit Leg. N. 566, 93 N. W. 251.

77. Where for thirty years a fence has been maintained on a line bordering a street, and the city authorities have permitted it to remain, though for twenty years they have knowledge of a shortage in the land originally platted—Corey v. Ft. Dodge (Iowa) 92 N. W. 704.

78. Knoll v. Randolph (Neb.) 92 N. W. 195.

79. Leonard v. Forbing, 109 La. 220.

80. For admissibility of a judgment in a prior suit, objected to on the ground that the line was not in controversy therein; that a corner therein did not correspond with the call in the patent, and because the call and the judgment presented a patent ambiguity, see Dillingham v. Smith (Tex. Civ. App.) 70 S. W. 791. It may be shown that a railroad track had been moved, where a surveyor locating the line testified that he had taken the center as a starting point, assuming that the track had been located in the center of the right of way and not moved—Anderson v. Wirth (Mich.) 9 Detroit Leg. N. 254, 91 N. W. 157. Where there is a dispute as to a boundary line, evidence of establishment of a boundary by consent is not an attempted construction of the deeds—Dierssen v. Nelson, 138 Cal. 394, 71 Pac. 456. Where in a patent the intent was evident to exclude the Presidio military reservation, oral evidence to show the location of an ancient fence and cannon marking the boundary is admissible as is the testimony of engineers with plats to illustrate the location of these objects in connection with the premises in dispute, though there was an erroneous map attached to the patent apparently indicating the boundary—Wheeler v. Benjamin, 136 Cal. 51, 68 P. 313. A deed which does not locate any line or corner of the land in controversy is not admissible to show a boundary line, though in connection with evidence of marks made at the time of conveyance—Clark v. Gallagher, 74 Vt. 331. Where a boundary is described as a public road and two roads are shown to have been in existence when the deed was executed, either of which would have satisfied the call, proceedings of the county commissioners of the county to establish a road answering the description are admissible—Davis v. Blacksher Co., 131 Ala. 401.

Plats. The original plat of a survey is admissible and of great weight in determining the original location of lines and corners—Bell County Land & Coal Co. v. Hendrickson, 24 Ky. Law Rep. 371, 68 S. W. 842. Surveys and plats made in partition to which defendant was not a party are inadmissible on an issue as to boundary—Harper v. Anderson, 130 N. C. 538. A plat is admissible over an objection that it was made by persons without title where the lot in controversy was purchased with reference to the plat, and it was offered to show the location of the lot in connection with the shore line—Schwede v. Hemrich, 29 Wash. 124, 69 Pac. 643.

Field notes. The original field notes are

Sufficiency of evidence.—Evidence of a nonexpert as to the location of a line from existing government monuments may overcome that of surveyors locating a different line independent of monuments.[83] Miscellaneous holdings as to sufficiency in particular cases are grouped below.[84]

Questions of law and fact.—The location of a boundary line is a question of fact.[85] It is a question for the jury whether a line has been agreed on as one established by government survey or acquiesced in as a true division line.[86]

Instructions.[87]—An estoppel should not be submitted where the pleadings do not warrant it.[88] The jury may be instructed that a natural object clearly proved corresponds to the description in the writing.[89]

Verdict and judgment or decree.—A verdict which calls for a straight line and fixes three points, one of which is not in the line, is too uncertain to support a judgment.[90] A decree referring to a government survey specifically may be sufficient.[91] The judgment must conform to the verdict.[92]

admissible in behalf of either party. Where the field notes have been introduced in evidence by plaintiff, defendant may show by the surveyor who ran lines contended for by him, that they correspond with certain calls of the original notes—Hamilton v. Saunders (Tex. Civ. App.) 73 S. W. 1069.

Surveys and opinions of surveyors. Where a branch was the boundary, though course and distance was also given, the opinion of surveyors that the line should be run by course and distance rather than by following the branch is inadmissible—Griffin v. Barbee (Tex. Civ. App.) 68 S. W. 698. Evidence of an expert as to a different result obtained by a survey is proper to rebut evidence of another expert as to a survey which he had made from the same starting point—Clark v. Gallagher, 74 Vt. 331. Where the boundary of a lot is in controversy and its limits are fixed by a plat in which it is described by course and distance from a specified starting point, a survey made for the purpose of straightening streets beginning at an arbitrary point other than that specified in the plat is not admissible—Trotter v. Stayton, 41 Or. 117, 68 Pac. 3. The fact that on making a subsequent survey the surveyor began on the other end of the line will not cause it to be rejected—Shrake v. Laflin (Neb.) 92 N. W. 184.

81. Kentucky Land & Immigration Co. v. Crabtree, 24 Ky. Law Rep. 743, 70 S. W. 31.

82. Evidence that by reputation a certain tree was a beginning corner is inadmissible where the witnesses testify that they had not heard that it was such corner until after a date when a surveyor had been unable to make a resurvey without the assistance of the surveyor who had made the original survey in finding the starting point, such evidence being too recent and not ante litem motam—Westfelt v. Adams, 131 N. C. 379.

83. Baty v. Elrod (Neb.) 92 N. W. 1032.

84. McCulloch v. Patman (Tex. Civ. App.) 69 S. W. 1012. To show that a channel indicated by an original survey was not capable of location by either natural or artificial land marks—Shrake v. Laflin (Neb.) 92 N. W. 184. To establish that a fence was built on the line of an original survey—Gilman v. Brown, 115 Wis. 1. Evidence that a fence was observed to correspond with at least one of the stakes of an original survey is not overcome by measurements not connected with points established to have been on such survey—Gilman v. Brown, 115 Wis. 1. An identification of a section corner as a starting point by a county surveyor on examination of the ground and on sworn evidence will not be rejected in the absence of any showing of mistake or error—Shrake v. Laflin (Neb.) 92 N. W. 184. Evidence held to show that a corner was lost and the field notes inaccurate, authorizing commissioners to locate the lines from original government corners found elsewhere—Trinwith v. Smith (Or.) 70 Pac. 816. To establish that land was within a certain survey—Sherman v. King (Ark.) 72 S. W. 571. To show that a re-survey corresponded with an original survey—McGarry v. Runkel (Wis.) 94 N. W. 662.

85. Watkins v. King (C. C. A.) 118 Fed. 524; Patterson v. T. J. Moss Tie Co., 24 Ky. Law Rep. 1571, 71 S. W. 930. True location of a block of land is for the jury where plaintiff's evidence shows that it could be well located west of where it met calls for an old survey, and defendant shows that plaintiff's block could be well located by marks on the ground east of the present location—Lehigh Val. Coal Co. v. Beaver Lumber Co., 203 Pa. 544. Where a street is a monument, its existence at the date of the deed is a question for the jury—Hammond v. George (Ga.) 43 S. E. 53.

86. Clark v. Thornburg (Neb.) 92 N. W. 1056.

87. An instruction that the jury shall decide from the evidence whether meandered lines located by a government surveyor can be identified, where such lines indicate the margin of a certain channel, does not substitute the lines for the center of the channel as a boundary where the jury is expressly told that if such channel can be located its center must constitute such boundary—Shrake v. Laflin (Neb.) 92 N. W. 184; Mensen v. Same, Id.

88. An instruction that if defendant purchased land in reliance on a fence as a true line, then plaintiff was estopped from claiming that the boundary was elsewhere, should not be given, where defendant's answer does not allege that he purchased in reliance on the location of the boundary as evidenced by a fence erected by a former owner on the line as then surveyed—First Nat. Bank v. McDonald (Or.) 70 Pac. 901.

89. Miller v. Cure, 205 Pa. 168.

90. Dillingham v. Smith (Tex. Civ. App.) 70 S. W. 791.

Incidental relief and costs.—A decree in proceedings to determine division lines from a shore to a harbor line should not be accompanied by an injunction unless demanded by the circumstances.[93] Where the actual distance between remote corners varies from the length actually called for, the variance must be proportionately distributed between the several subdivisions.[94] Shortage in land platted will be distributed between the lot owners where there has been no adverse possession, each block being regarded as distinct if possible.[95] Costs in such proceedings should not be taxed to persons whose lines are not determined.[96]

Vacation.—Statutory proceedings to locate a boundary line cannot be set aside by the person bringing them because of failure to notify the parties or because of the omission of immaterial evidence by the surveyor or because of errors, and an independent action setting aside the report of a surveyor cannot be allowed because of failure of the party by reason of a mistake to perfect his appeal.[97]

§ 6. *Offenses against land marks.*—A wall used merely as a fence and which has not been mentioned as a monument in any deed is not within the meaning of statute punishing the destruction of monuments.[98]

BOUNTIES.

§ 1. *Bounties to soldiers.*—The soldier's additional homestead allowed by Rev. St. § 2306, is in the nature of a bounty.[1]

§ 2. *Bounties on naval captures.*—What is prize of war is elsewhere treated. Where the flag ship was within signal distance at the beginning and again before the end of the engagement, she is entitled to share.[3] What persons attached to or on board a vessel are entitled to share is treated in the notes.[4] One who was both fleet captain and commander of a vessel may share as both.[5]

BREACH OF PROMISE OF MARRIAGE.

§ 1. *The promise.*—A written agreement for marriage, signed and accepted by both, is binding on the woman though she does not agree, in words, to marry.[1] Disease rendering consummation impossible is the only excuse available for failure

91. It is not sufficiently definite to describe land as "commencing at the closing corner established by United States surveyor Alt, in May, 1900," if the field notes of the survey are on file in the office of the commission of public lands in the state, but the decree would be sufficient if the survey referred to were the one made pursuant to Act Congress, Aug. 18, 1894, and was specifically referred to—Egan v. Light (Neb.) 93 N. W. 859.

92. Where a verdict finds three points on a boundary not in a line, a direction of the court to a surveyor to locate a certain point and run a straight line and an entry of judgment in accordance with his report is not authorized as based on the verdict—Dillingham v. Smith (Tex. Civ. App.) 70 S. W. 791.

93. Proceedings under Gen. Laws, c. 266, in which the court did not decide injunction to be proper, and no fraud or intent to disregard the lines established was shown—Taber v. Hall (R. I.) 52 Atl. 686.

94. Entire line was in the same survey, and it was not to be presumed that the variance was caused by a defective survey of any part—Brooks v. Stanley (Neb.) 92 N. W. 1013.

95. Anderson v. Wirth (Mich.) 9 Detroit Leg. N. 254, 91 N. W. 157.

96. Error to tax costs to persons made parties but whose lines have been previously determined—Taber v. Hall (R. I.) 52 Atl. 686.

97. Close v. Huntington (Kan.) 71 Pac. 812.

98. R. S. L. c. 208, § 78—Ropes v. Flint, 182 Mass. 473.

1. United States v. Lair, 118 Fed. 98.
2. "War."
3. Sampson v. U. S., 36 Ct. Cl. 194.
4. Men on board though their accounts were kept on other vessels; men temporarily detailed to other vessels are entitled to share; men transferred to shore hospital before the engagement are not, nor men subsequently attached—In re Engagement off Santiago Bay, 36 Ct. Cl. 200, 206. The rules formulated by the auditor Nov. 22, 1898, govern—In re Engagement off Santiago Bay, 36 Ct. Cl. 200.
5. Chadwick v. U. S., 36 Ct. Cl. 471.
1. Sponable v. Owens, 92 Mo. App. 174.

to fulfill a promise to marry.[2] A promise to marry to be fulfilled on the happening of a future event must be performed within a reasonable time with regard to the character of the contingency, and the lapse of time after the event together with conduct indicating intent not to marry amount to a refusal.[3]

§ 2. *The action.*[4]—Attachment will not lie in aid of a suit for breach of marriage promise.[5] Recovery cannot be had for breach of a marriage promise, setting no time for consummation, without an offer to perform or a request of the other party to perform,[6] but lapse of time after the time set to marry and conduct indicating an intention not to marry may render a demand for performance unnecessary.[7] Where defendant could not marry on a day set because of sickness, and, before he was able, plaintiff brought an action for breach which she discontinued, an offer to marry or a request of defendant to marry was necessary after discontinuance before bringing another action.[8] Seduction must be specially pleaded to be considered in aggravation of damages, and likewise the bad character of plaintiff to be considered in mitigation of damages.[9] Where there is proof that defendant owned property of value, his financial condition may be considered in determining what position in life plaintiff would have attained by marriage though the exact value of his property does not appear.[10] The pecuniary ability of defendant may be shown to show substantial injury resulting to plaintiff, and this may be accomplished by proof of his reputed financial ability.[11] Evidence of ownership of specific property by defendant is admissible where plaintiff alleges loss of valuable dower rights in his property.[12] Evidence of statements by plaintiff that she had been unduly intimate with another than defendant may be rebutted by her denial of the fact or the statement.[13] An instruction excluding consideration of "the result of any sexual relations between the parties" as an element of damages is not objectionable as excluding birth of an illegitimate child, though it excludes consideration of "sexual intercourse."[14] Where part of correspondence is lost and oral testimony thereof is given, the construction of a marriage promise contained therein is not for the court.[15]

BRIBERY.

Nature and elements of offense.—Accepting a bribe and agreeing to accept the same are distinct offenses.[1] Offer of money for release by one illegally arrested is not an offense.[2] The solicitation of a bribe is an offense though the person solicited refuses to give it.[3]

Indictment.[4]—Where the indictment alleges that money was offered it need not be alleged to be of value.[5] An averment of agreement by an officer to receive

2. Smith v. Compton, 67 N. J. Law, 548.
3. Birum v. Johnson, 87 Minn. 362.
4. Sufficiency of instruction giving consideration of plaintiff's financial circumstances to the jury in estimating plaintiff's damages—Herriman v. Layman (Iowa) 92 N. W. 710.
5. The demand does not come within Gen. Laws, c. 252, §§ 14, 17—Mainz v. Lederer (R. I.) 51 Atl. 1044.
6. Clark v. Corey (R. I.) 52 Atl. 811.
7. Birum v. Johnson, 87 Minn. 362.
8. Smith v. Compton, 67 N. J. Law, 548.
9. As to mitigating circumstances see Code, § 3593—Herriman v. Layman (Iowa) 92 N. W. 710.
10. Herriman v. Layman (Iowa) 92 N. W. 710.
11. Birum v. Johnson, 87 Minn. 362.
12. Smith v. Compton, 67 N. J. Law, 548.
13. Herriman v. Layman (Iowa) 92 N. W. 710.
14. Herriman v. Layman (Iowa) 92 N. W. 710.
15. Barber v. Geer (Tex. Civ. App.) 71 S. W. 792.
1. And, accordingly, Pol. Code, art. 21, § 1879, was not repealed by Pen. Code, § 68—People v. Seeley, 137 Cal. 13, 69 Pac. 693.
2. Moore v. State (Tex. Cr. App.) 69 S. W. 521; Ex parte Richards (Tex. Cr. App.) 72 S. W. 838.
3. People v. Hammond (Mich.) 93 N. W. 1084.
4. Indictment of legislator held not sufficient in respect to allegation that official action was to be influenced—State v. Meysenburg (Mo.) 71 S. W. 229. Indictment of po-

a bribe on agreement that his action on a matter pending before him should be thereby influenced sufficiently alleges corrupt intent.[6] An indictment reciting that defendant knew that he would be called on to vote on a certain measure is not argumentative.[7]

Evidence and instructions.[8]—That defendant executed the agreement under which the bribe was received is admissible.[9] Evidence of conversations with one who acted as go-between are admissible, but not bribes received by co-officers of defendant,[10] nor the fact that accused made purchases.[11] It may be shown whether the thing given was regarded as valuable.[12]

BRIDGES.

§ 1. Location and Provision for Public Bridges.
§ 2. Construction and Maintenance.—Injuries; Proximate Cause; Contributory Negligence; Remedies.
§ 3. Penalties for Injuring Bridge.

The construction and maintenance of bridges as part of the highway and by the usual highway authorities,[1] the rights and liabilities of toll bridge companies,[2] and the duties and liabilities of railroad companies as to construction and maintenance of bridges over their tracks,[3] will be treated more fully elsewhere.

§ 1. *Location and provision for public bridges.*[4]—The sanitary district of Chicago, in diverting the Chicago River into artificial channels for drainage, was empowered to replace bridges rendered useless by the widening of the river.[5] A city may swing a bridge over the land of a private owner and, in consideration for the right, construct a vault under the street to be used free of rent by the owner during the existence of the bridge.[6]

§ 2. *Construction and maintenance. A. In general.*[7]—Villages are charged with maintenance of bridges within their limits and are not liable to taxation to aid towns in the building of bridges under a law exempting them from liability

lice officer for accepting bribe to permit operation of confidence men held good—State v. Gardiner (Minn.) 92 N. W. 529. Omission of the word "English" before the word "sparrow" in describing the bounties with respect to which the bribery was alleged is not fatal—People v. Gorsline (Mich.) 94 N. W. 16. Indictment for offering bribe to sheriff to permit escape of prisoner held sufficient—Moore v. State (Tex. Cr. App.) 69 S. W. 521.

5. People v. Seeley, 137 Cal. 13, 69 Pac. 693.

6. People v. Seeley, 137 Cal. 13, 69 Pac. 693.

7. People v. Hammond (Mich.) 93 N. W. 1084. **Variance:** Between averment of money and proof of check is fatal but in respect to amount ($9,000 alleged, $8,966.28 proved) is not—State v. Meysenburg (Mo.) 71 S. W. 229.

8. **Instructions:** Instruction as to intent held to be covered by general charge—People v. Gorsline (Mich.) 94 N. W. 16. Instruction held to misstate an admission by defendant—People v. Gorsline (Mich.) 94 N. W. 16.

9. State v. Gardiner (Minn.) 92 N. W. 529. And see State v. Meysenburg (Mo.) 71 S. W. 229.

10. State v. Meysenburg (Mo.) 71 S. W. 229.

11. Evidence that one who was alleged to have bribed defendant to allow a house of prostitution to run without interference afterwards bought furniture is inadmissible—People v. Bissert, 172 N. Y. 643.

12. Where defendant transferred certain stock to the alleged bribe giver, the transfer being claimed by the state to be a mere blind, it was held that proof of the value of the stock was competent; that declarations of the alleged bribe-giver that he regarded it as worthless was admissible; that the amount received by another shareholder was not admissible—State v. Meysenburg (Mo.) 71 S. W. 229.

1. Highways and Streets.
2. Toll Roads and Bridges.
3. Railroads.

4. Constitutionality of c. 78, Comp. St. Neb., relating to the building of bridges over streams dividing counties—Cass County v. Sarpy County (Neb.) 92 N. W. 635.

5. Under Hurd's Rev. St. Ill. 1899, p. 327, providing for organization of the district to make an outlet for drainage and sewage through the Desplaines and Illinois rivers—Lussem v. Sanitary Dist., 192 Ill. 404.

6. Under Rev. St. Ill. 1874, c. 24, par. 62, Starr & C. Ann. St. Ill. c. 24, par. 284—Chicago v. Norton Milling Co., 196 Ill. 580.

7. Constitutionality of Pub. Laws Pa. 1899, page 231, providing for the purchase, maintenance, use and condemnation by the city of bridges over streams separating or dividing parts or districts of counties—Stegmaier v. Jones, 203 Pa. 47.

where they maintain their own bridges.[8] Where a law, charging the maintenance of portions of a bridge between two towns, upon one of the towns, is repealed by a law saving prior acts under it, the liability for maintenance is not changed.[9] In building a public bridge, a county should provide for whatever business may be fairly anticipated for the accommodation of the public in the vicinity.[10] Authority from the supervisors to construct a bridge continues for eleven years.[11] That the supervisors have not authorized construction of a bridge cannot be urged by a taxpayer where it was ordered by the proper city authorities.[12] The county and town boards cannot act jointly in making a contract for construction of a bridge.[13] A law authorizing taxation by counties to aid towns in building bridges, which does not apply to property in cities or incorporated villages maintaining their own bridges, is not unconstitutional as class legislation rendering taxation not uniform.[14] That sufficient means are not available to build a needed bridge will not prevent a recovery when such funds are available for materials furnished.[15] Under the law authorizing the fiscal court to appoint a bridge commissioner to superintend the construction and repair, one thus appointed holds his office subject to the right of the court to revoke the bond, remove him from office, or abolish the office.[16] Where county commissioners, representing that they had the right under the law, purchased bridges and gave orders for payment, the holders of such orders may bring an action for leave to remove the bridges unless paid for.[17] A bridge tax levied on all property in a ward is a local assessment, though it cannot be imposed without a vote of the tax payers of the ward.[18] One who leases oyster ground in a navigable river from a town cannot recover damages for eviction by reason of construction of a bridge by the town across the river over the oyster ground.[19]

The liability of a county to contribute for construction or maintenance of a bridge on a county line highway is purely statutory,[20] and a county need not contribute to the repair of a bridge over a stream on the line where the other county repaired the bridge in violation of a law regulating repairs.[21] One county, by suit, may compel an adjoining county to contribute for repair of a bridge across a stream on the county line without a previous contract,[22] but not unless such county has refused to enter a contract for that purpose where the plaintiff county has already made the repairs.[23] That a county allowed the construction of a bridge on its line without objection, and made approaches thereto, and that the bridge was used by its citizens, will not estop it nor its taxpayers from disputing a claim presented by the other county for contribution.[24] Allowance by a county board of a claim by another county for contribution to a line bridge will not estop the first county on

8. Under various sections of the statutes regarding maintenance of bridges by villages and towns—Battles v. Doll, 113 Wis. 357.

9. Under Laws N. Y. 1828, c. 21, § 5, repealing act of 1818, c. 91—In re Webster, 77 App. Div. (N. Y.) 560.

10. Seyfer v. Otoe County (Neb.) 92 N. W. 756.

11. Kundinger v. Saginaw (Mich.) 9 Detroit Leg. N. 650, 93 N. W. 914.

12. Kundinger v. Saginaw (Mich.) 9 Detroit Leg. N. 650, 93 N. W. 914.

13. Under Rev. St. Wis. 1898, § 1319, providing for payment of half the cost of bridges by the county on petition from the town—Johnson v. Buffalo County, 111 Wis. 265.

14. Rev. St. Wis. 1898, § 1319, construed in connection with Const. Wis. art. 8, § 1—Battles v. Doll, 113 Wis. 357.

15. Under Gen. St. Kan. 1901, c. 110, art. 12—Chicago L. & C. Co. v. Sugar Loaf Tp., 64 Kan. 163, 67 Pac. 630.

16. Ky. St. § 4320—Campbell County v. Trapp, 23 Ky. Law Rep. 2356, 67 S. W. 369.

17. Lee v. Board of Com'rs of Monroe County (C. C. A.) 114 Fed. 744.

18. Griggsry Const. Co. v. Freeman, 108 La. 435.

19. Hall v. Oyster Bay, 171 N. Y. 646.

20. Under Comp. St. Neb. c. 78, §§ 87-89—Saline County v. Gage County (Neb.) 92 N. W. 1050.

21. Cass County v. Sarpy County (Neb.) 92 N. W. 635.

22. Under Comp. St. Neb. c. 78, § 89, amended April 1st, 1889—Cass County v. Sarpy County, 63 Neb. 813.

23. Under Comp. St. Neb. § 88—Saline County v. Gage County (Neb.) 92 N. W. 1050.

24. Saline County v. Gage County (Neb.) 92 N. W. 1050.

appeal from the allowance.[25] The supervisors of one of two adjoining counties had authority to appropriate money to construct part of a railroad bridge so as to make a passage for pedestrians and teams without letting a contract or taking a bond.[26]

A city must maintain suitable approaches to, and guards upon, bridges within its limits.[27] The county commissioners may repair a bridge over a navigable river though prohibited by law from building such bridges.[28] The highway commissioners in towns may employ a person to superintend the repair of unsafe bridges, and it is the duty of the town board on presentation of vouchers for his claim to allow a reasonable compensation, and in auditing such claim, the board is not restricted to proof submitted by the claimant, but may act on their own knowledge. The action of the board in rejecting the claim is not a bar to subsequent proceedings by the claimant to compel audit and payment.[29]

B. Injuries from improper or defective construction.—Townships are liable for repair of bridges, though built at the charge of the county by the commissioners and hence are liable for injuries resulting from neglect to repair,[30] though a town is not liable at common law for injuries resulting from a defective bridge.[31] It cannot be held liable for an injury caused by the negligence of the commissioners in constructing a temporary bridge on private property, under a license to replace a highway bridge carried away by a freshet,[32] nor for injuries resulting from undermining of the foundation of a bridge by a flood three years after construction without notice of such undermining, though the bridge was imperfectly constructed.[33] A municipality cannot escape liability for injuries from defects in a bridge resulting from natural decay because its officers did not have actual notice of the particular defect which caused the accident,[34] but notice to officers of a city that a certain bridge is defective and the failure of the city to repair will not make it liable for injury where the officers were not charged with care of the bridge.[35] It cannot be urged by a township that a defect causing injury was due to the original construction of a bridge by the county where the bridge had stood for nearly 60 years and the defect was due to the failure to repair the natural decay, nor can the township claim that such decay was a latent defect, it being negligence for the township to fail in precaution to discover the condition of the bridge.[36] Where by law, the town and not the commissioner of highways is liable for injuries from defective bridges, that the highway commissioner has no funds to repair a bridge is no defense to an action against the town for injuries resulting from its defects.[37] A highway commissioner is not excused from negligence in failing to place guard rails or barriers along a certain bridge because there were many similar bridges within the town requiring his attention, nor because this bridge and many others had been used for many years without protection.[38] Maintenance of a bridge

25. Saline County v. Gage County (Neb.) 92 N. W. 1050.

26. Under County Government Act (St. Cal. 1891, p. 295) § 25, construed in connection with Pol. Code, § 2713, and County Government Act, § 25, subd. 35—Croley v. California Pac. R. Co., 134 Cal. 557, 66 Pac. 860.

27. Grant v. Brainerd, 86 Minn. 126.

28. Under Code Md. art. 25, §§ 3, 13—Bembe v. Anne Arundel County Com'rs, 94 Md. 330.

29. Under Laws 1890, c. 568, § 10, as amended by Laws 1895, c. 606, and Laws 1899, c. 84—People v. Town Board of Oyster Bay, 114 N. Y. St. Rep. 309.

30. Under Act March 30, 1859 (Pub. Laws Pa. 309), which was extended to the particular county in question by act March 12, 1860—Whitmire v. Muncy Creek Tp., 17 Pa. Super. Ct. 399.

31. Mobus v. Waitsfield (Vt.) 53 Atl. 775.

32. Under Gen. Laws N. Y. c. 19, § 16, fixing the liability of towns for damages from defects in highways or bridges, a temporary bridge is unauthorized by law—Ehle v. Minden, 70 App. Div. (N. Y.) 275.

33. Pearl v. Benton Tp. (Mich.) 9 Detroit Leg. N. 317, 91 N. W. 209.

34. Green v. Nebagamain, 113 Wis. 508.

35. San Antonio v. Ball (Tex. Civ. App.) 66 S. W. 713.

36. Whitmire v. Muncy Creek Tp., 17 Pa. Super. Ct. 399.

37. Laws N. Y. 1881, c. 700—Lee v. Berne, 79 App. Div. (N. Y.) 214.

38. Pelkey v. Saranac, 67 App. Div. (N. Y.) 337.

known to be too weak to support a load specified by law is prima facie negligence on the part of the highway commissioners.[39] That a traction engine together with a water tank weighed more than four tons will not prevent a recovery for damages resulting from the breaking of a bridge, where only the front wheels of the engine, which weighed less than four tons, were on the bridge at the time of collapse.[40]

A railroad company is not liable for injuries from defects in a bridge which it constructed across its tracks under a specific agreement as to the design with the borough council and which was accepted by such council,[41] but it cannot escape liability for failure to guard the approach to a bridge in a street on its right of way and leading to its crossing by reason of a contract with the city empowering the company to build a bridge, but rendering the city liable for its repair, where the bridge together with its approaches constitutes a part of the road way of a street as well as of the right of way. Both the city and railroad company are liable for injuries to travelers.[42] It is also liable for injuries from defects in a bridge over its tracks by reason of the failure of the town to notify the company of such defects as required by law.[43] A toll bridge company has the duty of exercising not only ordinary care in making a safe passage for travelers, but a degree of care nearly akin to that required of a carrier of passengers.[44] In order to recover for injuries received on a town bridge, plaintiff must be a traveler at the time and the injury must result to his person or property as a traveler.[45] One who went to the assistance of her husband and son, who with their vehicle had broken through a public bridge, and was kicked by the horses as they floundered, and was injured by falling fragments of the bridge, cannot be held as a matter of law not to be a traveler on the bridge at the time of the injury.[46]

Proximate cause of injury.—A town is not liable for injuries occurring on a defective bridge unless the insufficiency of the bridge is the proximate cause.[47] Where both a loose plank over a hole on a bridge and the absence of a guard rail apparently contributed to an injury, it is immaterial which was the dominating cause.[48] Where travelers are injured at night by the sudden fright and shying of their horse, whereby their vehicle is thrown over a high approach to a bridge, the want of a guard rail is the proximate cause of the injury.[49] A city is liable for injuries to persons leaving a draw bridge where the bridge tender's negligence in ascertaining their safety was the proximate cause, though the act of a third person in his employ co-operated to produce the injury.[50] Where a toll bridge company was negligent in failing to light their bridge, whereby a traveler was injured, that the negligence of another traveler concurred in the accident, will not prevent recovery from the company.[51]

Contributory negligence.—One was not guilty of contributory negligence as a matter of law by passing through an unlighted bridge with knowledge of its condition.[52] One with knowledge of a hole in a bridge is not excused from vigilance in

39. Under Gen. Laws N. Y. c. 19, § 154, fixing the weight of a vehicle and load at four tons—Heib v. Big Flats, 66 App. Div. (N. Y.) 88.

40. Under Highway Law N. Y. 1890, c. 568, § 154—Vandewater v. Wappinger, 69 App. Div. (N. Y.) 325.

41. Smith v. Pennsylvania R. Co., 201 Pa. 131.

42. Sayles' Annual Civ. St. Tex. 1897, arts. 4426, 4438—Gulf, C. & S. F. R. Co. v. Sandifer (Tex. Civ. App.) 69 S. W. 461.

43. The liability of the company is absolute—Martin v. Sherwood, 74 Conn. 475.

44. Conowingo Bridge Co. v. Hedrick, 95 Md. 669.

45. Mobus v. Waitsfield (Vt.) 53 Atl. 775.

46. Mobus v. Waitsfield (Vt.) 53 Atl. 775.

47. Mobus v. Waitsfield (Vt.) 53 Atl. 775.

48. Strader v. Monroe, 202 Pa. 626.

49. Gulf, C. & S. F. R. Co. v. Sandifer (Tex. Civ. App.) 69 S. W. 461.

50. This though the city is not liable for acts of such third person—Chicago v. O'Malley, 196 Ill. 197.

51. Conowingo Bridge Co. v. Hedrick, 95 Md. 669.

52. Conowingo Bridge Co. v. Hedrick, 95 Md. 669.

crossing though he had previously seen that the defect had been repaired.[53] A boy between six and seven years old, rightfully on a bridge in a city to which he was a stranger was not contributorily negligent in running from a man in the employ of the bridge tender, by reason of which he fell off the bridge and was injured.[54] A traveler knowing the defective condition of a bridge is contributorily negligent in forcing his way through the gates and attempting to cross whereby injury results.[55] For a driver of a milk wagon to sit on one of the cans is not negligence per se in crossing a defective bridge though he must use greater care.[56] One crossing a bridge with a vehicle and load in excess of the statutory weight thereby weakening it so that he sustained an injury in crossing the next day from the breaking of the bridge cannot recover.[57] In an action against a township for damages to a threshing machine by the breaking of a defective bridge, plaintiff was not negligent in crossing without examining the condition of the bridge, where it appears that his machine was below the statutory weight and of the sort in ordinary use in the vicinity.[58] A woman riding a bicycle on a township bridge in broad daylight with no obstruction ahead, and having the full width of the bridge, cannot recover for injuries resulting from her failure to properly direct her wheel whereby she was thrown into the stream and injured though there was no guard rail.[59]

Remedies.[60]—The thirty days' limitation applies to an action for injuries from a defective bridge though plaintiff alleges that he was mentally incompetent until the limitation expired.[61] The town in which a bridge over a railroad is located is not a necessary party to an action against a railroad company for injuries from defects in a bridge.[62] A notice by one injured from defects in a culvert or bridge to the town is a condition precedent to the maintenance of an action and must state that he will demand satisfaction.[63] After a finding by the jury in an action for injuries from a defective highway by special verdict that the highway was not defective, an answer in reply to another question that the town officers should have known of the existence of the defect and repaired it before any injury occurred did not render the verdict inconsistent.[64]

Pleading and evidence.[65]—A complaint for injuries by reason of defects in a bridge over a railroad maintained by the company need not allege that it was the duty of the company to repair the bridge or that it built or owned the bridge.[66] A complaint against a county for injury to live stock from a defective bridge must allege that it was a public bridge and that it was erected after passage of the act fixing the liability for such injuries.[67] The burden is on one injured to show no contributory negligence.[68] An allegation in an action for injuries from a defective

53. Smith v. Jackson Tp., 20 Pa. Super. Ct. 337.
54. Chicago v. O'Malley, 196 Ill. 197.
55. Kane v. Yonkers, 169 N. Y. 392.
56. Smith v. Jackson Tp., 20 Pa. Super. Ct. 337.
57. Heib v. Big Flats, 66 App. Div. (N. Y.) 88.
58. Whitmire v. Muncy Creek Tp., 17 Pa. Super. Ct. 399.
59. Beer v. Clarion Tp., 17 Pa. Super. Ct. 537.
60. Sufficiency of verdict in action for injury resulting from a defective bridge as consistent with the finding that the injury was the result of the accident and not negligence—Miller v. Casco (Wis.) 93 N. W. 447.
61. Under Comp. St. Neb. c. 78, § 117—Swaney v. Gage County (Neb.) 90 N. W. 542.
62. Martin v. Sherwood, 74 Conn. 475.
63. Lawton v. Weathersfield, 74 Vt. 41.
64. Miller v. Casco (Wis.) 93 N. W. 447.
65. Sufficiency of evidence in action for personal injuries from a defective bridge—Lenz v. St. Paul, 87 Minn. 85. Evidence of contributory negligence by one injured by falling off a draw bridge—Brennan v. Albany & G. Bridge Co., 170 N. Y. 588. Evidence of contributory negligence of a mother and daughter driving along an unprotected approach to a bridge in the evening—Gulf, C. & S. F. R. Co. v. Sandifer (Tex. Civ. App.) 69 S. W. 461. Evidence of negligence of a highway commissioner in failing to repair a bridge after obstruction by a flood—Lee v. Berne, 79 App. Div. (N. Y.) 214.
66. Under Gen. St. § 2673, requiring the company to repair and Pub. Acts Conn. 1893, c. 244—Martin v. Sherwood, 74 Conn. 475.
67. Under Act Ga. Dec. 29, 1888—Seymore v. Elbert County (Ga.) 42 S. E. 727.
68. Mobus v. Waitsfield (Vt.) 53 Atl. 775.

bridge that they resulted from the insufficiency of the bridge precludes any idea of negligence on the part of the town.[69] The question of the weight of a loaded vehicle, in an action against the town for the breaking of a bridge, is one of proof as to the weight together with the strain caused by the attempt to move the load on the bridge.[70] In an action against a town for injuries from a defective bridge, testimony of witnesses that they had suffered accidents in driving over the bridge may be admitted.[71] Where the law requires that a claim for personal injuries from a defective bridge should state, in a notice to the town, what part of the body was injured and plaintiff stated that the back of her head was injured, she could properly show that her head was bloody, that there was a bruise on the back of her head and that after the accident she suffered from headaches.[72]

Questions for jury.—The failure of a city to properly maintain barriers on an embankment on a public highway leading to a bridge,[73] contributory negligence in crossing a bridge with an engine and separator,[74] the negligence of highway commissioners in failing to place a guard rail or barrier on a bridge of a certain size,[75] whether the acts of a city bridge tender are the proximate cause of an injury,[76] and the negligence of a toll bridge company in failing to light their bridge by reason of which a traveler was injured in collision with another,[77] are questions for the jury. In an action against a toll bridge company for injuries while crossing an unlighted bridge by collision with a bicycle rider, the question of carelessness of the rider cannot be submitted to the jury where there was no evidence on that point. Mere absence of lights on the bridge cannot impute negligence to the company, that being a question for the jury.[78] In an action by an administrator against a county for injuries to his decedent while crossing a bridge with a threshing machine, the questions of the construction of the bridge and the proper use by decedent are for the jury.[79] In an action for injuries from a defective bridge, the question whether it was a bridge need not be submitted to the jury where there was no controversy on that point and the testimony showed that it was a bridge.[80]

§ 3. *Penalties for injuries to bridges.*—The penalty for injuries to a public bridge given by the law applies only to willful, not mere negligent, acts.[81]

BROKERS.

§ 1. Employment and Relation in General.—Double Agency.
§ 2. Mutual Rights, Duties, and Liabilities.—Representation; Good Faith and Diligence; Ratification; Damages; Accounting; Remedies.
§ 3. Rights and Liabilities as to Third Persons.
§ 4. Compensation and Lien.—Real Estate Brokers; Revocation; Ability of Purchaser to Perform; Sufficiency of Broker's Performance; Modification of Terms of Bargain; Fraud or Bad Faith on Broker's Part; Acting for Both Parties; Actions; Pleading; Burden of Proof and Evidence; Trial and Instructions.

General principles of agency,[1] and agency in particular relations,[2] are treated under particular topics.

§ 1. *Employment and relation in general.*[3]—A person buying claims for him-

69. Vt. St. § 3490, providing for recovery of such damages in an action on the case—Mobus v. Waitsfield (Vt.) 53 Atl. 775.
70. Heib v. Big Flats, 66 App. Div. (N. Y.) 88.
71. Lynds v. Plymouth, 73 Vt. 216.
72. Lynds v. Plymouth, 73 Vt. 216.
73. Grant v. Brainerd, 86 Minn. 126.
74. Heib v. Big Flats, 66 App. Div. (N. Y.) 88.
75. Pelkey v. Saranac, 67 App. Div. (N. Y.) 337.
76. Chicago v. O'Malley, 196 Ill. 197.
77. Conowingo Bridge Co. v. Hedrick, 95 Md. 669.
78. Conowingo Bridge Co. v. Hedrick, 95 Md. 669.
79. Seyfer v. Otoe County (Neb.) 92 N. W. 756.
80. Lynds v. Plymouth, 73 Vt. 216.
81. Comp. Laws Mich. 1897, § 4160—St. Ignace Tp. Overseer v. Pelton (Mich.) 8 Detroit Leg. N. 842, 87 N. W. 1029.
1. Agency.
2. Factors, Insurance, Attorneys and Counselors.
3. Sufficiency of evidence of employment

self is not a broker.[4] One receiving certain goods from another to effect their sale on commission is a mere broker, and the relation of debtor and creditor does not exist.[5] The listing of real estate of a wife by her husband and her acquiescence in such act and their agreement to pay commissions to the broker, together with part payment by the husband and a promise of the balance, sufficiently shows the broker's employment by the husband for his wife and her ratification of the act.[6] Where it appears that the broker asked the owner if he wanted to sell, and his price, stating that he had a party who might buy, and that afterward the broker made offers for the property, speaking of the prospective purchasers as his clients, he was the agent of the buyer and not the seller.[7] Whether a hotel keeper had impliedly employed a cigar dealer who dealt with him to act for him as a broker in the sale of his lands, as shown by certain negotiations between the parties and by the testimony of the alleged broker, is for the jury.[8]

A contract for services in selling lands is governed by the statute of frauds in the state where made.[9] A real estate agent cannot recover on a quantum meruit for selling real estate under oral employment in New Jersey, since the authority must be in writing,[10] and a real estate broker of a city of the first or second class must have written authority of the owner before selling real property, or he can recover no commission;[11] however this law has been held unconstitutional as depriving the citizen of liberty and property without due process of law.[12]

Mere acquiescence in a broker's statement that he had secured a loan for prospective purchasers does not show ratification of the broker's agency, no such agency being shown by the latter's statement.[13] Where a contract for the sale of lands by a broker is made without time, either party may terminate it in good faith at will,[14] or after a reasonable time for the completion of a contract by a broker, the principal may revoke the authority;[15] but where services rendered by a broker in one employment are in part the consideration for a second employment, the latter employment is coupled with an interest so that it cannot be revoked at the mere pleasure of the owner,[16] and a contract authorizing a broker to sell lands within a certain period, either in parcel or en masse, cannot be revoked by the owner during the period, where the broker was proceeding diligently in the sale.[17] A broker's contract authorizing the sale of a large tract of land and providing that it should be subdivided and that a portion should be reserved for sale on other terms does not

(Hogan v. Slade [Mo. App.] 71 S. W. 1104; Benedict v. Pell [N. Y.] 70 App. Div. 40); of employment of agent for exchange of lands (Barton v. Powers, 182 Mass. 467); for the sale of stock (Kratt v. Hopkins [N. Y.] 77 App. Div. 634); of broker's employment in an action against the owner for commissions (Benedict v. Pell [N. Y.] 70 App. Div. 40); to show that an agent was employed by another to purchase an electric light plant (Hart v. Maloney, 114 N. Y. State Rep. 293); of evidence to carry to the jury the issue whether the president of a corporation and a trustee jointly, or one of them individually, employed a broker to sell lands of the corporation so as to be liable for commissions—Monk v. Parker, 180 Mass. 246. Sufficiency of revocation of employment of broker for sale of business property—Abbott v. Hunt, 126 N. C. 403.

4. Gast v. Buckley, 23 Ky. Law Rep. 992, 64 S. W. 632.

5. American Val. Co. v. Wyman, 92 Mo. App. 294.

6. McCormack v. McCaffrey (N. Y.) 36 Misc. Rep. 775.

7. Haynes v. Fraser (N. Y.) 76 App. Div. 627.

8. Horwitz v. Pepper, 128 Mich. 688.

9. Goldstein v. Scott (N. Y.) 76 App. Div. 78.

10. Under Gen. St. N. J., p. 1604, § 10 (Statute of Frauds)—Goldstein v. Scott (N. Y.) 76 App. Div. 78.

11. Under L. New York 1901, c. 128, § 640d, making a sale of real property without written authority of the owner, a misdemeanor—Whiteley v. Terry (N. Y.) 39 Misc. Rep. 93.

12. Grossman v. Caminez (N. Y.) 79 App. Div. 15.

13. Howe v. Miller, 23 Ky. Law Rep. 1610, 65 S. W. 353, 66 S. W. 184.

14. Taylor v. Martin (La.) 33 So. 112; Huffman v. Ellis (Neb.) 90 N. W. 552.

15. Collier v. Johnson, 23 Ky. Law Rep. 2453, 67 S. W. 830.

16. Bird v. Phillips, 115 Iowa, 703.

17. McLane v. Maurer (Tex. Civ. App.) 66 S. W. 693.

contemplate that all lands should be surveyed and subdivided before sale so that failure in such acts will authorize revocation of the contract.[18] A contract with a broker for the sale of lands to net the owner a certain sum may be terminated at will so as to prevent recovery by the broker for services thereafter.[19] The law requiring a real estate broker's license will not prevent one not a broker from receiving compensation for services in buying and selling real estate of others,[20] nor one who sells land for an owner under a special contract without holding himself out as a real estate broker.[21] A state privilege tax on resident merchandise brokers who merely solicit orders within the state for nonresident dealers, to be shipped by them, is a violation of the commerce clause of the federal constitution.[22] A law requiring a license on agents securing laborers to work in another state does not violate the federal constitution or interfere with interstate commerce.[23]

Agency for both parties.[24]—A lender who paid a loan to an agent of the borrower with whom the borrower had made arrangements to pay off mortgages on his property is not liable for money retained by the agent from the amount, since the latter was the representative of the borrower.[25] A real estate agent employed by an owner to sell lands on commission, after the conclusion of the contract, may become an agent of the purchaser to pass on the title, pay the price and receive the deed, if the purchaser knows of his former employment and a knowledge of an incumbrance on the land gained in such capacity will be binding on the purchaser.[26]

§ 2. *Mutual rights, duties, and liabilities. Representative duties and authority.*[27]—The authority of a real estate agent is limited to the terms given by his principal.[28] Under a simple agreement with brokers to find a satisfactory purchaser, the owner is entitled to determine the consideration and the details concerning payment.[29] The words "placed in the hands of 'a broker' to be sold" do not confer on the brokers the right to possession of the land but merely indicate appointment for sale.[30] A contract giving a broker "the sale of the following described property" for a certain period at a certain price, is one conferring an ordinary broker's authority, and will not authorize him to sign contracts of sale for the owner.[31] Where an owner offered his property to an agent to sell at a certain price, leaving the details of the settlement indefinite, the agent's authority extended only to production of the buyer and he could not complete the contract.[32] An agent for renting and collecting rents cannot authorize another to sell the realty for the owner.[33] When brokers authorized to sell land during a period of six months for certain terms, and afterwards until certain notice of withdrawal is given, found a purchaser able and willing to buy at the terms, they could contract to sell, allowing a reasonable time for the arrangements and his investigation of the title, and were not required to demand cash payment.[34] A broker employed to make a loan has no authority to collect principal and interest though payable at his office, nor will authority to collect interest authorize him to collect the prin-

18. McLane v. Maurer (Tex. Civ. App.) 66 S. W. 693.
19. Abbott v. Hunt, 129 N. C. 403.
20. Raeder v. Butler, 19 Pa. Sup. Ct. 604.
21. Black v. Snook (Pa.) 53 Atl. 648.
22. Stockard v. Morgan, 185 U. S. 27.
23. Laws N. C. 1901, c. 9, § 84—State v. Hunt, 129 N. C. 686.
24. See post, § 4, for effect on right to compensation.
25. Henken v. Schwicker (N. Y.) 67 App. Div. 196.
26. Vercruysse v. Williams (C. C. A.) 112 Fed. 206.
27. Sufficiency of notice to show ratification by a customer of an unauthorized purchase of stock by brokers on his account in good faith—Wolff v. Lockwood (N. Y.) 70 App. Div. 569.
28. Balkema v. Searle, 116 Iowa, 374.
29. Kilham v. Wilson (C. C. A.) 112 Fed. 565.
30. Raeder v. Butler, 19 Pa. Sup. Ct. 604.
31. Brandrup v. Britten (N. D.) 92 N. W. 453.
32. Balkema v. Searle, 116 Iowa, 374.
33. Topliff v. Shadwell, 64 Kan. 884.
34. Gilmore v. Bailey, 103 Ill. App. 245.

cipal, especially where the lender retains possession of the security.[35] Brokers who bought wheat for a customer on margins were not bound, after his death and the refusal of his representatives to act, to make the necessary advances when the market fell to carry the wheat instead of closing out as the contract provided.[36]

Good faith and diligence of the parties.[37]—Though a contract for the sale of lands by an agent is unilateral and invalid, an advertisement and listing by the agent is a sufficient partial performance to enable an enforcement.[38] A contract for the sale of lands providing that the owner shall fix the price will raise an inference in law that the price shall be fixed and the sale completed within a reasonable time.[39] An agent for the sale of property on certain terms, who learns of a better sale or exchange to be made, should make known the facts thereof to the owner before procuring a sale as authorized, and conduct otherwise amounts to a fraud.[40] An agent for the sale of lands without particular instructions is not guilty of fraud for failing to reveal the identity of a purchaser where the owner makes no inquiry regarding him.[41] The owner of lands is entitled to know who the prospective purchaser is for the purpose of consummating the sale, but a statement by him to the agent that if he fails to meet such purchaser at the time appointed for the completion of the same, the contract may be considered closed, is a sufficient waiver of his right to such information.[42]

Ratification by principal of unauthorized acts.—Ratification of a contract of sale by an attorney in fact under a power properly made will bind the owner whether he knew all the terms and conditions of the contract when it was made or not.[43] A principal who receives and retains the consideration from a sale by his agent on unauthorized terms and does not offer to return the same cannot recover damages from the agent for his unauthorized act in the absence of his fraud. Retention of the consideration for a reasonable time is sufficient to show ratification and no particular time need be shown.[44] Where a real estate agent violated his contract by taking deeds in the name of a third person receipt and retention of the deeds and abstracts by the principal do not amount to a ratification.[45] Retention of an account of a sale of stock by the owner without objection is not a ratification of the sale by the owner without authority, where, on being informed of the sale, he immediately responded to his broker that the sale was without authority.[46] Acceptance of the proceeds of a sale of her realty by an aged and incompetent woman did not amount to a ratification of the sale by her agent, especially where she did not know that the deed named the agent as grantee, and, on learning such fact, stated her intention to recover the land.[47]

Damages for negligence or unauthorized conduct.—Where an agent for the sale of realty takes a different security in payment than the one he was authorized to take, the measure of damages resulting to the principal from his act is the difference in value between the security taken and the one authorized, not exceeding the amount of payments covered by the security.[48] Where it appears that stock brokers accepted an order to purchase but failed to execute it, and it is not shown

35. Hefferman v. Boteler, 87 Mo. App. 316.
36. Demary v. Burtenshaw's Estate (Mich.) 9 Detroit Leg. N. 365, 91 N. W. 647.
37. What constitutes a reasonable time within which a purchaser of stock may repurchase stock to replace that which should have been purchased by his brokers within the rule to recover as damages for negligence of brokers—Burhorn v. Lockwood (N. Y.) 71 App. Div. 301.
38. Lapham v. Flint, 86 Minn. 376.
39. Tinsley v. Durfey, 99 Ill. App. 239.
40. Holmes v. Cathcart (Minn.) 92 N. W. 956.
41. Rank v. Garvey (Neb.) 92 N. W. 1025.
42. Simpson v. Smith (N. Y.) 36 Misc. Rep. 815.
43. Rank v. Garvey (Neb.) 92 N. W. 1025.
44. Lunn v. Guthrie, 115 Iowa, 501.
45. Cole v. Baker (S. D.) 91 N. W. 324.
46. Burhorn v. Lockwood (N. Y.) 71 App. Div. 301.
47. Clark v. Bird (N. Y.) 66 App. Div. 284.
48. Lunn v. Guthrie, 115 Iowa, 501.

that they were to carry the stock for a rise, the measure of damages for the jury is the difference between the market value on the day set for purchase and the market value within a reasonable time after knowledge of the broker's negligence, during which the plaintiff might have purchased.[49] Where three persons are interested together in a speculative account with stock brokers, they may be regarded as partners by the brokers so that one is individually liable for the balance due on the account, and it may be set off by the brokers in an action against them by such person for damages in closing an account in which he was individually interested.[50]

Accounting to principal.—An agent in charge of the management and sale of the premises failing to communicate offers to his principal and purchasing for himself at a less price that the offers, who sells afterward at an advanced price, must account to his principal.[51] A land broker who purchases for himself, using a third person as intermediary, and sells at a profit, must account for such profit to the owner.[52] The relations of broker and principal for the purchase of stock on a margin are not those of pledgee and pledgor, but of parties to an executory contract for the sale and purchase of the stock, so that the broker is bound to deliver the stock purchased on demand and payment and may claim payment on the tender of the stock after reasonable notice.[53] Stock brokers cannot be compelled to return funds appropriated by them in their negotiations for their principal where it is not shown what their contract was nor that they were not entitled to retain the funds.[54]

Remedies between the parties.[55]—Causes of action by a purchaser of stock against a broker acting for him on margins without any intention that the sale should be completed by actual delivery may be joined, since they sound in contract.[56] On a general assignment by a broker, or on his becoming bankrupt, a customer need not make a demand and tender before asserting the breach of the contract, though the parties may regard the assignment as temporary and treat the bankruptcy as a breach if the trustee does not tender performance within a reasonable time, so that the customer's damages may begin at the date of the bankruptcy petition.[57] In an action for damages against an agent for the sale of land on unauthorized terms, if the principal pleads no fraud, he must show a return of the consideration received by him to the purchaser or an offer for such return, and the agent is not charged with the burden of proving that the principal received and retained the consideration.[58]

§ 3. *Rights and liabilities of principal and broker as to third persons.*—The holder of a note is not estopped to deny the authority of a broker to receive payment where the payor does not know of the holder's ownership.[59] One who pays the amount of security to another as agent for the holder, who is in possession of the

49. Gurley v. MacLennan, 17 App. D. C. 170.

50. Wolff v. Lockwood (N. Y.) 70 App. Div. 569.

51. Cornwell v. Foord, 96 Ill. App. 366.

52. Merriam v. Johnson, 86 Minn. 61.

53. In re Swift (C. C. A.) 112 Fed. 315; Hutchinson v. Dee, Id.

54. Sufficiency of complaint—Cowen v. Voyer (N. Y.) 79 App. Div. 638.

55. Pleading and burden of proof in an action by a principal against his stock broker for recovery of a balance alleged to be retained by the broker—Kratt v. Hopkins (N. Y.) 77 App. Div. 634. Sufficiency of evidence to set aside conveyance of lands secured by an agent for an aged and incompetent principal (Clark v. Bird [N. Y.] 66 App. Div. 284); of evidence of ratification of a contract for the sale of land by the owner (Topliff v. Shadwell, 64 Kan. 884); of evidence to show that a contract made by the sales agent of a land company was binding on the company—Keen v. Maple Shade L. & I. Co. (N. J.) 50 Atl. 467.

56. Actions under Sts. (Mass.) 1890, c. 437, § 2, as construed in connection with Pub. Sts. (Mass.) c. 167, § 2, cl. 5—Ballou v. Willey, 180 Mass. 562.

57. In re Swift (C. C. A.) 112 Fed. 315; Hutchinson v. Dee, Id.

58. Lunn v. Guthrie, 115 Iowa, 501.

59. Hefferman v. Boteler, 87 Mo. App. 316.

paper, takes the risk of showing the authority of the agent to collect.[60] Where a broker employed to procure and consummate the purchase of lands, learned, before the transaction was complete, that there was an outstanding mortgage which really covered the land but which by mistake was made to describe a different tract, and accepted the title and paid for the lands, the purchaser was bound by the agent's knowledge and the mortgage could be enforced against him.[61] Where an offer to buy cotton in bale made through a broker was subject to confirmation by the buyer and he insisted that the broker should give security, such condition was not a waiver of the customary requirement for confirmation and until such contract was so confirmed, no action could be maintained upon it.[62] Where a broker can sell only on confirmation by his principal and misrepresents a prospective sale to the latter so as to secure approval, there was no sale though the goods were delivered and the seller could recover goods retained by the purchasers though he could not recover for goods which the purchaser returned to the broker as in excess of the amount they ordered.[63] In an action for deceit in an exchange of property conducted by the broker of defendant, evidence that defendant complained of the contract made by his broker is sufficient to show the employment.[64]

§ 4. *Compensation and lien.*[65]—If it appears in an action for commissions that there were no acts for the brokers to perform, a promise for commissions is without consideration and void.[66] An executory contract by a real estate agent, to reduce his commissions in order to secure a sale, based upon a bona fide misstatement of an agent of the buyer that the sale could not be reached without reduction, is without consideration, and cannot be enforced by either party to the sale.[67] An oral offer to the owner, by the proposed purchaser secured by an agent, to buy the lands at the agreed price is sufficient under the Iowa statutes to entitle the agent to commissions.[68]

A real estate broker is entitled to commissions where it appears that, within the time limited, he found a solvent purchaser ready to make an enforceable contract at the seller's terms,[69] or at more favorable terms,[70] or, in the absence of express terms, at terms acceptable to the owner.[71] It must appear that the purchaser was secured by the broker or that he in some way aided the sale.[72] The rule applies to an exchange as well as a sale of lands.[73] That the principal did not know that the agent secured a purchaser to come to him will not prevent recovery, nor that the title to the property was in the name of the principal's wife.[74] Completion of a satisfactory contract with the principal is sufficient though it calls for part payment and the principal failed to collect the remainder.[75] A broker employed to secure a buyer for land at a "figure satisfactory" to the owner must comply with this condition before he is entitled to recover commissions.[76] Where it

60. Hefferman v. Boteler, 87 Mo. App. 316.
61. Vercruysse v. Williams (C. C. A.) 112 Fed. 206.
62. Johnston v. Fairmont Mills, 116 Fed. 537.
63. Frye v. Keller (Tex. Civ. App.) 72 S. W. 228.
64. Arnold v. Teel, 182 Mass. 1.
65. Sufficiency of compliance by broker with terms of sale as fixed by owner—Donly v. Porter (Iowa) 93 N. W. 574. Right to compensation for securing sale of a ferry—Gracie v. Stevens, 171 N. Y. 658.
66. Wolff v. Denbosky (N. Y.) 36 Misc. Rep. 643.
67. Dayton v. Am. Steel Barge Co. (N. Y.) 36 Misc. Rep. 223.
68. Bird v. Phillips, 115 Iowa, 703.
69. Ross v. Smiley (Colo. App.) 70 Pac. 766; Locke v. Griswold, 96 Mo. App. 527; Phillips v. Dowhower, 103 Ill. App. 50; Sullivan v. Milliken (C. C. A.) 113 Fed. 93; McCaffrey v. Page, 20 Pa. Super. Ct. 400.
70. McCaffrey v. Paige, 20 Pa. Super. Ct. 400.
71. Fairchild v. Cunningham, 84 Minn. 521.
72. Wilson v. Weber (Tex. Civ. App.) 68 S. W. 800.
73. Hersher v. Wells, 103 Ill. App. 418.
74. Rounds v. Alee, 116 Iowa, 345.
75. Brady v. Foster (N. Y.) 72 App. Div. 416.
76. Weibler v. Cook (N. Y.) 77 App. Div. 637.

appears that two brokers were given the sale of certain lands, the one that first directed the attention of a purchaser thereto and visited the property with him was not entitled to commissions, unless it appeared that he was the procuring cause of the sale.[77] Mere introduction of a purchaser to the owner by an agent without authority who also rendered some assistance in furthering negotiations will not entitle the agent to commissions.[78] Where a purchaser was found by the owner and the brokers merely repeated an accepted proposition to the purchaser, after it had been made by the owner who closed the trade himself, the agents are not the procuring cause of the sale so as to be entitled to commissions.[79] If a broker does not have exclusive charge of the land, so as to prevent its sale by the owner, and was not instrumental in bringing about a sale, he cannot recover commissions.[80] If land is listed as a whole and the broker has authority to sell only in that manner, a sale by the owner of part of the property after the employment is terminated will not entitle the broker to a commission.[81] Where negotiations by a broker are brought to a definite proposition to the owner by a buyer, but the proposition is rejected and the negotiations abandoned, a purchase by the same person subsequently after the termination of the broker's authority, direct from the owner without fraud of the latter, will not entitle the broker to commissions.[82] Where the agent informed the owner, who was unable to understand English, that the contract, at the time of signature, provided that the agent was to have no commissions, he cannot recover commissions if the owner found a buyer without assistance.[83] The employment of a second broker by the first, on information from the latter, cannot be proven to defeat commissions for a sale of land.[84] Where an agent authorized to sell land at a certain price put the owner into communication with a purchaser, but the latter postponed the purchase and subsequently went to another agent who had authority to sell the same land and purchased at a reduced price, which was accepted by the owner, the first agent was entitled to a commission for the sale.[85] An agent who procured a purchaser willing to buy corporate property within the terms of his contract is entitled to his agreed commission though the purchaser demanded indemnity against certain suits brought against the corporation, of which he had no notice, and which were not noticed in the contract.[86] A broker is entitled to his agreed commission where he furnishes a building contractor with information whereby he enters into contracts for the construction of buildings for the principal.[87] If a promoter aided in negotiations with prospective purchasers of a street railway under a contract with the owners, the owners are liable for his compensation; and, where the contract provided for compensation if any of the negotiations with the prospective purchaser were completed, the owners cannot urge a change in the contract to prevent payment of commissions.[88] Where the broker is the procuring cause of a loan, he is entitled to commission from the one who authorized or ratified his employment for that purpose.[89] He must inform his client that a lender has been found or actually complete the loan in order

77. Bowser v. Mick, 29 Ind. App. 49.
78. McVickar v. Roche (N. Y.) 74 App. Div. 397.
79. Collier v. Johnson, 23 Ky. Law Rep. 2453, 67 S. W. 830.
80. Buck v. Hogeboom (Neb.) 90 N. W. 635.
81. Frenzer v. Lee (Neb.) 90 N. W. 914.
82. Fairchild v. Cunningham, 84 Minn. 521.
83. Curtis v. Wagner, 98 Ill. App. 345.
84. Adams v. McLaughlin (Ind.) 64 N. E. 462.
85. Cunliff v. Hausman (Mo. App.) 71 S. W. 368.
86. Injunctions relating to paving contracts to be assigned the purchaser in the course of the contract—Indiana Bermudez Asphalt Co. v. Robinson, 29 Ind. App. 59.
87. Kaestner v. Oldham, 102 Ill. App. 372.
88. Alexander v. Wakefield (Tex. Civ. App.) 69 S. W. 77.
89. Sufficiency of evidence to show employment of broker to secure a loan and to show that the broker was the procuring cause of the loan—Williams v. Clowes (Conn.) 52 Atl. 820.

to merit his commissions.[90] There is no implied promise on the part of an owner to pay commissions to a third person who procured an exchange of lands through information from the broker employed to effect the exchange.[91] A broker who mails a letter accepting a proposition for the purchase of lands is complying with his contract so as to be entitled to his commissions even though the letter is intercepted by another before its delivery.[92] A condition in a contract between an owner and a broker that the commission shall be paid out of the first cash payment is not a condition precedent to the right to recover commissions since it does not mean that unless a cash payment is made no commission can be recovered.[93] Where a broker authorized to sell land for a certain price was offered a larger amount by the purchaser, who afterwards bought without the broker's aid, he could not recover the excess in the price from the purchaser but must sue the owner.[94] Where a land owner wrote a broker declining an offer of purchase made through him, and asking a larger price, which was declined, at the same time denying any contract for commissions on the sale if made, a sale through a third person to the same purchaser for a different price will not entitle the broker to commissions.[95] Where a loan broker fails to appear at the time specified for completing the loan and the papers are not prepared, the borrower cannot rescind his contract and deprive the broker of commissions, if the latter offers to perform the same day.[96]

Revocation of the broker's authority will prevent recovery of commissions for a sale effected thereafter, his efforts in this behalf being voluntary,[97] but if the owner permits an agent to act for him in completing a sale after notice of the termination of his contract,[98] or if the revocation is made after an able and willing purchaser is secured by the broker, he is liable for commissions.[99] Merely bringing parties to a sale together in the absence of a binding contract will not entitle the broker to commissions,[1] especially if the broker was entitled to commissions only if the land was sold, and his employer was in no way responsible for the failure of sale.[2] Where it does not appear that the parties to a proposed sale ever met on any terms or conditions as to payments of the price, the broker is not entitled to commissions where those conditions were a part of his contract though the purchaser offered to buy at the agreed price.[3] If a broker brings the parties to an exchange of property together, that the contract is made without notice to him,[4] or that the owner completed the sale[5] will not deprive the broker of compensation. If an owner accepts an offer on certain terms, the broker finding a purchaser may recover his commission, though the terms are indefinite.[6] If the broker sells on other terms than those given him by the owner, he cannot recover commissions,[7] as where he sold land for $17 less than the price set by the owner.[8]

The broker must show that a purchaser secured by him is able to complete

90. McLaughlin v. Whiton (N. Y.) 36 Misc. Rep. 838.
91. Dartt v. Sonnesyn, 86 Minn. 55.
92. Scottish-American Mortg. Co. v. Davis (Tex. Civ. App.) 72 S. W. 217.
93. Finch v. Guardian Trust Co., 92 Mo. App. 263.
94. The broker was bound to sell for the best price obtainable and account for all receipts except a reasonable compensation —Boysen v. Robertson, 70 Ark. 56.
95. Land Mortgage Bank v. Hargis (Tex. Civ. App.) 70 S. W. 352.
96. Collier v. Weyman, 114 Ga. 944.
97. Fairchild v. Cunningham, 84 Minn. 521.
98. Dayton v. Am. Steel Barge Co. (N. Y.) 36 Misc. Rep. 223.
99. McLane v. Goode (Tex. Civ. App.) 68 S. W. 707.
1. Pipkin v. Horne (Tex. Civ. App.) 68 S. W. 1000; Carnes v. Howard, 180 Mass. 569. An instruction that if he brought the parties together thereby beginning negotiations that resulted in a sale is misleading as not showing that he effected the sale—Bowser v. Mick, 29 Ind. App. 52.
2. Owen v. Kuhn, Loeb & Co. (Tex. Civ. App.) 72 S. W. 432.
3. Drake v. Biddinger (Ind. App.) 66 N. E. 56.
4. French v. McKay, 181 Mass. 485.
5. Dean v. Archer, 103 Ill. App. 455.
6. Monk v. Parker, 180 Mass. 246.
7. Huffman v. Ellis (Neb.) 90 N. W. 552.
8. Howell v. Denton (Tex. Civ. App.) 68 S. W. 1002.

the contract, which included an exchange of lands, and a mere production of deeds is insufficient unless he shows that the purchaser held ownership to the lands which were the subject of the contract.[9] If the purchaser secured by the broker accepts the terms, the commission is earned though the purchaser fails to complete the sale and demands a reduction in the price.[10] Though a broker secured a purchaser and the terms were fully agreed upon and a deposit made, but no memorandum or receipt made between the parties, he is not entitled to commissions where the purchaser subsequently refuses to complete the contract.[11] That a contract for the sale of a mine was not capable of enforcement and was canceled by the parties will not prevent a recovery of commissions by an agent who found a customer according to his agreement.[12] Where an agent is employed to sell property for a certain price, all over such price to belong to the agent, and in case of withdrawal before sale, to receive a certain commission on the price of the property at that time, he is entitled to such commission on withdrawal.[13] A contract of sale with a purchaser secured by a land broker which provides for delivery on the first payment and, in case of default that the contract shall be returned to the owner, is a mere option and on failure thereof, the broker is not entitled to commissions.[14]

Sufficiency of performance.—Where a contract written by the broker representing the owner of lands contained a mistaken description, and included lands which he did not own, without his knowledge and consent, the broker is not entitled to commissions though the tract to be conveyed actually contained more than the amount specified.[15] Where an agent to sell lands was under verbal authority, the principal cannot object, in an action for commissions, that an acceptance by a purchaser was insufficient because it called for a written agreement warranting a perfect title and an adjustment of rent and interest details since such agreement was necessary to a binding contract.[16] Where an owner agreed to pay another a commission for obtaining a tenant for his building, and after unsuccessful efforts by the agent, another agent of the owner secured a tenant on different terms from those offered by the first agent, without any participation of the latter, he was not entitled to commissions.[17] Where a broker sold goods at a higher price than set by the owner and part of the order was filled by the latter before revocation of the sale by the buyer, and subsequently the buyer renewed the contract at a lower price, the broker was entitled to commissions on the whole amount of goods.[18] An agreement with a broker to accept a loan on property and pay commissions from the proceeds of the loan will not render his employer liable, where the title is rejected by the lender and the loan refused.[19] Where the commission of a loan broker is to be deducted from the loan on the day of closing, the principal is not liable for the commission, if his title is rejected and the loan refused by the lender.[20] Where the trustees of an estate furnished a perfect record title for the security of a loan which they had employed an agent to secure for them on commissions, but the agent failed to procure the loan because the lender declined to accept the title, the agent was not entitled to commissions.[21] The owner's refusal to complete a purchase will not prevent recovery

9. Hersher v. Wells, 103 Ill. App. 418.
10. Michaelis v. Roffmann (N. Y.) 37 Misc. Rep. 830.
11. Kronenberger v. Bierling (N. Y.) 37 Misc. Rep. 817.
12. Mattes v. Engel, 15 S. D. 330.
13. Schlange v. Lennox, 101 Ill. App. 88.
14. Arthur D. Jones & Co. v. Eilenfeldt, 28 Wash. 687, 69 Pac. 368.
15. Scott v. Gage (S. D.) 92 N. W. 37.
16. Ross v. Smiley (Colo. App.) 70 Pac. 766.
17. Henkel v. Dunn (Mo. App.) 71 S. W. 735.
18. Edward H. Everett Co. v. Cumberland Glass Mfg. Co., 112 Wis. 544.
19. Hess v. Eggers (N. Y.) 38 Misc. Rep. 726.
20. Hess v. Eggers (N. Y.) 37 Misc. Rep. 845.
21. Marmaduke v. Martin, 90 Mo. App. 629.

of commission where the broker has secured a purchaser ready and willing to buy on the terms offered,[22] though the commission consists of a percentage of the price to be obtained.[23] That the owner was at liberty to sell and had given another an option on the property, which either party thereto might revoke at any time, will not relieve him of liability for commission.[24] That his employer does not own the lands to be sold and cannot secure the title will not prevent recovery of commissions, where he secured a purchaser satisfactory in every way without knowledge of these facts;[25] and where he brought a purchaser able and willing to buy on the owner's terms, he is entitled to compensation though the sale is not completed on such terms owing to the misrepresentations of the owner as to the property.[26] Where the owner of lands calls off negotiations by his broker for a sale, because of litigation between him and the prospective purchaser, a subsequent sale by the owner to such purchaser in settlement of the litigation will not entitle the broker to commissions.[27] An owner who authorized a broker to sell land for a certain price on a certain cash payment and balance on delivery of title, but refused to complete the sale because the price was insufficient, exclusive of commissions, was estopped to assert afterward that he was not bound to pay commissions because the agent did not comply with his instructions as to payment of price.[28] Where an executor employs an agent to secure a loan at a certain commission, and the agent produces a lender able and willing to make the loan, but he declines because the executor does not have authority to execute the mortgage on the lands of the estate, the agent may recover his commission.[29] A loan broker who secured a party willing to make the loan within his terms but was prevented from completing the contract on account of a cloud on the title to the land which was to be made the security, and the borrower did not complete the title until finally conditions had changed so that the lender declined to make the loan, is nevertheless entitled to commissions.[30]

That the owner in his agent's presence modified the terms of the purchaser's proposal as to the method of payment will not prevent the recovery of commissions by the agent,[31] as, a change in the price to which the owner agreed,[32] or a change in the contract whereby an exchange of lands instead of a sale was effected,[33] or a change in the property so that other property was received.[34] Where the broker brought the parties to a contract together and by negotiations between themselves they effected an exchange of property different from that which was contemplated by the broker, he is entitled to commissions if he stood ready to render any services necessary to effect the exchange and his conduct was the efficient cause which produced the result.[35] If the owner makes a new condition for compliance with a sale effected by his authorized broker to an able and willing purchaser, the agent is entitled to commissions though the transaction fails.[36] Where a landowner sold a larger tract of land to a purchaser secured by a broker than was intrusted to

22. York v. Nash (Or.) 71 Pac. 59; Bird v. Phillips, 115 Iowa, 703; Thain v. Philbrick (N. Y.) 36 Misc. Rep. 829; Gresham v. Connally, 114 Ga. 906; Sullivan v. Milliken (C. C. A.) 113 Fed. 93; Hersher v. Wells, 103 Ill. App. 418.

23. Stauffer v. Linenthal, 29 Ind. App. 305.

24. York v. Nash (Or.) 71 Pac. 59.

25. Monk v. Parker, 180 Mass. 246.

26. Veatch v. Norman, 95 Mo. App. 500.

27. Taylor v. Martin (La.) 33 So. 112.

28. Donly v. Porter (Iowa) 93 N. W. 574.

29. Fullerton v. Carpenter (Mo. App.) 71 S. W. 98.

30. Clark v. H. G. Thompson Co. (Conn.) 52 Atl. 720.

31. Sale of street railway secured by agent—Alexander v. Wakefield (Tex. Civ. App.) 69 S. W. 77; Huntemer v. Arent (S. D.) 93 N. W. 653.

32. McLane v. Goode (Tex. Civ. App.) 68 S. W. 707.

33. Rabb v. Johnson, 28 Ind. App. 665.

34. French v. McKay, 181 Mass. 485.

35. French v. McKay, 181 Mass. 485.

36. McQuillen v. Carpenter (N. Y.) 72 App. Div. 595.

37. Veatch v. Norman, 95 Mo. App. 500.

the broker, and at a less price, before a reasonable time was given for completion of the sale begun by the broker, the latter was entitled to a reasonable compensation for services rendered.[37] A broker who is promised certain commissions for a sale at not less than a certain price, and certain extra commissions and compensation for his services if the property is sold by the owner, is entitled to the latter compensation where he has performed his duties, though the owner sells on his own account for less than the agreed price.[38] Modification of a contract for sale of lands, made by a broker employed to exchange all or a part of his principal's lands, will not affect the right to commissions where arranged by the principal himself and made necessary by conditions beyond the broker's control.[39] A broker employed to sell for a specified sum, or less if accepted by the owner in writing, on a condition that during a certain time the owner will not sell except through the broker, or, if he does, will pay full commissions, can recover commissions on a sale by the owner during the time, though the owner referred the broker to the purchaser and though the amount received was less than the amount specified.[40] That one who sold a mine as agent was afterwards made superintendent by the purchaser and secured a modification of the contract will not prevent the recovery of commissions.[41] That a lessee of convict labor releases a sublessee from a contract made for him by an authorized agent, and accepts a contract at a sum which gives the agent no commission under his contract, will not prevent recovery of the agreed commission.[42] Where a contract with a broker for the sale of cattle allowed to him all he should receive above a certain price, he cannot recover commissions, though he secured a purchaser, where the owner took up the negotiations and sold the cattle to the purchaser at a reduced price.[43]

Effect of fraud or bad faith.—A broker who had an interest in the contract of sale, in order to recover commissions, must show that he acted in good faith.[44] A broker employed to sell lands, at a fixed price and under a certain condition, who sells under like terms to a purchaser without informing his employers cannot recover commissions from them.[45] Brokers acting for a guardian cannot recover commissions, where it appears that one of them was guilty of bad faith in attempting to lower the price of the property at the sale secured by the order of court in partition proceedings.[46] Where an agent undertook to sell land for a certain price, any amount above that to be his commission and he induced his employer to agree to sell for a lower price without disclosing the fact that he might obtain more and then sold for a price much above the first agreed price, the employer was entitled to recover the amount of the reduction from the agent.[47] Where a broker secured a purchaser for lands and immediately telegraphed and wrote to the owner concerning such purchaser, who also sent a message to the owner though he intercepted it before it was received, there was no negligence on the part of the broker to notify the owner of the sale so as to forfeit his right to commissions though the land had been sold, before the notice was received, to another purchaser.[48]

Acting for both parties.—Acting for the other party without knowledge of his principal will destroy the broker's right to commission,[49] and the principal may

38. Raeder v. Butler, 19 Pa. Super. Ct. 604.
39. Blair v. Slosson, 27 Tex. Civ. App. 403.
40. Gregory v. Bonney, 135 Cal. 589, 67 Pac. 1038.
41. Mattes v. Engel, 15 S. D. 330.
42. The agent was to have all excess over a certain price per convict as commission—Bush v. Mattox, 116 Ga. 42.
43. Frey v. Klar (Tex. Civ. App.) 69 S. W. 211.
44. Buck v. Hogeboom (Neb.) 90 N. W. 635.
45. Linderman v. McKenna, 20 Pa. Super. Ct. 409.
46. DeArmit v. Milnor, 20 Pa. Super. Ct. 369.
47. Ballinger v. Wilson (N. J. Eq.) 53 Atl. 488.
48. Scottish-American Mortg. Co. v. Davis (Tex. Civ. App.) 72 S. W. 217.
49. Linderman v. McKenna, 20 Pa. Super. Ct. 409.

show that, though the sale took place as alleged, the broker, while acting for him and without his consent, acted for the other party and received commissions for such services;[50] but if the agent informed both parties that he would charge them commissions to be paid equally by them, to which both agreed, both are liable.[51] If the broker was not intrusted with discretion as to terms of sale, an arrangement between him and the purchaser regarding compensation will not prevent recovery of commissions from the owner.[52] A broker acting for one party cannot show, in an action for compensation from the other, that there was a general custom in acting for both parties for brokers to charge commissions of each.[53] A real estate broker carrying on negotiations for a lease in the name of the tenant cannot claim commissions from the landlord.[54] A broker who was not an intermediary to bring the parties together, but who took a contract from the owner to himself, refusing to disclose the purchaser and receiving a commission from the latter, neither of the parties knowing that the other was charged a commission, cannot recover a commission from the owner.[55] Where a broker in charge of the property of two owners tried to effect an exchange with the knowledge of one but not of the other that he was representing both parties, their acts in completing the contract, after the other had repudiated the agency on notice of the double representation, amounted to a ratification of the agent's acts so as to render the one liable for commissions who contracted with knowledge of the double agency.[56]

Accrual and amount of commissions.—The right to commission accrues when an acceptable contract is completed by the principal.[57] Where a broker's contract called for payment of commissions for the sale of land out of the purchase money as paid, the whole commissions became due on confirmation of a foreclosure sale, under the purchase money mortgage, at which the vendor bid in the property for the full unpaid balance and costs.[58] Where a land agent induced an owner to fix a net price and on the representation of the sale as to a third person, he cannot purchase so as to realize a greater profit than a reasonable commission.[59] An agreement for commissions in a certain amount, to cover fees, attorney's charges, and expenses, cannot be ground for a judgment for the full amount, where performance was prevented by reason of the owner's defective title.[60] $112,500 was not an excessive commission in selling a ferry for $4,500,000.[61] A contract between an owner and real estate brokers whom he owed for services, recorded in the office of the recorder of deeds, by which he agrees to give them exclusive control of a sale of lands from the proceeds of which they were to be paid, gives the brokers a lien on the proceeds, and where the owner reserved the right to fix the price but afterwards refused to comply and executed mortgages on the property, the debt became due and the lien attached.[62]

Actions for compensation.[63]—A broker may sue a purchaser who has failed to carry out his contract with the vendor thereby destroying the right to commissions,

50. Wolff v. Denbosky (N. Y.) 36 Misc. Rep. 643.
51. Lamb v. Baxter, 130 N. C. 67.
52. Sale of ferry—Gracie v. Stevens, 171 N. Y. 658.
53. Dartt v. Sonnesyn, 86 Minn. 55.
54. Callaway v. Equitable Trust Co., 67 N. J. Law, 44.
55. Horwitz v. Pepper, 128 Mich. 688.
56. Casady v. Carraher (Iowa) 93 N. W. 386.
57. Brady v. Foster (N. Y.) 72 App. Div. 416.
58. Crane v. Eddy, 191 Ill. 645.
59. Merriam v. Johnson, 86 Minn. 61.
60. Gatling v. Central Spar Verein (N. Y.) 67 App. Div. 50.
61. Gracie v. Stevens, 171 N. Y. 658.
62. Tinsley v. Durfey, 99 Ill. App. 239.
63. Sufficiency of complaint by real estate broker for commissions (Adams v. McLaughlin [Ind.] 64 N. E. 462); of amended petition in an action for commissions for the sale of land its effect as changing the cause of action so as to constitute a departure—Stewart v. Van Horne, 91 Mo. App. 647. Sufficiency of evidence in action for commissions (Kratt v. Hopkins [N. Y.] 77 App. Div. 634; Benedict v. Pell [N. Y.] 70 App. Div. 40; Monk v. Parker, 180 Mass. 246;

though the broker agreed to look to the vendor for commissions.[64] Where one desiring to purchase realty employs an agent to secure it and afterward employs another without the knowledge of the agent who makes the purchase and receives the commission, the agent has no remedy against the third person to recover the commissions but his remedy is against his employer.[65]

The declaration in an action for commissions must allege either an actual sale or that plaintiff secured a purchaser, within the time limited, who was able and willing to buy on the terms stated and that the sale was prevented by the owner;[66] and in an action for commissions on a loan, the complaint must show that the borrower knew that a lender had been found or that the loan was actually secured.[67] An answer in an action to recover commissions is insufficient, where it admits the contract and the services of the agent, but attempts to show that the latter was guilty of fraud in persuading the owner to trade for other property of less value while failing to show that such property was of less value than the land or stating facts showing the fraud.[68] A common count stating that a broker performed services for another to the value of $3,000 is sufficient to sustain a finding that an employer agreed to pay the broker the usual commission of one per cent on a loan of $300,000 and that this was the reasonable value of the broker's services.[69] A broker suing on a contract for services will not be denied commissions according to the facts as proved because his petition asks for a particular amount.[70] In an action for commissions for the sale of land, the owner is entitled to show what effect the acts of other agents had upon the sale before and after the employment of the plaintiff.[71] In an action to recover commissions for the exchange of lands, which defendant should convey when leave was obtained by the court, plaintiff need not show that such leave was obtained, that the owner still held the property, and that

Rutherford v. Simpson [Minn.] 92 N. W. 413); in action to recover commissions for securing a loan (Faulkner v. Cornell, 114 N. Y. State Rep. 526); in action for recovery of commissions for securing a tenant (Clark v. Dayton, 87 Minn. 454); in action for commissions for sale of land to show the employment and that the agent was the broker and procured the sale though it was closed through another agent (Hogan v. Slade [Mo. App.] 71 S. W. 1104); of evidence of approval by the owner of a contract for sale of goods made by his agent in order to entitle the latter to commissions (Edward H. Everett Co. v. Cumberland Glass Mfg. Co., 112 Wis. 544); in action for commissions for sale of land to warrant a finding that the agreement between the parties contemplated a finding of a purchaser by the broker rather than a sale (Rounds v. Allee, 116 Iowa, 345); in action for commissions to show that the broker secured a purchaser ready and able to buy on terms acceptable and that the sale failed through the owner's fault (Huntemer v. Arent [S. D.] 93 N. W. 653); of evidence of employment of agent to secure exchange of property so as to entitle him to commissions (Barton v. Powers, 182 Mass. 467); of evidence to show that the broker's authority ceased before sale and that his efforts did not produce the sale (Fairchild v. Cunningham, 84 Minn. 521; to show that a broker suing for commissions on sale of land was the efficient cause of the acceptance of defendant's offer by the prospective purchaser (Summers v. Carey [N. Y.] 69 App. Div. 428); to show that the broker's employment to sell continued until completion of the sale (Diamond v. Wheeler, 114 N. Y. State Rep. 416); to show an agreement to pay a reasonable commission for services (Hart v. Maloney, 114 N. Y. State Rep. 293); to show fraud in representations by the broker so as to warrant the purchaser in refusing to buy and deprive the broker of his commissions (Scottish-American Mortg. Co. v. Davis [Tex. Civ. App.] 72 S. W. 217); of evidence to carry to the jury the question whether the plaintiff broker had induced the purchase of lands so as to entitle him to commissions (Rounds v. Allee, 116 Iowa, 345); to carry to the jury the issue whether an owner of goods prevented an exchange by an authorized agent so as to render him liable for the agent's commissions (Stauffer v. Linenthal, 29 Ind. App. 305); of evidence to warrant directing a verdict for the owner in an action against him for commissions—McDermott v. Mahoney (Iowa) 93 N. W. 499. Sufficiency of instructions in action by real estate broker for commissions—Kesterson v. Cheuvront (Mo. App.) 70 S. W. 1091.

64. Livermore v. Crane, 26 Wash. 529, 67 Pac. 221.

65. Adams v. Dieren, 92 Mo. App. 129.

66. Sullivan v. Milliken (C. C. A.) 113 Fed. 93.

67. McLaughlin v. Whiton (N. Y.) 37 Misc. Rep. 838.

68. Rabb v. Johnson, 28 Ind. App. 665.

69. Williams v. Clowes (Conn.) 52 Atl. 820.

70. Veatch v. Norman, 95 Mo. App. 500.

71. Smiley v. Bradley (Colo. App.) 70 Pac. 696.

it was possible for him to complete the trade, unless there was bad faith or fraud on the part of the owner.[72] Evidence that a broker procured money at the request of another and on his promise to pay commissions is not a variance from an allegation that the broker procured a loan for him.[73] On an allegation of performance of a contract by a broker for a loan for his principal to be secured by a mortgage on his property, the agent cannot prove the failure to complete performance because of defects in the principal's title.[74]

The burden of proof is on a landowner who alleges, in defense of an action for commissions, that, after he made a sale, the broker procured a sale by fraud.[75] Where the owner of lands in an action by the broker for commissions bases his defense on a misrepresentation of the land by the broker so that the prospective purchaser refused to buy, he must show in what way the land varied from the broker's description so it may be determined whether or not the variation is material.[76] Where the broker finds a purchaser whose offer is accepted it will be presumed, in an action for commissions, that the latter is able to complete the contract and the burden is on the owner to show the contrary.[77] The buyer of a street railway, sold by a promoter for the owners, may testify in an action for commissions by the promoter as to the truth of the representations made to him by the promoter regarding the earning capacity of the road.[78] Where the owner refused to complete a sale to a purchaser secured by the broker, the purchaser may testify in an action by the broker for commissions that when he was introduced to the owner he was ready and willing to buy on the terms fixed, and that he so stated to the owner, and evidence is also admissible that when the broker introduced the purchaser to the owner he refused to sell, and, when the broker claimed his commissions, stated that he would rather pay the commissions than lose a certain price per acre on the land.[79] It is immaterial in an action for commissions on a sale of land that the owner had other agents where it is not contended that they were instrumental in the sale.[80] Conversations between the broker and proposed purchaser in the absence of the owner of lands cannot be introduced in an action by the broker against the owner for commissions on the sale.[81] In an action by an agent for commissions for securing a loan on realty, evidence that the loan had been twice refused on account of defects in defendant's title, and that lis pendens existed, is insufficient to show a defective title, where it does not appear that they constituted a cloud on the title when the loan was refused.[82] Where an owner being sued by a broker for commissions introduced a complaint in another action by the broker against the purchaser of the lands for damages for refusing to carry out the sale, a stipulation made by the parties to that action filed in court by which the broker acknowledged the receipt of a certain amount in full of all demands, is properly admitted in evidence.[83]

Trial and instructions.—An instruction cannot be given which assumes a contract of employment when that issue is in conflict and is separately submitted.[84] The jury in an action for commissions for the sale of land should not be in-

72. Carnes v. Howard, 180 Mass. 569.
73. Williams v. Clowes (Conn.) 52 Atl. 820.
74. Gatling v. Central Spar Verein (N. Y.) 67 App. Div. 50.
75. Stem v. Whitney, 23 Ky. Law Rep. 2179, 66 S. W. 820.
76. Scottish-American Mortg. Co. v. Davis (Tex. Civ. App.) 72 S. W. 217.
77. Stauffer v. Linenthal, 29 Ind. App. 305.
78. Alexander v. Wakefield (Tex. Civ. App.) 69 S. W. 77.
79. McDermott v. Mahoney (Iowa) 93 N. W. 499.
80. Rounds v. Alee, 116 Iowa, 345.
81. Rutherford v. Simpson (Minn.) 92 N. W. 413.
82. Gatling v. Central Spar Verein (N. Y.) 67 App. Div. 50.
83. Davies v. Thomas, 87 Minn. 301.
84. Casady v. Carraher (Iowa) 93 N. W. 386.

structed that they are not bound by any rule as to compensation, since the rule in the absence of contract is the usual commission in such cases or a fair compensation under the facts.[85] Where the evidence as to the employment of a broker is conflicting in an action for commissions, an instruction that he may recover, if he procured the sale, is erroneous as taking the question of employment from the jury.[86] Where the parties to an action for commissions differed as to the terms of the contract, its terms must be left to the jury.[87] Where the evidence is conflicting upon the issue whether a broker had the exclusive right to the sale of certain land, the question should be presented to the jury;[88] and on contradictory testimony, the question whether there was a sale or whether the agent acted in good faith is for the jury.[89] Where the evidence appears undisputed that an owner agreed to the price at which an agent sold different tracts of land, the jury cannot find for the owner as to any of the tracts.[90] The question whether the plaintiff in an action for commissions was a real estate broker is properly submitted to the jury, where a written contract is produced by which the plaintiff was to sell lands belonging to defendant for commissions.[91] Whether the parties to a sale of land intended that a memorandum, specifying the terms and executed by the owner alone, should be a contract between them was a question of fact so that its delivery was not conclusive as entitling the broker to commissions as for a completed sale.[92] Whether owners of property had so acquiesced in a contract by a broker for its sale as will preclude their setting up its invalidity as a defense to an action for commissions is a question for the jury.[93] Evidence that a broker suing for commissions secured a purchaser and that the landowner admitted by letter that a sale had been made is sufficient to send the completion of the contract as a question to the jury,[94] and evidence that certain brokers were employed by the owners to sell lands on certain terms and that they signed the agreement of sale as agents of the owner will carry the question of employment to the jury, though the owner denies such employment.[95] Where there was evidence to show, in an action for commissions in effecting the exchange of lands, that defendant promised to pay a compensation beyond the agreed commission if he found the exchange satisfactory, and that he found it satisfactory, the issue is properly submitted to the jury.[96]

BUILDING AND CONSTRUCTION CONTRACTS.

§ 1. The Contract, Sufficiency and Interpretation.—Plans and Specifications; Severability; Fraud.
§ 2. Performance of Contract.—Deviation; Abandonment.
§ 3. Modification of Contract.
§ 4. Changes in Plans and Specifications.
§ 5. Extra Work.
§ 6. Delay in Performance.—Waiver; Liquidated Damages.
§ 7. Termination or Cancellation of Contract.
§ 8. Completion by Owner or Third Person.
§ 9. Architects' and Other Certificates of Performance.
§ 10. Arbitration of Disputes.
§ 11. Acceptance.
§ 12. Payment.
§ 13. Sub-Contracts.—Extra Work; Withholding of Payments to Principal Contractor; Default.
§ 14. Remedies and Procedure.—Recovery on Quantum Meruit; Pleading; Evidence.

§ 1. *The contract, sufficiency and interpretation.*[1]—An agreement to furnish

85. Hartman v. Warner (Conn.) 52 Atl. 719.
86. Benedict v. Pell (N. Y.) 70 App. Div. 40.
87. Merriam v. Johnson, 86 Minn. 61.
88. Black v. Snook (Pa.) 53 Atl. 648.
89. McCaffrey v. Page, 20 Pa. Super. Ct. 400.
90. McLane v. Goode (Tex. Civ. App.) 68 S. W. 707.
91. Raeder v. Butler, 19 Pa. Super. Ct. 604.
92. Rutherford v. Simpson (Minn.) 92 N. W. 413.
93. Sale of ferry—Gracie v. Stevens, 171 N. Y. 658.
94. Finch v. Guardian Trust Co., 92 Mo. App. 263.
95. Dixon v. Daub, 17 Pa. Super. Ct. 168.
96. Blair v. Slosson, 27 Tex. Civ. App. 403.
1. Facts held not to show an implied con-

material according to plans and specifications is in the nature of a building contract and not a sale on inspection.[2] Liability on a building contract may pass with the premises on which the building is to be erected.[3] One who contracts for work to be placed in a building in the course of construction by another may become a guarantor of the performance of the construction necessary before the work may be begun.[4]

The construction of the contract is for the court where the specifications are not contradictory or inconsistent.[5] An attached writing may become a part of the contract where so recognized by both parties.[6] Particular terms and provisions construed are grouped in the notes.[7]

Plans, specifications, and detail drawings become a part of the contract on an offer to furnish material in accordance therewith,[8] but the contractor is not bound by contractual provisions in the specifications not embodied in the contract.[9]

tract by a subscriber to the stock of a corporation to pay contractors for work performed in the erection of buildings for the corporation—Poulson v. De Navarro, 102 N. Y. St. Rep. 177. Evidence held sufficient to show inception of a contract to plaster buildings—Disken v. Herter, 73 App. Div. (N. Y.) 453.

2. Agreement by a lumber dealer to furnish material according to plans and specifications requiring all material to be thoroughly kiln dried, smooth and straight—Utah Lumber Co. v. James (Utah) 71 Pac. 986.

3. On transfer of the premises, if the grantee assumes the payment of claims for materials, he becomes the principal debtor, and the grantor is surety, but the undertaking does not apply to a claim for materials for which the grantor is not liable—Hurd v. Wing, 76 App. Div (N. Y.) 506.

4. A person contracting for marble work to be placed in a chapel in the course of erection by a church organization becomes such a guarantor where the contract provided that the owner agreed to provide all labor and material not included in the contract in such manner as not to delay the material progress of the work and in event of failure so to do thereby causing loss to the contractor agreed that he would reimburse him for such loss—Fontano v. Robbins, 18 App. D. C. 402.

5. Question of whether the erection of smoke, heat and ventilating flues and stacks was included—Keefer v. Sunbury School Dist., 203 Pa. 334. A "complete carpenter's rig of good quality" and an "outfit of drilling tools and lines" are to be construed by the jury with the aid of expert evidence—Glenn v. Strickland, 21 Pa. Super. Ct. 88.

6. Attached to a written contract to install an automatic sprinkling system, was a writing, "We propose to furnish and install a complete wet system for the sum of $1,056, additional for tank riser, $75. We commence on the inside of the building at the foot of each riser and at the bottom of the tank to be furnished by you, additional for outside work to connect sprinkler with and leave plugs for extension post and indicator valves to control risers, for the sum of $175." Held that where the owner had a copy of the contract with the writing attached and allowed the erection of the tank, riser and outside work without objection, accepting it when completed, that the contractor was entitled to recover the sum of $250 therefor, in addition to the contract price of $1,056—General Fire Extinguisher Co. v. Mooresville Cotton Mills (N. C.) 43 S. E. 942. A clause attached to a contract to furnish an automatic sprinkler and alarm system signed only by the party agreeing to furnish the system "it is further understood that if you desire us to maintain the alarm system connection to our station longer than one year will do so at an annual expense to you of $35 per year," does not impose an obligation to furnish the connection at the price named during the pleasure of the other party—Baylies v. Automatic Fire Alarm Co., 70 App. Div. (N. Y.) 557.

7. Capacity of a stated "nominal horse power" in the absence of a technical meaning as to such terms in the trade, will be regarded as meaning a rated rather than an actually developed power in use—Heine Safety Boiler Co. v. Francis Bros. & Jellett (C. C. A.) 117 Fed. 235. Soap stone is "rock" within the meaning of a well-drilling contract—Okey v. Moyers (Iowa) 91 N. W. 771. The removal of quick-sand flowing in from the sides of an excavation may be recovered for at the agreed price per cubic yard if it is necessarily removable. (The contract stated that it would be necessary to pile the excavations, since there was a stratum of sand which it would be necessary to keep out to prevent the bank from caving)—Carroll Contracting Co. v. Gilsonite R. & P. Co. (Mo. App.) 71 S. W. 1119. Specifications for a contract of papering, requiring, "Walls to be washed or sized with good, strong glue as necessary to insure that paper will remain fast to the wall," do not bind the contractor to so treat the walls that the paper will remain fast but only to adopt the method most likely to cause it to do so—Independent School Dist. v. Swearngin (Iowa) 94 N. W. 206. A general clause in specifications requiring work to be made water tight, imposes an obligation to make the work water tight only so far as possible under the plans and specifications—Dwyer v. New York, 77 App. Div. (N. Y.) 224.

8. Utah Lumber Co. v. James (Utah) 71 Pac. 986.

9. A contractor may recover for extra work, though not agreed to in writing as specified by the specifications—Reichert v. Brown, 38 Misc. Rep. (N. Y.) 782.

Entire and severable contracts.—Where in a contract for the erection of a number of houses, each building is separately dealt with as to subject-matter, consideration, and remedy, the contract is divisible,[10] but it is not sufficient merely to require specified sums for each building.[11] An agreement to perform certain different branches of work for a lump sum amounts to an entire contract.[12]

Fraud, misrepresentation, or mistake.—A mistake in the estimates, for which the party is not responsible, does not invalidate an offer accepted by him.[13] One party may rely on representations of the other as to matters with which the first is unfamiliar and of which the second has knowledge,[14] but if the whole environment and physical conditions surrounding the work are apparent, the contractor cannot claim that he has been misled.[15] The fact that borings have been relied on by the contractor in making his bid does not entitle him to recover for extra work caused by obstructions.[16]

§ 2. *Performance of contract.*[17]—In the absence of a guaranty, compliance with plans and specifications together with performance when directed is all that can be required of a contractor,[18] and he is not responsible for unsatisfactory results.[19] If there are no particular specifications, he is bound to select proper materials and perform the work in a proper manner.[20] Performance as called for in the contract cannot be abandoned, and a more feasible plan adopted by the contractor.[21]

10. Contract to erect 86 houses, fixing a separate price of work on each house, payments to be made as enumerated in the estimate. On payment of the contract price of a house, a release of liens thereon was to be given, and in default of payment a lien might be filed for the amount unpaid, but only on the houses not paid for—Nolt v. Crow, 22 Pa. Super. Ct. 113.

11. A contract for the erection of four buildings for a specified price, seventy-five per cent. to be paid during progress of the work, twenty-five per cent. a stated time after completion, is not made a severable contract by a provision that the entire sum shall be segregated and divided in payments so as to require specified sums for each of the buildings—Wehrung v. Denham (Or.) 71 Pac. 133.

12. Agreement to decorate walls, place the wood-work, and furnish a room—Pitcairn v. Philip Hiss Co., 113 Fed. 492, 51 C. C. A. 323.

13. Mistake of $10,000 in the estimate for the erection of a building occasioned by an error in addition—Brown v. Levy (Tex. Civ. App.) 69 S. W. 255.

14. Representations leading to a contract of dredging as to the thickness of rock to be removed, made after soundings had been taken, and a chart made with which the party making the statements was familiar, are as to matters of fact, though actual measurements were not stated to have been made—Hingston v. Smith, 114 Fed. 294, 52 C. C. A. 206.

15. Contract to dredge a channel, alleged misrepresentations as to locality and depth of water—Rowland Lumber Co. v. Ross, 4 Va. Sup. Ct. R. 191, 40 S. E. 922.

16. On a contract for the sinking of piers a profile showing borings in the vicinity of each pier marked with the character and thickness of each stratum does not guaranty that the same conditions exist where the piers are to be sunk but only that they represent with substantial accuracy what was found where the borings were made—Groton B. & M. Co. v. Alabama & V. R. Co., 80 Miss. 162.

17. A contract for boilers of 140 nominal horse power not complied with by boilers rated at the shop in accordance with the usual rules as 130 horse power—Heine Safety Boiler Co. v. Francis Bros. & Jellett (C. C. A.) 117 Fed. 235. Where an original bid for construction of a building from stone, brick and terra cotta is based on specifications for iron beams and girders over window and door openings, such beams may be required on the construction of the same building from marble under an alternate bid though they were not usually required in marble buildings where the specifications for the alternate bid require the work to be done in compliance with drawings to be furnished including all necessary changes on account of the substituted construction—Miles v. United States, 113 Fed. 1011.

18. Contractor is not liable for the fact that mortar is killed by freezing—Schliess v. Grand Rapids (Mich.) 9 Detroit Leg. N. 192, 90 N. W. 700.

19. Cannon v. Hunt (Ga.) 42 S. E. 734. Where specifications for an elevator called for a ten horse power motor, the contractor may recover, though the motor was not powerful enough—Morse, etc., Co. v. Puffer, 182 Mass. 423. In assumpsit by a contractor to recover the value of certain concrete placed in a foundation according to the terms of a building contract, it cannot be shown that such concrete is without value as a foundation—Board of Com'rs v. Gibson, 158 Ind. 471. A contractor may recover the costs of reconstruction on failure to produce the desired result, where he has followed the specifications. (After the specifications was the clause "generally the work is all to be performed in a thorough and mechanical manner and rendered thoroughly water tight, all to be subject to the approval of the architect)—Dwyer v. New York, 77 App. Div. (N. Y.) 224.

20. Cannon v. Hunt (Ga.) 42 S. E. 734.

21. On agreement to drill a well, the con-

Deviation from specifications.—The contractor is liable for failure to follow plans and specifications,[22] so the owner may have damages for deviation from the material specified.[23] An engineer in charge of government work cannot consent to deviations from the plans and specifications.[24]

Substantial performance may warrant a recovery after deduction for trifling omissions,[25] though not if the contract requires strict execution.[26] The question of substantial performance is for the jury.[27]

Liability for failure to perform.—To charge the contractor, there must be a substantial failure in performance.[28] Return of the contract price does not discharge liability for breach of the contract.[29]

Damage to finished work.—Woodwork placed in a building may be recovered for though injured by the falling of the roof through the owner's negligence.[30]

Abandonment.—The contractor is not entitled to abandon the difficult portion of the work and perform the less difficult,[31] or to abandon so as to place himself in a better position, and the other party in a worse position, than were the contract fully executed.[32]

§ 3. *Modification of contract.*—A new contract to take less than the price previously specified or to do the work at the contractor's risk must be on a new consideration.[33] Settlement of a dispute may be a sufficient consideration.[34] On substitution of a contract in which a price is not specified, the price provided by the original contract cannot be recovered.[35]

tractors are not entitled to drill a second hole though without charge for a first which they abandoned by reason of a drill rod having been broken and lodged therein. The contractors were bound to prosecute their work with reasonable diligence and care, and if that was not done were not entitled to drill a second hole if water was not found in the first, the other party having agreed to board the employees and furnish the teams necessary for the work—Peacock v. Gleason (Iowa) 90 N. W. 610.

22. Sarrazin v. Adams (La.) 34 So. 301. Recovery cannot be had in the absence of a waiver of non-performance where the contractor has substituted inferior workmanship and materials in place of those required and effected saving to himself and damage to the owner by making changes and omissions—D'Amato v. Gentile, 100 N. Y. State Rep. 832.

23. It is immaterial that the materials used be equally as good as those specified—Cannon v. Hunt (Ga.) 42 S. E. 734. It is an open violation of the contract to fail to follow the plans and specifications, using poor material, leaving the floors so far from level that the furniture leaned forward or to the side, so that the roof leaked and the doors and windows could not be closed, and if the contract was for the payment of $2,800, $1,100 may be reserved by the owner to place the house in repair—Sarrazin v. Adams (La.) 34 So. 301.

24. If a government contract provide that the plans and specifications cannot be changed except on written order of the bureau of yards and docks, the consent to deviations from the specifications by the engineer in charge with power to reject materials and work unsuitable or variant from the plans and specifications does not operate as a waiver or estoppel, relieving the contractors from liability to the government for deviations—United States v. Walsh, 115 Fed. 697, 52 C. C. A. 419.

25. Perry v. Levenson, 82 App. Div. (N. Y.) 94.

26. When the trial court found that there had been a failure to the extent of one-seventh of the value of the contract price it was error to find substantial performance and render judgment for the contract price less one-seventh—Mitchell v. Williams, 114 N. Y. St. Rep. 864.

27. Evidence of defects in woodwork necessitating an expenditure of $500 on a contract to do woodwork and decorate the walls of a room for $5200—Pitcairn v. Philip Hiss Co., 113 Fed. 492, 51 C. C. A. 323.

28. Contract to procure and supervise the erection of a house—Anderson v. Harper, 30 Wash. 378, 70 Pac. 965.

29. Provisions for the removal of machinery in event it should prove unsatisfactory, on return of the money to be paid therefor, do not limit the builder's liability on failure to perform to the return of the money received—Harrison v. Murray Iron Works Co., 96 Mo. App. 348.

30. Teakle v. Moore (Mich.) 9 Detroit Leg. N. 371, 91 N. W. 636.

31. Sewer contract provided for weekly allowances by the engineer in charge. Held, that the contractor could not suspend work in loose soil where he had encountered difficulties and recover for subsequent excavation in rock ground—National Contracting Co. v. Com. (Mass.) 66 N. E. 639.

32. A contractor for a sewer system for a city, the city not being at fault, cannot abandon the work at a stage selected for his benefit—Brown v. Baton Rouge, 109 La. 967.

33. Contract for drilling a well—Wendling v. Snyder (Ind. App.) 65 N. E. 1041.

34. Where a plumber refused to replace portions of the work which had been stolen unless paid therefor and the owners told him to continue the work and they would pay him—Innes v. Ryan, 37 Misc. Rep. (N. Y.) 806.

35. A contract to construct an electric

§ 4. *Changes in plans and specifications.*—The fact that detailed drawings are to be furnished at a later date does not authorize a change in the plans.[36] A requirement of a written order of the architect for alteration does not necessitate such an order on a mere change in the parties doing the work.[37] A provision that the engineer in charge may make alterations if demanded by emergencies is not to be regarded as imposing an obligation to make alterations.[38] If the engineer has full authority to order necessary changes, the contractor must make them, though the action of the engineer is not reasonable.[39]

Provisions that alterations and additions to a contract must be settled and agreed on in writing may be waived by either party so far as they are for his benefit.[40]

§ 5. *Extra work.*—Recovery for extra work cannot be had in the absence of an express or implied consent thereto.[41] A promise to pay a claim for extra work clearly provided for in the specifications is without consideration.[42] A contract for additional compensation precludes a claim that the work was within the intendment of the original contract.[43] The contractor cannot charge for extra work rendered necessary by his faulty performance.[44]

A provision, in general specifications for bidding, that the price of extra work must be agreed on in writing before it is commenced, does not apply to extra work done under a branch of the contract, in the specifications for which there is no such provision. Where extra work is to be allowed only if done pursuant to the order of the architect and notice of claims therefor is required to be given him, the order only is essential to recovery.[45] Claim of compensation for changes need not be made at the time they are ordered.[46]

Where work done outside the original contract is accepted, it should be paid for at the rate originally contemplated,[47] and recovery is not limited to the actual cost of labor and materials;[48] but where the main contract fixes an aggregate

light plant with a three wire system for a stated price, substitution of a two wire system—Davis v. Bingham, 39 Misc. Rep. (N. Y.) 299.

36. A provision for the furnishing of detailed drawings in future, and that anything omitted in the specifications and shown on the drawings, or vice versa, was to be done without extra charge, does not authorize a change in the plans—Dwyer v. New York, 77 App. Div. (N. Y.) 224.

37. Drumheller v. American Surety Co., 30 Wash. 530, 71 Pac. 25.

38. Such provision in a sewer contract held to be for the benefit of the commonwealth only—National Contracting Co. v. Com. (Mass.) 66 N. E. 639.

39. Under a provision that the engineer in charge might direct necessary modifications of a sewer contract and order additional supports at the contractor's expense if proper ones were not furnished, the engineer may order oak ribs to be used instead of pine ones though the contract called for the use of spruce lumber at such points and of such descriptions as the engineer might direct—National Contracting Co. v. Com. (Mass.) 66 N. E. 639.

40. The question of waiver of a requirement of a description in writing of alterations in a building contract is for the jury —Copeland v. Hewett, 96 Me. 525. Obtaining of a written order from the architect as required by the contract for deviation from the specifications may be waived by the presence and consent of the owner at the time of deviation—Perry v. Levenson, 82 App. Div. (N. Y.) 94. Oral directions for alterations acted on by the contractor operate as a waiver of a requirement in the contract of written evidence to charge the owner—Crowley v. United States F. & G. Co., 29 Wash. 268, 69 Pac. 784.

41. Niemeyer v. Woods, 110 N. Y. St. Rep. 563.

42. Under specifications requiring foundation to go deeper than shown on the drawings if necessary to reach natural undisturbed earth work done under the level shown by the drawings cannot be charged for as extra work—Wear v. Schmelzer, 92 Mo. App. 314.

43. Contract between county commissioners and a court house building contractor—Board of Com'rs v. Gibson, 158 Ind. 471.

44. Columns to support a balcony—Vanderhoof v. Shell (Or.) 72 Pac. 126.

45. Extra carpenter work—Teakle v. Moore (Mich.) 9 Detroit Leg. N. 371, 91 N. W. 636.

46. The contract provided for extra compensation in such case—Essex v. Murray (Tex. Civ. App.) 68 S. W. 736.

47. Contract for lowering the bed of a tail race—Malloy & Boggs v. Lincoln Cotton Mills (N. C.) 43 S. E. 951.

48. A reasonable profit may be recovered —Venable Const. Co. v. United States, 114 Fed. 763.

price, the price paid thereunder for similar labor and material cannot be regarded as fixing the price paid for extra work which must be measured by its cash market value.[49]

§ 6. *Delay in performance.*—A provision in a building contract intending to prevent forfeiture for delay should be upheld if possible.[50] Where no time is specified, the work must be begun or prosecuted within a reasonable time,[51] and the contractor is bound to complete the work within a reasonable time only.[52]

Delay occasioned by a strike will not prevent recovery on the contract where the owner has taken no steps at the time to complete the work or terminate the contract under a right conferred on him therein, and there being no time limit fixed in the contract.[53]

A stoppage of work occasioned by a delay of the architect in passing on completed work which would be covered up by further work is not a breach of the contract.[54]

The owner cannot defend on the ground of delay caused by his fault.[55] Failure to make payments as required prevents the enforcement of a penalty for failure in timely completion of the work.[56] Demand by the contractor for allowance for delay occasioned by the owner need not be made in writing of the architect, where the architect assured the contractor that he was entitled to the amount of time demanded.[57]

Waiver of delay or extension of time.—Where the owner has gone into possession while the contractors are at work, she cannot recover for a delay in delivery.[58] Completion at the time specified may be waived by allowing the contractor to continue without objection and assisting him in completion,[59] and where the contractor undertakes work relying on representations of the other party that it would be less difficult than it afterward proved to be, and the work is accepted and used, though more time was required than contemplated, there is an implied extension of time of completion.[60]

Liquidated damages.—In computing the time of delay for which the owner is entitled to damages, deduction should be made of the time for which the con-

49. Board of Com'rs v. Gibson, 158 Ind. 471.

50. King v. United States, 37 Ct. Cl. 428.

51. Andrae v. Watson (Tex. Civ. App.) 73 S. W. 991.

52. Contract for the construction of an annex to a building—Krause v. Board of School Trustees (Ind. App.) 66 N. E. 1010.

53. Three weeks' delay—Happel v. Marasco, 37 Misc. Rep. (N. Y.) 314.

Strike as excuse for non-performance. (Note.) The contractor is not excused because of a strike of laborers affecting the building operations (Hammon, Cont. p. 827; Budgett v. Bennington [Eng.] 1 Q. B. 35), but it is common to insert a "strike clause" in such contracts by which the contractor is relieved in case of a strike. When the time of performance is not specified, the performance, though delayed by a strike, may still be regarded as within a reasonable time under the circumstances (Hammon, Cont. p. 828; Pittsburg, etc., R. Co. v. Hallowell, 65 Ind. 188; Geismer v. Lake Shore R. Co., 102 N. Y. 563.)

54. A petition setting up the facts attendant on such a stoppage held not demurrable as showing a breach of the contract by plaintiff—McClellan v. McLemore (Tex. Civ. App.) 70 S. W. 224.

55. Ocorr, etc., Co. v. Little Falls, 77 App. Div. (N. Y.) 592. The delay was caused by the owner's violation of the building department's requirements and his desire that improvements on a seventh story should be finished before the sixth, and the owner had made no serious complaint about delay and also the season had been unusually wet—Perry v. Levenson, 82 App. Div. (N. Y.) 94.

56. Harris' Assignee v. Gardiner, 24 Ky. Law Rep. 103, 68 S. W. 8.

57. The architect was also the owner's superintendent—Vanderhoof v. Shell (Or.) 73 Pac. 126.

58. Sarrazin v. Adams (La.) 34 So. 301.

59. On subletting a grading contract, the principal contractor reserved the right to place an additional force on the work if he was of the opinion that enough men were not being employed to complete it within the specified time, and deduct the cost from the contract price. Held, that the action of the principal contractor in placing on his own men and teams after the specified time was a waiver—McArthur v. Whitney, 202 Ill. 527.

60. Representations leading to a contract to lower the bed of a tail race—Malloy & Boggs v. Lincoln Cotton Mills (N. C.) 43 S. E. 951.

tractor was delayed by the owner,[61] and delay occasioned by unavoidable contingencies where the contract is made subject thereto.[62] Sundays are not to be deducted.[63]

§ 7. *Termination or cancellation of contract.*[64]—Destruction of a building terminates a contract for the construction of an annex thereto.[65]

If the contract makes an architect's certificate a condition precedent to the right to terminate the contract, it must be strictly complied with.[66]

Provisions in a government contract authorizing the engineer in charge to annul it if the work be not faithfully prosecuted, and authorizing him to employ such additional labor as may seem essential to secure the completion of the work, are distinct.[67]

The owner is not the sole judge of proper performance, though the contract authorize its cancellation in case the work is not carried on rapidly enough or in accord with the specifications.[68] A parol agreement to increase weekly payments to a subcontractor in case more men are employed prevents the cancellation of the contract in case the amount subsequently paid is not enough to pay the extra men, and they strike for a single day.[69]

§ 8. *Completion by owner or third person.*[70]—Provisions for completion on default of the contractor are not regarded as creating forfeitures and to be construed strictly against the owner.[71] The owner is not bound to exercise the privilege to complete the work.[72] He may, without waiving his rights, make such changes as are usually made in good faith during construction.[73] Where it is provided that in completion the owner may use materials brought on the ground

61. Delay occasioned by a change in plastering from mortar to adamant—Vanderhoof v. Shell (Or.) 72 Pac. 126.

62. Pressed Steel Car Co. v. Eastern R. Co. (C. C. A.) 121 Fed. 609.

63. Vanderhoof v. Shell (Or.) 72 Pac. 126.

64. Where a sewer contractor refuses to uncover pipe which the chief engineer believes has been placed on the wrong grade, the engineer is entitled to have it done by other parties, and such is not an ousting of the contractor from the work, the contract providing that the engineer's orders are to be obeyed—Brown v. Baton Rouge, 109 La. 967.

65. Contract held to contain an implied condition that the whole building should continue to exist until full performance of the work thereunder—Krause v. Board of School Trustees (Ind. App.) 66 N. E. 1010.

66. If the contract requires a certificate from the architect that the contractor has not properly performed and that his neglect is sufficient ground for a termination of the employment, a certificate that the work is not being properly performed and that the owner may take such action as he deems best is not sufficient—White v. Mitchell (Ind. App.) 65 N. E. 1061. A private letter written to the owner and not communicated to the contractor will not justify a rescission—Wilson v. Borden (N. J. Err. & App.) 54 Atl. 815. A provision that after three days' notice the owner, in the case of default of the contractor in furnishing labor or material, might supply it, and if the architect certify that it was sufficient ground could terminate the employment of the contractor, requires three days' notice of intention to terminate the contract as well as of intention to furnish material and labor—McClellan v. McLemore (Tex. Civ. App.) 70 S. W. 224. If in a government contract it is provided that the contract may be annulled by notice in writing from the engineer in charge, it is questionable whether a notice from the engineer's superior officers will effect the annulment—King v. United States, 37 Ct. Cl. 428..

67. Exercising the right to employ additional labor in such a way as to interfere with the contractor's completion of the work, excludes the right to annul the contract—King v. United States, 37 Ct. Cl. 428.

68. Cancellation by him is not justified if the work in fact is being performed as called for in the contract—Hoyle v. Stellwagen, 28 Ind. App. 681.

69. Though the contract authorized cancellation if the sub-contractor got in arrears with his portion of the work—O'Dwyer v. Smith, 38 Misc. Rep. (N. Y.) 136.

70. Where the contract is abandoned after the owners have refused to pay an installment by reason of failure to substantially complete a building, the owners may complete it and hold the contractors for the necessary expense—Hansen v. Hackman, 37 Misc. Rep. (N. Y.) 290.

71. Though it is provided that in finishing the building the owner may use materials placed on the ground by the contractor and account to the contractor for the difference between the cost of completion and the unpaid contract price—Duplan Silk Co. v. Spencer (C. C. A.) 115 Fed. 689.

72. Failure to do so does not constitute a waiver of the contractor's default—Mitchell v. Williams, 114 N. Y. St. Rep. 864.

73. Delray Lumber Co. v. Keohane (Mich.) 9 Detroit Leg. N. 494, 92 N. W. 489.

by the contractor, the owner is regarded as having a qualified right of property in such materials,[74] though the mere fact that the contractor has gotten together material for the purpose of the contract does not give the other party any property therein or entitle him to enjoin the removal of the same.[75] If the owner takes over the working plant of the contractor without right, he is liable for the reasonable value of its use.[76]

Where the owner completes the building on abandonment by the contractor under a right reserved, the contractor is entitled to any balance of the contract price over the cost of completion.[77]

§ 9. *Architects' and other certificates of performance.*—An architect's certificate for payment is not issued until delivered to the contractor.[78] It is conclusive in the absence of fraud, the burden of proof of which is on the owner.[79]

Where an architect's certificate is refused in bad faith, recovery may be had without it,[80] and the requirement of a final certificate may be waived.[81] Absence of certificate will not prevent a recovery where no reason appears why the architects have refused it,[82] or where the owners enjoy every advantage of the contractor's work which they would obtain were a stipulated certificate granted,[83] so failure to procure a certificate required will not defeat assumpsit.[84]

Giving of certificates for partial payments does not preclude the pleading of defects as against an action to recover a final payment though the defects were in work done before the last instalment certificate was given.[85]

§ 10. *Arbitration of disputes.*[86]—Where not otherwise expressed or necessarily to be implied from the terms of a contract, an agreement for the submission of

74. They are regarded as being delivered into the possession of the owner in such a manner as to become surety for the advances made by him on the contract—Duplan Silk Co. v. Spencer (C. C. A.) 115 Fed. 689.

75. Material for a street railroad—Cameron v. Orleans & J. R. Co., 108 La. 83; Orleans & J. R. Co. v. International Const. Co., 108 La. 82.

76. A railroad construction company took over the working plant of a firm of contractors under the protection of an injunction, claiming to have the right to do so under the terms of the contract because of the contractor's default, but it was afterward adjudged not to have such a right—Champlain Const. Co. v. O'Brien, 117 Fed. 271, 788.

77. The work being regarded as done under the contract—White v. Livingston, 69 App. Div. (N. Y.) 361.

78. The architect made the certificate, sent it to the owner who objected to an allowance for certain work and the architect thereupon retained it—Wear v. Schmelzer, 92 Mo. App. 314.

79. Schultze v. Goodstein, 115 N. Y. St. Rep. 946.

80. Refusal based on failure to perform within the specified time—Perry v. Levenson, 82 App. Div. (N. Y.) 94.

81. It was provided that the architect should be the superintendent of the building, should be an arbiter between the parties, and could reject any work not complying with the specifications, and during the progress of the work, he inspected and approved it and made directions for corrections which were complied with, and the owner, architect and contractor agreed to the acceptance of the building subject to certain alterations—Vanderhoof v. Sheil (Or.) 72 Pac. 126. Where the owner has declared a forfeiture of the contract and begun completion of the building, provisions as to the obtaining of an architect's certificate need not be complied with before an action on the contract—Ocorr, etc., Co. v. Little Falls, 77 App. Div. (N. Y.) 592.

82. Contractors had made a substantial performance—Happel v. Marasco, 37 Misc. Rep. (N. Y.) 314.

83. Contract to equip a factory with a sprinkling system, price to be payable when a certificate should issue by a board of fire underwriters, and the board, though certifying that the contractor had fully performed, refused to grant the certificate because the water supply at the factory was insufficient and the factory was beyond the reach of an organized fire department—New York & N. H. Sprinkler Co. v. Andrews, 173 N. Y. 25.

84. Certificate as to the value of extra work in an action therefor—Board of Com'rs v. Gibson, 158 Ind. 471.

85. The final payment was to be made 15 days after the building was completed, delivered and accepted on certificate of the architect, "such certificate to be final and conclusive that the work done warranted said payments"—Blanchard v. Sonnefield (C. C. A.) 116 Fed. 257.

86. A stoppage of work occasioned by the failure of the architect to act with regard to the acceptance of work already done, and by the need to avoid covering up such work before settlement, presents a proper subject for arbitration within a clause of a contract providing for the arbitration of disputes between the contractors and the architect—McClellan v. McLemore (Tex. Civ. App.) 70 S. W. 224. Provisions for arbitration as to the value of changes or for

claims to arbitration is collateral and a breach cannot be pleaded in bar to an action on the contract itself.[87] Where a method of adjustment for extra work is provided in the contract, the contractor is not justified in abandoning without resort to such method.[88] A stipulation that findings of the engineers in charge as to the fulfillment of the contract shall be conclusive is not an attempted ouster of the courts of jurisdiction.[89] Where it is provided that architects designated by a firm name shall be arbiters, a member of the firm whose name does not appear in the firm name may act.[90]

A provision for arbitration as to extra work cannot be availed of by the owner where he has made no demand or offer of arbitration and has not taken steps to select arbitrators,[91] and an agreement or arbitration is not a condition precedent to a recovery if there is no question as to the reasonableness of the charges.[92] Provisions as to the finality of the decision of an arbitrator do not apply when the contract is rescinded.[93]

§ 11. *Acceptance.*[94]—The fact that a tenant is allowed to enter and use a building does not amount to an acceptance.[95] Entry after the stipulated time for completion is not a waiver of defects though ascertainable by the exercise of ordinary care.[96] Use of building material without discovery of latent defects does not prevent a subsequent assertion of breach of the contract.[97] The owner's supervision does not prevent refusal to accept finished work, the contractor having made no attempt to remedy defects then pointed out.[98] An agreement that the employer shall determine all questions, as to performance of work done after plans and specifications, does not entitle him to reject the work arbitrarily.[99] Recovery

damage occasioned by the contractor's delaying the progress of the work, do not require the submission to arbitrators of damages for failure to complete at the specified time, where liquidated damages for each day of such delay are provided—Drumheller v. American Surety Co., 30 Wash. 530, 71 Pac. 25. Under a clause providing for arbitration of matters in dispute, is included a dispute as to whether a recovery cannot be had for the entire amount of stone specified, though the whole amount was not delivered because rendered unnecessary by reason of rock foundation being found sooner than anticipated—Wymard v. Deeds, 21 Pa. Super. Ct. 332.

87. A provision for the arbitration of disputes concerning allowances for alterations does not make an arbitration a condition precedent to an action based on a distinct provision for the reimbursement of the contractor for delays, though the latter provision states that the amount of the contractor's loss through delay shall be fixed by the architects or by arbitration as provided in the first provision—Fontano v. Robbins, 18 App. D. C. 402.

88. A sewer contract agreed that in case of cavings of banks and errors in grade, the chief engineer of the city should adjust the claims and that expenditures and losses should be charged as provided for in the contract—Brown v. Baton Rouge, 109 La. 967.

89. Held to be within the rule allowing stipulations that actions shall not be brought until performance of certain acts by a third person—National Contracting Co. v. Hudson River Water Power Co., 170 N. Y. 439.

90. Such person was the architect in charge and recognized as such by both parties—Wymard v. Deeds, 21 Pa. Super. Ct. 332.

91. Evidence held insufficient to show a demand of arbitration by defendant and refusal by the plaintiff—Van Note v. Cook, 55 App. Div. (N. Y.) 55.

92. Essex v. Murray (Tex. Civ. App.) 68 S. W. 736.

93. Action for damages for the loss of a contract and not for work done thereunder in reference to a railroad contract making the decision of the engineer final as to disputes and waiving the right to sue at law —Dobbling v. York Springs R. Co., 203 Pa. 628.

94. An unequivocal acceptance results from delivery of keys to the owner and his taking possession subject to an agreed list of alterations subsequently performed by the contractor to the satisfaction of the architect—Vanderhoof v. Shell (Or.) 72 Pac. 126.

95. Mitchell v. Williams, 114 N. Y. St. Rep. 864.

96. Cannon v. Hunt (Ga.) 42 S. E. 734.

97. Utah Lumber Co. v. James (Utah) 71 Pac. 986.

98. The contract provided that the work should be done to the owner's satisfaction in a perfect and workmanlike manner and should be accepted by him—Mitchell v. Williams, 114 N. Y. St. Rep. 864.

99. The issue of substantial performance may be raised in an action for the contract price—Schliess v. Grand Rapids (Mich.) 9 Detroit Leg. N. 192, 90 N. W. 700.

may be had where the owner has agreed to accept a certain sum for a minor default in performance and agreed on the balance due.[1]

Acceptance and acquiescence of the engineer in charge, or final acceptance by an inspecting board, are not conclusive in the case of government contracts.[2]

§ 12. *Payment.*—Where a contract provides that a stated sum shall be paid within a specified time after a section of the work is completed, a payment not in excess of such sum cannot be refused on the ground that with the payments already made it will amount to more than the sum for which the work on that particular section was to be done under the contract.[3] A provision for the retention of money to indemnify the owner against any lien chargeable to the subcontractor entitles the retention of the amount of a judgment on a subcontractor's lien,[4] but a lien for material furnished by the owner does not come within a requirement that final payments shall not be made until the owner is satisfied that no liens have been placed on the property.[5]

An admitted liability may furnish a good consideration for an agreement to allow a deduction of an off-set for damages.[6]

§ 13. *Subcontracts.*—The contractor may be liable for a breach of a subcontract though the owners may have a good defense against the subcontractor.[7] A subcontractor may, by acting on his contract after knowledge of the insolvency of the general contractor, be prevented from disaffirming his agreement.[8]

A contract providing for payment of a subcontractor on his furnishing to the original contractor releases of all liens and claims which might arise under the subcontract is complied with by a showing that no mechanic's liens can attach.[9]

Extra work by subcontractor.—The fact that a subcontractor is required by the contract to omit specified work, or do extra work at the direction of the owner or architects, does not prevent the subcontractor from doing extra work at the direction of the principal contractor.[10] A promise to pay a subcontractor after he had done work outside his contract and not within the principal contract is without consideration on the part of the contractors.[11]

1. Roussel v. Mathews, 62 App. Div. (N. Y.) 1.

2. The government after payment and acceptance may hold contractors liable for defects where the final test was made under conditions which did not permit structural departures from the specifications to be discovered, and acceptance was in ignorance of facts which would have occasioned a refusal, the contract requiring that specifications should not be changed except on written order of the bureau in charge and by written agreement—United States v. Walsh, 115 Fed. 697, 52 C. C. A. 419.

3. Contract for completion of electrical work on a building for $725, such building being erected in two sections, provided that payment for labor should be made twice a week during the progress of the work and for material within 30 days after the receipt of the same, and that as there was immediate need of the first section $400 should be due within 10 days from the completion of the electrical work therein. $301 was paid for the first two weeks' work. Held, that refusal of a payment of $78 thirty days later, of which $63 was for labor, was not justified as to the labor by reason of the fact that it was in excess of the sum for which plaintiff was to do the work on the first section—Mullin v. Langley, 37 Misc. Rep. (N. Y.) 789.

4. Wear v. Schmelzer, 92 Mo. App. 314.

5. Vanderhoof v. Shell (Or.) 72 Pac. 126.

6. Admission of liability for an injury to a heating system in a building may operate as an off-set to the contractor's action for a balance due for work on the building, though the injury was caused by negligence of an independent contractor employed by plaintiff—McClure v. Lorain County Com'rs, 24 Ohio Cir. Ct. R. 72.

7. Agreement that work should not be sub-let without the architect's consent, and that all materials should be submitted to him, and failure by the subcontractor to comply with such requirement—Herry v. Benoit (Tex. Civ. App.) 70 S. W. 359.

8. The subcontractor failed to repudiate, called on the owner for aid in collecting purchase money and filed a mechanic's lien—University of Virginia v. Snyder (Va.) 42 S. E. 337.

9. Turner v. Wells, 67 N. J. Law, 572.

10. On a contract to set arch blocks on all floors except the ground floor in accordance with specifications, the sub-contractor may recover as for extra work for setting arch blocks in a basement floor on the street level of one frontage which was frequently referred to in the specifications as the basement or ground floor—Isaacs v. Dawson, 70 App. Div. (N. Y.) 232.

11. Majory v. Schubert, 115 N. Y. St. Rep. 703.

Withholding of payments for benefit of subcontractor.[12]—Action may be brought on an agreement to retain from the contractor money for the protection of a materialman before completion of the contract,[13] but on a contract to retain payments to be made a principal contractor and pay them, at the time of payments to a materialman, the materialman is not entitled to payment though he has furnished all the material if the principal contract has not progressed far enough to entitle the principal contractor to payment.[14]

Rights on default by subcontractor.—Where a contract provides that, on default in the furnishing of material, other material may be secured after five days' notice, the reasonableness of the action in terminating the contract is not involved; the contractors have the right to secure substantially the same material, and may purchase it from stock at greater than mill prices, if to have it manufactured would necessitate considerable delay.[15] A materialman agreeing to furnish inspectors cannot complain that he is not notified of their appointment.[16]

§ 14. *Bonds.*—Requirement that bond shall be given to secure performance of the contract does not require the owner to accept a bond requiring him to perform additional acts for the protection of his sureties.[17] Agreement to give a bond will not prevent recovery if it is found by the referee that the objection that the bond was not given was a mere subterfuge to avoid payment.[18] Laborers and materialmen are proper parties to a suit to enforce a bond exacted of a contractor for the payment of materials and wages.[19]

§ 15. *Remedies and procedure.*—An action may be brought for breach of contract though the owner has retained an amount stipulated as demurrage.[20] The owner's remedy on completion after abandonment by the contractor is an action for damages for breach of contract.[21] Where the contractor has refused to accept a small amount due on the contract, tendered by the owner, he cannot urge default in regard thereto as a defense to an action for breach.[22] A bill may be a sufficient demand.[23]

Recovery in general assumpsit or on quantum meruit.—Where nothing remains to be done under a special contract except payment of the amount due, recovery

12. An agreement by a mortgagee to withhold moneys coming into his hands for the owner for the purpose of paying them to a subcontractor, in case he will continue to supply materials, renders the mortgagee liable to the subcontractor with whom the agreement was made in case he pays such moneys over to the owner—Prata v. Green, 70 App. Div. (N. Y.) 224. An agreement to furnish materials to a contractor is a sufficient consideration for a promise by a third person to retain enough of the money due on the contract to pay the person furnishing the materials—Roussel v. Mathews, 62 App. Div. (N. Y.) 1.

13. Roussel v. Mathews, 62 App. Div. (N. Y.) 1.

14. Young v. Smith, 202 Pa. 329.

15. In this case 30 days had elapsed after the time limited for performance before the notice called for was given and manufacture would have consumed from 4 to 6 months—Christopher, etc., Co. v. Yeager, 202 Ill. 486.

16. The materialman was required to furnish shop drawings and the inspectors, without whose approval no work could be done, were appointed as soon as the shop drawings were approved—Christopher, etc., Co. v. Yeager, 202 Ill. 486.

17. The owner need not accept a bond requiring him to give immediate notice in writing to the surety of default by the principal and to institute any suit on the bond within six months after the work is completed—Brown v. Levy (Tex. Civ. App.) 69 S. W. 255.

18. Disken v. Herter, 73 App. Div. (N. Y.) 453.

19. Gastonia v. McEntee-Peterson Engineering Co., 131 N. C. 363.

20. Ramlose v. Dollman (Mo. App.) 73 S. W. 917.

21. Plaintiff cannot recover the contract price and cost of foundation on the common counts where defendant has abandoned a contract to erect a monument on a foundation prepared by him, and plaintiff has furnished the foundation and erected the monument—Wigent v. Marrs (Mich.) 9 Detroit Leg. N. 158, 90 N. W. 423.

22. Ramlose v. Dollman (Mo. App.) 73 S. W. 917.

23. Presentation of a bill by a subcontractor to a contractor on the contractor's rescission of his contract, followed by an admission that the bill was correct and delivery of a writing stating the rescission of the contract and fixing the amount due the subcontractor, shows a legal demand and

may be had on a common count for work and labor.[24] Where a contractor, without his fault, is prevented by the owner from completing, he may recover on a quantum meruit,[25] or on refusal of the owner to pay an instalment when due as required by the contract,[26] or on termination of the contract by inevitable casualty before full performance, if payment was to be made as the work progressed.[27] If work done under an express contract is accepted and used, recovery may be had on a quantum meruit though it is not done according to contract.[28] Completion of the work after an action commenced does not allow a recovery.[29] If the contractor rescinds for default of the other party, he may only recover on a quantum meruit.[30]

Where the contractor has canceled his written contract against the will of a subcontractor, the subcontractor may sue on a quantum meruit for the work and labor actually done, and need not tender the contractor what has already been paid.[31]

Pleading.—If plaintiff desire to disregard an invalid portion of the contract, the petition must be drawn on the theory that the contract is severable.[32] The complaint must show performance,[33] though performance of conditions not precedent to demand of performance of the other party need not be pleaded.[34] Waiver of provisions of the contract must be pleaded.[35] The elements of damages should be alleged.[36]

refusal to pay and it cannot be objected that claimant was not entitled to payment at the time of demand—South End Imp. Co. v. Harden (N. J. Ch.) 52 Atl. 1127.

24. On an express contract for construction of a sidewalk recovery after abandonment cannot be had on a quantum meruit, unless it is shown that the work rendered and the material furnished was of value to and accepted by defendant, which question is for the jury—Roskilly v. Steigers, 96 Mo. App. 576. Especially where the contract only fixes a maximum price—Board of Com'rs v. Gibson, 158 Ind. 471; Zapel v. Ennis, 104 Ill. App. 175.

25. Day v. Eisele. 76 App. Div. (N. Y.) 304. On wrongful prevention of completion, if the contractor elect to treat the contract as rescinded, the reasonable value of the work done may be recovered, if there is no provision for an apportionment of compensation—George M. Newhall Engineering Co. v. Daly (Wis.) 93 N. W. 12.

26. White v. Livingston, 69 App. Div. (N. Y.) 361.

27. Krause v. Board of School Trustees (Ind. App.) 66 N. E. 1010.

28. Plumbing—Gross v. Creyts (Mich.) 9 Detroit Leg. N. 199, 90 N. W. 689. On a contract to construct a heating plant, the contractor may recover for services rendered on a quantum meruit less the damages occasioned by his breach—McKnight v. Bertram H. & P. Co., 65 Kan. 859, 70 Pac. 345.

29. Riddell v. Peck-Williamson H. & V. Co., 27 Mont. 44, 69 Pac. 241.

30. Person v. Stoll, 72 App. Div. (N. Y.) 141.

31. O'Dwyer v. Smith, 38 Misc. Rep. (N. Y.) 136.

32. Laclede Const. Co. v. Tudor Iron Works, 169 Mo. 137.

33. Where work is required to be done according to the plans, specifications and requirements of an engineer, a petition is demurrable which does not allege that petitioner performed according to the requirements of the supervising engineer or set forth facts excusing him—National Contracting Co. v. Com. (Mass.) 66 N. E. 639. It is not sufficient to show performance of a condition precedent to a right to terminate the contract to aver "that plaintiff had done and performed all the agreements, provisions and stipulations to be by him done and performed by the terms of said contract"—White v. Mitchell (Ind. App.) 65 N. E. 1061. Under a contract providing that weekly payments should be made on estimates of the engineer in charge, but that such estimates should be made only when the work progressed in accordance with the contract, a petition which does not allege that the express agreement was complied with is demurrable—National Contracting Co. v. Com. (Mass.) 66 N. E. 639. A petition for damages for breach of contract, in that the engineer in charge had failed to make alterations in the plans of work, though an emergency had arisen by reason of the material around the tunnel not permitting an excavation and the refilling of it be done under air pressure, is defective if it fail to allege that air pressure was necessary to prevent changes in the ground water line, the contract providing that alterations should be made if demanded by an emergency and that work be done under air pressure when necessary to prevent changes in the adjacent ground water line—National Contracting Co. v. Com. (Mass.) 66 N. E. 639.

34. The owner need not plead performance of the conditions of the contract in an action by him for breach, where it was stipulated that payments should depend on the progress of the work, and on presentation of certificates from the architect as to performance—Ramlose v. Dollman (Mo. App.) 73 S. W. 917.

35. Waiver of provisions for a written order of the architect for alterations must

A defense that plaintiff has not complied with an essential condition precedent is not demurrable.[37] Where the complaint is assumpsit for extra work outside a building contract, it is not sufficient answer to aver execution of the original contract.[38] Where the complaint alleges a contract to erect a building, it is but a partial defense to allege a contract to furnish certain portions of the building which was taken out of defendant's hands in violation of the agreement.[39] Special notice is not needed to allow proof of nondelivery of materials.[40] By statute it may become unnecessary to traverse a different contract set up by answer.[41]

Variance.—The pleadings and proof must correspond.[42]

Evidence.—The burden is on defendant to show failure to complete the work within the agreed time.[43] Plaintiff's failure to prove the expense of completion may be supplied by defendant's evidence.[44] In an action for extra work, evidence of the cost thereof is inadmissible which does not show its amount or value under the terms of the contract;[45] the contractor must introduce the original contract.[46] In an action on a contract and not a quantum meruit, the right to recover is not affected by evidence of value to the defendant,[47] other rulings as to the admissibility of evidence are collected in the notes,[48] as are holdings as to sufficiency.[49]

be pleaded—Essex v. Murray (Tex. Civ. App.) 68 S. W. 736.

36. Action for failure to permit a contractor to perform should allege the character and amount of labor done by plaintiff preparatory to the work, the fact that a profit would have been made and the amount thereof—Andrae v. Watson (Tex. Civ. App.) 73 S. W. 991.

37. Averment in an answer of a clause providing that the decision of the supervising engineers as to the fulfillment of the contract should be conclusive, and that the contractor has not obtained such decision or requested defendant to obtain it—National Contracting Co. v. Hudson River Water Power Co., 170 N. Y. 439.

38. Complaint alleged that the work was in addition to the work required by the original contract—Board of Com'rs v. Gibson, 158 Ind. 471.

39. Where no denial of the allegations of the complaint was made, an answer setting up such facts as a complete defense was demurrable but was good as a counterclaim —Ivy Courts Realty Co. v. Morton, 73 App. Div. (N. Y.) 335.

40. In an action to recover under a contract to furnish stone, defendant may without special notice show that it became unnecessary to use the rock anticipated, and plaintiff having been notified did not deliver it, though he claimed for the entire amount specified by the contract—Wymard v. Deeds, 21 Pa. Super. Ct. 332.

41. In an action for breach of a contract to pay for certain floor arches, an answer which alleges a written agreement by which payment was guaranteed by defendant only of a certain portion of the price of setting up such arches, is under Code Civ. Proc. § 522, regarded as traversed without a reply so that fraud may be proven in avoidance of the agreement—Nesbit v. Jencks, 81 App. Div. (N. Y.) 140.

42. Where the complaint alleges simply a contract, the answer avers the execution of a written contract and the reply admits the execution of a contract as set forth in plaintiff's complaint, and plaintiff on the trial admits that he made the written contract attached to the answer, evidence of an oral modification on a subsequent day may be rejected as variance—Duval v. American Telep. & Teleg. Co., 113 Wis. 504. Under an allegation that a tram-way as constructed was defective, unsafe and not of the kind agreed on, it may be shown that the tramway was defective in that it was more destructive to the cable used than was the tram-way which it replaced—Lipscomb v. South Bound R. Co., 65 S. C. 148. Under allegations in an action for damage occasioned by falling of plaster, that the materials furnished were not good and the work was not performed in a workmanlike manner, recovery cannot be had for falling of plaster caused by too rapid drying, though occasioned by defendant's failure to properly close the doors and windows—Taussig v. Wind (Mo. App.) 71 S. W. 1095. Where a contract required an architect's certificate and complete performance was alleged, the contractor cannot recover on a showing that the certificate was unreasonably withheld—Dwyer v. New York, 77 App. Div. (N. Y.) 224.

43. Supporting a counterclaim for liquidated damages—Dunn v. Morgenthau, 73 App. Div. (N. Y.) 147.

44. Action to recover a balance on a building contract where at the close of evidence plaintiff amended by alleging substantial instead of complete performance, defendant's evidence showing the necessary expense and enabling the court to adjust the judgment —Niemeyer v. Woods, 110 N. Y. St. Rep. 563.

45. Work in constructing a railroad grade under a contract fixing prices for extra work required by the engineer—North American Ry. Const. Co. v. McMath Surveying Co. (C. C. A.) 116 Fed. 169.

46. As evidence that the work was extra and of the rate at which it was to be paid— Board of Com'rs v. Gibson, 158 Ind. 471.

47. Letters not objected to on the ground of variance may be considered with regard to their effect on the previous contract though the original contract is pleaded— Laclede Const. Co. v. Tudor Iron Works, 169 Mo. 137.

48. Not reversible error to exclude evidence that the sub-contractor at the time of

Instructions[50] may remove from the jury the question of substantial performance of the entire contract.[51]

BUILDING AND LOAN ASSOCIATIONS.

§ 1. The Organization.—By-Laws; Powers; Ultra Vires; Powers of Officers; Bonds.

§ 2. Membership and Stock.—Status of Borrowing Members; Preferred Shares; Paid up Stock; Dividends; Transfer of Stock; Maturity; Withdrawal; Actions.

§ 3. Loans and Mortgages.—General Features; Priorities; Dues and Fines; Usury; Premiums; Cancellation of Contract; Default and Foreclosure; Foreclosure after Insolvency; Accounting between Borrower and Association; Accounting on Voluntary Liquidation; Accounting after Insolvency of Association.

§ 4. Termination and Insolvency of Association.—Receivership; Insolvency; Rights between Shareholders; Rights of Directors; Voluntary Liquidation.

§ 1. *The organization.*[1]—Invalidity of an association's charter may be remedied by subsequent curative legislation.[2] A provision for the returning of fees

making his contract had the specifications, where he is seeking to recover for work as extra, though it was called for by the specifications and expressly excluded from the sub-contract—Isaacs v. Dawson, 70 App. Div. (N. Y.) 232. Evidence of an expert plumber as to the preferability of one and one-half inch to two inch pipe under laundry tub is admissible if the issue is raised, the two inch pipe being called for in the contract and the one and one-half inch pipe conforming to the regulation of the building department. The expert may also testify as to whether earthen pipe was preferable to iron, if the contractor has sought to show that such pipe was necessitated by the condition of the ground—Schultze v. Goodstein, 115 N. Y. St. Rep. 946. Under allegations of facts showing that plaintiff was entitled to a final certificate which had been refused him on his demand, evidence showing that the certificate was refused at the instance of the owner is admissible—Vanderhoof v. Shell (Or.) 72 Pac. 126. Evidence of the contractor's reputation for fair and honorable dealing is irrelevant to an issue of compliance with the contract—Cannon v. Hunt (Ga.) 42 S. E. 734. Evidence of the work done under direction of the architect as well as under the original plans is admissible, where it appears that the architect has made numerous changes in the plans requiring a great deal of extra work making the original plans inadequate—McClellan v. McLemore (Tex. Civ. App.) 70 S. W. 224. Where contractors are compelled to abandon a well before they had reached water as required by the contract, evidence in an action to recover the reasonable value of the labor, that they were willing to start drilling another hole unless water was found is immaterial—Peacock v. Gleason (Iowa) 90 N. W. 610. Where defendant claimed failure to perform, it may be shown that he rented the building as erected and permitted the tenant to go into possession, and the acts of the tenant may be shown—Mitchell v. Williams, 114 N. Y. St. Rep. 864. On an issue as to whether a well was drilled with reasonable diligence and care, it may be shown that it was customary to use casing to prevent a well from caving in—Peacock v. Gleason (Iowa) 90 N. W. 610. Evidence of a custom in papering is inadmissible where the contract provides "walls to be washed or sized with good strong glue"—Independent School Dist. v. Swearngin (Iowa) 94 N. W. 206.

49. Evidence sufficient to warrant submission of the question as to whether a change was ordered by the architect—Essex v. Murray (Tex. Civ. App.) 68 S. W. 736. To show modification of a contract for drilling a well—Wendling v. Snyder (Ind. App.) 65 N. E. 1041. Court's allowance for changes and extra work held excessive—California Iron Const. Co. v. Bradbury, 138 Cal. 328, 71 Pac. 346. To establish insolvency of the contractor at the time of making a subcontract, entitling the subcontractor to repudiate on the ground of fraud—University of Virginia v. Snyder (Va.) 42 S. E. 337. To show agreement to pay wages at city rates for work in the country—Hilbrand v. Dininny, 73 App. Div. (N. Y.) 511. To show agreement to pay the board of laborers—Hilbrand v. Dininny, 73 App. Div. (N. Y.) 511. To show the substitution of a verbal contract abrogating a written contract for the dredging of a channel—Rowland Lumber Co. v. Ross, 4 Va. Sup. Ct. R. 191, 40 S. E. 922. To show waiver of timely delivery of material—Boyle, etc., Co. v. Fox, 110 N. Y. St. Rep. 102.

50. Instructions held erroneous as assuming that plaintiffs declined to proceed with their work unless their estimate was paid in full—McClellan v. McLemore (Tex. Civ. App.) 70 S. W. 224. Where there is evidence that fire proof arches had already been delivered before the contracts in controversy were entered into, the jury should be instructed that in case there had been a delivery there was no consideration for the contracts, one of them being alleged to be an agreement by a mortgagee to pay for them in consideration of their delivery into the mortgaged premises, and the other which was asserted by the mortgagee being an agreement to guarantee payment to a certain sum if plaintiff would furnish a set of arches in the building—Nesbit v. Jencks, 81 App. Div. (N. Y.) 140. Instructions that plaintiff would have no right to charge defendants with additional costs owing to changes in sizes and weights of material, render unnecessary instructions on the question of whether plaintiff could bind defendants by contract for heavier material, the action having arisen from an exercise of the right by plaintiff to procure material elsewhere on default of defendants in fur-

and charges paid in advance to a rejected applicant for membership does not deprive a corporation of its character as a building and loan association.[3] An unincorporated building association is a partnership and the directors are not governed by the strict rules applying to directors of corporations.[4]

Pleading corporate existence.—In an action by a corporation it may be regarded as a building and loan association if its name and the allegations of the petition indicate that it has such character.[5]

By-laws adopted before passage of an amendment to a statute, but conforming thereto, need not be readopted to become operative under the amendment,[6] though a mere doing business under a statute is not an acceptance of powers conferred in it.[7] In the absence of statute, notice of the repeal of a by-law is not required.[8] A member who has for years recognized the validity of by-laws cannot question the validity of their adoption collaterally, or there may be an estoppel to deny their existence.[9]

Powers.—Building and loan associations have no powers not conferred by statute.[10] They cannot borrow money to retire stock.[11] They may extend the time of payment of mortgages and make settlements with debtors.[12] If they have power

nishing it—Christopher, etc., Co. v. Yeager, 202 Ill. 486.

51. In an action on contract to decorate a room, erect woodwork and furnish it, the jury may be told that defective woodwork would not prevent recovery if the contract was "otherwise" substantially performed—Pitcairn v. Philip Hiss Co., 113 Fed. 492, 51 C. C. A. 323.

1. Taxation of building and loan associations is treated under the article Taxation.

The subject-matter of a statute concerning building and loan association mortgages is sufficiently indicated by a title "An act regulating building and loan associations"—Julien v. Model Bldg., Loan & Invest. Co. (Wis.) 92 N. W. 561.

2. An association organized under Act Jan. 30, 1871, whose charter is invalid for the reason that it was granted by a chancery court without power in the premises, may take advantage of act Mar. 23, 1883, providing that associations under charters granted by such courts may, by application for amendment of their charters, obtain powers prescribed by Acts 1875, c. 142, and it is a mere irregularity if in the application for the amendment some of the powers which the association desired to obtain were described merely by general reference to a specific section of such later statute—Deitch v. Staub (C. C. A.) 115 Fed. 309.

3. Cottingham v. Equitable Bldg. & Loan Ass'n (Ga.) 41 S. E. 72, 74.

4. The directors are regarded as managing partners and so called stockholders are general partners—Woodward v. Nelligan, 19 App. D. C. 550.

5. Cottingham v. Equitable Bldg. & Loan Ass'n (Ga.) 41 S. E. 72, 74.

6. Where, before the passage of Act July 1, 1891, providing that a building and loan association might make loans at a rate of interest and premium fixed by its by-laws, the preference or priority of loans being decided by the priority of applications, the association had adopted by-laws providing for the filing of applications consecutively and the charging of a fixed rate and premium, the board of directors need not go through the form of re-adopting the by-laws in order that they may become operative under the act—Collins v. Cobe, 104 Ill. App. 142.

7. If the statute confers authority on existing associations to make loans at a premium fixed in the by-laws without competition, it must be shown in order to validate a loan so made that a by-law previously adopted fixing the premium rate, was readopted after the statute took effect or that the association reorganized under the statute (Rev. St. 1889, ch. 42, art. 9; Rev. St. 1899, ch. 12, art. 10). On a loan so made, the association is entitled to but 6 per cent. interest and all payments in excess of such rate should be credited on the principal—Callison v. Trenton Bldg. & Loan Ass'n (Mo. App.) 72 S. W. 477.

8. A member of a Minnesota building association becoming such while the by-law is in force is not entitled on subsequently obtaining a loan to rely on the by-law as not having been repealed—Western Realty & Investment Co. v. Haase (Conn.) 53 Atl. 861.

9. By-laws entered on the records of the association, acted on, and enforced cannot be asserted by a member not to have been regularly adopted, as a defense to payment of his obligations to the association—Collins v. Cobe, 202 Ill. 469.

10. If the statute provides that shares shall mature when stock by reason of the earnings reaches par, the association cannot fix any period for maturity—Caston v. Stafford, 92 Mo. App. 182. They can use only such proportion of the monthly receipts in the retirement of stock as is authorized by statute—Appeal of Powell, 93 Mo. App. 296.

11. Such borrowing held not for temporary purposes—Appeal of Powell, 93 Mo. App. 296.

12. Where such acts are done for the benefit and valid exercise of their powers and not to evade statutory restrictions—Kelso v. Oak Park Bldg. & Loan Ass'n, 99 Ill. App. 123.

to purchase property sold under mortgages which they hold, they have also the power to sell and convey such property.[13]

Ultra vires acts.—Contracts to pay officers other than the secretary, for services, are ultra vires and against public policy.[14] A building and loan association is liable for a deposit though received on an ultra vires contract,[15] and where it has had the benefit of performance by the member cannot object that it was not authorized by statute to make a contract to pay a fixed sum at the maturity of the certificate.[16]

Powers of officers.—Loans may be placed in the hands of the directors.[17] It is not an unlawful placing of power in the hands of the directors to vest it in fifteen directors chosen from the stockholders.[18]

The corporation is bound by official statements of the secretary accepted and acted on in good faith.[19] Acts of the secretary of an incorporated building association beyond the scope of his powers as defined by the articles of the association may be binding on the association where by apparent acquiescence of the directors and members, he has become practically a general manager.[20] The association may be estopped by a statement of its collecting agent as to the number of payments required to bring stocks to par and release a deed of trust.[21]

The fact that a representative of an association receives a commission from the borrower does not make him the agent of the latter.[22]

Bonds of officers.—A signature of the secretary for the purpose of attesting the signature and seal of the vice-president on the back of the secretary's surety bond cannot be regarded as a signing of the bond.[23]

§ 2. *Membership and stock.*—The fact that a lending and borrowing class of members are created with adverse interests does not render the methods of the association unlawful.[24] Estoppel to deny membership by virtue of a forged certificate does not result from the acceptance of payment of dues to the secretary issuing the forged certificate where the treasurer is the only officer entitled to receive payments.[25]

13. Kelso v. Oak Park Bldg. & Loan Ass'n, 99 Ill. App. 123.

14. Eddy v. Barry, 99 Ill. App. 266.

15. On an ultra vires receipt of money as a deposit, with agreement to pay interest, the association is liable for interest only from the time payment is demanded—Brennan v. Gallagher, 199 Ill. 207.

16. Such defense is not available in an action by a member on a matured certificate—Vought v. Eastern Bldg. & Loan Ass'n, 172 N. Y. 508.

17. Boleman v. Citizens' Loan & Bldg. Ass'n, 114 Wis. 217.

18. Boleman v. Citizens' Loan & Bldg. Ass'n, 114 Wis. 217.

19. Statement concealing the condition of its affairs—Shinkle v. Knoll, 99 Ill. App. 274.

20. A member who has paid his debt to the association to the secretary, and secured the bond and deed of trust and accompanying certificate of title, which had been delivered as security, is entitled to a release of the deed of trust, acquiescence of the association in the acts of the secretary for nearly fourteen years being shown, and when for eight years after the member ceased paying dues, the directors made no effort to enforce them or enforce payment of the debt, and where it also appeared that the association was in process of liquidation with no "live" stock holders—Woodward v. Nelligan, 19 App. D. C. 550.

21. The estoppel extends to the assignee of the association and though the association did not know the purpose of the inquiry, where in reliance thereon plaintiff had purchased property and made payments—Williams v. Verity (Mo. App.) 73 S. W. 732.

22. The representative had power to solicit loans, collect fines and dues, appraise property and do everything toward the consummation of the loan, and was appointed to solicit subscriptions to capital stock and collect membership fees therefor—McMullen v. Griggs, 23 Ohio Cir. Ct. R. 417.

23. Laws 1895, p. 105, § 4, provides that the surety of an officer should be approved by the board of directors. A bond not otherwise signed by the secretary bore on its back after recital of such approval by the board, the signature of the vice president, followed by the corporate seal and the words "Attest, John C. Obert, Secretary." Held, that it was not a sufficient signature of his bond.—N. St. Louis Bldg. & Loan Ass'n v. Obert, 169 Mo. 507.

24. Boleman v. Citizens' Loan & Bldg. Ass'n, 114 Wis. 217.

25. Columbia Council Member No. 77 v.

Status of borrowing members.—The borrower's relation as a shareholder ceases with a resolution of the directors declaring the debt due and directing a foreclosure, and the stock is thereby forfeited and the debt matured, and it is also held that where the member becomes a borrower and pledges his stock, he becomes a debtor,[26] and is not chargeable with losses or entitled to share profits.[27]

Under certain statutory provisions a borrowing member is not entitled to profits unless they have been apportioned and declared by a board of directors. The action of the secretary, approved by the stockholders on report of the board of directors, is not sufficient.[28]

Preferred shares.—In the absence of charter or statutory prohibition, certain classes of shares may be given preference in respect to dividends and principal, and are not invalidated by the fact that when issued they were unauthorized by by-law, if their issuance was subsequently ratified by the shareholders and a by-law authorizing their further issuance adopted, objection not being made until after insolvency of the association.[29]

Full paid stock.—Associations may issue full paid stock with guaranteed dividends.[30] If such dividends are to be paid only from profits, the holders are not entitled to interest after insolvency of the association.[31]

A change in the by-laws of an association conferring on instalment stockholders equality with common or full paid stockholders does not authorize the full paid stockholders to recover the price paid by them for it, either on the ground that its issuance was ultra vires or that the contract under which it was issued was repudiated, and if they were previously required to make good losses in favor of instalment shareholders, and having control of the business, have charged losses against their stock, they are not entitled to repayment of the losses previously charged to them.[32]

Dividends due a stockholder may be applied to his debt to the association.[33] A provision in a coupon to pay a certain amount in a dividend at a certain time amounts to an agreement to pay it only if earned,[34] and the fact that profits are earned does not create a legal obligation to pay a dividend.[35]

Rights of pledgees.—Where a statute provides that stock may be pledged by delivery of certificates and the former holder may still represent it at meetings and vote as a stockholder, notice of the pledge or a transfer on the corporation's

Belmar Building & Loan Ass'n (N. J. Eq.) 54 Atl. 142.

26. Juergens v. Cobe, 99 Ill. App. 156.

27. Interstate Bldg. & Loan Ass'n v. Holland (S. C.) 43 S. E. 978.

28. Rev. St. c. 32, § 6c, par. 83b, § 6b, § 5, par. 82—Agnew v. Macomb Bldg. & Loan Ass'n, 197 Ill. 256.

29. Wilson v. Parvin (C. C. A.) 119 Fed. 652.

30. Such is regarded as a borrower of money—Cottingham v. Equitable Bldg. & Loan Ass'n (Ga.) 41 S. E. 72, 74.

31. Wilson v. Parvin (C. C. A.) 119 Fed. 652.

32. Installment stockholders were placed on an equality with the owners of full paid stock who had formerly had the sole right to vote and to control the business of the association, though their capital was subject to the repayment of losses sustained by the association in favor of installment stockholders. The meeting had been called for the purpose of amending the by-laws and complainants' stock was voted in favor of the proposition, complainants being represented by proxy—Synnott v. Cumberland Bldg. Loan Ass'n (C. C. A.) 117 Fed. 379.

33. As against the widow's claim of such dividend as part of her exempt distributable share of her husband's estate—Andrews v. Ky. Citizens' Bldg. & Loan Ass'n's Assignee, 24 Ky. Law Rep. 966, 70 S. W. 409.

34. Laws 1875, c. 564, § 1, provided that no dividend was to be declared except from earnings, and the stock certificate declared that the holder was subject to conditions printed thereon, that the certificate should participate in profits as provided by the articles of the association, that a dividend to the extent of 7% per cent. per annum would be paid. The by-laws made a similar provision for the annual payment of a dividend from profits not exceeding 7% per cent.—Watson v. Columbia Mut. Bldg. & Loan Ass'n (N. Y.) 71 App. Div. 498.

35. Dividend is not compelled by the fact that 2 per cent. profits were earned during the preceding six months—Watson v. Columbia Mut. Bldg. & Loan Ass'n (N. Y.) 71 App. Div. 498.

books is not required to make the association liable to a pledgee if it pay the value of the shares and cancel them without requiring a return of the certificate. The measure of damages is the amount for which they were pledged with interest from the time action was brought. The pledgee need not, before action, acquire title to the shares by judicial sale or otherwise.[36]

Maturity of stock.—A contract that stock shall mature before the borrower's monthly dues and profits bring the stock to par is ultra vires,[37] as are representations that stocks will be brought to par on the making of a stated number of fixed monthly payments.[38] An estimate in a building and loan company's prospectus that stock will mature at a stated time is not binding.[39] A statement that par will be paid for each share at the end of a stated time, subject to the terms, conditions, and by-laws attached, does not make the fixed time of maturity.[40] The promise to pay does not control other provisions in the certificate.[41] Where a certificate of stock states that it matures at a stated time, and that the company will then pay the par value, a member after such time cannot be required to continue to make payment until they, plus the earnings, equal the par value,[42] and where the instalments have been duly paid, the holder of the certificate of membership is entitled to the par value of each share of stock held thereunder.[43] Where the by-laws printed on a stock certificate are made part of the contract without reservation as to amendments, amendments subsequent to the issuance cannot be considered in construing the contract.[44] The contract with one shareholder cannot be avoided for the reason that the association may not be able to meet obligations to others.[45]

36. Brown v. Union Sav. & Loan Ass'n, 28 Wash. 657, 69 Pac. 383.

37. Caston v. Stafford, 92 Mo. App. 182.

38. Williams v. Verity (Mo. App.) 73 S. W. 732.

39. Stock does not necessarily mature in 60 months under by-laws providing: that payments on stock shall be a certain sum per month for 60 months or to the date of maturity, that when 60 payments have been made, the stockholder shall be entitled to the value thereof, that a borrowing stockholder making 60 payments of dues shall have credit on his loan to the value of the stock, and on the payment of any balance, the loan will be satisfied—Hough v. Woody (Ark.) 71 S. W. 252.

40. Racer v. International Bldg. & Loan Ass'n (Ind. App.) 63 N. E. 772.

41. There was also a provision that profits arising from interest, premiums, fines, etc., should at stated periods be apportioned among the shares, and when they with the monthly payments should amount to the par value, the shares should be deemed to have matured and not sooner—International Bldg. & Loan Ass'n v. Radebaugh (Ind.) 64 N. E. 604. Provisions for monthly payments on shares until matured or withdrawn and that a certain sum monthly should be paid by share holders on each share until they were fully paid, are not inconsistent with a promise to pay the par value of the share at a fixed date, making payment contingent on the paying in of a sum which with the profits apportioned to the certificate would amount to its face—Vought v. Eastern Bldg. & Loan Ass'n, 172 N. Y. 508.

42. Provision for maturity on seventy-eight payments. The by-laws provided that the certificate of stock, the application, and the by-laws formed the contract, and required a monthly installment of seventy-five cents on each share until fully paid and provided that $100 per share should be paid at maturity—Field v. Eastern Building & Loan Ass'n (Iowa) 90 N. W. 717.

43. The certificate provided that on compliance with the conditions and by-laws printed on the certificate, the association would pay $100 for each of the shares held by a member, 78 months after the date of the certificate, the amount of monthly installments and the maturity of the certificate being fixed by the indorsement on the back thereof—Vought v. Eastern Bldg. & Loan Ass'n, 172 N. Y. 508.

44. Field v. Eastern Bldg. & Loan Ass'n (Iowa) 90 N. W. 717. Where the association undertakes to mature certain shares in a certain time, the agreement is not affected by the fact that the shareholder obtains a loan on the security of his shares after amendment of the by-laws making stock mature when its par value is equaled by the amount of the dues paid thereon with apportioned profits; nor is it rendered conditional on the success of the enterprise by an agreement of the shareholder to pay a certain monthly installment until the stock matures or is withdrawn, or by a by-law continuing payment of installments until full payment of the share—Eastern Bldg. & Loan Ass'n v. Williamson, 189 U. S. 122.

45. The association was composed of small stockholders throughout the United States, and it was provided that no shareholder should have any claim or interest or control of the affairs, assets or funds of the association except as specifically provided—Field v. Eastern Bldg. & Loan Ass'n (Iowa) 90 N. W. 717.

Withdrawal.—Payment of the withdrawal value of shares may be required to be made from a particular fund, and a fee covering clerical expenses may be exacted.[46] The term "withdrawing stockholders" includes those who withdraw at the maturity of stock as well as those withdrawing before.[47] One who ceases to be a member of the association is no longer liable for its debts or entitled to share in its subsequent earnings.[48] A leaving of a portion of the amount due a stockholder on account of matured stock on deposit at interest will not be considered as a deposit to meet dues and payments on stock.[49]

Actions.—A foreign building and loan association cannot by a provision in its contract require that suits against it be brought in the state of its incorporation.[50] The withdrawing member of a building association may proceed in equity before having obtained a judgment at law and exhausted his legal remedies.[51] In an action on a matured certificate, the application for membership need not be introduced.[52] Where the contract is misleading, the shareholder may testify as to representations by the agent of the association at the time of her application.[53]

§ 3. *Loans and mortgages. A. General features and regulations.*—The issuing of stock, execution of a note and mortgage, and the issuance of lien stock may be one transaction.[54] Neither one who accepts a loan and stock issued nor his assignee can assert that he deals as a stranger.[55] The constitution and by-laws of the association become part of the contract.[56] Where there is no usury, fraud, or other illegality, contracts with a foreign association will be enforced according to the equitable interpretation of their terms.[57] Taking a trust deed on encumbered real estate to secure a loan by a member is not an ultra vires act, and statutes providing that borrowers shall give unencumbered security are not positive prohibitions on the association though mandatory on the members; hence a trust deed obtained on a false representation that the property was unencumbered is not void.[58] Only the state in a direct action may question whether a loan to one not a member is an unauthorized exercise of corporate power.[59] A statute providing that stock pledged as security may not be withdrawn does not forbid its withdrawal on payment of the loan.[60]

46. The association may limit payments of withdrawal value to funds derived from a percentage of dues collected, and may exact a withdrawal fee of one dollar per share without violating 1 Gen. St. p. 331—Intlso v. State (N. J. Law) 53 Atl. 206.

47. Construing a certificate of membership providing that no money should be drawn from the loan fund except to make loans on security and to pay amounts due withdrawing shareholders—Vought v. Eastern Bldg. & Loan Ass'n, 172 N. Y. 508.

48. Juergens v. Cobe, 99 Ill. App. 156.

49. The stockholder received a pass book showing a deposit of $3,800 on interest, the remaining stock amounted to only $2,000, and he made the payments thereon from other funds and received the value on its maturity, leaving the $3,800 on deposit—Brennan v. Gallagher, 199 Ill. 207.

50. Code 1897, c. 13, tit. 9, requires foreign building and loan associations to consent that notice of suit may be served on the auditor—Field v. Eastern Bldg. & Loan Ass'n (Iowa) 90 N. W. 717.

51. Continental Nat. Bldg. & Loan Ass'n v. Miller (Fla.) 33 So. 404.

52. It was not a part of the contract though mentioned as part of the consideration and defendant did not claim that it constituted a defense—Vought v. Eastern Bldg. & Loan Ass'n, 172 N. Y. 508.

53. Code 1897, § 4614, provides that where there is a mutual misunderstanding the contract is to prevail against either party in the sense in which he had reason to suppose the other understood it—Field v. Eastern Bldg. & Loan Ass'n (Iowa) 90 N. W. 717.

54. Sufficiency of evidence to establish such fact—Western Loan & Sav. Co. v. Desky, 24 Utah, 347, 68 Pac. 141.

55. The association having no right to make loans except to members—Boleman v. Citizens' Loan & Bldg. Ass'n, 114 Wis. 247.

56. Agnew v. Macomb Bldg. & Loan Ass'n, 197 Ill. 256.

57. People's Bldg., Loan & Sav. Ass'n v. Gilmore (Neb.) 90 N. W. 108.

58. Rev. St. c. 32, § 85—Juergens v. Cobe, 99 Ill. App. 156.

59. Civ. Code, §§ 633-648½—Bay City Bldg. & Loan Ass'n v. Broad, 136 Cal. 525, 69 Pac. 225.

60. Rev. St. 1899, §§ 1370, 1368—Reitz v. Hayward (Mo. App.) 73 S. W. 374.

In the absence of statute, notes and mortgages to a building and loan association are negotiable and assignable.[61]

Priority.—Statutes may, without violation of the United States Constitution, allow mortgages of mutual building and loan associations priority over other liens on premises subsequently filed.[62]

Insurance of mortgaged property.—A provision in the by-laws requiring borrowing members to insure their premises for the security of the association, and authorizing the association on failure of the borrower to make renewals, makes the association the borrower's agent and places on it the liability for loss in case it neglects to keep the property insured.[63]

Dues and fines.—Loan dues characterized by the by-laws as payments on stock cannot be regarded as interest,[64] and stock dues cannot be considered in determining whether interest paid is usurious where it is not intended to apply them to the loan until maturity.[65] Monthly stock dues do not of themselves operate as a pro tanto satisfaction of the loan.[66]

A stipulation to continue payment on stock surrendered at the time of loan is void.[67] The rule differs as to the liability for fines where a borrower has ceased payment.[68] Where, owing to the peculiar relationship of the borrower, fines for delinquent payments have never been charged against him, they should not be allowed in an action by him for the cancellation of his note and deed of trust.[69]

Rights and liabilities of transferees of borrower.—The grantee of a borrowing stockholder stands in the same position as the stockholder.[70]

B. Usury.—An agreement that the stockholder would be bound by the by-laws in existence or afterward adopted does not deprive him of his right to assert usury.[71]

Conflict of laws.—The rule of the federal courts is that the contract of a borrowing stockholder is governed by the law of the state in which the association

61. Prior to passage of Burns' Rev. St. § 4463e—Bowlby v. Kline, 28 Ind. App. 659.

62. Rev. St. 1898, §§ 2014-15; United States Const. art. 14, § 1—Julien v. Model Bldg., Loan & Invest. Co. (Wis.) 92 N. W. 561.

63. Geswine v. Star Bldg. & Loan Co., 23 Ohio Cir. Ct. R. 477.

64. And the only interest to which the association is entitled is the surplus of the total monthly payments for the specified period over the principal of the loan—Western Loan & Sav. Co. v. Desky, 24 Utah, 347, 68 Pac. 141.

65. Boleman v. Citizens' Loan & Bldg. Ass'n, 114 Wis. 247.

66. Caston v. Stafford, 92 Mo. App. 182.

67. Such an agreement by a member of a foreign mutual loan association, held to be without consideration and the borrower's obligation to be discharged by repayment of the loan, with interest—Kear v. Eastern Bldg. & Loan Ass'n (Neb.) 90 N. W. 643.

68. Fines may be embraced in a verdict in an action by the building association against the member—Cottingham v. Equitable Bldg. & Loan Ass'n (Ga.) 41 S. E. 72, 74. His connection with the association as a stockholder having ceased he is no longer liable for fines for non-payment of premiums—Kleimeir v. Covington Perpetual Bldg. & Loan Ass'n, 24 Ky. Law Rep. 735, 70 S. W. 41.

69. Loan by a building and loan association to its attorney—Arbuthnot v. Brookfield Loan & Bldg. Ass'n (Mo. App.) 72 S. W. 132.

70. If he assumes performance of the grantor's obligation he becomes personally bound and his notice of the nature of his grantor's obligation is not limited to the recitals in the deed of trust—Caston v. Stafford, 92 Mo. App. 182. One to whom the mortgagor has conveyed and assigned the mortgaged stock, cannot on failure to pay installments, object to the enforcement of fines provided for by the association by-laws—Boleman v. Citizens' Loan & Bldg. Ass'n, 114 Wis. 247. Where a borrower executes a mortgage providing for usurious premiums, the grantee of the mortgaged premises, who is admitted into membership by the association, may have credit for the usurious payments made by his grantor, whether he has agreed to assume a mortgage debt or not—Middle States Loan Bldg. & Const. Co. v. Baker, 19 App. D. C. 1. A purchaser of property who assumes payment on a building and loan association mortgage as part of the purchase price, can set up a defense of usury or have premiums credited to the principal because the association has become insolvent—Deitch v. Staub (C. C. A.) 115 Fed. 309. Where the borrower has paid usurious interest, one to whom he has conveyed the land subject to the mortgage, can have the usurious excess applied to the principal, though he has no such rights as regards excess interest paid by himself—Irwin v. Washington Loan Ass'n (Or.) 71 Pac. 142.

71. The by-law asserted was passed after the loan. Contracts waiving usury are against public policy—Georgia State B. & L. Ass'n v. Grant (Miss.) 34 So. 84.

is incorporated and has its home office, if the subscription to stock was there made and payments of stock instalments and interest are there payable,[72] and if the parties to the contract intended that there should be no violation of local usury laws, provisions intending to make the contract one of another state will not be regarded as for the purpose of enabling a violation of the law;[73] but Mississippi holds that a loan contract and mortgage is governed by the law of the state where the property is situated,[74] and is not freed from usury by the fact that a premium incidental to the stock contract is part of a contract separate from that of the loan and similar to those used in the state of the corporation's domicile where the by-laws fixed the place of performance;[75] while Nebraska holds that a foreign building and loan association is subject to its usury laws and that a premium to be paid by taking stock in a foreign corporation which has not complied with the state laws is usurious.[76]

Where a foreign association makes a loan and stipulates that it shall be with reference to the law of the state of its domicile, the rule as to accounting in such state may be followed.[77] Mortgages given to foreign building and loan associations are not affected by subsequent local acts.[78]

Exemption of building associations from general usury laws.—Building and loan associations are, by statute in certain states, exempted from the usury laws;[79]

72. Though the security is situated in another state—Interstate B. & L. Ass'n v. Edgefield Hotel Co., 120 Fed. 422; Alexander v. Southern Home B. & L. Ass'n, 120 Fed. 963; Gale v. Southern Bldg. & Loan Ass'n, 117 Fed. 732.

73. Provisions will not be regarded as for the purpose of avoiding the law of Virginia which are for the purpose of making the contract an Alabama one, if it was expected that the stock would be matured at such time as to render the rate of interest less than that allowed by the laws of Virginia—Gale v. Southern B. & L. Ass'n, 117 Fed. 732.

74. National Mut. B. & L. Ass'n v. Hulet (Miss.) 33 So. 3. Interest was payable to local boards in the state where the property was located according to the association's by-laws and was held to be governed by the local laws as to usury—Georgia State B. & L. Ass'n v. Shannon, 80 Miss. 642. Contract for a loan on land in Mississippi by an association having no office or general agent in the state but with special agents in various towns authorized to solicit subscriptions for stock, take application for loans and receive payments of dues, interest and premiums—National Mut. B. & L. Ass'n v. Brahan, 80 Miss. 407. A contract by foreign building association having no office or general agent within the state but having provided a place of payment of loans within the state and established a local board, making its secretary and treasurer agent to receive payment, is regarded as a local contract—National Mut. B. & L. Ass'n v. Farnham (Miss.) 33 So. 2.

75. Georgia State B. & L. Ass'n v. Brown (Miss.) 31 So. 911.

76. Contract called for six per cent. interest on a loan of $1,500 and a premium of $1,500 to be paid for taking stock to such amount and the making of monthly payments thereon of $9 until the stock matured—Anselme v. American S. & L. Ass'n (Neb.) 92 N. W. 745.

77. Loan by Maryland association on land in the District of Columbia; adoption of the Maryland rule, where the result of an accounting in the District is found to be the same—Middle States Loan, Bldg. & Construction Co. v. Baker, 19 App. D. C. 1.

78. Hurd's Rev. St. 1901, p. 479—Carpenter v. Welty, 101 Ill. App. 58.

Foreign loans. (Note.) An association which loans and does business in another state may therein charge no higher interest than the laws of such state permit. If it actually makes the loan in a state, it is of no avail that the contract specifies that it is subject to the laws of a foreign domicile (Shannon v. Georgia Building Ass'n, 84 Am. St. Rep. 657, 78 Miss. 955, cited in note to Floyd v. National Loan Co., 87 Am. St. Rep. 805, 826; S. C. 49 W. Va. 327).

What law governs in determining whether a loan by a foreign building association is usurious. (Note.) Though there is some apparent conflict in the authorities upon this point, the true answer will depend on the foreign or domestic character of the loan contract and the question whether or not it was designed to evade domestic usury laws. It was held that where the loan was in fact payable in the state of the borrower's residence, it was to be regarded as a contract of that state and governed by its laws; hence the fact that the contract contained a stipulation for payment in the foreign domicile of the lender was of no avail to make such contract a foreign one and thus to avoid usury laws of the state where the payment was to be made (Pacific Savings Co. v. Hill, 91 Am. St. Rep. 477, 40 Ore. 280, 67 Pac. 103; Hicinbothern v. Interstate Ass'n, 40 Ore. 511, 69 Pac. 1018). See discussion of these cases and others in note 91 Am. St. Rep. 484.

79. Under Rev. St. 1889, § 2814, Rev. St. 1899, § 1364, a membership and stock subscription contract cannot be claimed to be a fraud on the usury law—Stanley v. Verity (Mo. App.) 73 S. W. 727. Where it is found on foreclosure that the mortgagee is a

interest and premium payments together may exceed the legal rate;[80] and such statutes do not deny the equal protection of the laws,[81] interfere with property rights, or grant special privilege.[82] Statutes rendering the execution of premiums and fines nonusurious do not validate specific reservations of interest in excess of the legal rate.[83] The use of a form of contract employed by building and loan associations is not sufficient to show a loan to be made by such an association.[84]

Premiums.—Premiums for a loan do not render it usurious,[85] though a requirement of a payment monthly of a specified sum, called premium, in addition to a legal rate of interest, is void,[86] if not a monthly instalment of a fixed and determined premium for the loan.[87] A statute providing that a borrower, instead of paying the entire premium in advance, may pay it in equal monthly or other instalments, does not authorize other than a fixed and definite amount of premium.[88] If by statute, establishment of a fixed premium for loans is authorized, one who borrows at less than the premium fixed, though in addition to interest the total amounts to more than the legal rate, cannot claim that the transaction is usurious.[89] Contracts in which a gross premium is deducted from, and an annual premium made payable on, a loan may be legalized by subsequent statutes.[90] Where the terms of a loan call for interest at a certain rate and premium, the total being in excess of the statutory percentage, only the amount named as interest may be exacted by the association.[91] If the sum of premiums and instalments on stock is in excess of legalized interest, the mortgage is usurious only as to excessive payments.[92] The extortionateness of a premium fixed by the by-laws of an association may be determined by the courts.[93] Where premiums are constructively interest, the time when stock is to mature becomes essential.[94] The legal rate of interest which may be agreed on verbally does not control the question of usury in the exaction of premiums and instalments in addition to a rate named in the bond.[95]

homestead loan association, it may take more than the rate of interest otherwise allowed by law—Collins v. Cobe, 202 Ill. 469.

80. Sanb. & B. Ann. St. § 2013—Bullman v. Citizens' L. & B. Ass'n (Wis.) 90 N. W. 199.

81. The federal court held that the statute was not so clearly within the constitutional inhibition as to authorize it in declaring it invalid after it had been sustained by the state supreme court—Brandon v. Miller, 118 Fed. 361.

82. Rev. St. § 3836-3 does not violate Const. art. 1, §§ 1, 2—Spies v. Southern Ohio L. & T. Co., 24 Ohio Cir. Ct. R. 40.

83. Comp. Laws, §§ 7581, 7584—Estey v. Capitol Inv. B. & L. Ass'n (Mich.) 9 Detroit Leg. N. 424, 91 N. W. 753.

84. For the purpose of preventing the contract from being void by usury laws—Hyland v. Phoenix Loan Ass'n (Iowa) 92 N. W. 63.

85. Savings & Loan Association incorporated under laws 1851, c. 122—Roberts v. Murray, 40 Misc. Rep. (N. Y.) 339.

86. On accounting, payments so made should be charged as on account of the principal debt—Middle States Loan, Bldg. & Construction Co. v. Baker, 19 App. D. C. 1. A contract requiring a borrower to pay monthly premium and dues which with the interest on the loan exceed the legal rate is usurious (Laws 1886, p. 35, §§ 1, 2)—National Mut. B. & L. Ass'n v. Pinkston, 79 Miss. 468.

87. Washington Nat. B. & L. Ass'n v. Andrews, 95 Md. 696.

88. It is not a fixed premium to require "no more than" a certain number of fixed installments. Construing Code, art. 23, § 98, Acts 1894, c. 321—Washington Nat. B. & L. Ass'n v. Andrews, 95 Md. 696.

89. Cover v. Mercantile Mut. B. & L. Ass'n, 93 Mo. App. 302.

90. Burns' Rev. St. 1901, § 4463 (Horner's Rev. St. 1897, § 3406i)—Racer v. International B. & L. Ass'n (Ind. App.) 63 N. E. 772.

91. Bel. & C. Ann. Codes & St. § 4595, allows interest at the rate of 10 per cent. The contract called for 6 per cent. interest and a certain amount on each share of stock pledged. Held, that the association was entitled to interest at the rate of 6 per cent. only—Hubert v. Washington Nat. Bldg., Loan & Inv. Ass'n (Or.) 71 Pac. 64.

92. Irwin v. Washington Loan Ass'n (Or.) 71 Pac. 142.

93. Fixing a premium of forty cents per hundred dollars in addition to interest at 7 1-5 per cent. is not extortionate—Cover v. Mercantile Mut. B. & L. Ass'n, 93 Mo. App. 302.

94. Evidence as to the time of maturity is essential where it is contended that a premium deducted as an entire sum from the face of the loan is constructive interest because not fixed by competitive bidding—Laidley v. Cram, 96 Mo. App. 580.

95. Sums withheld whether regarded as

Competitive bidding to determine premiums.—The policy of certain states now is to favor fixed rates of interest and premiums,[96] the statutes of other states make a premium, over the legal rate of interest, not fixed by competitive bidding, usurious.[97] Premiums not fixed by competition or opportunity therefor are regarded as interest, and if when added to the stipulated interest they exceed the highest legal rate, the loan is usurious,[98] and the excessive premiums will be applied to the principal.[99]

The premium paid may be a certain per cent rather than a stated sum.[1] The bidding must be at a directors' meeting held for the purpose,[2] and a by-law providing a fixed minimum premium to be paid in advance out of the money borrowed renders a loan, made thereafter on competitive bidding, usurious,[3] though the premium so fixed was in excess of the minimum amount.[4] The burden is on the defendant borrower to show that a premium was not fixed as required by statute.[5]

Statutes authorizing a premium to be agreed on without bidding do not authorize the taking of two premiums, one in gross and one payable monthly.[6]

The stockholders need not meet whenever a loan is auctioned, though it is provided that loans shall be offered at open meeting, and a by-law may provide that the secretary on written authority may bid for the stockholder and a bid in writing be lawful.[7]

Application of usurious payments.—If the contract is usurious, the borrower should be charged with the amount of the loan and credited with the value of the stock and sums paid on interest and premiums.[8] He is entitled to credit on his loan of the entire amount of the usurious interest, though it is provided that a portion of such payments are to be applied to the operating expenses of the company;[9] but it has been elsewhere held that he cannot be credited with payments on the expense account or with fines and withdrawal fees[10] or with dividends,[11]

actual premiums or constructive interest are not usurious unless the entire amount exceed the rate of interest which may be contracted for in writing, though the bond in addition provides for interest at five per cent.—Laidley v. Cram, 96 Mo. App. 580.

96. Bullman v. Citizens' L. & B. Ass'n (Wis.) 90 N. W. 199.

97. Trainor v. German American S. L. & B. Ass'n, 102 Ill. App. 604. Rev. St. 1889, §§ 2812, 2814—Cover v. Mercantile Mut. B. & L. Ass'n, 93 Mo. App. 302.

98. Laidley v. Cram, 96 Mo. App. 580.

99. Moses v. National L. & I. Co., 92 Mo. App. 484.

1. Comp. Laws, §§ 7581, 7584—Estey v. Capitol Inv., B. & L. Ass'n (Mich.) 9 Detroit Leg. N. 424, 91 N. W. 753.

2. Moses v. National L. & I. Co., 92 Mo. App. 484.

3. The by-law was passed prior to Rev. St. 1899, c. 1362—Thudium v. Brookfield L. & B. Co. (Mo. App.) 72 S. W. 134.

4. Rev. St. 1889, § 2812. A by-law fixing a minimum premium of 6 per cent. vitiates a loan though the premium actually received as a consequence of competitive bidding was 25 per cent.—Arbuthnot v. Brookfield L. & B. Ass'n (Mo. App.) 72 S. W. 132.

5. Competitive bidding—Deitch v. Staub (C. C. A.) 115 Fed. 309. Evidence that the majority of loans had been made on a bid of a certain amount and that the secretary stated to applicants that such amount with the interest charged would probably mature their stock within a certain time, that the secretary had been so advised by an actuary, that such were the usual results, that this caused many of the bids to be put in on that basis, but that no rate was fixed by the directors and the bid was left to the option of the applicants, does not show that a fixed rate of interest was charged—Bullman v. Citizens' L. & B. Ass'n (Wis.) 90 N. W. 199.

6. Acts 1885, § 6, p. 83, required competitive bidding as to premiums. Acts 1897, p. 287, provided that the given rate of premium might be agreed on without bidding. Held, that the latter act did not authorize the double premium—International B. & L. Ass'n v. Radebaugh (Ind.) 64 N. E. 604.

7. Directors having control of the business with power to enact by-laws provided by by-laws for directors' meetings open to all stockholders at which loans were to be occasioned. Construing Sand. & B. Ann. St. § 2011—Bullman v. Citizens' L. & B. Ass'n (Wis.) 90 N. W. 199.

8. People's Bldg., Loan & Sav. Ass'n v. Marston (Tex. Civ. App.) 69 S. W. 1034. A receiver cannot collect either costs or interest on a usurious borrowing contract and the borrower should be credited with all dues and interest paid—Carpenter v. Lewis (S. C.) 43 S. E. 881.

9. Middle States Loan, Bldg. & Construction Co. v. Baker, 19 App. D. C. 1.

10. Georgia State B. & L. Ass'n v. Grant (Miss.) 34 So. 84.

11. Where the loan is usurious, the borrower is entitled to be credited with all pay-

and if the stock contract is separate from that for the usurious loan, the borrower may be credited only with the withdrawal value of the stock.[12]

Settlements waiving usury.—A change in the form of the usurious contract, at the request of the association, to make it in accord with a new plan of doing business, will not be regarded as a settlement of the borrower's claim for usury.[13] One who has, by settlement, participated in profits arising from contracts similar to his own, cannot claim that the contract and settlement is usurious,[14] and contracts may be purged of usury in equity where settlements have been made by the parties with full knowledge of their rights.[15]

Cancellation of contract.—Notice of desire to pay a loan need not be given before suing to cancel a note and deed of trust for usury.[16] Where it is desired to avoid a loan on account of usury, it must be alleged that premium is contrary to the by-laws. It is not sufficient to allege that it is forbidden by the statute.[17]

Particular contracts.—In the footnotes are given contracts regarded as usurious,[18] and not usurious.[19]

ments, whether indicated as premiums or interest as payment on an ordinary 6 per cent. loan, but in such case is not entitled to dividends on the stock—Kleimeir v. Covington Perpetual B. & L. Ass'n, 24 Ky. Law Rep. 735, 70 S. W. 41.

12. Georgia State B. & L. Ass'n v. Brown (Miss.) 31 So. 911.

13. The new contract included all money due by the old and additional repayment and expense charges—Hyland v. Phoenix Loan Ass'n (Iowa) 92 N. W. 63.

14. Cover v. Mercantile Mut. B. & L. Ass'n, 93 Mo. App. 302.

15. Equity has the right to consider the circumstances attending the entire matter as well as the relation and rights of the parties—Trainor v. German-American S. L. & B. Ass'n, 102 Ill. App. 604.

16. Rev. St. 1899, § 1368, does not require such notice though a balance is found due the association—Thudium v. Brookfield L. & B. Co. (Mo. App.) 72 S. W. 134.

17. Under statutes construed to allow an association to loan on a fixed premium, which together with interest exceeds the rate that others may charge—Gale v. Southern B. & L. Ass'n, 117 Fed. 732.

18. On application for the loan of $1,900, the borrower received $1,710, the difference being credited to the private account of the association and the borrower agreed to pay $12.35 per month stock dues and $15.84 per month interest and premiums. Held, that as the monthly payments of $15.84 were to be regarded as interest, they exceeded the statutory rate of 10 per cent. per annum, the sum loaned being only $1,710, and the contract was usurious—People's Bldg., Loan & Sav. Ass'n v. Marston (Tex. Civ. App.) 69 S. W. 1034. The contract was in the nominal sum of $1,500, dated June 14th, the borrower did not receive a first payment of $750 until Sept. 23rd, and of the second payment on December 23rd, $171 was reserved for monthly premiums to date—Hyland v. Phoenix Loan Ass'n (Iowa) 92 N. W. 63. It is unconscionable for a contract to provide that the borrower should repay double the amount borrowed together with interest, and a mortgage securing such contract will not be foreclosed. At the time of the loan the borrower purchased stock to the amount of the loan and immediately reassigned it to the association absolutely in consideration of the advancement, "by way of anticipation of the value at the maturity" of the shares, and it was further provided that the par value of the shares was given the association as a premium. The borrower was required to pay the loan with interest in seven years together with the entire premium if the stock had then matured, and if it had not, so much of the premium as had been earned or, in default of such payment, to keep up the dues on the stock until it matured, in addition to the payment of interest—Pacific States Sav., Loan & Bldg. Co. v. Green, 114 Fed. 412. It is sufficient to authorize a submission of a question as to whether a loan obligation was a device to evade usury laws, where a contract allows receipt of full interest on the principal until the maturity of the stock and the retention of all payments to such time, and plaintiff testifies that such payments were to be immediately applied on principal—Walter v. Mutual Home Sav. Ass'n (Tex. Civ. App.) 68 S. W. 536. Sufficiency of evidence to establish that contract was a device to cover usury—Cotton States Bldg. Co. v. Rawlins (Tex. Civ. App.) 70 S. W. 786. Subscription for stock and payment of premiums at the time of renewal of a loan, an amount of stock equal to the loan having been subscribed at the time of the original loan, is regarded as a mere pretext for usurious interest—Kleimeir v. Covington B. & L. Ass'n, 24 Ky. Law Rep. 735, 70 S. W. 41. Sufficiency of evidence to show that a transaction leading to a loan was free of fraud and without concealment, though usurious—Cover v. Mercantile Mut. B. & L. Ass'n, 93 Mo. App. 302.

19. On a loan of $2,250, the borrower paid 10 per cent. premium, also $1.00 per share premium for stock, and agreed to pay monthly $12.38 interest at 6 per cent. on the loan and premium, and 30c per share or $7.24 to be applied to payment of the stock. Held, that the transaction was not usurious—Hall v. Stowell, 75 App. Div. (N. Y.) 21. Six per cent. interest together with premiums of 16 2-3c a month on each $100 share, dues of 50c per month, and fines of 10c per month during default therein, are not usurious or

C. Default and foreclosure.—A provision for a shorter period of default than indicated by statute is not material to the validity of a mortgage where the association is not attempting to enforce such provision.[20] A borrower is not in default who has been prevented from making his monthly payments by the act of the association.[21] Where the borrower defaults he should be credited with the present value of his stock, and for such purpose, the stock will be regarded as equal to the sum of stock payments and declared dividends.[22]

Foreclosure.—A new corporation, assuming the liabilities of the former association to which the mortgagor had paid his dues and interest for about 4 years, may foreclose though the mortgage was not given to it originally.[23] The association is entitled to interest and monthly premium as provided in the contract to the time of decree.[24] Where an association satisfies a decree of foreclosure in consideration of an execution of the mortgage, if the mortgage is void the satisfaction is void.[25]

Foreclosure after insolvency.—In foreclosure of a borrowing member's mortgage by receivers, the member's claim against the association is properly left unadjusted.[26] Foreclosure will not be denied because dividends to which defendants would be entitled, are not yet ascertained,[27] and the member is not entitled to a computation of such dividends.[28] The mortgagor's stock should be sold and the proceeds credited on the debt before recourse to the premises,[29] and foreclosure will not be awarded where the payments on stock, interest, and premiums discharge the debt in full.[30] The stockholder cannot assert, as against foreclosure of his mortgage, that the association was improperly managed or that the contract was ultra vires.[31] Dues and premiums included in the bond should not be made part of the mortgage debt.[32]

D. Accounting between borrower and association. 1. *In general.*—The borrower's liability is for the sum loaned with such interest as may be rightfully collected under the contract.[33] The by-laws may be resorted to to determine the proportion of monthly payments to be applied to interest.[34] Interest on pre-

unreasonable—Spies v. Southern Ohio L. & T. Co., 24 Ohio Cir. Ct. R. 40. A borrower subscribed for 30 shares of stock, par value $240 each and applied for a loan $7,200 bidding 25 per cent. premium. The association withheld the premium, $1,800 and paid him $5,400. The borrower agreed to pay $30 monthly installment of stock and also $30 monthly interest, such payments to be continued until the stock should be worth $240, at which time it should be applied to the payment of the loan and cancelled. Held that the contract was not usurious—Laidley v. Cram, 96 Mo. App. 580.

20. Sand. & B. Ann. St. § 2011—Boleman v. Citizens' Loan & Bldg. Ass'n, 114 Wis. 217.

21. Home Sav. Ass'n v. Noblesville Monthly Meeting of Friends Church (Ind. App.) 64 N. E. 478.

22. People's Bldg., Loan & Sav. Ass'n v. Gilmore (Neb.) 90 N. W. 108.

23. It appeared that by mortgagor's consent the assets had been handed over to plaintiff association, and that he was relying on reimbursement from assets of which the mortgage in question was part—Helping Hand Bldg. & Loan Ass'n v. Samuelson, 21 Pa. Super. Ct. 134.

24. It is not limited to the legal rate of interest from the commencement of suit—Racer v. International Bldg. & Loan Ass'n (Ind. App.) 63 N. E. 772.

25. Kelso v. Oak Park Bldg. & Loan Ass'n, 99 Ill. App. 123.

26. There was no proof as to the value of the member's stock, or as to the probable dividend which would be paid from the assets—Riggs v. Carter (N. Y.) 77 App. Div. 580.

27. Breed v. Ruoff, 173 N. Y. 340.

28. The bond and mortgage obliged the member to pay the principal and interest of the loan in full—Hoagland v. Saul (N. J. Eq.) 53 Atl. 704.

29. The stock was assigned as collateral to the mortgage—Hoagland v. Saul (N. J. Eq.) 53 Atl. 704.

30. Meares v. Finlayson, 63 S. C. 537.

31. Menominee Loan & Bldg. Ass'n v. Lovell (Mich.) 9 Det. Leg. N. 420, 91 N. W. 743.

32. Such dues and premiums being part of a scheme which has failed, to enable the par value of the stock to be applied to the payment of the borrower's debts and the redemption of the non-borrowers' shares—Hoagland v. Saul (N. J. Eq.) 53 Atl. 704.

33. Interstate Bldg. & Loan Ass'n v. Holland (S. C.) 43 S. E. 978.

34. The mortgage on its face did not show how much was to be so applied on a

mium payments should not be credited on the principal if not usurious.[35] The member should not be allowed interest on interest rightfully paid.[36] Interest may be charged on the full amount of his loan though there was an illegal premium.[37] Where there is a tender of settlement of a loan, further payment of interest is released.[38]

Provisions that where the stock held as security is matured, the total payments of instalments, interest, and premiums will not exceed the amount of the advance together with interest at the highest legal rate, cannot be taken advantage of by the borrower until maturity of the stock.[39] The same is true of a provision in a by-law that only so much of the premium collected on contracts governed by laws that limit the aggregate amount of premium and interest that can be taken on them shall be taken as profits, as will in addition to the interest collected, equal the highest legal rate.[40]

Payments made on account of operating expenses should not be credited the loan,[41] or admission fees, stock dues and fines,[42] or insurance premiums required by the contract.[43]

The borrower should be credited with the withdrawal value of his stock at time of the loan and with subsequent payments of stock dues, interest, and premiums with interest from the time of payment.[44] Where credit is given for the amount paid, no further deduction for stock should be made on an accounting.[45] On accounting between a foreign association and a borrowing member, the borrower may have the value of his stock credited on the debt, though not prior to his election, and if there is no evidence of its actual value, stock will be valued at the amount actually paid on it. Dividends earned may also be applied.[46] Interest should be allowed on dues from date of payment.[47] The withdrawal value of stock of a stranger cannot be applied to a mortgage debt except by his express direction.[48]

The stockholder, seeking accounting, should allege that his stock has been brought to par by payment of monthly dues, thus entitling him to a release of his deed of trust.[49]

sum payable monthly—Washington Nat. Bldg. & Loan Ass'n v. Andrews, 95 Md. 696.

35. McDowell v. Pioneer Sav. & Loan Co. (Neb.) 90 N. W. 111.

36. In computing amount due on withdrawal—Reitz v. Hayward (Mo. App.) 73 S. W. 374.

37. The loan was subject to deduction of $10 attorney's fees and $16.50 premium, which was credited on the loan—Reitz v. Hayward (Mo. App.) 73 S. W. 374.

38. Reitz v. Hayward (Mo. App.) 73 S. W. 374.

39. Stipulation contained in the bond giving the stockholder on attempting to withdraw at any time the right to have account taken so that he shall only pay by way of interest the highest legal rate—Georgia State Bldg. & Loan Ass'n v. Grant (Miss.) 34 So. 84.

40. Georgia State Bldg. & Loan Ass'n v. Grant (Miss.) 34 So. 84.

41. McDowell v. Pioneer Sav. & Loan Co. (Neb.) 90 N. W. 111.

42. Though there is a by-law providing that a certain amount per share should be set aside for expenses, since the borrower on becoming a debtor of the association is no longer a member—Interstate Bldg. & Loan Ass'n v. Holland (S. C.) 43 S. E. 978.

43. Alexander v. Southern Home Bldg & Loan Ass'n, 120 Fed. 963.

44. Interstate Bldg. & Loan Ass'n v. Holland (S. C.) 43 S. E. 978.

45. Mercantile Co-Operative Bank v. Schaaf (Neb.) 89 N. W. 990. The borrower is not entitled to credit for dues and also for value of stock—Sappington v. Aetna Loan Co., 91 Mo. App. 551.

46. McDowell v. Pioneer Sav. & Loan Co. (Neb.) 90 N. W. 111.

47. Sappington v. Aetna Loan Co., 91 Mo. App. 551.

48. It was recited in a quitclaim deed from the association that the grantee's husband desired to withdraw his certificate and that it should be applied as a partial payment on the debt of the mortgagor. In the granting clause it was recited that in consideration of a payment of a sum of money and of the "cancellation of said certificates," the interest in the land and the mortgage held by the association was conveyed. Held, that the husband's certificate was withdrawn in consideration for the deed and was not to be applied on the mortgage as a payment, the other certificates mentioned being those of the mortgagor—McMillan v. Craft, 135 Ala. 148.

49. Caston v. Stafford, 92 Mo. App. 182.

The adjustment of a loan and acceptance of profits due a borrowing member will not be reviewed in an action to settle the rights of the parties under a new loan then made.[50] A mistaken statement to a stockholder that a loan was fully paid is not binding where immediately recalled before intervention of added rights.[51]

2. *Rights of borrower on voluntary liquidation.*—Stockholders are accounted with on the same principle whether the association is solvent or insolvent on voluntary liquidation.[52] On voluntary liquidation, a borrowing member can be credited only with payments made on the loan specifically, together with the value of the shares if it can practically be determined;[53] he is not entitled to damages for failure of the association to carry out the contract, and should be credited on his debt only with payments made as borrower.[54]

A judicial adjustment may be demanded by a borrowing member where an association on notifying him that it has decided to wind up its affairs refuses further payment under the contract and demands payment of a certain sum largely in excess of the loan; he is then required only to repay the loan with legal interest less premium and interest paid, and cannot be required to continue payments under the contract; interest at the legal rate is to be charged him to the date of adjustment of the claim and not to the date at which the company refused payments; and the association cannot complain of an apportionment of payments in a manner already adopted by it though not in compliance with the written contract. The court should fix the time for payment of the amount found due into court and make provision for the enforcement of a mortgage security.[55]

3. *After insolvency of association. In general.*—On receivership, the borrower need not comply further with his contract but there must be an equitable adjustment with the association.[56] Limitations of the right to demand direct payments of loans before the member's stock matures become inoperative.[57] Where it is not shown that the association was insolvent or that there had been prior losses at the date of termination of membership, a borrowing stockholder is entitled to credit for everything paid in excess of a legal rate of interest,[58] together with such payments as are not referable to the stock.[59] A mortgagor is entitled to credit for interest paid an association to be paid the holder of a prior mortgage and which has not been so paid, if an inequality of the final distribution of the assets of the association, it being insolvent, is not thereby produced.[60] Lim-

50. Callison v. Trenton Bldg. & Loan Ass'n (Mo. App.) 72 S. W. 477.

51. Alexander v. Southern Home Bldg. & Loan Ass'n, 120 Fed. 963.

52. People's Bldg. & Loan Ass'n v. McPhillamy (Miss.) 32 So. 1001; Same v. Hawks, Id.

53. He is not entitled to credit of the total amount paid including stock dues, and if the value of the shares cannot be estimated he must wait until distribution by the receiver before receiving their value—People's Bldg. & Loan Ass'n v. McPhillamy (Miss.) 32 So. 1001; Same v. Hawks, Id.

54. On adjusting his claim a special contract as to monthly payments was regarded as abrogated and the member regarded simply as a debtor—Home Sav. Ass'n v. Noblesville Monthly Meeting of Friends Church (Ind. App.) 66 N. E. 465.

55. Home Sav. Ass'n v. Noblesville Monthly Meeting of Friends Church (Ind. App.) 66 N. E. 465.

56. Hall v. Stowell (N. Y.) 75 App. Div. 21; Riggs v. Carter (N. Y.) 77 App. Div. 580.

57. Western Realty & Investment Co. v. Haase (Conn.) 53 Atl. 861. If it become necessary by reason of an assignment for benefit of creditors, to wind up the association, a borrower cannot complain that maturity of his loan is thereby hastened—Catlett v. U. S. Bldg. & Loan Ass'n's Assignee, 24 Ky. Law Rep. 200, 68 S. W. 123.

58. The only evidence of losses was that the assignee for the benefit of creditors of the association had charged off sums on account of uncollected usury and that there had been judgments recovered for usury collected—Olliges v. Ky. Citizens' Bldg. & Loan Ass'n's Assignee, 24 Ky. Law Rep. 1954, 72 S. W. 747.

59. Hall v. Stowell (N. Y.) 75 App. Div. 21.

60. Whitehead v. Commercial Bldg. & Loan Ass'n (N. J. Eq.) 53 Atl. 679.

itation of an action to recover a loan to a borrowing member begins to run at the date of appointment of a receiver on insolvency of the association.[61]

Credit and charges for premiums.—Payments of premiums should be credited to the debt,[62] without interest.[63] The member cannot be charged with premiums to be paid.[64] A stockholder after insolvency is not entitled to credit for premiums paid by reason of a provision in the bond that on final settlement the association was to retain, as instalment on the stock and interest, no more than the sum actually advanced with interest at a stated rate.[65]

Credits for dues.—In fixing the amount due on a mortgage to an insolvent association, the stock of the borrower, or payments, fines, dues, or penalties thereon cannot be considered.[66] He cannot be credited on the debt with sums paid as dues on stock.[67] On foreclosure by the receiver, they cannot be taken into consideration, but must await final distribution.[68] The borrower is not entitled to credit though before the assignment she has taken steps to have the dues applied to the discharge of the debt, if before such steps were taken the association was insolvent and endeavoring to wind up its affairs.[69] In the absence of fraud, a borrowing member who has assigned his certificate of stock as security cannot, after insolvency of the association, have his payments on stock credited to the loan, on the ground that he was not a stockholder.[70]

Credits for value of shares.—Provisions for final settlement with borrowers may be made the basis of a settlement on insolvency of the association before the stock matures.[71] Subsequent insolvency and assignment of the assets of the association does not affect the withdrawing member's right to credit for the value of his pledged stock and dividends already declared.[72] If the articles of the association provide that obligations due it may be canceled by applying the amount to the credit of all shares owned by the borrower, he is entitled on insolvency of the corporation to such credit, and if their value may be proximated, they may be set off in an action by the receiver on the note, though it is difficult or impossible to determine their exact value.[73] Credit to be allowed on shares is to be

61. Contract provided that the loan should be repaid at a future time and pledged the partly paid stock as security, stock to be paid by monthly dues, with an alternate provision for repayment of the loan thereby—Clarke v. Caufman (Kan.) 71 Pac. 241.

62. Since the association being unable to perform its part of the plan under which they were paid, they are without consideration—Hoagland v. Saul (N. J. Eq.) 53 Atl. 704; Roberts v. Murray (N. Y.) 40 Misc. Rep. 339.

63. Barry v. Friel, 114 Fed. 989.

64. Roberts v. Murray (N. Y.) 40 Misc. Rep. 339.

65. Alexander v. Southern Home Bldg. & Loan Ass'n, 120 Fed. 963.

66. Barry v. Friel, 114 Fed. 989.

67. In an action by the assignee of the insolvent association—U. S. Bldg. & Loan Ass'n's Assignee v. Fitzpatrick, 24 Ky. Law Rep. 222, 68 S. W. 400; Catlett v. U. S. Bldg. & Loan Ass'n's Assignee, 24 Ky. Law Rep. 200, 68 S. W. 123. The condition was to pay the principal in six months with interest "together with all dues and premiums due at the expiration of each month"—Hoagland v. Saul (N. J. Eq.) 53 Atl. 704; Coltrane v. Blake (C. C. A.) 113 Fed. 785; Andrews v. Kentucky Citizens' Bldg. & Loan Ass'n's Assignee, 24 Ky. Law Rep. 966, 70 S. W. 409; Whitehead v. Commercial Bldg. & Loan Ass'n (N. J. Eq.) 53 Atl. 679.

68. They should neither be charged the member or set off against the loan—Roberts v. Murray (N. Y.) 40 Misc. Rep. 339.

69. Wills v. Paducah Bldg. & Loan Ass'n (Ky.) 67 S. W. 991.

70. Monthly payments as interest and payments on stock, were continued for more than 3 years—Stanley v. Verity (Mo. App.) 73 S. W. 727.

71. Where the bond provided that on final settlement with the association, it should retain as installment on the stock and interest, no greater sum than the amount actually advanced with interest at the rate of 8 per cent., final settlements should be made under such provision, the borrower being charged with the loan and interest and credited with the installments of stock and interest paid as partial payments—Interstate Bldg. & Loan Ass'n v. Edgefield Hotel Co., 120 Fed. 422.

72. The action was begun before insolvency—Reitz v. Hayward (Mo. App.) 73 S. W. 374.

73. Robinson v. Spencer (N. Y.) 72 App. Div. 493.

computed according to their actual value. Statutory notice precedent to repayment of a loan and surrender of pledged stock may be waived, though a withdrawing member desiring credit on account of stock assigned to him subsequent to the loan must have given notice of its withdrawal.[74]

Dividends earned prior to insolvency should be credited on the loan of a withdrawing shareholder.[75]

§ 4. *Termination and insolvency of association.*—The court of an insolvent association's domicile in which its affairs are being wound up is a court of primary jurisdiction, and the courts of other states in which shareholders and assets are located should remit collections made by them in either ancillary or original receiverships to the domiciliary court for equitable distribution.[76]

Receivership.—Where a corporation is not only insolvent but its business has been carelessly managed, its affairs may be wound up though insolvency alone might not be sufficient ground.[77] Minority stockholders are entitled to receivership where the assets of the association have been permitted to be absorbed by a competing company and its affairs so managed that it becomes insolvent and they may have the transaction set aside,[78] and a member who has given notice of withdrawal may, notwithstanding, sue for appointment of receiver and equitable relief.[79] Where statutes provide that a receiver shall not be appointed for an association in liquidation except on application of the state auditor, a receiver cannot be appointed in an action by a shareholder though the association went into liquidation after the action was begun.[80]

Insolvency will not be inferred from a receivership.[81] Where the available assets are less than the value of the stock paid in, the association is insolvent.[82] In computing liabilities shareholders should be regarded as entitled to the amounts they have paid in, without deduction of expenses.[83]

Rights of withdrawing and paid up shareholders.—Shareholders, before withdrawal claims have been filed, are not creditors,[84] their status is not changed by payment of premiums and dues in advance, notice of withdrawal before assignment, or merging of claim into judgment; nor does the association become a borrower from a stockholder by the fact that the amount due on the stock was in the hands of the association at the time of assignment and after a demand for

74. Notice required by Rev. St. 1899, § 1368, is waived where the association disputes merely the amount owed—Reitz v. Hayward (Mo. App.) 73 S. W. 374.

75. Reitz v. Hayward (Mo. App.) 73 S. W. 374.

76. Whether such courts are state or federal—Southern Bldg. & Loan Ass'n v. Miller (C. C. A.) 118 Fed. 369.

77. P. L. 1899, p. 366, provides that an injunction against further operation and the appointment of a receiver may be had where the association is insolvent, exceeding its powers, or violating the law; or where its methods of business or continuation render its further operation hazardous to the public or those whose funds it has in custody; and, in the case at bar, it appeared that the association had been running 8½ years, was insolvent, its withdrawals large, expenses extravagant, investments careless, and there was no probability of maturing the shares within reasonable time. The association had been compelled to take property to an amount more than the first mortgage securities to prevent losses on loans—Bettle v. Republic Sav. & Loan Ass'n, 63 N. J. Eq. 578.

78. Continental Nat. Bldg. & Loan Ass'n v. Miller (Fla.) 33 So. 404.

79. The association had failed to set apart a fund to pay withdrawing members and other actions of the directors justified the proceeding—Continental Nat. Bldg. & Loan Ass'n v. Miller (Fla.) 33 So. 402.

80. Construing Burns' Rev. St. 1901, §§ 4477, 4479; Horner's Rev. St. 1901, §§ 3420ii, 3420kk; Acts 1899, p. 84, § 8; Burns' Rev. St. 1901, § 4463h; Horner's Rev. St. 1901, § 3406h—Huntington County Loan & Sav. Ass'n v. Fulk, 158 Ind. 113.

81. In a bill for an accounting on a loan where insolvency is not alleged—Caston v. Stafford, 92 Mo. App. 182.

82. Where stockholders cannot be paid the full amount of their contributions—Continental Nat. Bldg. & Loan Ass'n v. Miller (Fla.) 33 So. 404.

83. Sufficiency of evidence of insolvency—Bettle v. Republic Sav. & Loan Ass'n, 63 N. J. Eq. 578.

84. Bettle v. Republic Sav. & Loan Ass'n, 63 N. J. Eq. 578.

payment.[85] Notice of withdrawal does not give a preference over other members on distribution of assets in insolvency, against express provisions of the by-laws,[86] or if the association is insolvent before withdrawal is accomplished;[87] but where the holder of matured shares surrenders them and causes his certificate to be canceled, though he allows the amount due to remain with the association, his claim is entitled to preference over those whose stock has not matured at the time of insolvency,[88] and shareholders, who are issued certificates of indebtedness on withdrawal, obtain preference over other shareholders.[89] Holders of fully paid stock have no preference on insolvency over other stockholders,[90] being regarded as shareholders and not creditors;[91] but in Georgia it is held that the holder of fully paid, dividend-guaranteed, nonparticipating stock, is to be regarded as a creditor.[92]

A pledge of secureties to secure preferred shares of fully paid fixed dividend stocks may be enforced on insolvency, there being no general creditors.[93]

Rights of officers.—Directors are not deprived of their rights as creditors in the assets of the association because they have borrowed money beyond its legal capacity, nor is it gross negligence, raising such penalty, for them to mature stock after reports by duly appointed committees as to the financial condition of the association and with the advice of counsel,[94] where there was insufficient evidence to charge them with its insolvency.[95]

Voluntary liquidation.—The question of whether a voluntary liquidation is or is not an administration suit does not alter the rule of distribution among stockholders.[96]

85. The stockholder is not thereby given preference over other stockholders and the sole effect of the judgment, is to fix the amount on which she will receive pro rata distribution in the insolvency proceedings after dues are paid—Manheimer v. Henderson Bldg. & Loan Ass'n's Assignee, 24 Ky. Law Rep. 1816, 72 S. W. 313.

86. Coltrane v. Blake (C. C. A.) 113 Fed. 785.

87. Though such fact was unknown to the shareholder—Reitz v. Hayward (Mo. App.) 73 S. W. 374. If 30 days' notice is required by the by-laws in order that paid up stock may be withdrawn, in order that the status of the shareholder be changed, notice must be given more than 30 days before insolvency proceedings—Coltrane v. Blake (C. C. A.) 113 Fed. 785.

88. Jones v. Brennan, 100 Ill. App. 153; Gallagher v. Brennan, 99 Ill. App. 81.

89. Bates v. American Bldg. & Loan Ass'n (C. C. A.) 120 Fed. 1018; Reed v. Solomons, Id.; Solomons v. American Bldg. & Loan Ass'n, 116 Fed. 676.

90. The only difference between the two classes of stock was that the holders of the fully paid received interest by a fixed dividend at stated periods instead of a proportionate share of the profits—Coltrane v. Blake (C. C. A.) 113 Fed. 785; Bates v. American Bldg. & Loan Ass'n (C. C. A.) 120 Fed. 1018; Reed v. Solomons, Id.

91. Solomons v. American Bldg. & Loan Ass'n, 116 Fed. 676; Coltrane v. Blake (C. C. A.) 113 Fed. 785.

92. Though the right to payment is not absolute until after a stated period and specified notice and sufficient assets have been received from a specific source to make full payment—Cashen v. Southern Mut. Bldg. & Loan Ass'n (Ga.) 41 S. E. 51.

93. The corporation, having power to borrow money and mortgage the corporate property, issued prepaid shares bearing a fixed dividend out of the profits. The holders of such share had no vote and the proceeds became part of the fund to be loaned to borrowing shareholders. Held, that the prepaid shareholders were entitled to a preference as against other shareholders in notes and mortgages payable to the association placed in trust for the payment of principal and dividends of the prepaid shares —Wilson v. Parvin (C. C. A.) 119 Fed. 652.

94. It is not shown that the money did not go to the association or to what extent there was negligence, if any—Commonwealth v. Anchor Bldg. & Loan Ass'n, 20 Pa. Super. Ct. 101.

95. The evidence of the directors was not contradicted that the first intimation they had of financial difficulty, was an examination by bank examiners and the reports of committees for the examination of the financial affairs of the association had uniformly shown it to be solvent—Commonwealth v. Anchor Bldg. & Loan Ass'n, 20 Pa. Super. Ct. 101.

96. People's Bldg. & Loan Ass'n v. McPhillamy (Miss.) 32 So. 1001; Same v. Hawks, Id.

BUILDINGS.

§ 1. **Public Regulation.**
§ 2. **Private Regulation.**—Covenants as to Character of Buildings; Building Lines.
§ 3. **Liability for Unsafe Condition of Premises.**—Notice; Invitation or License; Falling Materials; Contributory Negligence; Actions.
4. Liability for Negligent Operation of Elevators.—Care Required; Contributory Negligence; Actions for Injuries.

§ 1. *Public regulation.*—Under general powers, a city cannot compel buildings in a certain locality to conform to a certain standard.[1] The right to regulate does not carry a right to condemn without inspection.[2] An ordinance may provide that in the business portion of a city no stationary or swinging sign or awning shed shall be erected across the sidewalk.[3] A city cannot allow the projection of a building over the sidewalk so as to impair the public use of the street or the passage of light and air to adjacent buildings.[4] An encroachment of a building on the sidewalk is a public nuisance whether the encroachment is for ornament or utility.[5]

Building inspectors are not included in an ordinance relating to the appointment of janitors, engineers, or other persons by the commissioner of public buildings.[6]

Precautions against fire and other casualty.—A statute providing for the provision of fire escapes may impose a duty on the owner independent of the action of the municipal officer or fire engineer.[7] Where lights are required to be maintained in hallways without outside window openings, windows opening into an air shaft, or a skylight at the top of the house, are not outside openings.[8] Cutting a door into a theatre entrance comes within an ordinance concerning such entrances.[9]

§ 2. *Private regulation. Covenants as to character of buildings.*—Where there are express restrictions in deeds as to the character of buildings, the vendee will not be bound by parol restrictions unless he is shown to have had notice of them before payment for the property.[10] Covenants for the erection of dwellings of a specified character and location run with the land and the fact that a street subse-

1. A power to make building regulations guarding against danger from unsafe construction, and to pass ordinances for the preservation of order and protection of rights and privileges from encroachment or for the maintenance of peace, good government and welfare, does not authorize an ordinance allowing the refusal of a building permit if the proposed building does not conform to the general character of the buildings erected in the locality and will tend to depreciate the value of surrounding property. Construing Baltimore City Charter, Acts 1898, c. 123, that a similar ordinance passed prior to the charter was not rendered valid by the section of the new charter ratifying all ordinances not inconsistent with the charter—Bostock v. Sams, 95 Md. 400.

2. A statute allowing cities of the first class to regulate the management and inspection of elevator hoist ways and elevator shafts, does not allow a city to condemn an entire class of elevator appliances and require their removal without inspection and by a general regulation—Act Pennsylvania, May 5th, 1899—Richmond Safety Gate Co. v. Ashbridge, 116 Fed. 220.

3. Such an ordinance is not an unlawful invasion of the rights of an abutting owner, is not special or discriminatory and its reasonableness will be presumed—Ivins v. Trenton (N. J. Sup.) 53 Atl. 202.

4. Ordinance authorizing the construction of a bay window projecting 18 inches over the sidewalk, held invalid—John Anisfield Co. v. Grossman, 98 Ill. App. 180.

5. Pillars 22 inches in the street may be enjoined by an adjoining owner—First Nat. Bank v. Tyson, 133 Ala. 459.

6. See for construction of the municipal Code and St. Louis City charter as to the right of a commissioner of public buildings to remove the building inspectors appointed by him—State v. Longfellow, 93 Mo. App. 364.

7. Rev. St. c. 26, § 26, as amended by Pub. Laws 1891, c. 89—Carrigan v. Stillwell, 97 Me. 247.

8. Laws 1897, p. 474, c. 378, § 1320—Bretsch v. Plate, 115 N. Y. St. Rep. 868.

9. Cutting of a door in a partition between a store and the entrance of an adjoining theatre without a permit from the building inspector, is a violation of building regulations 1897, § 182, as to theatre entrances and also of section 20 requiring the building inspector to determine whether a formal permit is necessary for an intended repair to a building—Mertz v. District of Columbia, 18 App. D. C. 434.

10. Standard L. & B. Co. v. Schanz (N. J. Ch.) 51 Atl. 620.

quently becomes a business street does not prevent the covenantee while occupying her residence as a dwelling from enforcing the covenant,[11] but a provision in a deed that a house erected on the lot sold should not be of more than certain dimensions does not create an easement in favor of an adjoining owner entitling him to insist that no different building shall ever be erected on the lot conveyed.[12] A covenant against the erection of tenement houses does not forbid the erection of a modern apartment house,[13] nor does a covenant in a deed for the erection of a first class dwelling house;[14] but a covenant similar to the latter prohibits erection of a photograph gallery.[15]

Building lines.—Provisions in deeds controlling the erection of buildings are to be strictly construed against the grantor.[16] Acceptance of a street by the public is an acceptance of the easement created by a building line established in a plat. One owner can be compelled to observe a building line though other owners have violated it.[17] Grantees of adjoining lots cannot enforce a covenant against building within a certain line.[18] The enforcement of a covenant establishing a building line may be rendered inequitable by changing circumstances,[19] or the restriction may expire with other limitations in the deed.[20]

11. A covenant that the grantor, her heirs or assigns, in the case of improvement of adjoining lots, would erect one or more first-class dwelling houses, the fronts of which would be on a line referred to, runs with the land and is binding on a subsequent grantee of such adjoining lots with notice, and one who acquires title to such lots in partition is bound by notice of the covenant obtained from the record of the deed—Holt v. Fleischman, 75 App. Div. (N. Y.) 593.

12. Boston Baptist Social Union v. Trustees of Boston University (Mass.) 66 N. E. 714.

13. Notwithstanding Laws 1867, c. 908, § 17, declares that a tenement house includes every house occupied as a residence of more than three families, living independently and doing their own cooking, and a covenant against the erection of a tenement house, contained in a deed executed in 1873, is not violated by the erection of a seven story apartment house containing two separate apartments on each floor—Kitchings v. Brown, 37 Misc. Rep. (N. Y.) 439; White v. Collins Bldg. & Const. Co., 82 App. Div. (N. Y.) 1.

14. Holt v. Fleischman, 75 App. Div. (N. Y.) 593.

15. A photograph gallery is within the meaning of a restriction that nothing but a two story dwelling house costing not less than $3,000 with a brick or stone foundation and set not less than twenty feet from the sidewalk should be erected on a lot conveyed—Frink v. Hughes (Mich.) 10 Detroit Leg. N. 106, 94 N. W. 601.

16. A deed conveying property provided that no building should be erected nearer a certain street than the building directly south of the property conveyed. The grantor did not own the property south but had conveyed it to his daughter. Held, that it did not sufficiently appear that the restriction was for the benefit of the daughter's lot to allow it to be enforced by her—Hays v. St. Paul M. E. Church, 196 Ill. 633.

17. The establishment of a building line is sufficient where the plat shows a street and a dash line parallel thereto upon which are the words, "Building line 50 ft. from the boulevard line," and the reservation is for the benefit of the public and property abutting on the street, and it is unnecessary to expressly mention grantees or donees of the easement in the plat, or to refer to the reservation in deeds made by the owner in order to bind persons holding under them by the restriction—Simpson v. Mikkelsen, 196 Ill. 575.

18. Held, that a subsequent purchaser of an adjacent lot and a portion of the lot subject to the covenant did not revive the easement by a conveyance, the adjacent lot having been taken from the original grantor free from the covenant—Schwoerer v. Leo, 39 Misc. Rep. (N. Y.) 505.

19. A covenant prohibiting the erection of any dwelling-house nearer than twenty feet to the street, will not be enforced where, at the time the deed was executed, the property was in the suburbs and neighboring houses were detached and set back some distance from the street, and since that time the character of the surrounding property has changed, an orphan asylum and a brewery have been erected on neighboring blocks, a street car line built and a flat building three stories high placed on the street line directly opposite—Roth v. Jung, 79 App. Div. (N. Y.) 1.

20. A condition in a deed that no building of less than a certain value shall be erected, that all buildings shall be set back from the street a certain distance and that no building shall be used for a livery stable or tenement house or for any manufacturing purpose for the period of ten years, is governed by the time limitation as to all the restrictions and becomes inoperative as to the building lines after ten years—Best v. Nagle, 182 Mass. 495.

Equitable enforcement of building restrictions. (Note.) The right to enforce a covenant concerning the use to which land shall be put may be enforced in equity, though it

§ 3. *Liability for unsafe condition of premises.*[21]—A building so erected that it accumulates ice and allows it to fall on adjacent property is a nuisance which may be enjoined.[22] Both the owner and contractor are liable under a building contract, the performance of which as planned will injure third persons, but the owner is not liable where the execution of the plan will not necessarily cause the injury, but it results from the negligence of the independent contractor.[23] The owners of a building are not responsible for injuries to employes by a person contracting to rearrange it according to fixed plans,[24] though they have been held liable to an employe of a contractor for the painting of an elevator shaft, who, while within the shaft, is struck by a weight of the elevator, the owners having used the elevator without warning.[25]

Notice.—Possession of the means of knowledge of the dangerous condition of premises and negligently remaining ignorant is equivalent to actual knowledge.[26]

Invitation or license to use dangerous place.—A mere license to enter on premises does not impose any obligation to provide against injuries or accidents arising from the existing condition of the premises,[27] but a person who is on the premises with the permission of the owner on business for their mutual benefit is not a mere licensee,[28] and a merchant must protect a customer from the unsafe condition of a

be not a covenant such as runs with the land (Tulk v. Moxhay, 2 Phillips, 774; Whitney v. Union R. Co., 11 Gray [Mass.] 359, 71 Am. Dec. 715). Some American cases base the right on the theory that an easement is created by the covenant, which theory is criticised by Mr. Tiffany (Tiff. Real Prop. p. 763). Agreements which are so enforced are usually restrictive, relating to the character of business to be transacted (McMahon v. Williams, 79 Ala. 288; Post v. Weil, 115 N. Y. 361) or to use for building (Peck v. Conway, 119 Mass. 546) or for residence purposes (Trustees v. Lynch, 70 N. Y. 440), or establishing building lines (Ogontz Co. v. Johnson, 168 Pa. St. 178; Linzee v. Mixer, 101 Mass. 512), or fixing a minimum cost of buildings (Page v. Murray, 46 N. J. Eq. 325) or style of construction (Keening v. Ayling, 126 Mass. 404). But agreements not restrictive have been enforced (Carson v. Percy, 57 Miss. 97; Sharp v. Cheatham, 88 Mo. 498).

Jurisdictions differ as to whether an owner may enforce such agreements when he is only indirectly benefited by them. Affirmative is New York. (Hodge v. Sloan, 107 N. Y. 244. Contra, Norcross v. James, 140 Mass. 188; Brewer v. Marshall, 18 N. J. Eq. 337).

While it is not necessary that such agreement be contained in a sealed instrument, yet the purchaser must have either actual or constructive notice. Ordinarily, a purchaser can enforce such an agreement only when it was made for the purpose of benefiting the land (De Gray v. Monmouth Beach Club, 50 N. J. Eq. 329; Sharpe v. Ropes, 110 Mass. 381; Equitable Life Association v. Brennon, 148 N. Y. 661). But such intention is inferred from the fact that the land was laid off in lots intended for building purposes (Parker v Nightengale, 6 Allen [Mass.] 341, 83 Am. Dec. 632). A prior purchaser enforcing such an agreement must generally show that the restriction was part of a common plan for the benefit of all the lots in a tract, it being then assumed that all assented to such plan (De Gray v. Monmouth Beach Club, 50 N. J. Eq. 329, citing with other cases, 1 Tiffany, Real Prop. 768). A change in, or frustration of, such a general plan of improvement (Trustees v. Thatcher, 87 N. Y. 311; Page v. Murray, 46 N. J. Eq. 325) or an adjoining proprietor's act in making it of no avail (Landell v. Hamilton, 177 Pa. St. 23) may defeat enforcement of it. The leading cases, embracing many others than those herein cited, are collected and discussed in 1 Tiffany, Real Prop. pp. 762-770, from which this note is taken.

See an extended discussion of the right to enjoin breach of contract in note to Philadelphia Ball Club v. Lajoie, 90 Am. St. Rep. 627, 641; S. C. 202 Pa. St. 210. Citing as applied to building covenants Gawtry v. Leland, 31 N. J. Eq. 385; Hills v. Metzenroth, 173 Mass. 423; Wright v. Evans, 2 Abb. Pr. (N. S.) 308.

21. As between landlord and tenant, see topic "Landlord and Tenant." Negligence of building contractors is treated with other general questions under "Negligence."

22. Davis v. Niagara Falls Tower Co., 171 N. Y. 336, 57 L. R. A. 545.

23. The contract is no justification to the contractor in an action by a party who has sustained damages, where the performance of the contract is necessarily injurious—Murray v. Arthur, 98 Ill. App. 331.

24. While the builder was in possession of the building, plaintiff, an employe of an electric company, fell through a hole in the floor which was concealed by rubbish—Hogan v. Arbuckle, 73 App. Div. (N. Y.) 591.

25. Harmer v. Reed A. & I. Co. (N. J. Err. & App.) 53 Atl. 402.

26. Person injured by slipping on fish in an aisle opposite a fish stall in a market house—Washington Market Co. v. Clagett, 19 App. D. C. 12.

27. Bentley v. Loverock, 102 Ill. App. 166.

28. Where a distilling company allows purchasers of slop to fill their wagons from the vat and to go on a platform around the vat and stir it, it is bound to ordinary care to keep the vat in a safe condition and may be liable for the scalding to death of a person by the bursting of the vat—Hupfer v. National Distilling Co., 114 Wis. 279.

store room though he enter at a place where he is uninvited.[29] The fact that a person has asked an employe of defendant whether she might use a certain door and has seen others enter and leave by it is not sufficient to show an implied invitation for its use.[30]

Acts or conditions showing negligence.[31]—It is not negligence per se to raise the floors of rooms of a building slightly above the hall floors.[32] Failure to provide fire escapes as required by statute, if the proximate cause of death, and the death is the ordinary consequence thereof, is evidence of actual negligence.[33]

Liability for falling buildings and material.—The owner of a building may be responsible for injuries resulting from its fall if he has not exercised proper care to ascertain its condition; its fall without apparent cause is prima facie evidence of negligence.[34]

The owner may be freed from liability for injuries resulting from the blowing of material from the roof of a building during a wind storm by the fact that he relied on the skill of skilled architects and workmen to whom the planning and construction of the building was delegated and that it was safely and properly constructed by skilled persons and was in possession of a tenant. It is also a good defense that the accident was the result of vis major.[35]

Where a building has been damaged by fire, the owner is liable for injuries from the falling of its walls after a reasonable time to make them safe under ordinary circumstances or such causes as past experiences would show to be likely to arise and he is not relieved by the employment of competent architects and builders to take proper precautionary measures, or by a threatened injunction against repair of the walls by persons attempting to save the contents of the building.[36] It is also held that he is bound to act only as a reasonably prudent man.[37]

City ordinances requiring the protection of sidewalks pending the construction of buildings do not create a cause of action in favor of persons injured through failure to take the required precaution and do not enlarge the personal liability of the owner, or render him liable for an injury sustained by the negligence of his contractor's servants in allowing material to fall into the street.[38]

29. Customer entering by an alley door—Burk v. Walsh (Iowa) 92 N. W. 65.

30. Door at the back of a store reached by three steps, access to which was had by a narrow passage between the counter and cashier's desk. Plaintiff was injured by stepping through such door and falling into an excavation outside, no light being provided—Rooney v. Woolworth, 74 Conn. 720.

31. The owner of a store is not liable for a fall occasioned through plaintiff catching his foot in a door mat, where the door mat has been in place for several years and no injury had ever happened—Dwyer v. Hills Bros. Co., 79 App. Div. (N. Y.) 45. Evidence held insufficient to establish negligence in the owner of a building toward a delivery man falling into a space between the elevator and the wall of a shaft—Gray v. Siegel-Cooper Co., 78 App. Div. (N. Y.) 118. The owner of a building is not liable to a fireman falling into an elevator shaft, though there was no guard rail on the side from which he approached, where it was not shown that he had entered the building in a way that might reasonably be anticipated, or that men preceding had not removed the guard rail and moved the elevator—Baker v. Otis Elevator Co., 78 App. Div. (N. Y.) 513. It is for the jury to determine where brick came from, the fall of which occasioned the injury and whether the fall thereof was the result of the negligence of defendant or his servants—Leach v. Durkin, 98 Ill. App. 415.

32. Licensee injured through the construction of a room floor in an office building, four and seven-eighths inches above the hall floor—Ware v. Evangelical B. B. & M. Soc., 181 Mass. 285.

33. Rev. St. c. 26, § 26, as amended by Pub. Laws 1891, c. 89—Carrigan v. Stillwell, 97 Me. 247.

34. Comp. Laws, § 3603, imposes a liability for injury to others by the want of ordinary care in the management of property—Patterson v. Jos. Schlitz Brew. Co. (S. D.) 91 N. W. 336.

35. Uggla v. Brokaw, 77 App. Div. (N. Y.) 310.

36. Lauer v. Palms (Mich.) 9 Detroit Leg. N. 61, 89 N. W. 694.

37. One acting on the report of a competent mechanic after examination of condition held not liable—Freeman v. Carter (Tex. Civ. App.) 67 S. W. 527.

38. New York City ordinance approved Sept. 25, 1895, amended Nov. 18, 1895, pro-

Contributory negligence.[39]—One who enters as a mere licensee on poorly lighted premises, with which he is not familiar, is contributorily negligent.[40]

Actions.—If a charge of negligence is based on the violation of a city ordinance, recovery cannot be had on a common law liability.[41] In the footnotes are grouped decisions to sufficiency of pleading,[42] admissibility of evidence,[43] sufficiency of evidence,[44] and instructions.[45] Instructions ignoring the question of whether the true condition of a building could be ascertained by the exercise of ordinary care should

viding penalties for failure of an owner or general contractor constructing a building over five stories high to build a temporary roof over the sidewalk in front thereof—Koch v. Fox, 71 App. Div. (N. Y.) 288.

39. A tenant of a building may, without negligence, use a dumb waiter placed in the house for the convenience of persons delivering goods—Vandercar v. Universal Trust Co., 114 N. Y. St. Rep. 290. An ice dealer who uses a dumb waiter in an apartment house with knowledge that it was in a dangerous condition, is contributorily negligent—McGuire v. Board, 58 App. Div. (N. Y.) 388. Evidence held sufficient to go to the jury as to plaintiff's contributory negligence in stepping through the door of an elevator shaft in an unlighted hall on a dark day—Muller v. Hale, 138 Cal. 163, 71 Pac. 81.

40. He cannot recover for a fall down an elevator shaft—Bentley v. Loverock, 102 Ill. App. 166. The same rule applies where plaintiff after having several times called at the front door, found the front door locked on one evening and went to the rear, while attempting to enter the back door in the dark, fell down the elevator shaft—Daley v. Kinsman, 182 Mass. 306.

41. Action for injury to a child falling through a hatch-way based on an ordinance requiring such hatch-way to be guarded—Hirst v. Ringen Real Estate Co., 169 Mo. 194.

42. It is sufficient that the complaint state that the owner permitted a building to collapse, and in so doing, to instantly and without notice kill deceased while he was rightfully and without negligence therein—Patterson v. Jos. Schlitz Brew. Co. (S. D.) 91 N. W. 336. It is sufficient against a general demurrer to allege "that this hatch-way, at the time of the injuries of plaintiff's child, was barred, enclosed by railing, gate or other contrivance to prevent accident or injuries to persons therefrom as required by § 749, art. 3, c. 16, of the Revised Ordinance of the city"—Hirst v. Ringen Real Estate Co., 169 Mo. 194. Complaint for injuries received by the fall of a building alleged that plaintiff was lawfully in front of the building and the answer denied it, held, that there was no issue as to the plaintiff's precise position—Waterhouse v. Jos. Schlitz Brew. Co. (S. D.) 94 N. W. 587.

43. In an action for the falling of a building, evidence that other similar buildings had fallen is admissible to show notice; it may be shown how and of what material the building was constructed, the manner of construction and the fact that the material had decayed being alleged in the complaint; and description of material and methods employed in constructing similar buildings is admissible—Waterhouse v. Jos. Schlitz Brew. Co. (S. D.) 94 N. W. 587. To show that a hall was lighted at the time plaintiff stepped into an elevator shaft, it is inadmissible to introduce evidence of its being lighted at the same time of day on other days of the month—Muller v. Hale, 138 Cal. 163, 71 Pac. 81. Evidence that fine print could be read March 18th at 5 P. M. is not admissible to show that a hallway was sufficiently lighted without artificial light December 13th between 4 and 4:30 P. M. Records of the United States Weather Bureau as to conditions of the weather are admissible, and a picture of the hallway may be admissible to show the construction of the staircase though it will not show whether the hall was sufficiently lighted—Bretsch v. Plate, 115 N. Y. St. Rep. 868. Witness cannot be asked as to her knowledge of whether it is customary for elevators to have lights, though she testified that when she entered the room where the shafts were, there were no lights—Muller v. Hale, 138 Cal. 163, 71 Pac. 81. In an action for injuries from the falling of a wall after a fire, a letter written by the chief engineer to the mayor of the town and given by the mayor to the owner, stating that the wall was dangerous and should be pulled down is admissible to show notice—Curd v. Wing, 115 Ga. 371.

44. To sustain a recovery against a hotel proprietor for injury received by being struck by a bag of potato peelings falling from a back platform—Ahern v. Melvin, 21 Pa. Super. Ct. 462. Evidence that a section of iron railing has been allowed to remain loose for some time is sufficient to go to the jury in an action by a pedestrian injured by its fall—Butts v. National Exch. Bank (Mo. App.) 72 S. W. 1083. Evidence held sufficient to show that the defective condition of a vat could have been discovered by exercise of ordinary care—Hupier v. National Distilling Co., 114 Wis. 279. To show that a hall was sufficiently lighted to relieve the owner from the duty of maintaining a light under Laws 1897, p. 474, c. 378, § 1320—Bretsch v. Plate, 115 N. Y. St. Rep. 868.

45. An instruction that it is the duty of the owner of a market house to maintain sufficient watchmen to keep the aisles in safe condition for the public, is proper—Washington Market Co. v. Clagett, 19 App. D. C. 12. Where injury was received from the falling of walls after partial destruction of a brick building, an instruction that the owner would not be liable if he had employed a competent mechanic to inspect the walls, and the mechanic had reported them safe, should be given though there is a general charge on ordinary care—Freeman v. Carter (Tex. Civ. App.) 67 S. W. 527.

be refused.[46] Instructions requiring a peculiar kind of protection to an elevator shaft are erroneous.[47] Hypothetical findings will not be reviewed.[48]

§ 4. *Liability for negligent operation of elevators.*—Operators of passenger elevators are common carriers of passengers;[49] while not insurers, they must exercise the highest degree of care, and their liabilities are similar to those of a carrier by railroad.[50] It is their duty to use extraordinary care in and about the operation of elevators to prevent injury to persons therein,[51] and they are bound to the highest degree of care and diligence for the safety of passengers practically consistent with efficient use and operation thereof.[52]

Where the elevator is built by a reputable firm, has all known safety appliances, and is frequently inspected, there is no liability for an accident.[53] The owner of a building may be liable for negligence where a freight elevator is so constructed that it will not come to the level of a floor so that loading causes jarring resulting in an accident.[54] The owner may not be liable for an act of a third person.[55] The jury may be instructed that noncompliance with statutory requirements of the use of appliances to prevent passenger elevators from starting while their doors are open is evidence of negligence.[56] Where an elevator is not out of repair, or its use in the way in which it was used dangerous, the doctrine of res ipsa loquitur does not apply to a person accustomed to its operation who is injured in an unexplained manner.[57]

Where a stop is made to allow passengers to get off, the operator must stop long

46. Instruction is properly refused in an action for collapse of a building, that defendant was not liable unless there was something in the appearance of the building or its condition to indicate to a person on an ordinary examination that the building was improperly constructed or unless defendant had notice that it was improperly constructed—Waterhouse v. Jos. Schlitz Brew. Co. (S. D.) 94 N. W. 587.

47. Error to instruct that a failure to erect and maintain guards and barriers for the protection of an elevator shaft was negligence—Burk v. Walsh (Iowa) 92 N. W. 65.

48. It is not an adjudication that defendants failed to perform their duty toward plaintiff as a licensee, and that plaintiff did not by her negligence contribute to her injuries such as to demand a review, where the trial court found that plaintiff, who was injured by stepping into an excavation on going out of a door of defendant's store, used the door by an implied invitation, and that if the facts did not establish such conclusion it would find that the license given plaintiff established a liability—Rooney v. Woolworth, 74 Conn. 720.

49. Chicago Exch. Bldg. Co. v. Nelson, 197 Ill. 334; Beidler v. Branshaw, 102 Ill. App. 187.

50. Becker v. Lincoln Real Estate & Bldg. Co. (Mo.) 73 S. W. 581; Griffen v. Manice, 74 App. Div. (N. Y.) 371.

51. Beidler v. Branshaw, 102 Ill. App. 187.

52. Chicago Exch. Bldg. Co. v. Nelson, 197 Ill. 334. Where persons are carried on a freight elevator, the highest degree of care must be exercised practicable and consistent with the efficient use of the means and appliances adopted—Beidler v. Branshaw, 102 Ill. App. 187.

53. The elevator was shown to be in perfect order by various inspections of the persons erecting it, the insurance companies, and the city. There was an occasional bumping of the car on the springs, and the accident occurred through the unexplained failure of the machinery to stop at the bottom of the shaft, though the car was properly operated—Griffen v. Manice, 74 App. Div. (N. Y.) 371.

54. Grifhahn v. Kreizer, 62 App. Div. (N. Y.) 413.

55. The owner of a building is not liable to a person injured by the sudden starting of a freight elevator through the fact that some one on another floor pulled the starting rope without giving warning, where no similar accident had occurred since the elevator had been in use some four years, and the person injured testified that he did not think that a person outside the shaft could pull the rope with force enough to start the elevator—Cleary v. Brooklyn Factory & Power Co., 79 App. Div. (N. Y.) 35.

56. Gen. Laws, c. 108, § 16. Plaintiff's foot was caught between the elevator and the floor by the moving upward of the elevator when she started out after the door had been opened—Bullock v. Butler Exch. Co. (R. I.) 52 Atl. 122.

57. A freight and passenger elevator was so constructed that in passing through the shaft it lifted on its top sections of the floor and carried them thus to the top of the shaft, leaving them again in their proper places on the trip down. Plaintiff's intestate had been carried to the top floor of the building and left alone there, it being agreed that the elevator should return for him when he signalled. The signal was given, and the operator on reaching the top floor discovered him pinned between the top of the elevator and the roof, the guard rail of the opening being down; there was an abundance of light around the elevator. Held that on the evidence, the owners of the building were not liable—State v. Green, 95 Md. 217.

enough to allow passengers desiring to do so to alight, though they are not the ones directing the stop, and before starting must exercise reasonable care to ascertain if there are other persons in the act of getting off.[58] Moving of an elevator after it is stopped, though at plaintiff's request, may be negligence.[59] Starting an elevator without closing the door tends to show negligence in its operation.[60]

Contributory negligence.—An attempt to leave an elevator at the usual stop without speaking to the conductor is not negligence as a matter of law, though the passenger does not stop to look or listen or observe whether the conductor is about to close the door which has been opened to admit passengers.[61] The passenger's mistake in the number of the floor at which he is attempting to leave the elevator need not be considered in determining his care.[62] Persons riding on freight elevators must avoid assuming dangerous positions.[63]

Actions for injuries.—A statute as to safety appliances need not be referred to in terms in the pleadings if it clearly appear from the averment of the accident that had it been complied with the accident would not have occurred.[64] The burden of showing negligence is on the person injured.[65] No presumption that negligence does not exist in the operation of a freight elevator arises from the fact that it has been operated for some time without accident.[66] Evidence of negligence not charged in the declaration is inadmissible.[67] The condition of the elevator immediately after the accident may be shown.[68] Decisions as to sufficiency of evidence are collected in the notes.[69]

58. Becker v. Lincoln R. E. & B. Co. (Mo.) 73 S. W. 581.

59. An instruction as to such point should be that if the elevator was so moved at plaintiff's request as to conduce to the accident, such moving was not negligence on the part of defendant—Bullock v. Butler Exch. Co. (R. I.) 52 Atl. 122.

60. Passenger knowing it to be the custom for descending passengers to notify the operator of a desire to get off at floors before the ground floor, attempted to leave at the second floor, thinking that the elevator had reached the ground—Chicago Exch. Bldg. Co. v. Nelson, 197 Ill. 334.

61. Chicago Exch. Bldg. Co. v. Nelson, 197 Ill. 334. The question of whether a passenger is guilty of contributory negligence in attempting to leave an elevator without acquainting the conductor of his purpose as well as the right to assume that the car would not start until the door is closed is for the jury—Roulo v. Minot (Mich.) 9 Detroit Leg. N. 619, 93 N. W. 870.

62. The passenger has the right to alight at any of the usual stopping places, though in this case it was customary for descending passengers to notify the conductor if they desired to get off elsewhere than at the ground floor—Chicago Exch. Bldg. Co. v. Nelson, 197 Ill. 334.

63. One using a freight elevator as a licensee who steps off into an unguarded place which was perfectly apparent, is contributorily negligent—Gray v. Siegel-Cooper Co., 78 App. Div. (N. Y.) 118. It may be contributory negligence for a person familiar with the construction of an elevator to so stand that his heel is caught between the car and a lintel—Beidler v. Branshaw, 200 Ill. 425. One who with knowledge places his foot between a freight elevator and a floor is negligent and cannot recover where the elevator is subsequently lowered by the employee in charge without knowledge of the presence of the foot—Bromberg v. Friend, 101 N. Y. St. Rep. 698.

64. Gen. Laws, c. 108, § 16—Bullock v. Butler Exch. Co. (R. I.) 52 Atl. 122.

65. Defective working of elevator—Griffen v. Manice, 74 App. Div. (N. Y.) 371.

66. There was evidence that the elevator was improperly constructed—Grifhahn v. Kreizer, 62 App. Div. (N. Y.) 413.

67. Operation of an elevator—La Salle County Carbon Coal Co. v. Eastman, 99 Ill. App. 495.

68. Where there is no evidence that its condition had changed before the examination by the witness—Slack v. Harris, 101 Ill. App. 527.

69. To show negligence of defendant in an accident caused by the sudden starting up of an elevator while plaintiff was attempting to leave it—Ingrafia v. Samuels, 71 App. Div. (N. Y.) 14. To show that by defendant's negligence plaintiff's foot was caught and crushed under a floor plate through the elevator stopping below the floor and then moving upward while plaintiff was getting out—Bullock v. Butler Exch. Co. (R. I.) 52 Atl. 122. Evidence held insufficient to sustain a judgment for plaintiff injured by the falling of an elevator which was inspected and found in good condition by a competent engineer the morning of the accident, which was in charge of a competent operator and had worked for three years without accident and worked properly after the accident without repair and there was no evidence of any fault of the operator or other employes—Hubener v. Heide, 73 App. Div. (N. Y.) 200. Negligence not shown in aged woman's attempting to leave an elevator after it had stopped and the door was opened, and being caught between the car and the

BURGLARY.

§ 1. *What constitutes. Breaking.*—Entry by a servant with intent to steal is burglarious though he had a right to sleep in the building.[1] Opening a closed door is a breaking,[2] as is breaking a window and reaching in through it.[3] Removing the putty around a window pane without taking out the pane is not.[4]

Intent.—If there is no intent to commit crime, the offense is not burglary.[5]

Nature and situation of building.[6]—Enclosure is not necessary to make a building part of the curtilage.[7] A corn crib is a "house,"[8] and a chicken house is a "building."[9]

Commission of intended crime.—Actual commission of a crime is not necessary.[10]

Attempt.—Going to a building with burglar's tools and with intent to break in is an attempt.[11]

§ 2. *Indictment.*—The indictment need not state whether the owner of the building was a partnership or a corporation,[12] but it has been otherwise held as to the property within the building,[13] nor need an indictment for burglary in rooms in a hotel allege the leasing thereof though they are stated to be a dwelling house.[14] It need not be alleged that there were goods subject of larceny in the building.[15] Whether the crime was committed in the day or night need not be stated under some of the later laws.[16] Property may be laid in a part owner who is in control,[17] or in a tenant,[18] and it has been held that the owner's name need not be alleged,[19] and title to the chattels stolen may be laid in one having special property.[20] Particular allegations passed on by the courts are in the notes.[21]

§ 3. *Admissibility of evidence.*[22]—Actual larceny may be proved to show

floor by the sudden rising of the car—Bullock v. Butler Exch. Co. (R. I.) 52 Atl. 122. Evidence held sufficient for the jury on the question of an elevator conductor's negligence in allowing the elevator to start while the passenger was getting out—Roulo v. Minot (Mich.) 9 Detroit Leg. N. 619, 93 N. W. 870.

1. State v. Howard, 64 S. C. 344.

2. Barber v. State (Tex. Cr. App.) 69 S. W. 515; State v. Snow (Del.) 51 Atl. 607.

3. State v. Boysen, 30 Wash. 338, 70 Pac. 740.

4. Minter v. State (Ark.) 71 S. W. 944.

5. It is breaking and entering under the Delaware Statute—State v. Snow (Del.) 51 Atl. 607.

6. Under Gen. St. 1901, § 2059, to constitute burglary in the second degree there must be a human being or some valuable property in the building—State v. Poole, 65 Kan. 713, 70 Pac. 637.

7. State v. Bugg (Kan.) 72 Pac. 236.

8. Barber v. State (Tex. Cr. App.) 69 S. W. 515.

9. State v. Poole, 65 Kan. 713, 70 Pac. 637.

10. Accused took property not subject of larceny—Farris v. State (Tex. Cr. App.) 69 S. W. 140; Ragland v. State (Ark.) 70 S. W. 1039; Walker v. State (Fla.) 32 So. 954.

11. People v. Sullivan, 173 N. Y. 122.

12. State v. Golden, 86 Minn. 206.

13. State v. Jones, 168 Mo. 398. By statute in Kentucky (Stat. § 1162) an averment of the ownership of such property is surplusage—Scott v. Com., 24 Ky. Law Rep. 889, 70 S. W. 281.

14. State v. Burton, 27 Wash. 528, 67 Pac. 1097.

15. State v. Golden, 86 Minn. 206.

16. But if it is alleged to have been committed in the night a conviction of burglary in the day time cannot be had—People v. Smith, 136 Cal. 207, 68 Pac. 702.

17. Farris v. State (Tex. Cr. App.) 69 S. W. 140.

18. Brown v. State (Miss.) 33 So. 170.

19. State v. Williams (Iowa) 94 N. W. 255.

20. Blackwell v. State (Tex. Cr. App.) 73 S. W. 960.

21. Drug store properly described as a "store house commonly called a drug store"—McNutt v. State (Neb.) 94 N. W. 143. Description of money taken held sufficient—State v. Wilson (Kan.) 71 Pac. 849. Information for burglary from railroad car held to insufficiently describe the car—People v. Webber, 138 Cal. 145, 70 Pac. 1089. Indictment sufficient in this respect—Gilbert v. State (Ga.) 43 S. E. 47. Indictment charging entry and intent to "commit a felony" in general terms sufficient—Com. v. Johnston, 19 Pa. Super. Ct. 241. And see as to general charge of intent to commit larceny—State v. Ellsworth, 130 N. C. 690; Smith v. State (Neb.) 94 N. W. 106. **Variance:** As to ownership of car entered fatal—People v. Webber, 138 Cal. 145, 70 Pac. 1089.

22. Subsequent finding of hidden goods admissible—McAnally v. State (Tex. Cr. App.) 73 S. W. 404. Evidence that defendant's wife knew there was money in the house is not admissible—Long v. State

the intent.[23] Possession of burglar's tools some time later may be shown.[24] Proof of possession of burglar's tools is not excluded by the fact that such possession is an independent crime.[25]

§ 4. *Sufficiency of evidence.*[26]—*Possession of stolen goods* is not necessarily a proof of guilt.[27]

§ 5. *Instructions and verdict.*[28]—An instruction ignoring intent is reversible error.[29] Instructions that where defendant is found in possession of stolen goods he must show that he obtained them "fairly and honestly,"[30] or must satisfactorily explain their possession,[31] are erroneous. The verdict must be certain as between two crimes charged,[32] and if it denominates the offense found must specify it.[33]

CANALS.

§ 1. *Location, establishment, construction, and operation.*—Where a company, authorized to construct a canal under a law requiring it to keep the canal open for public patronage at prescribed tolls, is empowered by a subsequent law to lease, sell, or discontinue it because no longer useful, a purchaser of the canal and franchises is not required to keep it open.[1] An owner of lands adjoining a canal may enjoin the discharge of city sewage into it where he will suffer substantial

(Miss.) 33 So. 224. Statements as to instrument with which door was broken (State v. Ellsworth, 130 N. C. 690); and as to whether defendant could have entered through a certain opening (Murmutt v. State [Tex. Cr. App.] 67 S. W. 508) not excluded as mere opinions. Statement of co-conspirator admissible—Barber v. State (Tex. Cr. App.) 69. S. W. 515. Admissions indefinite as to time held inadmissible—State v. Snyder (Iowa) 91 N. W. 765. Where there is testimony that defendant was seen with similar property he may explain his possession—State v. Brundidge (Iowa) 91 N. W. 920.

23. Moseley v. State (Tex. Cr. App.) 67 S. W. 414. And see Farris v. State (Tex. Cr. App.) 69 S. W. 140.

24. Williams v. People, 196 Ill. 173; People v. Gregory (Mich.) 90 N. W. 414.

25. Williams v. People, 196 Ill. 173.

26. Evidence sufficient—Ragland v. State (Ark.) 70 S. W. 1039; Walker v. State (Fla.) 32 So. 954; Gilbert v. State (Ga.) 43 S. E. 47; State v. Armstrong, 170 Mo. 406; Blackwell v. State (Tex. Cr. App.) 73 S. W. 960. Evidence insufficient—Garcia v. State (Tex. Cr. App.) 70 S. W. 95; Brooks v. State (Tex. Cr. App.) 70 S. W. 419. Evidence of ownership of building sufficient—McNutt v. State (Neb.) 94 N. W. 143. Evidence sufficient to show that stolen goods subsequently found were hidden by defendant—McAnally v. State (Tex. Cr. App.) 73 S. W. 404. Evidence of venue sufficient in prosecution for burglary from car—Gilbert v. State (Ga.) 43 S. E. 47. Presumption of intent (Laws 1895, c. 4405) authorizing presumption of intent from entry in night does not apply to entry by day—Walker v. State (Fla.) 32 So. 954. Evidence that property was taken for temporary use only insufficient to go to jury—King v. State (Tex. Cr. App.) 67 S. W. 410.

27. State v. Brady (Iowa) 91 N. W. 801; Carano v. State, 24 Ohio Cir. Ct. 93; Gravitt v. State, 114 Ga. 841; State v. Brundidge (Iowa) 91 N. W. 920. But see State v. Armstrong, 170 Mo. 406. And it has been said that it will support a conviction—State v. Swift (Iowa) 94 N. W. 269; but only where the burglary and attendant larceny were committed by the same person and at the same time—State v. Williams (Iowa) 94 N. W. 255. In connection with other facts held sufficient—Branch v. Com. (Va.) 41 S. E. 862; Richardson v. State (Miss.) 33 So. 441; Odell v. State (Tex. Cr. App.) 71 S. W. 971; State v. Brady (Iowa) 91 N. W. 801; Williams v. People, 196 Ill. 173; Hollengshead v. State (Tex. Cr. App.) 67 S. W. 114.

28. Charge held argumentative—Brantley v. State, 115 Ga. 229. Limitation of proof of other burglaries to bearing on intent—Camarillo v. State (Tex. Cr. App.) 68 S. W. 795. **Evidence not requiring:** Instructions as to taking of property for temporary use—King v. State (Tex. Cr. App.) 67 S. W. 410. As to acquiescence in statement of third person by silence—Brantley v. State, 115 Ga. 229. Instruction as to possession of stolen goods—Brantley v. State, 115 Ga. 229. As to circumstantial evidence—Moncevlis v. State (Tex. Cr. App.) 70 S. W. 94. As to innocent intent of one claiming to have been employed as drayman—Whitworth v. State (Tex. Cr. App.) 67 S. W. 1019.

29. State v. Williams (Iowa) 94 N. W. 255.

30. State v. Brady (Iowa) 91 N. W. 801. But see State v. Swift (Iowa) 94 N. W. 269.

31. State v. Brundidge (Iowa) 91 N. W. 920. Instructions as to possession of stolen goods held erroneous—People v. Boxer, 137 Cal. 562, 70 Pac. 671. Instructions held correct—State v. Swift (Iowa) 94 N. W. 269.

32. On trial for burglary and larceny must identfy crime found—State v. Jones, 168 Mo. 398. Verdict on several counts construed—Carano v. State, 24 Ohio Cir. Ct. R. 93.

33. "Guilty of a misdemeanor" insufficient—Smith v. State (Ga.) 43 S. E. 440.

1. Under Laws 1899, c. 469, § 3—New York Cement Co. v. Consolidated Rosendale Cement Co., 76 App. Div. (N. Y.) 285.

injury therefrom though he thereby greatly interferes with the plans of the city for the public welfare.[2]

§ 2. *Ownership and administrative control by public.*—A canal, constructed by a corporation having the power of eminent domain and the right to divert the waters of navigable rivers, which uses part of the bed of a public stream, is held under a public trust and the tolls thereof may be regulated by law; a lease of part of the canal from a grantee of the original corporation will not enable the lessee to charge larger tolls than originally fixed by law when the canal was constructed.[3] A law, authorizing a corporation which had constructed a canal to discontinue its use, contemplates an actual physical discontinuance by vote of the corporate managers, and notice of closing given by a mesne grantee of the corporation is not effectual against another corporation having the right to use part of the canal while it remained a canal.[4]

CANCELLATION OF INSTRUMENTS.

§ 1. Nature of Remedy.—What Instruments; Adequacy of Remedy at Law.
§ 2. Grounds of Action.
§ 3. Procedure.—Laches; Conditions Precedent; Parties and Pleading; Evidence and Questions of Fact; Findings and Judgment.

§ 1. *Nature of remedy.*[1] *Instruments which may be canceled.*—A deed will be set aside in equity for fraud where it concerns an estate purely in expectancy as well as an estate in praesenti,[2] and though void on its face since it operates as a cloud on title;[3] but where both parties to a deed are equally guilty in attempting to defraud creditors, equity will leave them in the position in which they have placed themselves.[4] The federal government may maintain a suit to set aside patents erroneously issued granting lands to a railroad company as against the company and alleged bona fide purchasers.[5]

Adequacy of remedy at law.[6]—Generally, a conveyance of an interest in lands will not be canceled in equity where complainant is not in possession, his remedy at law by ejectment being adequate;[7] and a contract by him with the tenants of the grantee to lease premises to them will not be such a regaining of possession by him as will enable him to maintain a suit in equity;[8] but it is otherwise

2. Warren v. Gloversville, 114 N. Y. State, 912.

3. Under Laws 1823, c. 238, lease under Laws 1899, c. 469—New York Cement Co. v. Consolidated Rosendale Cement Co., 37 Misc. Rep. (N. Y.) 746.

4. Laws 1899, c. 469, §§ 3, 4—New York Cement Co. v. Consolidated Rosendale Cement Co., 38 Misc. Rep. (N. Y.) 518.

1. See Quieting Title; Reformation of Instruments; retention of bill to grant complete relief, see Equity.

Cancellation of land patents by government, see Public Lands; of patents to mineral claims, see Mines and Minerals; of tax deeds by officers, see Taxes; of insurance policy under terms of instrument, see Insurance.

2. Wells v. Houston (Tex. Civ. App.) 69 S. W. 183.

3. Morton v. Morris, 27 Tex. Civ. App. 262.

4. Edgell v. Smith, 50 W. Va. 349.

5. Under U. S. Acts, Mar. 3, 1887; Feb. 12, 1896; and Mar. 2, 1896, the company may, in the same suit, be required to account for lands sold—United States v. Southern Pac. R. Co., 117 Fed. 544.

6. Sufficiency of showing of inadequacy of remedy at law for cancellation of life policy for concealment of facts to entitle company to sue in equity—Mutual Life Ins. Co. v. Pearson, 114 Fed. 395.

7. Treadwell v. Torbert, 133 Ala. 504. On ground of mental incapacity—Wilkinson v. Wilkinson, 129 Ala. 279. Deed by alleged insane person out of possession—Galloway v. Hendon, 131 Ala. 280. Deed from a testator after the will at suit of a devisee out of possession—Letohatchie Baptist Church v. Bullock, 133 Ala. 548. A deed conveying land to another on condition that it shall revert to the grantor or the happening of the condition subsequent be cancelled after such event has occurred—Davison v. Davison, 71 N. H. 180. Where the bill avers that complainant never delivered possession to the grantees at any time it should be dismissed for failure to show that complainant had possession when it was filed—Galloway v. Hendon, 131 Ala. 280. A devisee seeking to recover land from another in possession under a deed made by testator after his will, on the ground of mental incapacity and failure to join the wife in a conveyance of the homestead, will be left to his remedy at law—Letohatchie Baptist Church v. Bullock, 133 Ala. 548.

8. Treadwell v. Torbert, 133 Ala. 504.

as to a deed, on consideration that the grantee should remain with and care for the grantor during life, sought to be set aside on the ground of breach of contract,[9] or an instrument secured from complainant by fraud and misrepresentations of one in a fiduciary relation toward him,[10] or a suit in Illinois to set aside a deed for fraud, alleged to be a cloud on the title,[11] and the cancellation of a release of damages for personal injuries, obtained by fraud in equity, will not be prevented by an enactment of a statute giving a remedy at law.[12] Equity will not cancel an insurance policy for a fraudulent representation by the insured in his application, there being a complete remedy at law.[13] Where fraud in obtaining a release of an interest in an estate was constructive and insufficient for declaring it void in a court of law, that defendant's account as executor was pending in a municipal court for settlement constituted no ground for refusing jurisdiction on the theory that complete relief could be had in a municipal court.[14] Where a statute provides that fraud or circumvention used in obtaining execution of a note may be pleaded in defense in an action on the note, equity will not cancel or order return of the note even though it contains a power of attorney authorizing confession of judgment in term time or vacation.[15]

§ 2. *Grounds of action; right to relief. Right in general.*—A grantee in a deed executed after a grantor is restored to sanity may sue to cancel a previous deed executed by him while insane.[16] Instruments representing debts already paid will be canceled in equity.[17] An assignment, without consideration, of a policy on the life of her husband just before his death, by a wife to his brother, who was in close relations with them, under circumstances indicating undue influence and misrepresentation, will be canceled at her suit where it appears that the husband intended that his wife and children should receive the proceeds and so indicated by his will, leaving her little else in lieu of her dower in valuable property.[18]

Duress and mistake.—A deed obtained by duress may be set aside by the grantor or his heirs within the limitation period,[19] but duress is not shown where it appears that both fear and promises contributed to induce the execution, since fear without the promises might have proved insufficient.[20] That the grantee of a deed from a husband and his wife knew of the bad habits and tyranny of the husband is insufficient to show constructive notice that the husband procured the wife to sign by coercion.[21] Mistake is a ground for cancellation of an instrument in equity,[22] if mutual.[23]

9. There is no remedy at law—Lowman v. Crawford, 99 Va. 688, 3 Va. Sup. Ct. R. 534.

10. Robinson v. Sharp, 201 Ill. 86.

11. Clay v. Hammond, 199 Ill. 370.

12. Roberts v. Central Lead Co., 95 Mo. 581.

13. Shenehon v. Illinois Life Ins. Co., 100 Ill. App. 281.

14. Gorman v. McCabe (R. I.) 52 Atl. 989.

15. Hurd's Rev. St. Ill. 1899, c. 98, § 10—Vannatta v. Lindley, 198 Ill. 40.

16. Clay v. Hammond, 199 Ill. 370.

17. Note given to testator will be cancelled as against executrix where it appears that it was paid before testator's death—Hoberg v. Haessig, 90 Mo. App. 516. Bonds and notes of complainant held by defendant as unpaid though fully paid—Canon v. Ballard, 63 N. J. Eq. 797.

18. Way v. Union Cent. Life Ins. Co., 61 S. C. 501.

19. Hovorka v. Havlik (Neb.) 93 N. W. 990.

20. Deed by husband and wife sought to be cancelled at suit of wife—Pratt L. & I. Co. v. McClain, 135 Ala. 452.

21. Pratt L. & I. Co. v. McClain, 135 Ala. 452.

22. Failure of husband to join in a purchase money mortgage on property purchased by the wife because of a mistake of the draughtsman—Dietrich v. Hutchinson, 73 Vt. 134. Deed made under a misapprehension as to the location of the land, and which conveys a wrong tract though there was no intent to defraud on the part of the grantor—Fearon L. & V. Co. v. Wilson, 51 W. Va. 30. Release of a cause of action for personal injuries executed when complainant did not fully understand the nature of the document—Roberts v. Central Lead Co., 95 Mo. App. 581.

23. Stewart v. Dunn, 77 App. Div. (N. Y.) 631.

Fraud and misrepresentation.—An instrument procured by fraud may be canceled in equity,[24] but it must appear that the grantee participated therein or gave consideration with knowledge of the fraud,[25] and that he has made misstatements whereby the grantor has been misled, or that, knowing the grantor to be laboring under mistake, he remained silent.[26] A power of attorney executed by an insane person, whereby the attorney conveyed to a third person who in turn conveyed to the attorney will be canceled for fraud together with the subsequent instruments.[27] Fraud in securing conveyance of property in a residence district, the residents of which had agreed not to sell to undesirable persons, to one who was undesirable, is sufficient ground for cancellation at suit of the grantor though he suffered no pecuniary loss and the consideration was adequate.[28] Where an owner conveyed property relying on a misrepresentation of the grantee that a mortgage received in consideration was a prior lien, he is entitled, when the property covered by the mortgage is swept away by foreclosure of prior liens and the mortgagor is insolvent, to sue in equity, to set aside his conveyance, and as well, one from his grantee to a third person without consideration; that he destroyed the worthless mortgage before discovering the fraud will not prevent relief.[29]

Inadequacy of consideration or unconscionable terms exacted of complainant may be ground of cancellation,[30] but a deed executed by husband and wife will not be canceled, on behalf of the wife, merely because the consideration was, in part, an old debt due from the husband.[31]

Mental incapacity and undue influence.—Where an instrument is executed by one of insufficient mental powers to understand its import, or who has been unduly influenced by another of stronger mind, equity will grant relief,[32] but other-

24. Andrews v. Frierson, 134 Ala. 626. Sufficiency of fraud and misrepresentation to warrant cancellation of deed—Dashner v. Buffington, 170 Mo. 260. Of evidence to show fraud, undue influence, mental incapacity, or misrepresentation in execution of a deed from mother to her son—Revels v. Revels, 64 S. C. 256. Contract for the collection of payments on insurance policies obtained through fraud may be cancelled in equity and further litigation enjoined—Barrington v. Ryan, 88 Mo. App. 85. Misrepresentations made by an intelligent white man to an ignorant and destitute negro woman who had great confidence in him, whereby he secured a deed of her land will warrant cancellation of the deed—Cannon v. Gilmer, 135 Ala. 302. A quit claim deed from his wife recorded by a husband after their separation conveying the homestead which he had previously conveyed to her and had always treated as hers will be cancelled where it appears that she never knowingly executed it—Chittenden v. Chittenden, 22 Ohio Cir. Ct. R. 498, 12 O. C. D. 526.

25. Pratt L. & I. Co. v. McClain, 135 Ala. 452.

26. Stewart v. Dunn, 77 App. Div. (N. Y.) 631.

27. Clay v. Hammond, 199 Ill. 370.

28. Brett v. Cooney (Conn.) 53 Atl. 729.

29. Sufficiency of evidence to show conveyance of property in consideration of the mortgage—Bishop v. Thompson, 196 Ill. 206.

30. Sufficiency of showing of unconscionable contract—Coveney v. Pattullo (Mich.) 89 N. W. 968. Deed given in exchange for worthless mortgage—Bishop v. Thompson, 196 Ill. 206. That it is sealed is no defense to a suit to cancel an instrument for want of consideration. Way v. Union Cent. Life Ins. Co., 61 S. C. 501. A sale of annuities worth $20,400 for a consideration of $2,700 will be set aside as unconscionable—Roux v. Rothschild, 37 Misc. Rep. (N. Y.) 435. Where it appears that an attorney has been sufficiently paid for his services in defending a charge of robbery against complainant, a mortgage on his farm executed by complainant, to the attorney for additional fees, will be set aside as unconscionable—Coveney v. Pattullo (Mich.) 9 Detroit Leg. N. 26, 89 N. W. 968. Where a deed was made to prevent collection of a judgment against the grantor for damages and the ground for damages failed, the purpose of the conveyance will not prevent a suit to set aside the deed—Brant v. Brant, 115 Iowa, 701.

31. Pratt L. & I. Co. v. McClain, 135 Ala. 452.

32. Sufficiency of evidence to show mental incapacity of father in action to set aside a conveyance to his son—Chidester v. Turnbull (Iowa) 90 N. W. 583. One claiming as devisee may recover land from another in possession under a deed after the will on a showing of undue influence—Letohatchie Baptist Church v. Bullock, 123 Ala. 548. Deed for a grossly inadequate consideration secured by an unfair advantage of the grantor, who was mentally weak—Walling v. Thomas, 133 Ala. 426. Release of a cause of action for personal injuries executed when the maker was so weak physically and mentally, because of his injuries that he could not understand the nature of the document—Roberts v. Central Lead Co., 95 Mo. App. 581. Release of interest in estate by

wise if the grantor realized, without advice, the nature of the transaction and guarded the interests of those who should rightfully receive his property.[33]

§ 3. *Procedure. Laches.*—Delay before bringing a suit to set aside an instrument for fraud must not be unreasonable,[34] and what constitutes unreasonable delay depends upon the particular circumstances of each case;[35] if complainant was ignorant of the fraud until shortly before suit, laches cannot be imputed,[36] unless he had knowledge of facts putting him on inquiry.[37] If the parties are living in confidential or fiduciary relations, the fraud must be actually discovered,[38] and if complainant relies on promises of defendant to settle and delays suit he will be held blameless.[39] The rule is stricter where fraud is not shown.[40] The period of legal limitation will not always govern.[41]

Conditions precedent.—A suit may be brought by a surety to cancel a bond for fraudulent representations by the obligee, though no action has been brought on the bond.[42] Where it appears that respondent had secured a conveyance of property from his mother by fraud and undue influence and had attempted to have them rescinded on behalf of the complainant, no notice of the rescission was necessary as to him.[43]

Return of consideration or the placing of the other party in statu quo within

an aged person, weak and unable to write to an executor in ignorance of its contents and relying on the advice of the executor—Gorman v. McCabe (R. I.) 52 Atl. 989.

33. Deed of aged woman who provided for her rightful heirs—Dean v. Dean (Or.) 70 Pac. 1039.

34. Deed—Edgell v. Smith, 50 W. Va. 349. Four years' unexplained delay is laches; Civ. Code, § 3711—Reynolds & Hamby Estate Mortg. Co. v. Martin (Ga.) 42 S. E. 796.

35. McGee v. Welch, 18 App. D. C. 177. Delay of 18 years with knowledge of fraud is fatal—Becht v. Becht, 168 Mo. 525. Delay may be laches in suit to set aside a release given by a legatee to an administratrix where the facts are rendered uncertain of proof—Lutjen v. Lutjen (N. J. Law) 53 Atl. 625. Three years' delay by wife before suing to cancel a deed executed by her and her husband, on ground of duress and fraud, is not laches—Pratt Land & Improvement Co. v. McClain, 135 Ala. 452. Where a suit was brought in the state court to set aside a release for wrongful death within one month after a prior suit for the same purpose was dismissed from the federal court for want of jurisdiction there was no laches—Russell v. Dayton Coal & Iron Co. (Tenn.) 70 S. W. 1.

36. Fraud was discovered five days before suit—Bishop v. Thompson, 196 Ill. 206.

37. Facts and circumstances excusing laches need not be alleged; sufficiency of evidence to show that complainant had notice of facts putting him on inquiry so as to constitute laches—Coolidge v. Rhodes, 199 Ill. 24. Suit to cancel a mortgage for fraud brought 40 years after execution and 33 years after foreclosure and sale will fail for laches where purchasers during that time have been in open possession of the lands and the original parties to the transaction are dead, none of whom it appears ever made any adverse claim—De Roux v. Girard's Ex'r (C. C. A.) 112 Fed. 89.

38. Children living with their father during many years, in friendly and confidential relations, before discovery that he claimed to own property under a deed from their mother, given before her death, are not guilty of laches in failing to file a suit for cancellation of such deed, on the ground that the mother never executed it, until the actual discovery of the fact—Lewis v. McGrath, 191 Ill. 401.

39. If complainants suing to set aside a deed obtained from their ancestress by undue influence have continually asserted their rights and postponed suit relying on promises made by defendant for nearly three years after the death of the grantor, they are not guilty of such laches as to prevent cancellation—Walling v. Thomas, 133 Ala. 426.

40. Ten years' unexplained delay, by one not under disability, before suing to cancel a release of his rights in an estate for fraud, is laches where fraud is not shown, nor mistake alleged, though the consideration may have been inadequate—Lutjen v. Lutjen (N. J. Law) 53 Atl. 625. Delay of three years in seeking to cancel a deed to a grantee after deceased, for failure of consideration, is fatal where the grantor never sought the consideration during the grantee's life nor from his administrator after his death until it was impossible to comply with the demand and the complaint does not show when the complainant learned that the grantee did not intend to complete his contract. The consideration was a deed to certain land of the grantor which was never executed—Dean v. Oliver, 131 Ala. 634.

41. Where a deed of property was given in consideration that the grantees should care for the grantor during life, and the deed was recorded at his death, and the grantees and those claiming under them were permitted to hold the property and pay the taxes for six years without any adverse claim or excuse for delay, a suit for cancellation instituted by heirs of the grantor was barred by laches though not barred by limitation—Vermilion County Children's Home v. Varner, 192 Ill. 594.

42. Craig v. McKnight, 108 Tenn. 690.

43. Parker v. Simpson, 180 Mass. 334.

a reasonable time is a necessary condition precedent to an action to set aside an instrument for fraud or undue influence,[44] unless the failure so to do is excused for good reason,[45] or it appears that the use of the property conveyed during defendant's possession has been of a greater value than the consideration received by complainant,[46] since equity proceeds on the principle that a transaction should not have taken place and the parties must be placed as nearly as possible in the position they would have occupied had there never been any such contract.[47] The return of worthless property is unnecessary,[48] nor is it necessary that the property be returned in the condition in which complainant received it.[49] A retiring partner, seeking to set aside an amicable settlement for fraud of the continuing partner, need not offer to return the amount received in such settlement.[50] In an action by heirs to set aside a deed of the ancestor, for fraud while she was mentally weak, an offer of restitution is unnecessary where an offer was made by amendment to account for the value of services rendered to the ancestor.[51] Cancellation of a building and loan mortgage and contract because it does not represent the real contract but is a mere device to avoid usury laws will not be refused for failure of payment of the debt and legal interest.[52]

Parties and pleading.[53]—The grantor need not be joined in a suit by one claiming to be the equitable owner to set aside a deed where both parties to the suit admit, that by the deed, defendant acquired all his interest.[54] A husband by whom she had children is prima facie invested with title to the curtesy on con-

44. Meyer v. Fishburn (Neb.) 91 N. W. 534. Trust deed of homestead executed by husband and wife—Hirzel v. Schwartz (Colo. App.) 68 Pac. 1056. Cancellation of release for personal injuries—Roberts v. Central Lead Co., 95 Mo. App. 581; Hill v. Northern Pac. R. Co. (C. C. A.) 113 Fed. 914. Where a deed was executed for a debt for which a note and mortgage on a homestead had previously been given, the debtors to keep possession and sell the property within nine months, retaining the proceeds after payment of the debt, the deed would not be set aside for failure to return the note and mortgage when such return was not necessary to execution of the deed and was not unreasonably delayed—Snyder v. Nichols, 64 Kan. 886, 67 Pac. 886.

45. Trust deed given in security of chattel mortgage debt—Fry v. Piersol, 166 Mo. 429.

46. Walling v. Thomas, 133 Ala. 426. The deed was alleged to be void as inconsistent with provisions of a will under which the land was held—Call v. Shewmaker, 24 Ky. Law Rep. 686, 69 S. W. 749.

47. Bell v. Felt, 102 Ill. App. 218.

48. Worthless notes and mortgages given in consideration—Bishop v. Thompson, 196 Ill. 206.

49. Bell v. Felt, 102 Ill. App. 218.

50. Menzenhauer v. Schmidt, 63 N. J. Eq. 463.

51. Eagan v. Conway, 115 Ga. 130.

52. Walter v. Mutual Home Sav. Ass'n (Tex. Civ. App.) 68 S. W. 536.

53. Parties in a suit to cancel a bond—Craig v. McKnight, 108 Tenn. 690. Sufficiency of allegations in bill to show duress (Glass v. Haygood, 133 Ala. 489); of mental incapacity of grantor to contract (Eagan v. Conway, 115 Ga. 130); of mental incapacity and duress (Walling v. Thomas, 133 Ala. 426); of fraud and mental incapacity (Combs v. Combs, 23 Ky. Law Rep. 1264, 65 S. W. 13); of allegations of fraud in securing a deed (Johnson v. Velve, 86 Minn. 46); of allegations of mental incapacity in bill for cancellation of a contract (Eagan v. Conway, 115 Ga. 130); of allegations in regard to contract sought to be set aside as showing that defendant was a creditor of the grantor's estate—Eagan v. Conway, 115 Ga. 130. Materiality of issues in suit for cancellation of deed from parent to child in consideration of support of parent—Payette v. Ferrier (Wash.) 71 Pac. 546.

Parties. (Note.) Actions for cancellation of instruments must depend upon the peculiar circumstances of each case in determining who shall be made parties thereto, but the general rule that all persons whose interests would be affected by the cancellation must be made parties will always apply—Pomeroy, Code Remedies, § 379. So in an action to set aside an award, the arbitrators, having no interest in the subject matter and not liable to be affected by the result of the action, cannot be made defendants—Knowlton v. Mickles, 29 Barb. (N. Y.) 465; nor will the conveyance of part of a tract of land to a third person, prior to the filing of a bill for cancellation of a fraudulent conveyance of the whole, render the grantee in the second conveyance a necessary party to the suit—Fletcher, Eq. Pl. & Pr. p. 61; Billings v. Aspen Mining Co., 51 Fed. 338.

The joinder of plaintiffs in suits of this kind depends entirely upon whether the fraudulent acts resulting in injury to them are the same as to each particular plaintiff and result from the same means and in identical results except as to the amount of the injury—Fletcher, Eq. Pl. & Pr. p. 72. So it has been held that persons subscribing to capital stock on false representation of the condition of the corporate capital and business prospects may join in a bill for cancellation of their subscriptions, where it appears that they acted jointly in the whole transaction—Id., and cases there cited.

54. Mackay v. Gabel, 117 Fed. 873.

veyance of realty to his wife, and should be joined as defendant in a suit against her to cancel the deed for fraud, so that he may join in reconveyance; and this, even though he would take no interest by curtesy on failure to join.[55] Where a grantor improperly brought suit in equity for cancellation, he may remedy the defect by filing the appropriate count at law amending the bill.[56] A bill in equity for cancellation of a deed must show that complainant was in possession when it was filed.[57] An allegation that the grantee offered to reconvey land and that such offer is still held good is sufficient to show that he is able to reconvey.[58] A bill to cancel a deed for undue influence need not allege the manner in which the influence was asserted if it alleges who asserted the influence.[59] A petition to cancel a mortgage for duress will not lie, where it is not averred that complainant did not owe the debt which the mortgage was executed to secure.[60] A complaint to cancel a deed by plaintiff's testator, alleging undue influence, incapacity, and weakness of mind of decedent, is sufficient, unless on special demurrer, though it does not directly allege fraud.[61] A bill to set aside a trust deed must set out facts enabling defendants to answer without embarrasssment or it will be dismissed.[62] Intimate relations of friendship between the parties need not be specially pleaded in order to be proved.[63] The facts constituting fraud alleged as the ground in a cross bill for cancellation of a mortgage must be particularly shown and a general allegation is insufficient.[64] An allegation in a complaint to rescind a conveyance for fraud, that the grantor showing the grantee a fertile and well timbered tract of land during the negotiations but conveyed to him a rough, timberless, and valueless tract, sufficiently alleges injury to the grantee.[65] Allegations in a petition to set aside a conveyance, that the vendees knew the value of land and fraudulently concealed it from the grantor, knowing his ignorance thereof, are material in connection with other appropriate allegations.[66] Allegations that the execution of a deed was procured by fraud and undue influence, that the grantor was weak in mind and incompetent to manage his affairs and that defendant knowing this had complete control over his mind and property, and, taking advantage thereof, procured the deed without consideration, sufficiently alleges the fraud.[67] A petition setting forth with sufficient clearness alleged fraud and artifice practiced to secure a conveyance will not be subject to demurrer for vagueness, and if it alleges that when the contract was made the grantor was old, without memory, and incapable of transacting business, it is not liable to a general demurrer for a failure to allege that she remained so incapable until her death.[68] A grantor seeking to set aside a deed for fraud in representations must allege and prove the misrepresentations, that they were false, that he believed them true and relied and acted upon them; if the allegations of the complaint confuse the theories of the contract sought to be canceled so that insufficient facts are shown to sustain any particular theory, it is insufficient.[69] In a suit to cancel a power of attorney in a deed executed by a person claimed to be insane brought by a grantee of the premises in a deed executed after his restoration to sanity, it is immaterial

55. Construction of Gen. Laws R. I. c. 194, § 16, with Pub. St. R. I., c. 166, § 16; also Gen. Laws, c. 194, § 1, as to right of husband in realty conveyed to wife—Gorman v. McHale (R. I.) 52 Atl. 1083.
56. Davison v. Davison, 71 N. H. 180.
57. Galloway v. Hendon, 131 Ala. 280.
58. Lockwood v. Allen, 113 Wis. 474.
59. Letohatchie Baptist Church v. Bullock, 133 Ala. 548.
60. Fry v. Piersol, 166 Mo. 429.
61. Collins v. O'Laverty, 136 Cal. 31.
62. Wolters v. Schrafft (N. J. Law) 52 Atl. 694.
63. Wells v. Houston (Tex. Civ. App.) 69 S. W. 183.
64. Mortimer v. McMullen, 102 Ill. App. 593.
65. Under the rule as to liberal construction of pleadings—Lockwood v. Allen, 113 Wis. 474.
66. Wells v. Houston (Tex. Civ. App.) 69 S. W. 183.
67. Johnson v. Velve, 86 Minn. 46.
68. Eagan v. Conway, 115 Ga. 130.
69. Grentner v. Fehrenschield, 64 Kan. 764, 68 Pac. 619.

what consideration was paid by plaintiff for his conveyance.[70] In a suit by heirs to cancel a deed of their ancestor, for fraud used while she was mentally incompetent, an amendment to the bill offering to account for the value of services rendered to the ancestor by defendant as her agent was sufficient as an offer of restitution.[71] In a suit for cancellation of a bond and mortgage the instruments need not be made a part of the complaint or filed therewith.[72] In an action to cancel a deed for excess of authority in execution by plaintiff's agent, evidence that plaintiff enlarged the agent's authority is not admissible where no averment of such enlargement was made in the answer.[73]

Evidence and questions of fact.[74]—In a suit for cancellation, one who derives a benefit from the instrument must show the fairness of the transaction.[75] Complainant must prove fraud alleged as ground for cancellation of an instrument, even though, for want of personal knowledge by defendants, their answer lacks the force of an answer under oath made on actual knowledge.[76] Where defendant in foreclosure sets up fraud in securing the note and mortgage and asks for cancellation by cross bill, the burden of proving fraud is upon her.[77] That a conveyance is made by a father to his son while residing with the son will not suffice to show it presumptively fraudulent so as to shift the burden of proof of want of undue influence to the grantee, though the conveyance deprives other children of their share in the property.[78] In a suit for cancellation of a mortgage for duress, plaintiff must show, by a preponderance of the evidence, that he made the mortgage to escape criminal prosecution.[79] Evidence that the agreed price was the value of the land cannot be heard in an action to cancel a deed because executed by an agent in excess of his authority.[80] Inadequacy of consideration is not necessarily conclusive evidence of fraud in the execution of a conveyance.[81] Parol evidence to set aside a written contract for fraud, accident, or mistake, must concern what occurred contemporaneously with execution of the document and

70. Clay v. Hammond, 199 Ill. 370.

71. Eagan v. Conway, 115 Ga. 130.

72. Marley v. National Bldg., Loan & Sav. Ass'n, 28 Ind. App. 369.

73. Morton v. Morris, 27 Tex. Civ. App. 262.

74. Admissibility of evidence, in a suit to cancel a contract for the sale of cotton, as to the manner of baling cotton and improvements therein after the making of the contract—American Cotton Co. v. Collier (Tex. Civ. App.) 69 S. W. 1021. Sufficiency of evidence of mistake (Stewart v. Dunn, 77 App. Div. 631); of mental incapacity to execute deed (Wilson v. Jackson, 167 Mo. 135); of mental incapacity to execute a trust deed (Tatum v. Tatum's Adm'r [Va.] 43 S. E. 184); of mental incapacity at time of executing a mortgage (Beatty v. Somerville, 102 Ill. App. 487); of evidence to show that a trust deed was executed without duress (Bogue v. Franks, 199 Ill. 411); to show that the assignment of a ground lease was without fraud (Sheehan v. Erbe, 77 App. Div. 176); of evidence as depending on weight and credibility of witnesses (Frank v. Schloss [N. Y.] 37 Misc. Rep. 140); to show that no undue influence was used in securing execution of a deed (Vinson v. Scott, 198 Ill. 144); to show mental capacity to execute a deed (Vinson v. Scott, 198 Ill. 144); to show that an offer to place the other party in statu quo was made in reasonable time (Meyer v. Fishburn [Neb.] 91 N. W. 534); to cancel deed to grantor's granddaughter for fraud and undue influence (Haynes v. Harriman [Wis.] 92 N. W. 1100); of evidence of acquiescence by complainant in breach of a condition subsequent by a railroad company of provisions in a deed granting the company complainant's land (Dickson v. St. Louis & K. R. Co., 168 Mo. 90); of evidence, in suit by administrator to cancel testator's deed for fraud, to carry to the jury the issue whether the instrument contained the real contract between the parties (Carpenter v. Bradshaw [Ga.] 42 S. E. 1016); of evidence to establish lien on property received from her father's estate conveyed by a daughter to her brother for services in care of the daughter and father by the son in a suit by the daughter to set aside her deed as against the son's widow—Domling v. Domling, 8 Det. Leg. N. 786, 87 N. W. 788. Sufficiency of instructions as to ratification of execution of contract and deeds sought to be cancelled—American Cotton Co. v. Collier (Tex. Civ. App.) 69 S. W. 1021.

75. Cannon v. Gilmer, 135 Ala. 302.

76. De Roux v. Girard's Ex'r (C. C. A.) 112 Fed. 89.

77. Mortimer v. McMullen, 102 Ill. App. 593.

78. Chidester v. Turnbull (Iowa) 90 N. W. 583.

79. Fry v. Piersol, 166 Mo. 429.

80. Morton v. Morris, 27 Tex. Civ. App. 262.

81. An instruction directing the jury to find that the conveyance was procured by fraud, if the consideration was so inadequate as to shock the conscience was incorrect—Wells v. Houston (Tex. Civ. App.) 69 S. W. 183.

what secured its execution and must be clear and precise in order that the case may be submitted to the jury.[82] Whether an offer to return consideration or place the other party in statu quo was made in reasonable time is a mixed question of law and fact.[83] The question of ratification of a conveyance of an expectant estate secured by fraud of the grantee for an inadequate consideration is for the jury, where evidence appears reasonable, tending to show that at the time of the alleged ratification he knew no more about the transaction than at the time of execution.[84]

Findings and judgment.[85]—Where facts sufficient to require cancellation for fraud and mental incapacity were pleaded by plaintiff, and sufficient evidence appears to sustain the allegation, defendant suffers no injury because the jury was required to make certain additional findings though their submission was not justified by the evidence.[86] A verdict for cancellation of a deed is sufficient where the description of property in the petition is practically that in the deed so that the property is fully identified.[87] If it appears in an action to rescind a conveyance for fraud, that there was no evidence of any change in the contract, but the making of the deed and the execution of a mortgage to secure the purchase price were admitted, the court was warranted in finding that the grantee held the land unencumbered except for the purchase price mortgage.[88] Cancellation of a conveyance by an aged person, mentally incompetent, conveying land and vesting title to cash at suit of the heirs at law after death of the grantor, relates to the realty and the court having taken jurisdiction may retain it to recover the money.[89] A decree dismissing a suit for cancellation of a note should not contain findings which may prejudice an action on the note.[90] Where the prayer for relief asks that defendant be ordered to restore personal property received from plaintiff as far as possible, defendant is entitled, on a decree against him, to deliver any articles found to have been wrongfully obtained and receive credit therefor on the amount charged against him.[91] Where the court in a suit for cancellation for fraud of the grantee required the grantee to execute to the grantor a deed in fee and free from all incumbrances, except a purchase-money mortgage which was received from the grantee as a condition for entering of a judgment for the grantee rescinding the conveyance to him for fraud, the grantor's rights were fully protected.[92] Where an attorney, employed to perfect the title of land sold at the expense of the grantor, secured a cancellation of a mortgage covering part of the purchase price and another loan, at the instance of the grantee and without the knowledge of the grantor, the latter may have the cancellation set aside as fraudulent.[93] Where a father deeded land to a son in consideration of the care of his parents during life and payment of certain sums to his brothers, and after compliance for several years the son died leaving a wife but no children, in a suit by the brothers to determine the interests of the wife in the farm and recover the title, a decree was properly granted, on condition that the wife be paid $500, and that the brothers restore to her the notes given to them by her husband for the payment of the sums coming to them from their father's estate.[94]

82. Nettleton v. Caryl, 20 Pa. Super. Ct. 250.
83. Meyer v. Fishburn (Neb.) 92 N. W. 534.
84. Wells v. Houston (Tex. Civ. App.) 69 S. W. 183.
85. Conclusiveness of findings as to misrepresentations and undue influence in securing a sale of lands at greatly inadequate consideration on the question of setting the sale aside—Coile v. Hudgins (Tenn.) 70 S. W. 56.
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88. Lockwood v. Allen, 113 Wis. 474.
89. Eagan v. Conway, 115 Ga. 130.
90. Vannatta v. Lindley, 198 Ill. 40.
91. Parker v. Simpson, 180 Mass. 334.
92. Lockwood v. Allen, 113 Wis. 474.
93. Renner v. Kannally, 193 Ill. 212.
94. Coe v. Dickerson, 8 Det. Leg. N. 838, 87 N. W. 1028.

CURRENT LAW

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PART V. CARRIAGE OF BAGGAGE AND PASSENGERS' EFFECTS.

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Part 1. *In general.* § 1. *Definitions and distinctions.*—One who travels between certain points and openly professes to carry goods for all such persons as choose to employ him is a common carrier.[2] A storage company which engages in moving household goods is not,[3] nor is the driver of a licensed bus necessarily so.[4] Operators of passenger elevators are carriers.[5]

§ 2. *Duty to undertake and provide carriage; discrimination; penalties.*[6]—A carrier is bound to receive and transport freight from all persons similarly situated,[7] though it may fix for itself the limits within which it will act as a common carrier if it act in good faith and without discrimination.[8] The carrier cannot refuse shipments except such as are to be sold to a certain person, even though the refusal is applied to all shippers.[9]

Charges of common carriers may be regulated by the legislature,[10] but should not be so reduced as to render operation of the road infeasible.[11] A carrier may charge a less rate than that fixed by the railroad commission if discrimination is not made, and if it is attempted to exact the maximum rate after an agreement to carry for less, the shipper may recover back the overcharge.[12] Where goods consigned to a point in the state are sold to a person without the state, and by

2. Swift & Co. v. Ronan, 103 Ill. App. 475.

3. In a sense entitling it to a lien for charges—Thompson v. Storage Co. (Mo. App.) 70 S. W. 938.

4. Atlantic City v. Dehn (N. J. Sup.) 54 Atl. 220.

5. Chicago Exch. Bldg. Co. v. Nelson, 197 Ill. 334; Beidler v. Branshaw, 102 Ill. App. 187.

6. See "Commerce" for questions under the interstate commerce act. See post, § 14, for general questions of freight and demurrage charges. Discrimination in passenger rates, see post, § 23.

7. A carrier maintaining a switch to a certain quarry is bound to receive freight belonging to owners of a neighboring quarry to and from reasonable points along its lines at which it could lawfully ship or receive it.—Bedford-Bowling Green Stone Co. v. Oman, 24 Ky. L. R. 2274, 73 S. W. 1038.

8. It may determine the means and methods of transportation, the goods it will carry, and between what points and under what circumstances and conditions it will receive them—Harp v. Railroad Co., 118 Fed. 169.

9. Refusal to accept shipments of coal—Loraine v. Railroad Co., 205 Pa. 132.

10. Chicago Union Traction Co. v. Chicago, 199 Ill. 484.

11. Legislative reduction of rates chargeable on local business is unreasonable and unjust where at the time, under the exercise of efficient and economical management, the earnings from local business within the state are insufficient to pay one half the proportion of the interest of the mortgage debt on the lines within the state justly chargeable thereon—Chicago, M. & St. P. R. Co. v. Smith, 110 Fed. 473.

12. Wells-Fargo Exp. Co. v. Williams (Tex. Civ. App.) 71 S. W. 314.

him sold to a person at another point within the state, a shipment from the original destination to the final one is intra-state business, governed by the rates of the state, but transfers from one car to another, and re-billing, do not cause the shipment to lose its character as an interstate one, if there is a definite intention that the shipment shall be from a point without to a point within a state,[13] and though the person alleging an overcharge acquired title from the original shipper at a point within the state before it arrived at its destination.[14] To render a railroad liable for failure to observe a domestic regulation, it must be shown to have knowledge that the shipment is domestic.[15]

Statutory prevention of discrimination.—A provision for indictment of carriers for discrimination in rates, if on investigation the railroad commission fails to exonerate them from the operation of a statute, is not an encroachment on the power vested in the railroad commission to determine to what extent a carrier may be relieved from an inhibition against greater charges for short than long hauls,[16] but it cannot be provided that indictments for unjust discrimination may be made only on recommendation by the commission, for that might exempt the carrier from the constitutional penalty.[17]

A proceeding by action against a railroad commission under the Texas law, to declare an established rate to be unreasonable, does not give the court advisory power to pass on the rules and regulations of the commission,[18] but the inquiry is not limited to whether the rate is so unreasonable and unjust as to amount to the taking of property without due process of law.[19]

Omission from a new statute providing for the fixing of rates by a railroad commission, of provisions for the prosecution of carriers charging unlawful rates, does not effect a repeal of the previous statute,[20] and where statutes relating to discrimination are united in a revision and the penalties provided in each are continued, the penalty provided in one cannot be imposed in a prosecution based on the violation of another.[21]

What constitutes discrimination.—It is not discrimination to refuse to furnish cars for shipment in one direction though cars are furnished to be shipped in the opposite direction,[22] or to furnish cars which may be advantageously loaded when others are refused.[23] Cars must be furnished in the order in which requests therefor are received.[24] It is not a discrimination to refuse to construct spur tracks,[25] or to refuse to deliver stock to other than the carrier's yards,[26] and,

13. Gulf, C. & S. F. R. Co. v. State (Tex. Civ. App.) 73 S. W. 429.

14. Gulf, C. & S. F. R. Co. v. Fort Grain Co. (Tex. Civ. App.) 72 S. W. 419.

15. Evidence held insufficient—failure to stop cotton at first compress—(Rev. St. 1895, art. 4574, § 1)—State v. Railroad Co. (Tex. Civ. App.) 73 S. W. 572.

16. Construing Ky. St. § 820; Const. § 218—Illinois Cent. R. Co. v. Com., 23 Ky. L. R. 1159, 64 S. W. 975.

17. Commonwealth v. Railroad Co., 23 Ky. L. R. 1382, 65 S. W. 158.

18. Railroad Commission v. Weld (Tex. Civ. App.) 66 S. W. 122.

19. Rev. St. 1895, arts. 4565, 4566—Railroad Commission v. Weld & Neville, 95 Tex. 278, 73 S. W. 529.

20. Construing Act Ky. March 10, 1900, Gen. St. Ky. 1894, § 819—McChord v. Railroad Cos., 183 U. S. 483, 46 U. S. Lawy. Ed. 289.

21. Construing Rev. St. 1889, §§ 2636, 2637, 2663, and awarding a judgment for treble damages—McGrew v. Railway Co., 87 Mo. App. 250.

22. The cars furnished were for local and not for interstate shipments and the order applied to all persons alike—Harp v. Railway Co., 118 Fed. 169.

23. It is not an unlawful discrimination either at common law or under the statute to furnish coal cars to be loaded from chutes at a time when cars to be loaded by wagon in station yards are refused, nor is it unreasonable at a time when the supply of cars was insufficient and the tracks on which cars to be loaded by wagons would have to be placed were in constant use—Harp v. Railway Co., 118 Fed. 169.

24. Nichols v. Railroad Co., 24 Utah, 83, 66 Pac. 768.

25. A railroad need not lay a track to a mine, though it has permitted the building of similar tracks to other mines—Harp v. Railway Co., 118 Fed. 169.

26. The facilities provided were reasonable—Central Stock Yards Co. v. Railroad Co. (C. C. A.) 118 Fed. 113.

in the absence of statute, the courts cannot compel an exchange of traffic between connecting railroads.[27] A greater sum may be charged for the carriage of a high than a low grade of coal.[28] A level rate on cotton without regard to density of compression is not unreasonable and unjust.[29] Where the statute prohibits a greater charge for a shorter than for a longer haul over the same line in the same direction, the shorter being included in the longer distance, it is not a discrimination for connecting carriers to charge less under a joint traffic agreement for a haul from a point on one road to a point on the other than the first carrier charges from the initial point on its road to its terminus between the points.[30] Penalties for overcharges cannot be recovered for the inclusion by the carrier of a switching charge exacted of it by another road which delivers the goods to it.[31]

It may be an illegal discrimination to furnish a newspaper editor an annual pass in consideration of the publication of a time table.[32]

Penalties.—Where a penalty is provided for each article refused, a separate penalty may be exacted for each animal on refusal to transport a car load of cattle.[33] Where a statute provides a penalty for a refusal of freight or passengers, a connecting carrier to whom freight is consigned cannot sue for the penalty.[34]

Indictment and prosecution.—A fine provided for an overcharge in freight rates cannot be enforced in a civil action.[35] An indictment for violation of the Kentucky statute against discrimination cannot be returned until the railroad commission has refused to exonerate the carrier, since it is provided by statute that it shall be the duty of the commission to investigate charges against the carrier, and, if an order failing to exonerate it is made, to furnish the grand jury a copy of the order that it may be indicted.[36] Under the same law, an order of railroad commissioners failing to exonerate a carrier from unlawful discrimination with regard to special named cases cannot be made the basis of an indictment for discrimination as to subsequent shipments.[37] Where the statute provides that freight of the same class must be hauled for all persons between the same points and on the same conditions, in the same manner and for the same charges, an indictment for discrimination must allege that the services were on the same conditions.[38]

§ 3. *Rights and relations between carrier and connecting carrier, draymen or transfermen, etc.*[39]—Ownership of connecting property is not a prerequisite to the statutory duty of one connecting or crossing railroad to afford accommodations to the other in the transportation of passengers and goods.[40] A railroad has power

27. Such power is not conferred on courts by the interstate commerce act—Central Stock Yards Co. v. Railroad Co. (C. C. A.) 118 Fed. 113.

28. Construing Const. § 215—Commonwealth v. Railroad Co., 24 Ky. L. R. 509, 68 S. W. 1103.

29. Not a violation of Rev. St. 1895, art. 4566, supporting an action against the railroad commission—Railroad Commission v. Weld & Neville, 95 Tex. 278, 73 S. W. 529.

30. Ky. St. § 820—Commonwealth v. Railroad Co., 24 Ky. L. R. 1883, 72 S. W. 361.

31. Code 1892, §§ 4287, 4288. Defendant had given a rate for transportation over its own line and in the freight bill included a switching charge which it had to pay in order to obtain possession of the freight—Gilliland v. Railroad Co. (Miss.) 32 So. 916.

32. If the value of the advertisement is not shown to equal the value of the pass and there is a sale of transportation on credit and not payable in money. Construing Laws 1891, p. 277, c. 320, § 4—McNeill v. Railroad Co. (N. C.) 44 S. E. 34.

33. Carter v. Railroad Co., 129 N. C. 213.

34. 2 Comp. Laws 1897, § 6235—Crosby v. Railroad Co. (Mich.) 9 Det. Leg. N. 310, 91 N. W. 124.

35. Laws 1893, c. 24, § 9—State v. Railroad Co. (Neb.) 93 N. W. 222.

36. Ky. St. § 820—Illinois Cent. R. Co. v. Com., 23 Ky. L. R. 1159, 64 S. W. 975.

37. Const. § 218; Ky. St. § 820—Louisville & N. R. Co. v. Com., 24 Ky. L. R. 1593, 1779, 71 S. W. 910.

38. Violation of Const. § 215, construing Cr. Code, § 124, as to certainty of indictment—Commonwealth v. Railroad Co., 24 Ky. L. R. 1887, 72 S. W. 758. "On different conditions" held bad—Commonwealth v. Railroad Co., 24 Ky. L. R. 1888, 72 S. W. 361; Commonwealth v. Railroad Co., 24 Ky. Law Rep. 1886, 72 S. W. 360.

39. See post, § 26, for liability of carrier of passengers who uses the premises or vehicles or transports the cars of another.

40. A street railroad, vested with the right of eminent domain and with charter power to acquire real estate, is subject to

to contract with other railroads for carriage beyond its lines, provided it does not fix discriminatory rates.[41] Where a carrier maintains a wharf for the transfer of goods between its own lines and vessels of other carriers, the use of such wharf and its appliances must be allowed to all on equal terms.[42] In a statutory proceeding for the appointment of commissioners to make an award as to the terms on which crossing and connecting railways are to receive the goods and passengers of each other, a recognizance for costs is not required unless provided for by the statute.[43]

A railroad may prevent the solicitation of custom within its stations for carriage and baggage lines and hotels,[44] or the congregating of hackmen around the doors of its station, to solicit business, in such numbers as to interfere with ingress and egress, though it has allowed one firm of hackmen to enter its station to solicit trade.[45]

Part 2. Carriage of goods. § 4. *Delivery to carrier and inception of liability.*[46]—A carrier may refuse to accept freight improperly prepared for shipment, or may prepare it itself.[47] It is not a conversion for a carrier without notice to accept goods from other than the true owner.[48]

§ 5. *Contracts for carriage.*—A contract of carriage is governed by the law of the place of its inception.[49]

A carrier undertaking to carry out a contract to deliver freight at a certain point cannot absolve itself from negligence by reason of the insufficient authority of an agent to make the contract.[50] The station agent is not presumed to have authority to bind his company for loss on connecting lines, but his authority may be inferred from previous course of dealing.[51] If the carrier ratifies a contract by a local agent accepting, instead of advance payment of freight required by rule, a deposit of the amount at the point of destination, it must perform the contract.[52] The agent of a railroad company having no line within the state has implied authority to contract for the safe delivery of goods beyond the line of his company, and to contract over what roads the freight shall be transported.[53] A contract made by an eastern freight agent may be binding on the receivers of a western railroad.[54] Where the receiving carrier agrees to carry over its own

V. S. c. 169, § 3860—Rutland R. Co. v. St. Ry. Co., 73 Vt. 20.

41. Code, § 2066—Bras v. McConnell, 114 Iowa, 401.

42. West Coast Naval Stores Co. v. Railroad Co. (C. C. A.) 121 Fed. 645; Macon, D. & S. R. Co. v. Graham & Ward (Ga.) 43 S. E. 1000. Injunction will lie against a grant of the exclusive use of coal unloading machinery at a dock to one shipper, though the machine which had been erected and maintained jointly by the carrier and a coal transfer company is conveyed to the transfer company—Youghiogheny & O. Coal Co. v. Railway Co., 24 Ohio Cir. Ct. R. 289.

43. V. S. § 3864—Rutland R. Co. v. St. Ry. Co., 73 Vt. 20.

44. Injunction will lie for such purpose—Pennsylvania Co. v. Donovan, 116 Fed. 907.

45. The injunction should not go further than to protect complainant's right of private property; an obstruction to the use of the sidewalk or street by the public should be left to be dealt with by the municipality—Donovan v. Pennsylvania Co. (C. C. A.) 120 Fed. 215.

46. Evidence held sufficient for the jury in an action for damages from negligent failure to ship goods.—Porter v. Railroad Co. (N. C.) 43 S. E. 547.

47. Elgin J. & E. Ry. Co. v. Bates Mach. Co., 98 Ill. App. 311.

48. Robt. C. White L. S. Commission Co. v. Railroad Co., 87 Mo. App. 330.

49. A contract entered into in Missouri between a resident corporation and a carrier having an office and doing business there is a Missouri contract—Herf & Frerichs Chemical Co. v. Lackawanna Line (Mo. App.) 73 S. W. 346. See, also, article "Conflict of Laws."

50. Nashville, C. & St. L. Ry. Co. v. Smith, 132 Ala. 434.

51. Faulkner v. Chicago, R. I. & P. Ry. Co. (Mo. App.) 73 S. W. 927.

52. Porter v. Railroad Co. (N. C.) 43 S. E. 547.

53. Freemont, E. & M. V. R. Co. v. Railroad Co. (Neb.) 92 N. W. 131; New York, C. & St. L. R. Co. v. Railroad Co., Id.

54. Such freight agent has apparent authority to contract at his office in New York, for carriage over the road and the connecting steamship lines across the Pacific, and such contract is binding on the receivers, if the shipper has no notice of limitation on the agent's authority, and does not

line and forward according to the usual course of business from its terminus, it is not bound by statements of its station agent as to the rate to be charged by the connecting carrier.[55] A statement by one not the regular agent but in the carrier's office, that a low rate will be given in a few days, does not evidence a contract to carry at such rate.[56] A railroad station agent may bind the company to furnish cars.[57] The burden of showing the station agent's authority is on the plaintiff.[58]

Failure to furnish cars.—Where the carrier fails to furnish cars at an hour specified, but furnishes them at a time early enough to bring them to their destination in time for the same market, the shipper cannot refuse to ship and recover for breach of contract.[59] In an action for failure to furnish cars the contract must be set out if the cause of action is apparently one for breach.[60] It must be alleged that the goods concerning which the action is brought were tendered or received by an authorized agent of the carrier or application for cars made to agent authorized to furnish cars.[61] The carrier is liable for breach of agreement to furnish cars belonging to another line, and inability to obtain the precise kind of cars ordered is not an excuse, if it was understood that the shipper would accept any variety obtainable where the others could not be secured.[62]

The carrier is liable for refusal to accept perishable goods and provide suitable cars, though it has not held itself out as furnishing refrigerator cars. The carrier is not relieved from liability by failure of a refrigerator car company to furnish cars, or by the fact that it was willing to haul iced cars to be furnished by another company under contract with the shipper, or that there were more goods for shipment than enough to fill the cars ordered.[63]

§ 6. *Bills of lading.*—Issuance of the bill of lading is not necessary to fix the liability of a railroad as a carrier.[64] Where a bill of lading is issued for accommodation before actual delivery of the goods, the carrier is not bound to endeavor to get possession of the goods if the owner has agreed to deliver them on board.[65]

know that the railroad does not own the steamship line, and the receivers do not operate it—Farmers' Loan & Trust Co. v. Railroad Co. (C. C. A.) 120 Fed. 873.

55. McLagan v. Railway Co., 116 Iowa, 183.

56. Wells-Fargo Exp. Co. v. Williams, (Tex. Civ. App.) 71 S. W. 314.

57. An oral agreement to such effect is valid unless the want of authority of the agent is known to the shipper—Gulf, C. & S. F. Ry. Co. v. Irvine & Woods (Tex. Civ. App.) 73 S. W. 540.

58. McLagan v. Railway Co., 116 Iowa, 183.

59. Currell v. Railroad Co. (Mo. App.) 71 S. W. 113.

60. Such omission is not supplied by an allegation in the answer stating a contract to furnish cars on a certain date in time for a certain market and a replication admitting such contract, as pleaded, and the trial could not proceed on the theory of a contract to have cars ready on a certain hour and not a contract to furnish them in time for a certain market.—Currell v. Railroad Co. (Mo. App.) 71 S. W. 113.

61. Complaint held demurrable which alleged that plaintiff placed timber for shipment near the company's tracks at a station named and that he applied to a freight conductor and the company's agents at other stations for a car—St. Louis, I. M. & S. Ry. Co. v. Lee, 69 Ark. 584.

62. Nichols v. Railroad Co., 24 Utah, 83, 66 Pac. 768.

63. An agreement to furnish refrigerator cars at particular dates need not be shown to establish prima facie liability—Mathis v. Railway Co. (S. C.) 43 S. E. 684.

64. Where it has received a consignment for transportation and is notified of its destination, it cannot escape liability as a carrier by issuing a bill of lading in the form of a track or warehouse receipt after destruction of the consignment—Cleveland, C., C. & St. L. R. Co. v. Wilson, 99 Ill. App. 367.

65. An unauthorized issuance by an agent of bills of lading for goods in a public warehouse is not ratified by a steamship company by its reception on board of goods purporting to be those described, which have been fraudulently substituted for the actual goods in the warehouse. Acceptance of goods on board is a ratification only from time of delivery, and the company is not liable while the goods are in the warehouse subject to the orders of the seller, though a bill of lading has been issued by its agent to the purchaser—Cunard S. S. Co. v. Kelley (C. C. A.) 115 Fed. 678.

Conclusiveness of bill.—Statutes making bills of lading conclusive, where weights are stated therein, have been held constitutional,[66] and may provide for attorney's fees in cases prosecuted under them.[67] Liability is for goods actually received, though a different quantity is described in the bill.[68] A receipt for goods not delivered to the carrier may be explained by showing that it was not intended to change the actual or legal custody until they were loaded.[69]

Interpretation.—Clauses of bills of lading will be interpreted in their relation to the other clauses thereof, and according to obvious, not to hidden, meanings.[70] A phrase in a receipt, in "apparent good order except as noted, contents and condition of contents unknown," does not create a presumption that boxed goods are received in good condition.[71]

Indorsement and transfer of bill of lading operates as a constructive delivery of the property, though not where it has been taken from the carrier's possession under legal process, with knowledge of the parties.[72] Transfer deprives the consignor of his control,[73] and the carrier becomes an agent of the indorsee if he has actual possession.[74] The receipt and negotiation of the bill does not, as between the shipper and the carrier, annul a prior contract under which the goods were shipped and upon which rights and obligations have accrued.[75] Transfer of bill of lading, with draft attached, to a creditor, confers a lien superior to the lien of a subsequent attachment.[76] Assignment after delivery of the goods to the consignee does not pass title, where the bill requires that it shall be taken up on such delivery,[77] but bills of lading attached to drafts, deposited with a bank to secure checks drawn for the payment of the drafts, in the hands of the bank still represent the goods on which it has a lien.[78] A bank advancing money for the purchase of goods may, through acquiescence in a uniform course of business, be prevented from retaining possession of the goods and bills of lading as against one to whom the purchasers had sold them.[79] Under statutes providing that a bill of lading to bearer may be transferred by delivery, the carrier is liable for delivery to the consignee where it has given the shipper a bill of lading naming the shipper and consignee, providing for delivery of the goods shipped to the parties entitled thereto, and such bill has been indorsed and delivered to a third person.[80]

66. Laws 1893, c. 100—Missouri, K. & T. Ry. Co. v. Simonson, 64 Kan. 802, 68 Pac. 653, 57 L. R. A. 765.

67. Missouri, K. & T. Ry. Co. v. Simonson, 64 Kan. 802, 68 Pac. 653, 57 L. R. A. 765.

68. Southern Ry. Co. v. Allison, 115 Ga. 635.

69. A bill of lading in its character as a receipt is open to explanation—Cunard S. S. Co. v. Kelley (C. C. A.) 115 Fed. 678.

70. Texas & P. R. Co. v. Reiss, 183 U. S. 621, 46 U. S. Lawy. Ed. 358.

71. Mears v. Railroad Co. (Conn.) 52 Atl. 610, 56 L. R. A. 884.

72. Storey v. Hershey, 19 Pa. Super. Ct. 485.

73. Robt. C. White L. S. Commission Co. v. Railroad Co., 87 Mo. App. 330.

74. Storey v. Hershey, 19 Pa. Super. Ct. 485. A carrier is not relieved from its duty to forward within a reasonable time, by reason of the fact that a party, who by the terms of the bill of lading it was to notify, verbally instructed it not to deliver the goods, such person not being in possession of or entitled to the bill of lading in which the owner of the goods was named as both shipper and consignee—Florida Cent. & P. R. Co. v. Berry (Ga.) 42 S. E. 371.

75. Negotiation is not a ratification or adoption of the bill—Farmers' Loan & Trust Co. v. Railroad Co. (C. C. A.) 120 Fed. 873.

76. Clary v. Tyson (Mo. App.) 71 S. W. 710.

77. Action by the assignee for a valuable consideration to recover for a conversion—National Commercial Bank v. Lackawanna Transp. Co., 59 App. Div. (N. Y.) 270.

78. First Nat. Bank v. Railway Co. (Tex. Civ. App.) 72 S. W. 1033.

See Hall v. Keller, 64 Kan. 211, 67 Pac. 518, 91 Am. St. Rep. 209, and note on liability of indorsee for breach of contract for sale of goods so shipped.

79. Agreement to advance money to cotton dealers for the purchase of cotton, taking the bills of lading as security under a course of business whereby the dealers sold the cotton, and, after the sales were made, obtained the bills from the bank and deposited the amount received on the sales therein—First Nat. Bank v. Railway Co. (Tex. Civ. App.) 72 S. W. 1033.

80. 1 Ball. Ann. Codes & Statutes, §§ 3598, 3603, 3604, and 3600—First Nat. Bank v. Railroad Co., 28 Wash. 439, 68 Pac. 965.

§ 7. *Delay in transportation and delivery.*—The carrier is not liable for delay to perishable fruit on account of damage to the track by unprecedented rains.[81] If goods are accepted for shipment with knowledge that they may be seized as contraband of war, the carrier is bound to use all reasonable means to prevent delay from such cause.[82] The carrier is not liable for the value of goods by reason of a mere omission to deliver within a reasonable time; the measure of damages is the difference between the value at time of delivery and the value at the time delivery should have been made,[83] and if after shipment the destination is changed, the measure of damages for delay at the original destination is the difference in value at the substituted destination.[84] Any reasonable expense occasioned by an unreasonable delay, causing goods to deteriorate in value, may be recovered.[85]

§ 8. *Loss of or injury to goods.*—Where receipt of goods is admitted, the carrier must show that their loss was not the result of his negligence.[86] He is not liable for acts done at the direction of the shipper,[87] unless from an unreasonable delay in transportation it becomes the carrier's duty to disregard instructions.[88]

Damage by water and storms.—Cars must be shown to be free from leaks.[89] Where there is a stipulation against loss by water, the fact that goods were delayed two days and were wet when delivered does not show that they were wet by the carrier's negligence.[90] A carrier is not rendered liable for loss of goods by an unprecedented storm by the mere fact that he has failed to make a prompt delivery after arrival. He must, by ordinary prudence, have been able to protect the goods after notice of the impending danger.[91] A carrier is not liable as for conversion of wheat destroyed by an unusual storm while the property remains in its possession, through delay in carriage and delivery at the point of destination, but is liable for retention of a portion of wheat recovered after the storm and retained for an unreasonable time.[92]

Fire.—No presumption of negligence in an express company arises from the mere fact that a fire occurs.[93] The carrier is bound to guard its warehouse

81. A train containing fruit was sent over the road first after repair of the section damaged, though a light work train went over the road through the water the day before—Burnham v. Railway Co. (Miss.) 32 So. 912.

82. After lead was loaded on a vessel, the deputy collector refused to clear the ship on the ground that the lead was contraband, and it was unloaded. The ruling was reversed on the following day before the vessel sailed, but the lead was left, and the carrier, in the absence of proof that it had made any effort to see that the vessel was cleared, was held liable for damages resulting from delay, though the lead was sent on by a later vessel—Farmers' Loan & Trust Co. v. Railroad Co. (C. C. A.) 120 Fed. 873.

83. Louisville, N. A. & C. Ry. Co. v. Hellprin, 95 Ill. App. 402.

84. San Antonio & A. P. Ry. Co. v. Thompson (Tex. Civ. App.) 66 S. W. 792.

85. San Antonio & A. P. Ry. Co. v. Josey (Tex. Civ. App.) 71 S. W. 606.

The consignor's estimate of damage from delay may be taken, though it is greater than that of the consignee and the consignor states that the consignee has a greater knowledge of the market—Southern Ry. Co. v. Deakins, 107 Tenn. 522.

86. Blum v. Monahan, 36 Misc. (N. Y.) 179.

87. Where a vent in a car of vegetables is so left open in February, recovery cannot be had for severe but not unprecedented cold weather—Gillett v. Railway Co. (Tex. Civ. App.) 68 S. W. 61.

88. Negligence of a consignor in instructing not to ice perishable goods—Texas Cent. R. Co. v. Dorsey (Tex. Civ. App.) 70 S. W. 575.

89. Where injury was received in an unprecedented storm, evidence that cars appeared to be good, close and dry and were in good condition at a certain point, does not show lack of negligence where there was no evidence of the effect of the storm on the cars as breaking them or causing leaks—Gulf, W. T. & P. Ry. Co. v. Browne, 27 Tex. Civ. App. 437, 66 S. W. 341.

90. Dobson v. Railroad Co., 38 Misc. (N. Y.) 582.

91. In this case, though delivery was possible on the morning of the storm, the drayman was deterred by bad weather and after the storm became apparent it did not appear that there was any safer place than that of storage—International & G. N. R. Co. v. Bergman (Tex. Civ. App.) 64 S. W. 999.

92. Gulf, C. & S. F. Ry. Co. v. Darby (Tex. Civ. App.) 67 S. W. 129.

93. The contract was on condition that the carrier should not be liable for loss or damage by fire unless the goods were spe-

from the spread of fire originating on adjoining premises.[94] Where an express company is not informed that a package contains gold, it is not negligent in failing to search the ruins of a burned car for its recovery.[95]

Effect of failure to disclose value.—It is a fraud, releasing the carrier from liability, for the shipper not to state the value of the property in order to obtain a lower freight charge,[96] though there is no fraud or concealment of value where goods are shipped under a proper description, without inquiries or representations.[97] Where a valuable package is shipped without disclosure under a stipulation for limited liability at a less charge than would have been made had the value been disclosed, recovery in excess of such limitation cannot be had in the absence of proof of an affirmative act of wrong doing.[98]

Acceptance by consignee.—Signature of a clear receipt by one employed by the consignee to take away the goods may not be binding.[99]

§ 9. *Delivery by carrier.*—Goods may be held until charges are paid.[1] In order that seizure under a legal process be a defense to nondelivery, the carrier must notify the shipper and must show that the process was valid on its face.[2] Where there is reasonable doubt as to who is entitled to possession of goods, the carrier may investigate before immediate shipment,[3] and the amount of time reasonable to allow a carrier to determine disputed ownership is a question for the jury.[4] When goods shipped subject to acceptance are refused by the consignee and the consignor refuses to order their return after notice, he cannot recover of the carrier.[5] The carrier is liable for a promise of prompt delivery by its agent preventing the consignee from removing the goods promptly on arrival.[6]

Notice of arrival.—Under the laws of Missouri, where a consignment arrives at its destination on time, the carrier is not bound to notify the consignee of arrival, but the duty may be imposed by established usage at the point of destination, and is not removed by a stipulation in the contract that goods are to be called for on the day of their arrival.[7]

cially insured.—Rowan v. Wells, Fargo & Co., 114 N. Y. St. Rep. 226.

94. Adequate precaution on the carrier's premises may not relieve it from liability for a fire originating on adjoining premises, and so violent that its spread to the carrier's building could not be prevented, if the carrier had full knowledge of the specially hazardous condition of the adjoining place. Where wool is stored in a shed adjoining a large quantity of jute particularly exposed to fire, evidence that the shed in which the jute was stored had no watchman, and little fire protection, and that defendant's shed was not well constructed to withstand a fire from the outside, is sufficient to warrant the submission of the question of defendant's care to the jury—Judd v. Steamship Co. (C. C. A.) 117 Fed. 206.

95. Rowan v. Wells, Fargo & Co., 114 N. Y. St. Rep. 226.

96. Pacific Exp. Co. v. Pitman (Tex. Civ. App.) 71 S. W. 312.

97. Valuable negatives shipped as "photo goods"—Southern Pac. Co. v. D'Arcais, 27 Tex. Civ. App. 57, 64 S. W. 813.

98. Rowan v. Wells, Fargo & Co., 114 N. Y. St. Rep. 226.

99. The fact that a local express company's agent employed by the consignee to procure the goods for him, signs a clear receipt without complaint, does not prevent the consignee from showing that the goods were wet—Mears v. Railroad Co. (Conn.) 52 Atl. 610, 56 L. R. A. 884.

1. Held error to refuse an instruction that if goods were shipped by mistake over another line by plaintiff's agent and they were shipped to their right destination partly over defendant's line, defendant could hold them for charges and plaintiff could not recover, it being shown that the value was less than the freight charges—Texas & P. Ry. Co. v. Klepper (Tex. Civ. App.) 69 S. W. 426.

2, 3, 4. Merz v. Railway Co., 86 Minn. 33, 90 N. W. 7.

5. Levy v. Weir, 38 Misc. (N. Y.) 361.

6. Where the agent with knowledge of congestion in the freight yards promises a delivery preventing the consignee from removing the goods—Southern Ry. Co. v. Deakins, 107 Tenn. 522, 64 S. W. 477.

7. The question of notice becomes one for the jury, where the carrier claims that it had notified the consignee by mail, and the person having charge of the consignee's mail claimed that such notice was never received and could not be found in the usual files—Herf & Frerichs Chemical Co. v. Lackawanna Line (Mo. App.) 73 S. W. 346.

Duty to require production of bill of lading.—A carrier is not civilly liable for delivery to the consignee without requiring surrender of the bill of lading, though such bill is not marked "Not negotiable."[8] There is no common law liability to require surrender of the bill of lading on delivery to the owner or consignee, and there is no liability to a third person to whom the bill is afterward sold.[9] Commercial usage may require a production of a bill of lading though it name the consignee.[10] The owner of a cotton press receiving cotton in transit for compression is liable to the holder of the bills of lading for its delivery without their production.[11]

Place of delivery or destination.—Goods shipped to a port for water carriage may be delivered at carrier's wharf though outside the statutory limits of the port.[12]

Wrongful delivery.—The liability for wrongful delivery remains though the carrier has become a warehouseman or an involuntary bailee.[13] An express company is not excused for delivery of money to a third person other than the consignee, by the fact that the consignor might, by the exercise of due care, have ascertained that the order and check for the money were forgeries.[14]

Liability of carrier as for conversion.—Where an express company delivers to a person other than the consignee, it is liable for a conversion.[15] If a railroad company delivers a consignment to another than the consignee, subject to the consignor's order, it is not relieved from liability for the technical conversion by the fact that the goods are destroyed in the hands of a third person by an unprecedented storm.[16] Where a demurrage charge may be collected at the expiration of a certain time, and at the expiration of a greater time the carrier has the right to remove the shipment and place it in a warehouse, the carrier is guilty of a conversion in case it remove a car before the final period, though the demurrage charge has accrued.[17] There is no conversion if the carrier delivers the goods at their destination, and the remedy of the shipper is an action for negligence or breach of contract.[18] In the absence of direction, failure of the carrier to return goods refused by the consignee on account of delay, is not a conversion.[19]

Shipments C. O. D.—Where goods shipped C. O. D. show damage by water, the agent must disclose such fact before exacting payment from the consignee,[20] and if he unjustifiably suppresses facts as to their condition, the carrier is not relieved from liability by the fact that it has remitted the proceeds to the consignor before receiving notice within a reasonable time that the goods were worthless.[21] Notice within a reasonable time should be given of the consignee's refusal

8. Pen. Code, § 629, 633, Laws 1858, c. 326, as amended by Laws 1859, c. 353—Mairs v. Railroad Co., 73 App. Div. (N. Y.) 265.

9. Where the bill does not provide for delivery to the order of the consignee, the carrier is not liable for delivery to him without requiring presentation of the bill, though the words "or order" were inserted in the bill and it was transferred to an innocent purchaser—Mairs v. Railroad Co., 73 App. Div. (N. Y.) 265.

10. First Nat. Bank v. Railroad Co., 28 Wash. 439, 68 Pac. 965.

11. Southern R. Co. v. Bank (C. C. A.) 112 Fed. 861.

12. Delivery at a carrier's wharf at Westwego is permissible on a contract of shipment from Texas to the port of New Orleans for export, though such point is a few miles above across the river from and outside the municipal or port limits of New Orleans—Marande v. Railroad Co., 184 U. S. 173, 46 U. S. Lawy. Ed. 487.

13. Security Trust Co. v. Wells, Fargo & Co. Exp., 114 N. Y. St. Rep. 830.

14. Security Trust Co. v. Wells, Fargo & Co. Exp., 114 N. Y. St. Rep. 830.

15. Security Trust Co. v. Wells, Fargo & Co. Exp., 114 N. Y. St. Rep. 830.

16. Missouri, K. & T. Ry. Co. v. Seley (Tex. Civ. App.) 72 S. W. 89.

17. Darlington v. Railway Co. (Mo. App.) 72 S. W. 122.

18. The shipper should receive the goods. The measure of damages in either action is the same—Redmon v. Railroad Co., 90 Mo. App. 68.

19. Louisville, N. A. & C. R. Co. v. Heilprin, 95 Ill. App. 402.

20, 21, 22, 23. Books evidencing damage by water, were delivered Dec. 1st, opened on the 12th or 13th, and notice sent the ex-

to accept,[22] and the question of reasonableness may be for the jury.[23] Before money paid for damaged goods received C. O. D. can be recovered, there must be an offer to return the goods.[24]

Refusal by consignee.—Before the shipper may abandon goods to the carrier, it must show that the goods were not delivered in due time through the carrier's negligence, and that they were kept in an unsafe place until there was material deterioration.[25]

§ 10. *Carrier as warehouseman.*—The carrier is liable as a warehouseman only, where goods are not demanded by the consignee immediately on their arrival,[26] or where it holds them after refusal of the consignee to accept on account of special damages.[27] The fact that goods are shipped to the shipper himself as the consignee does not alter the rule as to the termination of the carrier's liability as a carrier.[28] An express company, after the consignee has refused to accept a C. O. D. parcel and the shipper has directed it to be held until called for,[29] or a carrier by water, where goods are left on its dock at the direction of the consignee for more than a reasonable time after notice of arrival, is liable as a warehouseman only.[30] Where facts are undisputed, the question of whether a railroad is a carrier or a warehouseman is one of law.[31]

Care required.—An express company whose liability has become that of a warehouseman is not liable for the theft of goods in the night-time from a small country depot in which they are stored.[32] Recovery cannot be had for goods stolen from the carrier's warehouse without its fault, after the consignee has allowed them to remain therein three days.[33]

§ 11. *Liability of carrier or connecting carrier.*[34]—In the absence of contract, the carrier is not at common law liable for the negligence of employees of a connecting carrier,[35] though one company owns a large amount of stock of the other.[36] The common law rule has been declared by certain statutes,[37] but if the contract is to deliver at the ultimate destination, there is a liability.[38] Acceptance of freight for transportation to a point beyond the terminus creates a prima facie obligation to deliver at the point of destination.[39] If several carriers make a joint agreement for through transportation and division of compensation, they become jointly and severally liable for any loss on the whole line.[40] The carrier is liable for an injury on a connecting line where a through car is sent to its destination without

press company on the 19th after the purchase price had been remitted to the consignor—Hardy v. American Exp. Co., 182 Mass. 328.

24. Where a consignment of books is so damaged as to be worth but five or six dollars, it must nevertheless be tendered the express company on demand for the price paid—Hardy v. American Exp. Co., 182 Mass. 328.

25. Herf & Frerichs Chemical Co. v. Lackawanna Line (Mo. App.) 73 S. W. 346.

26. St. Louis & S. F. R. Co. v. Akers (Tex. Civ. App.) 73 S. W. 848.

27. Goods burned after two weeks had elapsed—Frederick v. Railroad Co., 133 Ala. 486.

28. The carrier is liable as warehouseman only, for goods destroyed the fourth day after notice of delivery, though the goods are shipped to the shipper as consignee and he does not arrive at the place of delivery or have an agent there until after such time—Denver & R. G. R. Co. v. Peterson (Colo.) 69 Pac. 578.

29. Byrne v. Fargo, 36 Misc. (N. Y.) 543.

30. Notice and direction by wife of the consignee in charge of his place of business—King v. Steamboat Co., 36 Misc. (N. Y.) 555.

31. Denver & R. G. R. Co. v. Peterson (Colo.) 69 Pac. 578.

32. Byrne v. Fargo, 36 Misc. (N. Y.) 543.

33. King v. Steamboat Co., 36 Misc. (N. Y.) 555.

34. See post, § 18, carriage of live stock.

35. Hartley v. Railroad Co., 115 Iowa, 612.

36. Gulf, C. & S. F. Ry. Co. v. Lee (Tex. Civ. App.) 65 S. W. 54.

37. Civ. Code, § 2298, provides that a company shall be liable only to its own terminus and until delivery to the connecting road—Felton v. Railway Co., 114 Ga. 609.

38. Jones v. Railroad Co., 89 Mo. App. 653. Agreement to transfer over its own and connecting lines—Gulf, C. & S. F. Ry. Co. v. Leatherwood (Tex. Civ. App.) 69 S. W. 119.

39. Elgin, J. & E. Ry. Co. v. Machine Co., 98 Ill. App. 311.

40. Robt. C. White L. S. Commission Co. v. Railroad Co., 87 Mo. App. 330.

unloading.[41] Where a transportation company receives its car from an initial carrier, the transportation company becomes liable for mistake in the directions given the railroad next taking the car.[42]

Exemption and limitation of liability.—An initial carrier entering into a through contract may limit its liability for transportation to the terminus of its own line;[43] this, though statutes exist providing that no contract shall exempt a railroad corporation from a liability which would have existed in the absence of a contract.[44] Though the agent making a contract is the agent of other connecting roads, a contract limiting the liability of a connecting road to injuries on its own line may be valid.[45] The limitation may be in the bill of lading.[46] It is not affected by the fact that there is an agreement for a particular kind of service, or the naming of a destination beyond the carrier's line.[47] In the absence of such limitation, it is liable for injuries occurring on other lines beyond its terminus.[48] In Nebraska it is held that where the first carrier receives the entire charge for transportation, it cannot free itself from liability for safe carriage over every part of the route by express contract, the agreement being regarded as one to deliver at the ultimate destination.[49] If the contract provides that the agreement is between the shipper, the carrier and the connecting lines, and that no line shall be liable for the negligence of another, the receiving carrier is not liable for negligence of other carriers.[50] Where a carrier makes a through contract, it cannot exempt itself from liability for the negligence of connecting carriers.[51] Receipt of bills of lading from connecting lines containing an assumption of liability is sufficient to show that the shipper does not regard the original carrier as liable for the entire distance.[52] Though the carrier limit its liability to its own line, it is liable for the negligence of its agent in billing freight to a wrong destination on the line of the connecting carrier.[53] An exemption in favor of the first carrier may extend to a connecting carrier,[54] though not specially named.[55]

Delivery to succeeding carrier.[56]—The duty of an intermediate carrier is to use reasonable diligence to secure further transportation by tender to a connecting line, and if acceptance is refused, to notify the consignor or consignee without unreasonable delay, and store or care for the goods while awaiting for

41. The contract was to transport "to destination if on its road or otherwise to the place on its road where same is to be delivered to any connecting carrier"—Elgin, J. & E. Ry. Co. v. Mach. Co., 200 Ill. 636.

42. Richer v. Fargo, 77 App. Div. (N. Y.) 550.

43. Fremont, E. & M. V. R. Co. v. Railroad Co. (Neb.) 92 N. W. 131; N. Y., C. & St. L. R. Co. v. Railroad Co., Id.; Hartley v. Railroad Co., 115 Iowa, 612.

44. Code, § 2074—Hartley v. Railroad Co., 115 Iowa, 612.

45. The connecting road was not sued as a partner—Askew v. Railway Co. (Tex. Civ. App.) 73 S. W. 846.

46. Provision that the carrier shall not be liable for loss not proved to have occurred on its own road or after the property is ready to deliver to the next carrier—Dunbar v. Railway Co., 62 S. C. 414.

47. Taffe v. Railroad Co., 41 Or. 64, 67 Pac. 1015.

The words, "Fulton Market, New York City," with a stipulation "on fastest passenger train service," do not amount to an agreement to deliver at the ultimate destination but is merely an undertaking to deliver to the connecting carrier—Taffe v. Oregon R. & Nav. Co., 41 Or. 64, 68 Pac. 732.

48. Elgin, J. & E. Ry. Co. v. Machine Co., 98 Ill. App. 311.

49. Bill of lading provided that the property was to be delivered in good order to the succeeding carrier, "it being expressly agreed that the responsibility of this company shall cease at this company's depot at which the same are to be delivered" to such carrier—Chicago, R. I. & P. Ry. Co. v. Grain Co. (Neb.) 90 N. W. 205.

50. Louisville & N. R. Co. v. Chestnut & Co., 24 Ky. L. R. 1846, 72 S. W. 351.

51. Redmon v. Railroad Co., 90 Mo. App. 68.

52. Hartley v. Railroad Co., 115 Iowa, 612.

53. Gulf, C. & S. F. Ry. Co. v. Harris (Tex. Civ. App.) 72 S. W. 71.

54. Cincinnati, H. & D. R. Co. v. Berdan, 22 Ohio Circ. R. 326.

55. Stipulation that no carrier should be liable for damage by water not due to its own negligence—Mears v. Railroad Co. (Conn.) 52 Atl. 610, 56 L. R. A. 884.

56. Delivery of livestock, see post, § 17.

instructions, and when it has done this, it becomes liable only as a warehouseman.[57] Property unloaded at the pier of a connecting carrier before notice of arrival to the succeeding carrier is not within the meaning of a clause limiting the carrier to liability as a warehouseman only while the property awaits further conveyance.[58] A bill of lading providing for a termination of liability on delivery to a steamship company or on the steamship company's pier is not complied with by an unloading on a pier in the absolute control and possession of a railroad company and notice to the steamship company,[59] but on almost identical facts, a contrary ruling is announced.[60] A connecting carrier is not liable for conversion if, instead of delivery to the next carrier, it stores the property subject to the owner's order.[61] Where the agreement of an express company is to forward goods to its agency nearest the ultimate destination and to deliver it to another express company, it is not liable for a loss in the hands of a transfer company while the goods were in transmission to the succeeding express company.[62]

Loss or injury.—Where freight is injured while in carriage by several carriers, the presumption is that it was injured on the last line.[63] It may be a question for the jury whether damage occurred on the line of the initial carrier.[64] The final carrier is not liable where the loss occurs by a delay on the part of the initial carrier,[65] so, where a carrier delays vegetables, it is liable for the natural consequences even beyond its own line.[66] After limitation of liability to loss and damage occurring on the initial carrier's road and to causes within its control, it is not liable for a delay occasioned by an agreement between the last carrier and the consignee, resulting in a storage of the goods, and finally an absolute refusal to receive them.[67]

Statutory regulations.—A statute that carriers receiving goods for through transportation between points in the state shall be regarded as connecting car-

57. Where a railroad company receives cotton for delivery to a steamship company it is not bound, where the carrier by water refuses to accept it on account of the fact that fire has broken out in the cotton, to place the cotton in condition for shipment and again tender it, but after having notified the owner of refusal is justified in storing it to wait his orders—Buston v. Railroad Co. (C. C. A.) 119 Fed. 808; aff. jt. 116 Fed. 235, but disapproving opinion announced on this point that the railroad should place the cotton in fit condition and renew the tender.

58. Texas & P. R. Co. v. Reiss, 183 U. S. 621, 46 U. S. Lawy. Ed. 358.

59. It is held that though the pier was the place agreed on between the railroad company and steamship company for delivery of cotton, it was not sufficient if the railroad company had full control, and under certain contingencies could send the cotton by another steamer, and the steamship company could not take it until a steamer was sent to the pier for such purpose—Texas & P. R. Co. v. Callender, 183 U. S. 63, 46 U. S. Lawy. Ed. 362.

60. Washburn, Crosby Co. v. Railroad Co., 180 Mass. 252. The railroad company in this case gave the steamship company notice by letter which was acquiesced in, that unloading at the pier constituted delivery by the railroad company, and it afterward assumed no liability therefor.

61. Buston v. Railroad Co., 116 Fed. 235.

62. The contract contained a provision that the company to which the goods were delivered by the initial carrier should be regarded as the agent of the owner and liable for subsequent damages—Mills v. Weir, 115 N. Y. St. Rep. 801.

63. Cote v. Railroad Co., 182 Mass. 290. Presumption arises from receipt in good condition by an initial carrier and delivery in a damaged condition by a terminal carrier—Missouri, K. & T. Ry. Co. v. Mazie (Tex. Civ. App.) 68 S. W. 56.

64. A car of fruit not iced remained for several days during hot weather in the possession of the initial carrier and was not opened until arrival at its destination—Missouri, K. & T. Ry. Co. v. Mazie (Tex. Civ. App.) 68 S. W. 56.

65. As where goods packed to remain in good condition from 2½ to 3½ days, were in the hands of the initial carrier about 2¾ days, being carried about 50 miles and defendant could not carry them the remainder of the journey in less than from 2 to 3 days—Farmers' Nursery Co. v. Cowan, 21 Pa. Super. Ct. 192.

66. San Antonio & A. P. Ry. Co. v. Thompson (Tex. Civ. App.) 66 S. W. 792. A delivering carrier is not liable for damage to fruit resulting from decay commenced owing to its inherent nature in the initial carrier's possession and which could not be stopped—Missouri, K. & T. Ry. Co. v. Mazie (Tex. Civ. App.) 68 S. W. 56.

67. Harris v. Railroad Co., 36 Misc. (N. Y.) 181.

riers and agents for each other does not apply to an interstate shipment.[68] Statutory provisions requiring any member of a line of connecting carriers to obtain and furnish information as to the place of loss of freight and the manner thereof, together with the persons by whom such facts may be established, are not unreasonable, and are not unconstitutional in that they compel by penalty the production of information which the company is entitled to withhold.[69] The validity of the act or the legal sufficiency of the application for information cannot be tested by a motion for non-suit, nor can failure of the evidence to show that a carrier has failed to trace freight as requested, and that it showed the damages were the result of plaintiff's negligence, be so urged.[70] The shipper, though not the owner of the goods, may bring an action.[71] It cannot be shown that defendant delivered the freight to a succeeding carrier in good order if by its terms the act expressly applies, though by contract or law the responsibility of a carrier shall cease on such delivery.[72] A petition will not be regarded as stating a cause of action under a statutory provision authorizing action against the last of several connecting carriers, by reason of the fact that it alleged that defendants received goods in good order at a station on its line and transported them to their destination.[73]

§ 12. *Limitation of liability.*[74]—A carrier may limit his common law liability by a just and reasonable contract made as a basis merely for his charges and responsibility.[75] He may exempt himself from liability for loss from specified causes other than his own negligence,[76] though he cannot avoid the latter liability.[77] Carriers may contract against their liability as mere bailees.[78]

Validity and effect of particular limitations.—The carrier may exempt itself from liability for damage by wetting not due to its negligence.[79] Though the carrier cannot stipulate against its own negligence, it may, for a consideration, contract for notice of damage within a reasonable time,[80] but the time for notice will not expire while facts remain undiscovered.[81] Where a bill of lading contains a clause "subject to delay," the carrier is not liable for delay resulting from the detention of the goods as contraband of war.[82] An express company's receipt.

68. Texas & N. O. R. Co. v. Berry (Tex. Civ. App.) 71 S. W. 326.

69. Civ. Code Ga. §§ 2317, 2318—Central of Georgia Ry. Co. v. Murphey (Ga.) 43 S. E. 265.

70. Savannah, F. & W. Ry. Co. v. Elder (Ga.) 43 S. E. 379.

71. Civ. Code, §§ 2317, 2318—Central of Georgia Ry. Co. v. Murphey (Ga.) 43 S. E. 265.

72. Civ. Code, §§ 2317, 2318—Savannah, F. & W. Ry. Co. v. Elder (Ga.) 43 S. E. 379.

73. Civ. Code, § 2298—Philadelphia & R. Ry. Co. v. Venable (Ga.) 43 S. E. 407.

74. See post, § 19, contracts for carriage of livestock. L. 1883, c. 124, § 13, providing that railroad companies cannot, except as provided by regulation of the board of railroad commissioners, limit their common law liability, became inoperative and void by reason of L. 1898, c. 29—Missouri Pac. Ry. Co. v. Park (Kan. Sup.) 71 Pac. 586.

75. O'Malley v. Railway Co., 86 Minn. 380. By contract based on special freight rate or other valuable consideration—Ullman v. Railway Co., 112 Wis. 168. A limitation of liability based on the rate of freight paid may be binding on shippers with notice—Klair v. Steamboat Co. (Del. Super.) 54 Atl. 694.

76. Morse v. Railway Co., 97 Me. 77; Louisville & N. R. Co. v. Landers, 135 Ala. 504.

77. Cincinnati, H. & D. R. Co. v. Berdan, 22 Ohio Circ. R. 326; Morse v. Railway Co., 97 Me. 77; Fasy v. Navigation Co., 77 App. Div. (N. Y.) 469.

78. Chicago, St. P., M. & O. R. Co. v. Schuldt (Neb.) 92 N. W. 162.

79. A receipt providing that no carrier or party in possession shall be liable for damages from wetting, does not relieve from damages due to carriers' own negligence—Mears v. Railroad Co. (Conn.) 52 Atl. 610, 56 L. R. A. 884.

80. Atchison, T. & S. F. Ry. Co. v. Morris, 65 Kan. 532, 70 Pac. 651.

81. A provision that claims must be presented within 90 days does not relieve an express company from liability for wrongful delivery where the claim is presented as soon as a fraud is discovered though more than two years after delivery—Security Trust Co. v. Wells, Fargo & Co. Exp., 81 App. Div. (N. Y.) 426.

82. Having a traffic agreement with a steamship company a railroad accepted lead for transportation to Japan and forwarded it seasonably to a steamship bound therefor, clearance of which was refused as long as the lead was on board, China and Japan be-

making it liable as a forwarder only, does not relieve it from liability for a wrongful delivery.[88] Evidence and findings as to the construction of contracts are to be construed as in other cases, though the contracts themselves are to be strictly construed against the carrier.[84] A specific exception of a certain kind of property, from clauses limiting liability, controls.[85]

Limitation of amount.—A carrier cannot limit its liability to an arbitrary sum, but a fair agreement, liquidating the loss or damage in advance on an agreed actual or maximum value basis, is not contrary to public policy, though the loss be attributable to the carrier's negligence.[86] A limitation of liability to value at place of shipment is invalid.[87] A limitation of the extent of liability for loss does not cover liability for negligence in delivering after notice to stop in transit,[88] nor does it relieve the carrier from liability to the extent of value of the goods, where they are entirely lost by him, there being no stipulation relieving the carrier from his own negligence.[89] A limitation of liability as carrier does not operate as limitation of liability as a bailee for hire, and the carrier may be, as such, liable to the full value of the goods.[90]

Necessity and sufficiency of agreement between carrier and shipper.—The limitation may be in a shipping receipt.[91] Acceptance of a receipt by the shipper containing the clause, "subject to the terms and conditions of the railroad company's bill of lading," renders the limitations therein a part of the contract.[92] Mere acceptance of a bill of lading containing restrictions of the common-law liability of the carrier, without notice thereof, does not render the restrictions binding on the consignor,[93] otherwise where there is knowledge of and no objection to the terms.[94] It is held that in the case of an express company, acceptance of a receipt containing a limitation of liability makes the contract binding on both parties.[95] The shipper need not sign or agree to the terms of the bill in writing.[96]

Evidence to show assent.[97]—The contract is not conclusive as to the fairness under which it was entered into.[98] The burden of showing assent to the terms

ing at war—Farmers Loan & Trust Co. v. Railroad Co., 112 Fed. 829.

83. Security Trust Co. v. Wells, Fargo & Co. Exp., 81 App. Div. (N. Y.) 426.

84. Adams Exp. Co. v. Carnahan, 29 Ind. App. 606.

85. Where a clause modifies the common law liability of the carrier as to property in its possession ready for delivery to the next carrier or awaiting further conveyance, and another clause provides that cotton is excepted from any clause therein on the subject of fire, the carrier shall be liable as at common law for loss or damage of cotton by fire—Texas & P. Ry. Co. v. Callender, 183 U. S. 632, 46 U. S. Lawy. Ed. 362.

86. Contract limiting amount of liability for "accident" construed to include loss or injury from negligence—Ullman v. Railway Co., 112 Wis. 168; Adams Exp. Co. v. Carnahan, 29 Ind. App. 606.

87. Though concerning an interstate shipment—Southern Pac. Co. v. D'Arcais, 27 Tex. Civ. App. 57.

88. Rosenthal v. Weir, 170 N. Y. 148.

89. Blum v. Monahan, 36 Misc. (N. Y.) 179.

90. Bermel v. Railroad Co., 62 App. Div. (N. Y.) 389.

91. As where entered into in consideration of a reduced rate of shipment—Mears v. Railroad Co. (Conn.) 52 Atl. 610, 56 L. R. A. 884.

92. Clause exempting the carrier from liability for loss or damage by causes beyond its control, or by floods or fire not due to its own negligence, though the shipper was not aware that such provision was contained therein—Cincinnati, H. & D. R. Co. v. Berdan, 22 Ohio Circ. R. 326.

93. Elgin, J. & E. Ry. Co. v. Machine Co., 98 Ill. App. 311.

94. Exemption from liability for fire—Cau v. Railway Co. (C. C. A.) 113 Fed. 91; Charnock v. Same, Id. 92. Acceptance without objection of a bill of lading stating the value or maximum value of property received for shipment, whether it does or does not state such value to be declared by the shipper, shows an assent to the terms thereof as regards value—Ullman v. Railway Co., 112 Wis. 168.

95. Adams Exp. Co. v. Carnahan, 29 Ind. App. 606. Though the shipper did not read it—Mills v. Weir, 115 N. Y. St. Rep. 801.

96. Cincinnati, H. & D. R. Co. v. Berdan, 22 Ohio Circ. R. 326.

97. It is sufficient to show that on information that a rate would be a certain amount if the value was not more than a sum fixed, the shipper authorized the agent to fix the value at a greater sum for a greater rate—Adams Exp. Co. v. Carnahan, 29 Ind. App. 606. Proof held insufficient to

of the bill of lading is on the carrier.[99] It will be presumed that a freight rate is based on an agreed valuation where there is no evidence to the contrary.[1] If the contract limits liability to a certain sum in case a greater value is not stated, a statement of a greater value indicates an intention to limit the liability to the amount stated.[2]

Waiver of exemption.—If the consignor of freight insures it in favor of the carrier, such act is a sufficient consideration for a promise by the carrier not to insist on the exemption in a bill of lading from damage by fire.[3]

§ 13. *Remedies and procedure.*[4] *Persons who may sue.*—Action for nondelivery may be brought by the consignor, where there is evidence that the consignee is not the owner, as where goods are shipped subject to inspection,[5] or are consigned for sale on commission.[6] Evidence sufficient to establish plaintiff's title as against the seller of goods is sufficient as against a carrier.[7]

The right of action to recover for a loss by fire is not affected by a conditional payment of insurance on account of the loss.[8]

Form of action.—Replevin will not lie for mere delay if there is no demand for return of the goods.[9]

Venue.—By statute, actions for loss or damage in the hands of connecting carriers may be brought against one or all of them in any county in which either of them extends or is operated,[10] and a carrier may be sued in the county in which goods are shipped, though its line does not run through such county, and the receiving carrier is not joined.[11]

Pleading.—Where forms of action are abolished, it is sufficient in an action to recover the value of goods represented by bills of lading to allege facts raising a duty in defendant to properly deliver the goods represented, and show a breach of such duty by delivery to a third person.[12] A statement in an action before a justice is insufficient if in one portion it seeks a recovery as for a conversion, and does not elsewhere state whether the action is based on contract or tort, or the amount of damages sustained.[13] A verbal agreement of shipment cannot be declared on subject to the terms and conditions of a written receipt, providing for delivery to another consignee.[14] An averment that the plaintiff consignee purchased the goods from the consignor and was the owner at the time of damage is a sufficient allegation of ownership.[15] An allegation that the sinking of a bridge causing the loss of goods was caused by the negligence of defendant, its officers and employes, is a sufficiently definite averment of negligence.[16] A complaint is sufficient which alleges the difference between the value of the goods as delivered

show a custom among water carriers to stipulate against liability for loss by fire—Robinson v. Steamship Co., 75 App. Div. (N. Y.) 431.

98. Limitation of liability purporting to be based on the charges fixed—O'Malley v. Railway Co., 86 Minn. 380.

99. Elgin, J. & E. R. Co. v. Machine Co., 98 Ill. App. 311.

1. Goods accepted under contract limiting liability to an agreed valuation.—Adams Exp. Co. v. Carnahan, 29 Ind. App. 606.

2. Adams Exp. Co. v. Carnahan, 29 Ind. App. 606.

3. Texas & P. Ry. Co. v. Cau (C. C. A.) 120 Fed. 15.

4. See post, § 20, actions against carriers of live stock. Questions of damages will be treated in the article "Damages."

5. Levy v. Wier, 38 Misc. (N. Y.) 361.

6. Failure to deliver promptly—Southern R. Co. v. Deakins, 107 Tenn. 522.

7. Union Feed Co. v. Clipper Line (Wash.) 71 Pac. 552.

8. Judd v. Steamship Co. (C. C. A.) 117 Fed. 206.

9. Wabash R. Co. v. House, 101 Ill. App. 397.

10. Gen. Laws 1899, p. 214—Texas & P. Ry. Co. v. Lynch (Tex. Civ. App.) 73 S. W. 65.

11. Acts 26th Leg., p. 214—Texas & P. Ry. Co. v. Middleton, 27 Tex. Civ. App. 481.

12. Southern Ry. Co. v. Bank (C. C. A.) 112 Fed. 861.

13. Redmon v. Railroad Co., 90 Mo. App. 68.

14. Thomas v. Railroad Co. (Del.) 3 Pennewill, 81.

15. Texas Cent. R. Co. v. Dorsey (Tex. Civ. App.) 70 S. W. 575.

16. Marsden Co. v. Bullitt, 24 Ky. L. R. 1697, 72 S. W. 32.

and as they should have been delivered.[17] Where a statute provides that in certain cities and towns notice of arrival must be given to terminate the liability as carrier, incorporation need not be pleaded if the statute makes no distinction between incorporated and unincorporated cities.[18] In action against the consignor and the carrier where the consignee's title is in issue, a refusal of the consignor to pay a claim for damage, stating that it must be collected from the carrier, is proper under the general allegation of ownership and may be presented in a supplemental pleading.[19] A replication to a plea setting up a limitation against liability for loss by fire is not good on demurrer, if it merely sets up a statutory provision requiring notice to the consignee to enable a carrier to reduce its liability to that of a warehouseman by storage of the goods.[20]

Conformity of pleadings and proof.—The bill introduced may contain limitations of the carrier's common-law liability, though the declaration is in statutory form "for suits on a bill of lading of a common carrier."[21] Recovery because the carrier wrongfully delivered goods without collecting a draft attached to the bill of lading is not warranted by a petition alleging that the goods were to be delivered to plaintiff's order, and defendant wrongfully delivered them to a third person, and proof that the goods were sold by plaintiff to such third person and were to be delivered to him on payment of the draft.[22] A contract to notify the consignee of an arrival at destination must be alleged, to permit a failure to be a ground of recovery.[23] Declaration on a contract as executed by an agent prevents denial of the agent's authority to agree to a limitation of liability.[24]

Burden of proof.—The carrier must show that injury was not due to its negligence,[25] unless recovery is sought against it merely as voluntary bailee,[26] or there has been a prima facie showing that losses resulted from an excepted cause,[27] so, where there is a contract against liability for delay, the shipper must show that delay was caused by negligence.[28] Wetting of goods in a carrier's possession does not compel an inference of negligence.[29] Where the carrier has exercised wrongful control, it must show that loss did not occur in its hands.[30] In action for conversion, plaintiff must prove nondelivery.[31]

Evidence admissible.—Rulings as to admissibility of evidence are grouped in the notes.[32]

17. Action for delay in delivery, damages special, on account of rice being wet when shipped—Texas & N. O. R. Co. v. Bigham (Tex. Civ. App.) 67 S. W. 522.

18. Louisville & N. R. Co. v. Johnson, 135 Ala. 232.

19. Texas Cent. R. Co. v. Dorsey (Tex. Civ. App.) 70 S. W. 575.

20. Code, § 2244, requires a notice within 24 hours in towns of over 2,000 population having a daily mail service. The plea set up that the property was destroyed by fire in the carrier's depot without fault on its part and the replication was held merely to be a denial or a confession and avoidance—Louisville & N. R. Co. v. Johnson, 135 Ala. 232.

21. Declaration in form prescribed by Code, No. 15, p. 946—Louisville & N. R. Co. v. Landers, 135 Ala. 504.

22. Fowler v. Railway Co. (Mo. App.) 71 S. W. 1077.

23. Gulf, C. & S. F. Ry. Co. v. Darby (Tex. Civ. App.) 67 S. W. 129.

24. Complaint in action against an express company, alleged the contract was executed by complainant's agent—Adams Exp. Co. v. Carnahan, 29 Ind. App. 606.

25. Goods injured by water—Mears v. Railroad Co. (Conn.) 52 Atl. 610, 56 L. R. A. 884.

26. Goods destroyed before delivery to the consignee—Frederick v. Railroad Co., 133 Ala. 486.

27. Morse v. Railway Co., 97 Me. 77.

28. In a jurisdiction where the carrier is prevented from contracting against liability for negligence—Anderson v. Railway Co., 93 Mo. App. 677.

29. Mears v. Railroad Co. (Conn.) 52 Atl. 610, 56 L. R. A. 884.

30. A carrier which did not, as required by its contract, give an owner an opportunity to take charge of the entry of a trunk at a port but sent it to a customs house, and after its entry and release sent it by express to the owner's address, must show that a loss therefrom did not occur while it was in its actual custody—Fasy v. Navigation Co., 77 App. Div. (N. Y.) 469.

31. Mere showing that goods were turned over to a carrier to be delivered to a certain person is not sufficient—Collins v. Railway Co., 94 Mo. App. 130.

32. Not fatal to admit evidence of defect in a locomotive claimed to have set the fire.

Questions of law and fact.—Liability of the owner of a car for the mistake of an employee of a railroad company in sending the car to a wrong destination with its contents is a question of law.[32] The carrier is entitled to have the question of whether damages were sustained before delivery to it submitted to the jury,[34] or the furnishing of sufficient watchmen,[35] or whether a denial of liability did not excuse a definite tender of injured goods.[36]

Instructions.[37]—Where the consignee's title is denied, an instruction that a sale would not be presumed in the absence of cash payment or an actual delivery is improper.[38]

Sufficiency of evidence.—Particular holdings are grouped in the notes.[39]

§ 14. *Freight and other charges.*[40]—A rate per hundred pounds in car lots delivered at the point named covers switching charges at terminals or tolls over other lines, and an unfilled car if accepted is taken at such rate.[41] Collection of

though it was shown not to have been near the place at the time of the fire—Denver & R. G. R. Co. v. Peterson (Colo. Sup.) 69 Pac. 578. Unless it was shown to be raining at the time, an expressman to whom delivery was made cannot be asked as to care taken on rainy days—Mears v. Railroad Co. (Conn.) 52 Atl. 610, 56 L. R. A. 884.

Bill of lading acknowledging receipt of goods is evidence of delivery to the carrier—Fasy v. Navigation Co., 77 App. Div. (N. Y.) 469. Freight bill not connected with the goods in question does not show an assumption of liability by the carrier in an action for goods shipped to the consignee and stored on his failure to remove them, the freight bill being relied on to show an agreement to return the goods to the consignor—Samuelson v. Steamship Co., 37 Misc. (N. Y.) 867. Custom to contract to carry over the carrier's and connecting lines may be shown in connection with the evidence that it so contracted—Gulf, C. & S. F. Ry. Co. v. Leatherwood (Tex. Civ. App.) 69 S. W. 119. In an action for failure to deliver freight it may be shown that the consignees have never received it—Alabama Midland Ry. Co. v. Thompson, 134 Ala. 232; and plaintiff may testify that he has not received payment—Southern Ry. Co. v. Allison, 115 Ga. 635. Where it is contended that not all goods received had been delivered, it may be shown that the car was sealed at the loading point and remained sealed until delivery—Missouri, K. & T. Ry. Co. v. Simonson, 64 Kan. 802, 68 Pac. 653, 57 L. R. A. 765. Evidence admissible that expressman, receipting for goods, looked at the box in which they were and made no complaint—Mears v. Railroad Co. (Conn.) 52 Atl. 610, 56 L. R. A. 884. It may be shown that the shipper chose to ship "owners' risk," rather than "shippers' risk" at a higher rate—Mears v. Railroad Co. (Conn.) 52 Atl. 610, 56 L. R. A. 884.

33. Richer v. Fargo, 77 App. Div. (N. Y.) 550.

34. Texas Cent. R. Co. v. Dorsey (Tex. Civ. App.) 70 S. W. 575.

35. Though it is contended that a watchman personally discovered the fire as soon as it started, if the jury may inquire from the evidence that the fire may have been in existence some time before its discovery and a sufficient force of watchmen would have aided in putting it out—Marande v. Railway Co., 184 U. S. 173, 46 U. S. Lawy. Ed. 487.

36. The first complaint of the consignees was, "We feel justified for putting in a claim for the entire shipment and holding the goods subject to your inspection"—Hardy v. American Exp. Co., 182 Mass. 328.

37. Instruction in an action against connecting carriers for delay does not allow the jury to fix the liability of each carrier without regard to the evidence, where it directs them to apportion the entire amount of damages among the defendants, "according to and in proportion to their respective liability as indicated by instructions already given"—Gulf, C. & S. F. Ry. Co. v. Cushney, 95 Tex. 309. When a contract containing a limitation of liability is declared on and the carrier by answer relies on the limitation, the only question presented is that of negligence and the jury should not be instructed as to the elements of a contract limiting liability and the burden of proof of establishing it—Wells, Fargo & Co. v. Bell, 65 Ohio St. 408.

38. There may have been an intention to vest title in the consignee sufficient to maintain the action—Texas Cent. R. Co. v. Dorsey (Tex. Civ. App.) 70 S. W. 575.

39. Delay in shipment of vegetables—San Antonio & A. P. Ry. Co. v. Thompson (Tex. Civ. App.) 66 S. W. 792. To support a recovery against an express company for fish improperly delivered to a game warden—Graham v. Express Co. (Minn.) 94 N. W. 548. To show receipt of freight—Southern Ry. Co. v. Allison, 115 Ga. 635. To show proper care against fire—Marande v. Railway Co., 184 U. S. 173, 46 U. S. Lawy. Ed. 487. Evidence of cause of a fire based on a defect in an engine shown not to have been near the depot at the time, held insufficient—Denver & R. G. R. Co. v. Peterson (Colo.) 69 Pac. 578. It need not be shown that a locomotive was near cotton destroyed by fire, on the day of a fire, in order that the case may go to the jury, since the fire may have been started on preceding days and have smouldered until discovered—Marande v. Railway Co., 184 U. S. 173, 46 U. S. Lawy. Ed. 487. Evidence held sufficient for submission to the jury of issues as to shipment and destruction of goods by fire en route—Rowan v. Wells, Fargo & Co., 114 N. Y. St. Rep. 226.

40. See ante, § 2, for unjust discrimination.

41. Chesapeake & Ohio R. Co. v. Dobbins, 23 Ky. L. R. 1588, 65 S. W. 334.

an increased rate is not justified by the fact that a rate fixed by an agent was due to a mistake, and knowledge of a general tariff rate does not prevent a recovery of the difference between such rate and a lesser one, where the consignee has knowledge that the lesser rate is being given in other cases.[42] A contract to pay "at the rate of tariff" does not create a liability to pay more than the rate agreed on.[43] Rates over roads of different gauge may be apportioned according to an arbitrary standard.[44]

Evidence of establishment of rates.—Commission rates cannot be established by a letter from one of the commissioners.[45] The fact that a rate higher than that contracted for is in a tariff filed in the office of the general freight agent does not show that it was established and published as required by the Inter-State Commerce Act.[46]

Rebates.—A shipper is not entitled to a reduction from the rate fixed by a railroad commission for cotton to be compressed in transit, where a shipment made under a bill of lading containing such privilege is not compressed.[47]

Persons liable for charges.—The consignor is not discharged from liability by the fact that charges are to be collected from the consignee, as the consignee is not bound to pay freight charges in the absence of an agreement, but if a consignee, with knowledge that charges are not paid and that the carrier is surrendering its lien therefor, accepts the goods and removes them, an agreement to pay the known and stated charges may be implied.[48]

Advances.—A carrier pays a lien on goods, for the purpose of continuing transportation, at its own risk, if without consent of the owner, but the connecting carrier may advance charges incident and necessary to the transportation paid by the preceding carrier and retain possession of the goods for its reimbursement, so the connecting carrier is entitled to freight paid by it to the initial carrier, though such carrier, there having been no instruction, has so routed them as to incur greater charges than had they been sent by the most direct line.[49] A carrier has no lien for customs duties paid, if goods shipped in bond to a specific port have been diverted.[50]

The receiving carrier is not liable for an additional charge exacted by a final carrier, unless it is shown that it received a portion of the sum so collected.[51]

Demurrage.—The carrier may provide a reasonable demurrage charge;[52] if it is reasonable, the shipper need not be consulted, and he is charged with notice by the regular rendition of bills for violation.[53] Weather will not excuse a consignee for failure to unload within the time stipulated by the bill of lading.[54]

Liens and enforcement.—A lien for demurrage may be had, though there is no express stipulation therefor, and it is not lost by delivering cars on to a switch

42. Southern Ry. Co. v. Machine Co., 135 Ala. 315.

43. Gulf, C. & S. F. Ry. Co. v. Leatherwood (Tex. Civ. App.) 69 S. W. 119.

44. Where freight rates in a shipment over a narrow gauge and standard gauge road are proportioned at the rate of three narrow gauge to two standard gauge cars, the fact that the standard guage road is not compelled to use its proportionate number of cars to carry the shipment does not create an overcharge in the case of a shipment beginning on the narrow gauge line—Carlisle v. Railway Co. (Mo. App.) 71 S. W. 475.

45. Wells, Fargo Exp. Co. v. Williams (Tex. Civ. App.) 71 S. W. 314.

46. Gulf, C. & S. F. Ry. Co. v. Leatherwood (Tex. Civ. App.) 69 S. W. 119.

47. Galveston, H. & S. A. Ry. Co. v. Orthwein-Fitzhugh Cotton Co. (Tex. Civ. App.) 69 S. W. 490.

48. Central R. Co. v. MacCartney (N. J. Law) 52 Atl. 575.

49. Glover v. Railway Co., 95 Mo. App. 369.

50. Pearce v. Railroad Co., 89 Mo. App. 437.

51. Chicago, R. I. & T. Ry. Co. v. Henderson (Tex. Civ. App.) 73 S. W. 36.

52. Darlington v. Railway Co. (Mo. App.) 72 S. W. 122.

53. Pennsylvania R. Co. v. Steel Co., 201 Pa. 624.

54. Darlington v. Railway Co. (Mo. App.) 72 S. W. 122.

track.[55] On refusal of goods owing to damage in transit, if the carrier sell them to third persons, it may retain its charges from the proceeds of the sale.[56]

Recovery of overpayment.—Freight paid under protest in excess of the rate mentioned in the bill of lading may be recovered.[57] A letter quoting a rate agreed on, written by the general freight agent to the shipper, is admissible in an action to recover excess freight.[58] In an action to recover the difference between the actual rate and the rate exacted over a connecting line, the actual rate having been stated by the receiving carrier, a general denial raises the issue as to whether the statements are binding on him.[59]

Actions for freight and charges.—It is sufficient to aver that a demurrage rule since its adoption has formed a part of the contract of carriage.[60] In the notes are decisions as to admissibility of evidence.[61] Demurrage rules may be so reasonable as not to be a question for the jury.[62]

Part 3. Carriage of live stock. § 15. *Duty to carry and contract of carriage generally.*—A carrier of live stock has a reasonable time after notice in which to furnish cars.[63]

A written contract supersedes an oral contract.[64] The written contract may be signed after delivery to the carrier if at the time of delivery it was the intention to execute such a contract.[65] An agreement to carry cattle to their destination in a shorter time is on a sufficient consideration, if based on an agreement of shipment in larger lots.[66]

§ 16. *Care required of carrier.*—A carrier of cattle is bound to the care, prudence and caution which ordinarily careful, prudent and cautious men exercise under like circumstances.[67] It is not an insurer.[68] It must carry with reasonable diligence.[69] It is not bound for injuries resulting from the inherent viciousness of the stock or their propensity to injure one another,[70] nor for dam-

55. It may repossess itself of such cars to enforce demurrage charges though the switch track is on private land leased by the consignee—Darlington v. Railway Co. (Mo. App.) 72 S. W. 122.

56. Gulf, W. T. & P. Ry. Co. v. Browne, 27 Tex. Civ. App. 437.

57. Southern Ry. Co. v. Anniston Foundry & Mach. Co. 135 Ala. 315.

58. Gulf, C. & S. F. Ry. Co. v. Leatherwood (Tex. Civ. App.) 69 S. W. 119.

59. McLagan v. Railway Co., 116 Iowa, 183.

60. Pacific R. Co. v. Steel Co., 201 Pa. 624.

61. Bill of lading is admissible in an action for freight where the plaintiff relies on a special promise made by defendant before car is shipped, though after issuance of the bill, providing that the consignee should pay freight. Defendant may testify that when freight was to be prepaid plaintiff so indicated it on the bill of lading, though he has never before shipped to a station at which prepayment was required, and he may show that he had no title to the goods after they were placed in the car—Montpelier & W. R. Co. v. Macchi, 74 Vt. 403.

62. Rule charging one dollar per day per car after forty-eight hours from time of readiness for delivery—Pennsylvania R. Co. v. Steel Co., 201 Pa. 624.

63. Illinois Cent. Ry. Co. v. Bundy, 97 Ill. App. 202.

64. Oral contract to furnish cars and a written contract providing that the shipment was not to be transported at any specified time, delivered at any particular hour, or in season for any particular market, and that the shipper released any cause of action for damages accruing to him by any previous contract—Helm v. Railway Co. (Mo. App.) 72 S. W. 148. Recovery cannot be had on an oral contract of shipment, though it is contended that a written contract afterwards signed limiting defendant's liability was executed under duress, where the shipper at the time of the oral contract had knowledge of a requirement that contracts of shipment be in writing—Texas Mexican Ry. Co. v. Gallagher (Tex. Civ. App.) 70 S. W. 97.

65. Texas & P. Ry. Co. v. Byers Bros. (Tex. Civ. App.) 73 S. W. 427.

66. St. Louis S. W. R. Co. v. Barnes (Tex. Civ. App.) 72 S. W. 1041.

67. Texas & P. Ry. Co. v. Tribble (Tex. Civ. App.) 67 S. W. 890. An instruction is erroneous binding the carrier for injuries unless occasioned by act of God, a public enemy, negligence of the shipper, or some vicious propensities of the animals themselves—Fort Worth & D. C. Ry. Co. v. Lock (Tex. Civ. App.) 70 S. W. 456. A carrier is not liable for the death of a horse from meningitis if it was not forewarned and took all possible care of the animal after the attack—Klair v. Steamboat Co. (Del.) 54 Atl. 694.

68. Louisville & N. R. Co. v. Harned, 23 Ky. L. R. 1651, 66 S. W. 25.

69. Held error to instruct that it must carry stock to its destination in as safe and speedy a way as possible—International & G. N. R. Co. v. Young (Tex. Civ. App.) 72 S. W. 68.

70. Instructions to this effect should be

ages of which the shipper's negligence is the proximate cause.[71] The fact that a shipper has expressed satisfaction with the bedding placed in cars before they are turned over to him may prevent his assertion of negligence in such regard.[72] The carrier is liable for ill treatment of cattle being held for charges.[73]

In loading, the carrier is bound to the care required in dealing with the particular animal, reference being had to his known instincts and habits.[74] An unnecessary delay, exposing cattle to severe cold, cannot be excused on the ground that the unseasonable cold was an act of God.[75] Making a flying switch may be gross carelessness.[76]

Unreasonable delay in the transportation of stock is not excused by a slippery track resulting from a heavy dew.[77] The carrier is usually liable for damages resulting from deviation from the route selected by the shipper,[78] but if the shipper has made no selection, the initial carrier may choose the route, the shipper's rights being duly regarded.[79]

§ 17. *Delivery.*—On an agreement to deliver to a consignee at the stock yards, it cannot be contended that delivery was undertaken only to the ordinary freight station.[80] The carrier need not deliver stock to connecting roads for delivery to other yards in the city, if it has provided adequate yards of its own.[81] Since the consignee is not bound to receive cattle at midnight, the carrier's liability does not cease on a tender at that time.[82] The shipper cannot hold the carrier as for a conversion by reason of a mere delay.[83]

§ 18. *Liability of carrier or connecting carrier. Through contracts.*[84]—The liability of an original carrier for negligence of a final carrier is purely statutory where so provided,[85] and is the same whether the original contract is verbal or written.[86] If the carrier contracts to deliver at a certain point, it is liable for injury on a connecting line,[87] though not where the consignor accepts a bill of lading from another carrier beyond the terminus of the initial carrier,[88] or if the contract is to carry by connecting lines, the first acting as agent only for such lines with distinct freight charges, in which case the contract is severable.[89] A through contract of shipment is sufficiently shown by evidence that the shipper arranged for transportation to a point beyond the terminus of the carrier, with

given—International & G. N. R. Co. v. Young (Tex. Civ. App.) 72 S. W. 68.

71. Where dogs, shipped by a train earlier than directed, are returned to the place of shipment, there being no one to receive them and the shipper directs that they be sent back the next day without caring for them, the carrier is not liable for the death of one of them from confinement—Harrison v. Weir, 71 App. Div. (N. Y.) 248.

72. Texas Cent. R. Co. v. O'Laughlin (Tex. Civ. App.) 72 S. W. 610.

73. Recovery is not prevented by the fact that shippers have refused for a time to pay a rate, higher than contracted for, demanded at the destination—Gulf, C. & S. F. Ry. Co. v. Leatherwood (Tex. Civ. App.) 69 S. W. 119.

74. A steamboat company is not relieved from liability for injuries received by a jack in resisting attempts to load him, by the fact that they used only necessary force in the operation—Jones v. Memphis & A. C. Packet Co. (Miss.) 31 So. 201.

75. Texas & P. Ry. Co. v. Smissen (Tex. Civ. App.) 73 S. W. 42.

76. Chicago & N. W. Ry. Co. v. Calumet Stock Farm, 96 Ill. App. 337.

77. Missouri, K. & T. R. Co. v. Truskett, 186 U. S. 479, 46 U. S. Lawy. Ed. 1259.

78, 79. Gulf, C. & S. F. Ry. Co. v. Irvine (Tex. Civ. App.) 73 S. W. 540.

80. Agreement to deliver at Kansas City stock yards is not fulfilled by delivery at Kansas City station—Jones v. Railroad Co., 89 Mo. App. 653.

81. Central Stock Yards Co. v. Railroad Co. (C. C. A.) 118 Fed. 113.

82. On the consignee's refusal to receive them they were unloaded and placed in the company's pens—Houston & T. C. Ry. Co. v. Trammell (Tex. Civ. App.) 68 S. W. 716.

83. Though a shipment of live stock is thereby injured and depreciated in value—Spalding v. Railroad Co. (Mo. App.) 73 S. W. 274.

84. See ante, §§ 3, 11. General rules as to connecting carriers and application to carriage of goods and merchandise.

85, 86. Rev. St. art. 331a—Galveston, H. & S. A. Ry. Co. v. Botts (Tex. Civ. App.) 70 S. W. 113.

87. Texas & P. Ry. Co. v. McCarty (Tex. Civ. App.) 69 S. W. 229.

88. Hartley v. Railroad Co., 115 Iowa, 612.

89. Hughes v. Railway Co., 202 Pa. 222.

privilege of changing the destination to another place.[90] A way bill issued for the guidance of an initial carrier's employes does not prove partnership or agency.[1]

Where the carrier guarantees the suitableness of cars, it is liable for injuries from their defective condition, whether on its own line or on connecting lines.[2]

Rights of holders of separate bills of lading.—A connecting carrier who issues an independent bill of lading sustains no contractual relation to a transferee of the bill of lading of the initial carrier, rendering it liable, where the shipper of the goods sells a portion thereof at a point on the connecting carrier's line.[3]

Limitation of liability.[4]—Connecting carriers are not jointly liable for injuries on either line, where there is no agency or partnership, and the contract limits the liability of each to its own line.[5] A carrier may provide that its liability shall cease at its terminus when the stock is ready to be delivered to the connecting carrier.[6] After a custom to ship for many years under a contract limiting the carrier to losses occurring on its own line, it will be presumed that the shipper intended to ship in the usual way, and it will not be inferred that there was any fraud or mistake.[7] A written contract of shipment controls a verbal agreement, in the absence of evidence of fraud, compulsion or want of time to examine the writing.[8] A written contract for shipment to a point on the carrier's line, limiting liability to such line, is not affected by a way bill issued by the carrier for guidance of its employes, terming the shipment as a "through line stock way bill" to a point on a connecting line.[9]

Duty to deliver to succeeding carrier.—A connecting carrier is not justified by a void state quarantine line in refusing to transport cattle consigned on a through bill of lading not issued by it to the place of delivery to a third carrier not within the line, though the ultimate destination is within.[10]

Delay.—Where the initial carrier issues a way bill stating that the entire freight has been paid, the connecting carrier is liable for negligence of its agent, who, without notice of the fact that the freight has been paid, states to the final carrier that it was unpaid, and causes such carrier to hold the freight until payment, and is liable for damages resulting from delay.[11] Where cattle are billed to an erroneous destination on a connecting line by the agent of an initial carrier, such act is the proximate cause of loss from failure to get them on a certain market, if the connecting carrier would have delivered them on time but for the mistake.[12]

Liability of final carrier.—The last of a line of carriers is not necessarily responsible for loss of cattle where it has received a car sealed, but has not receipted for it as in good order.[13]

90. Texas Mexican Ry. Co. v. Gallagher (Tex. Civ. App.) 64 S. W. 809.

1. San Antonio & A. P. Ry. Co. v. Barnett, 27 Tex. Civ. App. 498.

2. Burnside & C. R. R. Co. v. Tupman, 24 Ky. L. R. 2052, 72 S. W. 786.

3. Robert C. White Live Stock Commission Co. v. Railway Co., 87 Mo. App. 330.

4. See ante, § 12, as to limitations on carriage of goods.

5. Texas & P. Ry. Co. v. Byers Bros. (Tex. Civ. App.) 73 S. W. 427.

6. Const. § 106, denying carriers the right to contract from exemption from common law liability, does not apply—Pittsburg, C., C. & St. L. R. Co. v. Viers, 24 Ky. L. R. 356, 68 S. W. 469.

7. Richmond, N. I. & B. R. Co. v. Richardson, 23 Ky. L. R. 2234, 66 S. W. 1035.

8. So a written contract to deliver cattle at a point on the carrier's line controls an alleged verbal agreement for through carriage, though the consignor claims that he was forced to execute the written contract in order to get the cattle moved, and the evidence showed that it was executed at his direction to secure free transportation for the helpers—San Antonio & A. P. Ry. Co. v. Barnett, 27 Tex. Civ. App. 498.

9. San Antonio & A. P. Ry. Co. v. Barnett, 27 Tex. Civ. App. 498.

10. Tex. R. S. 1895, art. 4535, requiring the acceptance of freight by carriers—Fort Worth & D. C. Ry. Co. v. Masterson, 95 Tex. 262.

11. Missouri, K. & T. Ry. Co. v. Dilworth (Tex. Civ. App.) 65 S. W. 502.

12. Gulf, C. & S. F. Ry. Co. v. Harris (Tex. Civ. App.) 72 S. W. 71.

13. Civil Code, § 2298, provides that the

§ 19. *Limitation of liability.*[14]—Where, by special contract, a carrier of live stock has limited its liability to that of a private carrier for hire, it is not bound to exercise extraordinary diligence.[15] A carrier cannot exempt itself from liability for negligence with regard to stock, on consideration of making a lower rate,[16] nor can it by a contract relieve itself from liability for gross negligence.[17] It may exempt itself from liability from loss in loading and unloading.[18] The law of the place of the accident will control with regard to limitations of liability.[19] Liability for a connecting carrier's acts may be stipulated away.[20]

Limitations as to amount.—An agreement to transport cattle at a less rate, in consideration of an agreement that the value of stock shall be limited, is not invalid as a partial exemption from negligence,[21] but has been held to be against public policy, if the value stated is greatly below the true value, whether the carrier has information thereof or not.[22] In Kentucky, it is held that the carrier cannot limit its liability to a stipulated value or free itself from claims of loss or damage unless made in writing, verified and delivered to an agent of the carrier in a stipulated time from removal of the stock from the cars.[23]

Consideration.—A reduced rate is a sufficient consideration for a release of liability in excess of a declared value,[24] and a recital in a contract that a rate is a reduced one is prima facie evidence that it is.[25] A rate which is the only rate given is not a reduced rate.[26] A contract to care for stock is not without consideration, though no reduction is made in the regular rate.[27] The question of whether a limitation of liability is honestly made as a basis for freight charges is for the jury.[28]

Assent to limitation.—A shipper is not bound to a restriction in a contract unless he accepts it understandingly and assents, and the question of whether a limitation is fairly made is for the jury.[29] If the limitation is in the bill of lading, constituting both the receipt and contract, it must be shown that the shipper assented,[30] and it has been also held that the agreement must be outside the bill.[31]

Provisions that shipper shall accompany and care for or load and unload stock.—The carrier may, by contract, relieve itself of the duty of feeding and watering

last company receiving the goods as in good order shall be responsible. The goods in question were shipped for a reduced rate under a special contract requiring the shipper to accompany the stock, load and unload it at its own risk, and the carrier was released from the injury and damage not caused by fraud or gross negligence—Susong v. Railroad Co., 115 Ga. 361.

14. See ante, § 12, as to carriage of goods with limitations.

15. Central of Georgia Ry. Co. v. Glasscock (Ga.) 43 S. E. 981.

16. Normile v. Oregon Nav. Co., 41 Or. 177, 69 Pac. 928.

17. Chicago & N. W. Ry. Co. v. Calumet Stock Farm, 194 Ill. 9.

18. Robert C. White Live Stock Commission Co. v. Railway Co., 87 Mo. App. 330.

19. Limitation of value will not be enforced though the contract is made outside the state by connecting carriers for carriage to a point within the state—Hughes v. Railroad Co., 202 Pa. 222.

20. See ante, § 18.

21. Normile v. Oregon Nav. Co., 41 Or. 177, 69 Pac. 928. In case there is an agreed limitation of the amount of liability the jury cannot be instructed that the measure of damages is the market value of live stock—Central of Georgia Ry. Co. v. Glasscock (Ga.) 43 S. E. 981.

22. Southern Ry. Co. v. Jones (Ala.) 132 Ala. 437.

23. Illinois Cent. R. Co. v. Radford, 23 Ky. L. R. 886, 64 S. W. 511.

24, 25, 26. Bowring v. Railroad Co., 90 Mo. App. 324.

27. Rev. St., art. 326—Tex. & P. Ry. Co. v. Peters (Tex. Civ. App.) 71 S. W. 70.

28. O'Malley v. Railway Co., 86 Minn. 380.

29. Cleveland, C., C. & St. L. Ry. Co. v. Patton, 104 Ill. App. 550. As where the evidence was that on payment of freight charges, plaintiff was given a contract which he signed without reading, there having been no representations made as to the value of stock, which was inserted in the contract by the agent, and no evidence that the freight charges were in any way controlled by valuations—O'Malley v. Railway Co., 86 Minn. 380.

30. Chicago & N. W. Ry. Co. v. Calumet Stock Farm, 194 Ill. 9.

31. A provision in a bill of lading stipulating the value of horses shipped is not binding, there being no agreement outside the bill though valuable horses are shipped at a reduced rate—Louisville & N. R. Co. v. Frazee, 24 Ky. Law Rep. 1273, 71 S. W. 437.

animals,[32] proper facilities being provided the shipper,[33] but remains liable where it fails to furnish such facilities,[34] and it has been held that failure of the shipper to comply with an agreement requiring him to furnish a person to accompany the stock and care for it does not relieve the carrier from the duty to transport without unreasonable delay, and to care for the stock at the shipper's expense.[35] Though cattle are to be in sole charge of a person selected by the shipper, the carrier, while not liable for lack of attention or care, is liable for a wrongful act of its employees injuring the animals.[36] If the shipper is given free transportation and facilities the carrier is not liable for an injury from failure to water, through the shipper's fault.[37] A carrier is liable for negligence in unloading, though there is a stipulation that the shipper shall unload.[38] Where a contract for reduced rate contained a provision that the owner should load and unload stock at his own risk and should ride on the freight train, he is bound to have some one representing him on the train, though he is given a pass on a passenger train.[39] A contract providing that the shipper shall load at his own risk and exempting the carrier from injury resulting from overloading, fright or crowding of the animals, relieves the carrier from liability, where loss is occasioned by putting too many horses in one car or leaving them loose in the car.[40]

Provisions for notice of injury.—A contract providing that notice of claim for injury must be given in writing before removal of stock is reasonable, and such notice is essential.[41] If notice is given for certain cattle which died before removal, recovery cannot be for cattle dying after removal.[42] A requirement of notice of injury before removal of cattle is met by notice within a reasonably short time after discovery of injury, if such injury was not discoverable before removal, though notice was given as to other cattle before removal.[43]

Waiver of limitation.—Written notice of injury is waived by action being taken on verbal notice.[44]

§ 20. *Procedure in actions relating to carriage of stock.*[45] *Venue.*—A connecting carrier receiving cattle without limitation of liability will be regarded as having ratified the original contract, and may be sued in the county where it was made.[46]

Limitations and conditions precedent.—Actions for injuries resulting from defective condition of a car, expressly guaranteed to be sufficient, are not controlled by a general limitation of actions for injuries to cattle by railroads.[47] A demand for other cars in writing is not necessary to a recovery on account of defects in cars furnished.[48]

32. As by a stipulation in case of accident or delay the owner is to care for the stock at his own expense and shall have all proper facilities on trains to take care thereof—Seaboard & R. R. Co. v. Cauthen, 115 Ga. 422.

33. Such is not a limitation of liability forbidden by the Constitution, art. 11, § 4—Chicago, St. P., M. & O. R. Co. v. Schuldt (Neb.) 92 N. W. 162; Texas & P. Ry. Co. v. Byers Bros. (Tex. Civ. App.) 73 S. W. 427.

34. Illinois Cent. R. Co. v. Eblen, 24 Ky. Law Rep. 1609, 71 S. W. 919.

35. Spalding v. Railroad Co. (Mo. App.) 73 S. W. 274.

36. Schureman v. Railway Co., 88 Mo. App. 183.

37. Chicago, St. P., M. & O. R. Co. v. Schuldt (Neb.) 92 N. W. 162.

38. Normile v. Navigation Co., 41 Or. 177, 69 Pac. 928.

39. Susong v. Railroad Co., 115 Ga. 361.

40. Morse v. Railway Co., 97 Me. 77.

41. Southern Ry. Co. v. Adams, 115 Ga. 705.

42, 43. Louisville & N. R. Co. v. Landers, 135 Ala. 504.

44. St. Louis, I. M. & S. Ry. Co. v. Jacobs, 70 Ark. 401.

45. See ante, § 13, general questions of procedure.

46. Pittsburg, C., C. & St. L. R. Co. v. Viers, 24 Ky. L. R. 356, 68 S. W. 469.

47. Burnside & C. R. R. Co. v. Tupman, 24 Ky. L. R. 2052, 72 S. W. 786.

48. The shipper held cattle at a certain point on account of a failure to furnish cars at an agreed time—Gulf, C. & S. F. Ry. Co. v. Irvine & Woods (Tex. Civ. App.) 73 S. W. 540.

Who may sue.—Recovery of expenses of feed, due to delay in sailing, may be had by the shipper without proof of ownership of cattle.[49]

Pleading.—The shipper need not declare on the special contract exacted by the carrier, if he seeks to recover for negligence.[50] Gross negligence may be proved under an allegation of willful and reckless negligence.[51] The negligence charged may be changed by an amendment at the close of plaintiff's evidence.[52] Where there is a general denial of an allegation of the value of a horse, an affirmative allegation that the horse was traded for one of slight value is irrelevant.[53] If interest is sought to be recovered as an element of damage, it must be pleaded.[54] If a plaintiff places a contract, requiring the owner to care for stock, in issue by a supplementary petition, he cannot avail himself of defendant's failure to plead it.[55]

Variance.[56]—Where plaintiff in his evidence expressly denies a joint contract with connecting carriers and such issue is not submitted, defendant cannot have a peremptory instruction on the ground that a joint contract was declared on and not proved.[57] Recovery on contract cannot be had on a declaration on the common-law liability for negligence,[58] or recovery on liability as a warehouseman on a declaration on liability as a common carrier.[59] There is a fatal variance between a declaration on common-law liability and evidence of a valid contract stipulating for limited liability.[60]

Burden of proof.—If the shipper undertakes to care for stock and load and unload, he must show that injury resulted from the carrier's negligence.[61] Where the shipper examines cars, the burden is on him to show that an injury resulted from a concealed defect.[62]

Admissibility of evidence.[63]—Evidence of what the stock sold for at a different time and place than at the point of destination is improper.[64] Where recovery over is not sought by a defendant connecting carrier for failure of an initial

49. There being no stipulation to such effect—Morris v. Wilson Sons & Co. (C. C. A.) 114 Fed. 74.

50. Where the carrier is liable, notwithstanding the contract—Southern Pac. Ry. Co. v. Arnett (C. C. A.) 111 Fed. 849.

51. Chicago & N. W. Ry. Co. v. Stock Farm, 194 Ill. 9.

52. Original allegation of negligence in shipping a horse in a car recently used for transportation of fresh lime, amendment that the horse caught cold from undue exposure to the elements while in the car—Galliers v. Railroad Co., 116 Iowa, 319.

53. Galliers v. Railroad Co., 116 Iowa, 319.

54. Gulf, C. & S. F. Ry. Co. v. Lee (Tex. Civ. App.) 65 S. W. 54.

55. Texas & P. Ry. Co. v. Peters (Tex. Civ. App.) 71 S. W. 70.

56. Where the shipper alleged that live stock was never received by him, and the answer alleged that the property had been abandoned by the shipper to the carrier while in transit, and that it had been sold on the shipper's account, and there was a tender of the proceeds, it cannot be determined whether the amount tendered was the amount actually realized or whether it was the amount that should have been realized—Spalding v. Railroad Co. (Mo. App.) 73 S. W. 274.

57. Texas & P. Ry. Co. v. Hall (Tex. Civ. App.) 72 S. W. 1052.

58. Pennsylvania Co. v. Walker, 29 Ind. App. 285.

59. Normile v. Navigation Co., 41 Or. 177, 69 Pac. 928.

60. Normile v. Navigation Co., 41 Or. 177, 69 Pac. 928.

61. Louisville & N. R. Co. v. Harned, 23 Ky. L. R. 1651, 66 S. W. 25.

62. The contract recited that the shipper found the cars in good order and sufficient, and the injury was received through the animal getting his foot in a crack—Williams v. Central of Georgia R. Co. (Ga.) 43 S. E. 980.

63. Death of the cattle several days after leaving the cars may be shown—Gulf, C. & S. F. Ry. Co. v. Irvine & Woods (Tex. Civ. App.) 73 S. W. 540. Where a carrier shipped over a route other than that selected by the shipper, evidence as to the customary running time of trains over such route is admissible though evidence as to the speed of one freight train at a certain time is not—Gulf, C. & S. F. Ry. Co. v. Irvine & Woods (Tex. Civ. App.) 73 S. W. 540. It may be shown that at the time cattle were shipped they were not fit to stand transportation from a warmer to a cooler climate through the mountains, and that the effect of their becoming numb by cold would cause them to lie down and be unable to get up—Southern Pac. Co. v. Arnett (C. C. A.) 111 Fed. 849. It may be shown that the time made was unusually slow for a stock train and that the bad condition of the cattle was due to bad treatment en route—Southern Pac. Co. v. Arnett (C. C. A.) 111 Fed. 849. Evidence that an injury occurred after a car was delivered to a connecting carrier may be excluded, where the injury is due to the defective condition of the car—Burnside & C.

carrier to notify when the cattle were ready for delivery to it, evidence as to such notice cannot be admitted.[65]

Questions of law and fact.[66]—A written statement by the person in charge of stock as to their condition need not be construed by the court.[67] Where there is a conflict of evidence, as to whether one suing shipped as owner or as factor, the question is for the jury,[68] as is the question of whether a rate named in the contract is a special or a regular one,[69] or of whether there is an agreement as to value or a mere attempt to limit liability for negligence in a bill of lading,[70] or of whether a mule unloaded is properly secured so as to cause the carrier's liability to cease.[71] After negligence is shown, the extent of the injury resulting therefrom is for the jury.[72]

Sufficiency of evidence.[73]—In actions for negligent injury to live stock, the rule of disregarding evidence in contradiction of obvious physical facts cannot be applied.[74]

Instructions.[75]—If the carrier's liability is limited to its own line, it is entitled to an instruction that it is not liable for injury after the stock passes from

R. R. Co. v. Tupman, 24 Ky. L. R. 2052, 72 S. W. 786.

64. International & G. N. R. Co. v. Young (Tex. Civ. App.) 72 S. W. 68.

65. Gulf, C. & S. F. Ry. Co. v. Butler (Tex. Civ. App.) 73 S. W. 84.

66. The evidence of one of defendant's witnesses that stock could, after delivery by a connecting carrier, have been delivered at its destination in time for the market agreed on, renders the question of the possibility of such delivery for the jury, though plaintiff without knowledge of the distance testified that the delivery would have been impossible—Texas & P. Ry. Co. v. Hall (Tex. Civ. App.) 72 S. W. 1052. Where the terms and nature of a contract for delivery are in controversy, and there is evidence of damages resulting from lack of food and water, the case must be submitted to a jury—Waldron v. Fargo, 170 N. Y. 130.

67. In an action for penalty in failure to feed and water stock in transit it was held that such notice not being contractual was important only as evidence—Texas & P. Ry. Co. v. Peters (Tex. Civ. App.) 71 S. W. 70.

68. Brauer v. Navigation Co., 66 App. Div. (N. Y.) 605.

69. Bowring v. Railway Co., 90 Mo. App. 324.

70. Southern Ry. Co. v. Horner, 115 Ga. 381.

71. Normile v. Navigation Co., 41 Or. 177, 69 Pac. 928.

72. Louisville & N. R. Co. v. Wathen, 23 Ky. L. R. 2128, 66 S. W. 714.

73. To show injury on defendant's line—Western Md. R. Co. v. Landis, 95 Md. 749. To show negligence in making a flying switch—Chicago & N. W. Ry. Co. v. Stock Farm, 194 Ill. 9. To show that two railroads formed a continuous line, or that at the time of the receipt of cattle, defendant knew that the other road had issued bills of lading thereon—Robt. C. White L. S. Commission v. Railroad Co., 87 Mo. App. 330. To show negligence in rounding curves —Louisville & N. R. Co. v. Harned, 23 Ky. L. R. 1651, 66 S. W. 25. To show defective car—Williams v. Railway Co. (Ga.) 43 S. E. 980. To show that pneumonia resulted from injuries received—Louisville & N. R. Co. v. Wathen, 23 Ky. L. R. 2128, 66 S. W. 714. To show diligence in transportation of cattle—Sloop v. Wabash R. Co., 93 Mo. App. 605. To warrant the recovery of a penalty for failure to feed and water cattle in transit —Texas & P. Ry. Co. v. Peters (Tex. Civ. App.) 71 S. W. 70. Plaintiff's evidence that the contract was for through shipment may be sufficient to warrant the submission to the jury of the terms of the contract—Faulkner v. Railway Co. (Mo. App.) 73 S. W. 927. Previous similar contracts carried out by defendant warrant the submission of an agent's authority to make such contracts to the jury—Faulkner v. Railway Co. (Mo. App.) 73 S. W. 927. It is sufficient to raise a presumption of negligence to show that 24 hours was consumed in transportation, when it usually required but from 13 to 15 and there were delays of from 2 to 4 hours at various places—Anderson v. Railway Co., 93 Mo. App. 677.

74. Evidence tending to prove negligence in operating a train and that loss was occasioned thereby, is sufficient to send the case to the jury—Bowring v. Railway Co., 90 Mo. App. 324.

75. Instruction not erroneous in allowing damages to be assessed against two carriers which in fact occurred on the lines of three —Texas & P. Ry. Co. v. Hall (Tex. Civ. App.) 72 S. W. 1052. Not erroneous as tending to overweigh the injuries on the line of other connecting carriers—Texas & P. Ry. Co. v. Hall (Tex. Civ. App.) 72 S. W. 1052. Not failing to limit the value of the horses to the time immediately before and after the injury, or assuming that plaintiff had been put to expense to cure them—Chicago & N. W. Ry. Co. v. Stock Farm, 194 Ill. 9. Not erroneous as allowing a recovery while the cattle were in possession of the company operating the road from defendant's terminus to the final destination—Chicago, R. I. & T. Ry. Co. v. Henderson (Tex. Civ. App.) 73 S. W. 36. As to the measure of damages—Southern Pac. Co. v. Arnett (C. C. A.) 111 Fed. 849. The issue of increased damages by shipment over a longer route than that selected by the shipper cannot be submitted in the absence of evidence of increased dam-

its possession.[74] Where the only evidence is of delay in furnishing transportation, instructions based on an entire refusal to furnish should not be given.[77] Under an allegation that pens were insufficient to hold cattle, an instruction as to liability where the pens were injured by derailed car of another road is irrelevant.[78] Where the facts pleaded authorize a recovery on the carrier's common-law liability, instructions should not confine the right to recover on the existence of a particular contract, two contracts being pleaded.[79]

Judgment.—There may be a judgment over against the connecting carrier in favor of the initial carrier who has contracted to ship cattle over its own and a connecting line, the connecting carrier being primarily liable.[80] Judgment against one of two connecting carriers sued jointly for the full amount demanded is error, where neither carrier was to be responsible beyond the line of its own road, and there was evidence of negligence on the part of the carrier against whom judgment was not rendered.[81]

§ 21. *Damages.*—It is intended to treat here but a few particular questions of damages.[82] The measure of damages is the difference in the market price between the time at which the cattle were delivered and when they should have been delivered,[83] or the difference in market value of the stock in the condition in which they would have arrived but for the negligence of the carrier, and their value in the condition in which they did arrive.[84] Necessary deterioration must be disregarded.[85] The instructions should limit the carrier's liability to such injuries as result from its breach of contract or negligence and exempt it from ordinary shrinkage and necessary incident damage, and from inherent weakness or vice of the cattle.[86] For cattle killed in transit, the measure is the market value at the point of destination.[87] Where cattle die in transit, the amount of damages is to be reduced by the sum received by the owner on their sale.[88]

In order that commission for the purchase of cattle may be recovered on breach of a contract to furnish space on a steamer, it must be shown that the defendant was informed of the contract therefor.[89] The amount of a feed bill may be recovered if the cattle were fed contrary to the shipper's direction, or if they were not in fact fed.[90] Interest may be recovered from the time compensation was demanded.[91] There is no presumption of pregnancy augmenting damages for death of a bitch which had been but recently lined.[92]

ages—Gulf, C. & S. F. Ry. Co. v. Irvine & Woods (Tex. Civ. App.) 73 S. W. 540.

76. International & G. N. R. Co. v. Young (Tex. Civ. App.) 72 S. W. 68.

77. Illinois Cent. R. Co. v. Bundy, 97 Ill. App. 202.

78. Houston & T. C. Ry. Co. v. Trammell (Tex. Civ. App.) 68 S. W. 716.

79. St. Louis S. W. Ry. Co. v. Barnes (Tex. Civ. App.) 72 S. W. 1041.

80. Texas & P. Ry. Co. v. McCarty (Tex. Civ. App.) 69 S. W. 229.

81. Gulf, C. & S. F. Ry. Co. v. Lee (Tex. Civ. App.) 65 S. W. 54.

82. See generally article "Damages."

83. Perry v. Railway Co., 89 Mo. App. 49. First available market day after delivery is to be taken—Sloop v. Railroad Co., 93 Mo. App. 605. Verdict held conjectural and excessive—Helm v. Railroad Co. (Mo. App.) 72 S. W. 148.

84. Cleveland, C., C. & St. L. Ry. Co. v. Patton, 104 Ill. App. 550.

85. Evidence of the market value of cattle had they been delivered in the same condition as shipped is inadmissible where it is not disputed that there was bound to be some deterioration in value—Galveston, H. & S. A. Ry. Co. v. Botts (Tex. Civ. App.) 70 S. W. 113.

86. Louisville & N. R. Co. v. Wathen, 23 Ky. L. R. 2128, 66 S. W. 714. Erroneous to instruct that the defendant is liable for all injuries received on its line though they might not have developed or been discovered while the cattle were in defendant's custody—Gulf, C. & S. F. Ry. Co. v. Butler (Tex. Civ. App.) 73 S. W. 84.

87. Gulf, C. & S. F. Ry. Co. v. Butler (Tex. Civ. App.) 73 S. W. 84.

88. Amount received on sale of cattle dying in transit should be deducted—Gulf, C. & S. F. Ry. Co. v. Butler (Tex. Civ. App.) 73 S. W. 84.

89. An instruction to such effect must be given where the evidence is conflicting—Brauer v. Navigation Co., 66 App. Div. (N. Y.) 605.

90. Galveston, H. & S. A. Ry. Co. v. Botts (Tex. Civ. App.) 70 S. W. 113.

91. Missouri, K. & T. Ry. Co. v. Truskett (C. C. A.) 104 Fed. 728.

Connecting carriers.—The market price at the ultimate destination is the proper basis for estimation of damages against a connecting carrier, though it contracts for transportation over its own line only.[93] Where two connecting carriers are negligent, verdict for the entire amount of damages asked against one may be regarded as excessive.[94] Though a statute provides for apportionment of damages between several defendants who are connecting carriers, if recovered against more than one carrier, it is not necessary that the evidence show how much damage is done on each line.[95]

Part 4. Carriage of passengers. § 22. *Duty to undertake and provide carriage. Who are passengers.*—An express contract is not required to make a person a passenger.[96] The intention to pay fare is necessary,[97] though not actual payment or possession of ticket or pass;[98] so one who has paid no fare, traveling in charge of a race horse, cannot be regarded as a trespasser, if fare has not been demanded.[99] A child riding free in charge of an older person paying fare is a passenger,[1] as is a railroad employe traveling free though on private business,[2] but one intending to ride free under an arrangement with the conductor or brakeman, knowing that he has no authority to give free transportation, is a trespasser.[3] One traveling on a drover's pass in charge of cattle is a passenger for hire.[4]

When relation begins.—It is not necessary that a person touch a street car that he may be a passenger.[5] The intending passenger must not be at the station at an unreasonable time before the departure of the train,[6] but one at a station at train time, the time being late and the waiting room closed, may be rightfully on the platform as a passenger.[7] One having a ticket, approaching a train over the carrier's premises and under the direction of its agent, is a passenger, but must not take a short cut if too late to approach a train properly; hence, one is not regarded as a passenger who passes in front of an incoming train in order to take passage on another.[8] One who has been carried to a platform between elevated tracks and is waiting for a train is a passenger entitled to more than ordinary care.[9]

When relation ceases.—The passenger must have a reasonable opportunity to leave the car at the end of his journey;[10] so one stepping from a platform of the train, it having started without giving him sufficient time to alight, is still a pas-

92. American Exp. Co. v. Bradford (Miss.) 33 So. 843.

93. Missouri, K. & T. Ry. Co. v. Truskett (C. C. A.) 104 Fed. 728; Gulf, C. & S. F. Ry. Co. v. Houghton (Tex. Civ. App.) 68 S. W. 718.

94. Gulf, C. & S. F. Ry. Co. v. Lee (Tex. Civ. App.) 65 S. W. 54.

95. Gen. L. 1899, p. 214, c. 125—Texas & P. Ry. Co. v. Cushny (Tex. Civ. App.) 64 S. W. 795.

96. One attempting in a proper manner to enter a street car becomes a passenger—Kane v. Railway Co., 100 Ill. App. 181.

97. A passenger is defined to be one who enters the carrier's vehicle with the intention of paying the usual fare or with a ticket or pass entitling him to ride—Holt v. Railroad Co., 87 Mo. App. 203.

98. Simmons v. Railroad Co., 41 Or. 151, 69 Pac. 440.

99. Alabama & V. R. Co. v. Beardsley, 79 Miss. 417.

1. Rawlings v. R. Co. (Mo. App.) 71 S. W. 534.

2. Simmons v. Railroad Co., 41 Or. 151, 69 Pac. 440.

3. Purple v. R. Co. (C. C. A.) 114 Fed. 123, 57 L. R. A. 700. Boy of 17 paid a brakeman money to be carried to a certain point and obeyed instructions to ride on the platform on the baggage car, get off at all stops and keep out of sight—Mendenhall v. Railway Co. (Kan.) 71 Pac. 846.

4. Pennsylvania Co. v. Greso, 102 Ill. App. 252.

5. Where person walking along a platform to take a seat on the car, falls, he is entitled to the care due to the passenger relation—Haselton v. St. Ry. Co., 71 N. H. 589.

6. Ky. St. § 784, requires stations to be open 30 minutes before leaving time of trains, and it was held that the carrier was not liable to a person assaulted in its station three hours before time for the train which she intended taking—Illinois Cent. R. Co. v. Laloge, 24 Ky. L. R. 693, 696, 69 S. W. 795, 1113.

7. Plaintiff while three feet farther away from the track than the corner of the station, was struck by a piece of coal from a passing train—Louisville & N. R. Co. v. Reynolds, 24 Ky. L. R. 1402, 71 S. W. 516.

8. Chicago & N. W. Ry. Co. v. Weeks, 99 Ill. App. 518.

9. Lake St. El. R. Co. v. Burgess, 200 Ill. 628.

10. Chicago Terminal Transfer R. Co. v. Schmelling, 99 Ill. App. 577.

senger,[11] as is one who is descending from a street car.[12] One leaving a car before his journey's end at a regular station does not thereby cease to be a passenger, and he may still be within a statutory provision as to care toward persons "being transported," though the train is still, if he has left the car at the express or implied invitation of the carrier for necessary purposes incident to his journey.[13] The relation exists until he has left the station or has had a reasonable time for so doing,[14] but the carrier is not liable to a person as a passenger who, instead of taking an exit provided, climbs over a locked gate in the opposite direction and gets upon a track.[15]

Persons on other than passenger trains.—Where there is no rule allowing freight trains to carry passengers, one thereon is presumed to be a trespasser,[16] but persons boarding such trains, without knowledge that carriage of passengers is prohibited, may rely on the apparent authority of the conductor to allow them to ride and thus become passengers,[17] otherwise if they know, or with diligence may know, of the rule.[18] The rule is similar as to persons on a special excursion train.[19] A person who, without notice that it will not stop, boards a train which sometimes stops at his destination, is not a trespasser, unless he has failed to comply with the conductor's directions to leave at a station prior to his destination or go to one beyond.[20] One from whom a conductor on a construction train has accepted a ticket is a passenger.[21] One riding on a hand car at the invitation of a section foreman is not a passenger,[22] nor is an engine wiper riding on an engine.[23] *Persons in wrong coach,* though rightfully on the train, are passengers toward whom the carrier is charged with at least ordinary care.[24]

§ 23. *Contracts and tickets. The contract in general.*[25]—A presumption of assent to the conditions of a ticket arises from the fact that a person of ordinary intelligence signs it.[26] Where a carrier accepts freight from a connecting carrier and transports it on a through way bill for a proportion of the freight rate, it is

11. Pittsburgh, C., C. & St. L. Ry. Co. v. Gray, 28 Ind. App. 588.

12. The conductor pushed him off while he was descending and at the same time called a policeman to arrest him. Held that the company was liable if the arrest was wrongful—Grayson v. St. Louis Transit Co. (Mo. App.) 71 S. W. 730.

13. One leaving a train at a siding to get a drink of water who is killed while attempting to pass in front of a train on an intervening track, is not a passenger (construing Comp. St. c. 72, art. 1, § 3)—Chicago, R. I. & P. Ry. Co. v. Sattler (Neb.) 90 N. W. 649, 57 L. R. A. 890.

14. Houston & T. C. R. Co. v. Batchler (Tex. Civ. App.) 73 S. W. 981. It cannot be said as a matter of law that one who has alighted from a train and is standing in a space provided by the company for alighted passengers between the railroad tracks is not still a passenger—Chicago Terminal Transfer R. Co. v. Schmelling, 197 Ill. 619.

15. Chicago, B. & Q. R. Co. v. Harrison, 100 Ill. App. 211.

16. Purple v. Union Pac. R. Co., 51 C. C. A. 564, 114 Fed. 123, 57 L. R. A. 700.

17. Person riding on an extra freight which he has boarded in good faith, though passengers were allowed only on regular freights. The extra was in all appearance similar to a regular freight—Simmons v. Oregon R. Co., 41 Or. 151, 69 Pac. 440, 1022.

18. Purple v. Union Pac. R. Co., 51 C. C. A. 564, 57 L. R. A. 700.

19. Fitzgibbon v. Chicago & N. W. Ry. Co. (Iowa) 93 N. W. 276.

20. Baldwin v. Grand Trunk R. Co., 128 Mich. 417, 8 Detroit Leg. N. 706.

21. Plaintiff had ridden before on the train and had no knowledge that an official permit was required to allow passengers to be carried thereon—Spence v. Chicago, R. I. & P. Ry. Co., 117 Iowa, 1.

22. Rathbone v. Oregon R. Co., 40 Or. 225, 66 Pac. 909.

23. Though the company has knowledge of the habitual violation of its rules against employees riding on engines—Streets v. Grand Trunk Ry. Co., 76 App. Div. (N. Y.) 480.

24. Gulf, C. & S. F. Ry. Co. v. Shelton (Tex. Civ. App.) 69 S. W. 653.

25. "I. G. Ry. special excursion ticket. Going coupon. One first class passage from Austin, Texas, to San Antonio, Texas, rate sold, $1.50," stamped with the Austin date stamp, entitles the holder prima facie to transportation from Austin to San Antonio—International & G. N. R. Co. v. Ing (Tex. Civ. App.) 68 S. W. 722.

26. It need not have been read before or after signing or its conditions called to his attention to render binding provisions requiring an excursion ticket to be signed by the agent at the point of destination before it should be good for return passage—Daniels v. Florida Cent. & P. R. Co., 62 S. C. 1.

bound by an agreement made a part of the original contract by the initial carrier, that the shipper should have free return transportation over the connecting line.[27]

Discrimination.—A carrier by rail cannot lawfully discriminate in the rates of passenger fares between passengers under the same conditions and circumstances.[28] Use of an excursion ticket sold at a reduced rate may be limited to particular trains.[29]

Statutory regulation of fare.[30]—A statute providing that street car companies shall not charge more than five cents for a ride does not apply to a road which such a company leased from another company not incorporated under the act.[31] Where the same statute in separate sections provides a penalty for overcharges in fare by railroad and by street railroad companies, a defense provided by one section is applicable to the other.[32] If, after a refusal to accept a transfer and a demand of fare, before the passenger leaves the car, the conductor offers to return the fare and accept the transfer, it is shown that the overcharge is not due to gross negligence within a statute requiring the furnishing of transfers.[33] One who, under a misunderstanding, boards a car returning from rather than going to his destination must pay two fares if he continue on the car until it resumes its return trip.[34]

Mileage books.—Where mileage books entitling the holder to privileges accompanying the highest class ticket issued by the corporation are required by statute, issuance of such books cannot be conditional on use only for journeys wholly within the state.[35] A new corporation resulting from the reorganization of a former corporation is subject to the provisions of an act concerning mileage books, which is unconstitutional as to corporations organized before its passage.[36] Such a statute will be presumed to apply when it is admitted that at a previous date the defendant carrier was a domestic railroad.[37]

Through contracts.[38]—A mere statement by an agent as to the time a passenger will reach his destination does not constitute a contract making the carrier a through carrier or binding it to carry him to his destination within such time,[39] nor does the fact that a railroad sells a ticket to a point of connection with a steamship company and also an order for a steamship ticket to a further point render it liable for delay beyond its line.[40]

27. If the shipper was to receive return transportation on condition that he present to defendant's agent a transportation request issued with the contract for a return pass, the fact that the plaintiff did not present the form of request furnished is immaterial if he presented the contract itself, his identity was unquestioned and no objection to the form of the request made, and the agent received the contract, stamped it, and returned it saying that it would be all right and on ejection for failure to present the return pass or pay fare, he could recover for breach of contract without paying his fare—Texas & P. Ry. Co. v. Lynch (Tex. Civ. App.) 73 S. W. 65.

28. Phillips v. Southern Ry. Co., 114 Ga. 284.

29. England v. International & G. N. R. Co. (Tex. Civ. App.) 73 S. W. 24.

30. Rev. St. § 3374, providing a penalty for the exaction of a passenger fare "exceeding three cents per mile for a distance of more than eight miles," does not apply until the ninth mile is reached, since it will not be assumed that the legislature intended to take account of fractions of a mile—Cleveland, C., C. & St. L. Ry. Co. v. Wells, 65 Ohio St. 313.

31. L. 1884, c. 252—McNulty v. Brooklyn Heights R. Co., 36 Misc. (N. Y.) 402.

32. Construing Laws 1890, c. 565, §§ 39, 105—Tullis v. Brooklyn Heights R. Co., 71 App. Div. (N. Y.) 494.

33. Tullis v. Brooklyn Heights R. Co., 71 App. Div. (N. Y.) 494.

34. McGarry v. Holyoke St. Ry. Co., 182 Mass. 123.

35. Such a stipulation held to mean that the book is acceptable for such part only of a journey as is within the state—L. 1895, c. 1027—Horton v. Erie R. Co., 65 App. Div. (N. Y.) 587.

36. A railroad corporation reorganized under Laws 1892, c. 688, is subject to mileage book act, Laws 1895, c. 1027—Minor v. Erie R. Co., 171 N. Y. 566.

37. L. 1895, c. 1027—Horton v. Erie R. Co., 65 App. Div. (N. Y.) 587.

38. Evidence held insufficient to show liability of Pa. R. Co., for a breach of a special contract of carriage—Tyler v. Pennsylvania R. Co., 18 App. D. C. 31.

39. Statement that plaintiff would reach Dawson City before the close of navigation, does not bind the carrier to transport plaintiff to Dawson City before such time, it being no part of the consideration—Dresser v. Canadian Pac. Ry. Co., 116 Fed. 281.

40. Railroad sold a ticket from Chicago to Seattle and an order for steamship transpor-

Where a company receives a proportion of the price of tickets sold by another company, the ticket agent of the latter company is the agent of the former, so that each is liable for his acts in failing to issue a ticket to the proper destination.[41]

Regulation of sale of tickets.—Statutes restricting the sale of railroad tickets to authorized agents of the carrier are not valid regulations of the railroad company's business, whether regarded as regulations of a corporation created by the legislature or as a police regulation.[42] A ticket broker may be liable for his acts in inducing the purchaser of a nontransferable special ticket to sell a return portion for the purpose of having it used by another.[43] A carrier cannot deny the authority of a clerk where it acts on a contract with knowledge that it has been made by the clerk assuming to act as general passenger agent.[44] A statute prohibiting others than agents from selling railroad tickets, but stating that it is not applicable to persons holding tickets not having printed on their face that it is an offense to transfer such ticket for consideration, does not render a ticket without such notice nonassignable.[45]

Who may use tickets.—A railroad ticket is transferable in the absence of contract or constitutional or statutory provisions.[46] Use of a nontransferable ticket by a transferee is actionable.[47] Under statutes providing a penalty for an attempt to use a pass which by conditions expressed thereon is not transferable, an attempt to use a pass which has no condition except that it will be taken up if presented by any person other than the one to whom it was issued does not render a person liable to the penalty.[48]

Rights on loss of ticket.—Issuance of a duplicate in place of a lost commutation ticket cannot be compelled where the ticket provides that the company shall not be required to refund if it is not used, and the holder cannot on its loss recover the amount paid by him or damages for failure to transport him without paying fare, neither has he a right to transportation except on payment of the regular fare.[49]

Round trip tickets.—If round trip tickets provide that they must be stamped on the day that they are to be used for return, the carrier is bound to have present a person authorized so to stamp the ticket a reasonable time before the arrival of trains on which it is good for passage.[50] A round trip ticket good for one day is available on the only train returning, though it may not be scheduled to stop at the station of purchase.[51]

Limited tickets.—A ticket may be good for a return journey commenced though not completed before the final limit.[52] The ticket where signed by the purchaser and bearing punch mark showing date of its expiration, is conclusive

tation from there to Dawson City, which was stated to be of a certain value. The railroad's agent at Seattle purchased a regular contract ticket from the steamship company for the sum stated—Dresser v. Canadian Pac. Ry. Co., 116 Fed. 281.

41. Kansas City, M. & B. R. Co. v. Foster, 134 Ala. 244.

42. Laws 1901, c. 639—People v. Caldwell, 168 N. Y. 671.

43. Delaware, L. & W. R. Co. v. Frank, 110 Fed. 689.

44. Southern Ry. Co. v. Marshall, 23 Ky. L. R. 813, 64 S. W. 418.

45. Batts' Ann. Civ. St., title 94, c. 12a—International & G. N. R. Co. v. Ing (Tex. Civ. App.) 68 S. W. 722.

46. International & G. N. R. Co. v. Ing (Tex. Civ. App.) 68 S. W. 722.

47. Ticket issued at a reduced rate in consideration of persons agreeing that it should not be transferred—Delaware, L. & W. R. Co. v. Frank, 110 Fed. 689.

48. Act June 10, 1897—Allardt v. People, 197 Ill. 501.

49. Southern Ry. Co. v. De Saussure (Ga.) 42 S. E. 479.

50. Southern Ry. Co. v. Wood, 114 Ga. 140, 55 L. R. A. 536.

51. Illinois Cent. R. Co. v. Harris (Miss.) 32 So. 309.

52. Rutherford v. St. Louis S. W. Ry. Co. (Tex. Civ. App.) 67 S. W. 161. One who begins the return journey before midnight of the final day, but owing to a delay misses a connection, may recover for his ejection from the next train of the connecting road on the ground that the ticket has expired—Morningstar v. Louisville & N. R. Co., 125 Ala. 251.

evidence to the conductor as to when it expires.[53] The passenger is not bound by limitations printed on a general ticket, where his attention is not called to them and he is not charged with notice thereof.[54]

Stop over privileges do not exist in the absence of agreement, though the ticket is unlimited.[55] A passenger is entitled to ride from a point at which he has rightfully made a stop over, though he has no written evidence of his right to passage, it having been taken up by a previous conductor, before the stop over, over the passenger's objection.[56]

Redemption of tickets.—One who has purchased tickets for the purpose only of having them redeemed is not entitled to a statutory penalty on failure of redemption. Under statutes providing a penalty on failure to redeem where a demand for redemption has been made, a second demand of the price at the end of the time within which the redemption money should have been paid is not necessary to put the carrier in default. If the agent knows that the plaintiff has tickets in his possession for the purpose of asking that they be redeemed and declines redemption, a formal tender of the tickets is not required. Where notice of the time for redemption is not posted as required by the statute, demand may be made within the period of the general statutes of limitations.[57]

Actions for failure to carry or to honor tickets.[58]—An allegation that a conductor refused to accept a fare offered does not amount to a statement that there was a refusal to carry plaintiff.[59] Where the pleadings and evidence show reliance on statements of an agent that a train will stop at a certain place, an instruction permitting recovery on the ticket as evidencing the contract without regard to the agent's statements is erroneous.[60] Where a passenger pays a fare under threat of expulsion, the question of expulsion should not be submitted to the jury in an action for damages.[61] Breach of contract of carriage, no special damage being laid, entitles the passenger only to recover the costs of transportation in the most feasible, reasonable way.[62] Where an action is for the refusal of an excursion ticket on the ground that it had expired, the difference between the excursion and the regular rate is immaterial.[63] On breach of contract to hold the train, the measure of damages is the compensation for lost time, personal inconvenience and necessitated expenses, but there can be no recovery for pain of body or of mind.[64]

Performance of contract of carriage.—An ice blockade is not an act of God excusing breach of a contract to carry to a particular port, and where a ticket provides that in case it is impossible to land a passenger safely at his port of destination he may be landed at the next port, the carrier is not entitled to land him at a

53. Rolfs v. Atchison, T. & S. F. Ry. Co. (Kan.) 71 Pac. 526.

54. Full fare was paid and it was held that the posting of notices in the waiting rooms and ticket offices was not sufficient to charge him with notice of the limitations—Norman v. Southern Ry., 65 S. C. 517.

55. Louisville & N. R. Co. v. Klyman, 103 Tenn. 304, 56 L. R. A. 769.

56. Nothing on the face of the ticket inconsistent with the stop over privilege or any rule or knowledge thereof by the passenger inconsistent with such privilege was shown—Scofield v. Pennsylvania Co. (C. C. A.) 112 Fed. 855.

57. Acts 28th Genl. Assem. c. 71, § 1—Jolley v. Chicago, M. & St. P. Ry. Co. (Iowa) 93 N. W. 555.

58. Evidence held insufficient to warrant a peremptory instruction to find a promise by a railroad agent, that a train should stop where plaintiff desired to alight—International & G. N. R. Co. v. Kilgo (Tex. Civ. App.) 71 S. W. 556.

59. Dierig v. South Covington & C. St. Ry. Co., 24 Ky. L. R. 1825, 72 S. W. 355.

60. International & G. N. R. Co. v. Kilgo (Tex. Civ. App.) 71 S. W. 556.

61. Myers v. Southern R., 64 S. C. 514.

62. Rose v. King, 76 App. Div. (N. Y.) 308.

63. Rutherford v. St. Louis S. W. Ry. Co. (Tex. Civ. App.) 67 S. W. 161.

64. $250 excessive, where pecuniary loss is only $22.50 and delay for one night and plaintiff was able to secure a bed and go to sleep—Southern Ry. Co. v. Marshall, 23 Ky. L. R. 813, 64 S. W. 418.

previous port, though the port of destination is ice bound and inaccessible.[65] Where the agreement is to land a passenger at a point as near the mouth of a certain river as the landing may be made in safety, the determination of the landing is to be made by the master acting in good faith.[66]

Actions for failure to perform.—A release from one of the workmen is not a defense to an action for breach of contract in failing to land plaintiff and his workmen at their destination. Where defendant testifies that its reason for landing plaintiff short of his destination was information that the port was inaccessible on account of ice, it is immaterial from whom such information was received.[67] The costs incident to reaching the proper destination are elements of damage.[68] To establish the wages lost by failure to land plaintiff and his employees at the port of destination, evidence of wages at the point where landed is admissible, if they were the same as at the point of destination.[69] In the absence of notice of special necessity, a person delayed may recover only the value of his time during the delay.[70] Exemplary damages cannot be recovered for delay, though the causes thereof were known to the agent at the time the ticket was purchased.[71]

§ 24. *Extra charges where tickets are not procured, and other regulations.*—Before a greater charge may be exacted of persons paying fare on trains, a passenger must be afforded a reasonable opportunity to purchase a ticket before entering a train.[72] A street railway company's rule against employees in uniform, but off duty, sitting on front seats of open cars, is reasonable, though applied to an employee paying fare,[73] but does not justify a forcible ejection by an inspector who has authority to make rules governing employees.[74] The fact that an agent sells a ticket for passage on a freight train, without informing the passenger that he must sign a special permit, does not abrogate a rule requiring the permit, since it is reasonable, and the passenger is bound to take notice of reasonable rules.[75] Persistent violation of rules regulating conduct at stations may prevent a passenger from complaining of the use of unnecessary force in compelling him to obey them.[76] The reasonableness of regulations is a question of law.[77]

§ 25. *Ejection of passengers. Persons without ticket or refusing to pay fare.*—Where a passenger having stop over privileges is compelled to surrender the ticket-coupon evidencing his right to passage for the remainder of the journey, his lack of written evidence of right to transportation confers no authority on the conductor of a later train to eject him, and if he attempt to ride without a ticket, he is not guilty of contributory negligence, nor is his right of action rendered complete by the fact that the coupon ticket is taken up so that he has no right of

65. Bullock v. White Star S. S. Co., 30 Wash. 448, 70 Pac. 1106.

66. Torrey v. Kelly (C. C. A.) 121 Fed. 542.

67. Bullock v. White Star S. S. Co., 30 Wash. 448, 70 Pac. 1106.

68. Such as the cost of an outfit and supplies to travel to the point of destination, living expenses together with the expenses of loss of time and wages—Bullock v. White Star S. S. Co., 30 Wash. 448, 70 Pac. 1106.

69. Bullock v. White Star S. S. Co., 30 Wash. 448, 70 Pac. 1106.

70. Lawyer detained may recover value based on average earnings during at least twelve months preceding—Cooley v. Pennsylvania R. Co., 40 Misc. (N. Y.) 239.

71. Illinois Cent. R. Co. v. Pearson, 80 Miss. 26.

72. Phillips v. Southern Ry. Co., 114 Ga. 284. Fare for points within the state—Weber v. Southern Ry. Co., 65 S. C. 356.

73. Rowe v. Brooklyn Heights R. Co., 71 App. Div. (N. Y.) 474.

74. Rowe v. Brooklyn Heights R. Co., 80 App. Div. (N. Y.) 477.

75. Ellis v. Houston, E. & W. T. Ry. Co. (Tex. Civ. App.) 70 S. W. 114.

76. The persistent violation of regulation forbidding passengers from going to sleep in the waiting rooms or lying down on the benches causing defendant's servant to lose his temper—Central of Georgia Ry. Co. v. Motes (Ga.) 43 S. E. 990.

77. A rule forbidding passengers lying down or going to sleep in waiting rooms is not as a matter of law unreasonable—Central of Georgia Ry. Co. v. Motes (Ga.) 43 S. E. 990. Regulations as to excess rates and rebate checks—Weber v. Southern Ry. Co., 65 S. C. 356.

action for the subsequent expulsion.[78] Where a passenger is so drunk that he does not consciously refuse to produce a ticket, though he pays no attention to a request to do so, the carrier may be liable for ejecting him at night.[79]

Persons refusing to pay extra charges.—An extra charge cannot be exacted of one paying cash fare where the ticket office is not kept open up to the arrival of the train,[80] or where a ticket is not procured because of a statement of the agent that he could not sell a ticket and the passenger would have to pay fare on the train.[81]

Persons with defective tickets.—Where a coupon book provides that coupons must be detached by the conductor, one who presents a coupon from his wife's book and refuses to produce the book cannot recover for an expulsion though the conductor did not demand a cash fare or plaintiff tender payment except the coupon.[82] Where a return ticket provides that it shall be stamped by the carrier's agent, if the passenger, on the day he desires to return, is unable, by the exercise of due diligence, to find an authorized agent for such purpose, the carrier is liable for his expulsion from the train after he has explained the facts, and the passenger does not waive his right to recover by the fact that he has the ticket signed and stamped and uses it for return passage on another train.[83]

Interchangeable mileage.—Where a station is out of exchange tickets and a passenger boards a train and presents a mileage book, but the conductor refuses to issue an exchange ticket and ejects him at a station where the ticket office is closed, and refuses to allow him to re-enter the train, though he calls the conductor's attention to such fact, there is a breach of contract, the mileage ticket providing that conductors may issue exchange tickets where the train is boarded at stations where there is no ticket office or where the office is closed, and in such a case plaintiff is not required to pay his fare and rely on its recovery by suit, but may stand on his rights under the contract.[84]

Persons with defective transfers.—Where there is an agreement between two street railroads to transfer from one to the other, one company is liable for the mistake of the employee of the other in punching a transfer,[85] so a passenger who is given a transfer to a wrong line may recover if ejected after he has explained the matter to the conductor on the line over which he wishes to travel.[86] Reasonable explanations must be accepted.[87] One receiving an erroneous transfer is not contributorily negligent in case he does not understand it, and good faith of the conductor, or mistake in the way the transfer is punched, will not relieve the carrier from liability for his ejection.[88]

Right to tender fare after refusal.—A passenger may, after refusal to pay fare, tender it as he sees the conductor stop the train to put him off and the conductor

78. Scofield v. Pennsylvania Co. (C. C. A.) 112 Fed. 855.

79. Passenger was visibly intoxicated when he got on the car and had a coupon ticket to his destination the first coupon of which the conductor collected—Clark v. Harrisburg Traction Co., 20 Pa. Super. Ct. 76.

80. Laws 1857, c. 228, providing that the ticket office must be kept open for an hour prior to the departure of each passenger train—Monnier v. New York Cent. & H. R. R. Co., 70 App. Div. (N. Y.) 405.

81. Phillips v. Southern Ry. Co., 114 Ga. 284.

82. United Rys. & Electric Co. v. Hardesty, 94 Md. 661.

83. Southern Ry. Co. v. Wood, 114 Ga. 140, 55 L. R. A. 536.

84. Pennsylvania Co. v. Lenhart, 120 Fed. 61.

85. Jacobs v. Third Ave. R. Co., 71 App. Div. 199, 10 N. Y. Ann. Cas. 462.

86. The passenger was under no obligation to make a technical examination of the transfer slip—Lawshe v. Tacoma Ry. & Power Co., 29 Wash. 681, 70 Pac. 118.

87. Indianapolis St. Ry. Co. v. Wilson (Ind.) 66 N. E. 950.

88. Passenger was ejected on account of improper punching of transfer and arrested at the request of the conductor—Jacobs v. Third Ave. R. Co., 71 App. Div. 199, 10 N. Y. Ann. Cas. 462.

must accept it,[89] though it has also been held that an offer to pay fare during the process of ejection will not render the continuance of the expulsion tortious.[90]

Passenger on wrong train.—A passenger cannot recover where he is ejected because his ticket is not good on a particular train, of which fact he has knowledge,[91] nor can one who attempts to ride on a freight train without a necessary permit.[92] A person who has been sold a ticket for passage on a particular train, and assured by the agent that the train will stop at his destination, may recover if ejected on the sole ground that the train does not make such stop, unless he has knowledge that the agent had no power to so inform him and that the conductor is prohibited from stopping there.[93] He may rely on the representations of the local ticket agent.[94] A ticket entitling the purchaser to ride on a freight train, and containing a provision that the company shall not be liable for damages to person or baggage, cannot be revoked at any time by reason of the fact that the provision is not binding on the passenger.[95]

Passenger misbehaving.—A railroad company may, without unnecessary force, eject a boisterous, violent, and intoxicated passenger.[96]

Place of ejection.—If the place of ejection for nonpayment of fare is provided by statute, the carrier, to relieve itself from liability, must prove that the terms thereof were followed.[97] In some states, a carrier is liable for putting a passenger off at a dangerous place only in the event that he is put off against his will or in such a mental condition as to be incapable of having a will.[98] The question of the dangerous character of the place of ejection is controlled by the fitness of the place which the passenger safely reaches.[99]

Manner of ejection.—Where a passenger repeatedly refuses to pay fare, the conductor may use necessary force in putting him off.[1] There may be a forcible ejection though the passenger is not touched,[2] but mere rude and not abusive language used by a conductor does not render the carrier liable in damages.[3] A boisterous and intoxicated passenger may be expelled but not assaulted,[4] and his drunkenness does not relieve the company from liability to exercise care.[5] One,

89. In this case plaintiff sought to get a ticket before going on the train and also a credit slip necessary for rebate on purchase of ticket and had refused to pay fare unless the conductor would give such credit slip—Holt v. Hannibal & St. J. R. Co., 87 Mo. App. 203.

90. There had been a persistent refusal to pay the legal fare and physical force was being employed to eject plaintiff at the regular station—Behr v. Erie R. Co., 69 App. Div. (N. Y.) 416.

91. The ticket was an excursion ticket sold at a reduced rate and reciting that it was not good on a particular train, and the ejection was accompanied by no unnecessary force—England v. International & G. N. R. Co. (Tex. Civ. App.) 73 S. W. 24.

92. One knowing the necessity of a permit cannot rely on the ticket agent's statement that such permit may be obtained on the train if he know the statement is unauthorized—Houston, E. & W. T. Ry. Co. v. Stell (Tex. Civ. App.) 67 S. W. 537.

93. Atkinson v. Southern Ry. Co., 114 Ga. 146, 55 L. R. A. 223.

94. Kansas City, Ft. S. & M. R. Co. v. Little (Kan.) 71 Pac. 820.

95. This theory was advanced in an action for wrongful exclusion from a freight train—Central of Georgia Ry. Co. v. Almand (Ga.) 42 S. E. 67.

96. Chesapeake & O. Ry. Co. v. Saulsberry, 23 Ky. L. R. 2341, 66 S. W. 1051.

97. Rev. St. 1899, § 1074. Allowing a passenger to be ejected without unnecessary force at any usual stopping place or near any dwelling house—Holt v. Hannibal & St. J. R. Co., 87 Mo. App. 203.

98. So held construing an instruction—Bohannon's Adm'x v. Southern Ry. Co., 23 Ky. L. R. 1390, 65 S. W. 169.

99. It is not negligence to eject an intoxicated passenger, and leave him 25 or 30 feet from the track in a public street talking to a public officer—Gaukler v. Detroit, G. H. & M. Ry. Co. (Mich.) 9 Detroit Leg. N. 215, 90 N. W. 660.

1. McGarry v. Holyoke St. Ry. Co., 182 Mass. 123. On removal of an intoxicated passenger for nonpayment of fare the conductor must act in a prudent manner with the use of no more force than is necessary—Central Ry. Co. v. Mackey, 103 Ill. App. 15.

2. As where the conductor follows the passenger on the platform and threatens to throw him off if he does not alight—Indiana, D. & W. Ry. Co. v. Ditto, 158 Ind. 669.

3. Daniels v. Florida Cent. & P. R. Co., 62 S. C. 1.

4. St. Louis S. W. Ry. Co. v. Johnson (Tex. Civ. App.) 68 S. W. 58.

5. An instruction that if plaintiff was in such a state of intoxication as to render him

with a ticket, boarding a freight train, which does not carry passengers may recover if compelled to jump from it in the dark while it is in motion.[6]

Injuries caused by passenger's conduct.[7]—One who causes added indignities to be shown him for the purpose of increasing damages cannot recover therefor.[8] Where a passenger is injured while running beside a train after his ejection, with the intention of getting on again, the carrier is not bound to stop for the purpose of finding out if he is hurt.[9] Where a person on the steps refuses to either enter or leave the car, the conductor may use such reasonable force as may be necessary to make him do one thing or the other.[10]

Actions for ejection.—Recovery for ejection on refusal to accept a transfer may be by an action in tort as well as on contract unless plaintiff's fault or negligence aided in leading up to the expulsion.[11] An action of assault and battery may be maintained for ejection on refusal to pay an extra sum wrongfully demanded.[12]

Pleading.[13]—The complaint must negative a statute authorizing the charge of an increased fare.[14] An allegation that, after tender of legal fare, passage was refused, willfully, wrongfully, unlawfully, and intentionally, sets up a cause of action for punitive damages.[15] Where rules prohibiting the sale of tickets such as was presented by plaintiff are pleaded, disuse or waiver of the rules must be also pleaded.[16] It cannot be shown that plaintiff was drunk at the time of his ejection under a mere denial of wrongful ejection, the complaint alleging that plaintiff was put off without being allowed to pay his fare.[17] Defendant's opening statement is not restrictive as to the issues involved.[18]

Burden of proof.—In the absence of a plea of non est factum plaintiff need not prove that defendant executed and issued the ticket relied on.[19] The burden is on the carrier to establish conditions in a ticket relied on as a defense.[20] Defendant has the burden of proof if it admit that plaintiff is entitled to actual damages.[21]

Admissibility and sufficiency of evidence.—Particular decisions are grouped in the notes.[22]

mentally incapable of ordinary care and caution for his own personal safety, or if by reason of such state of intoxication he contributed to the injuries complained of, he could not recover, is erroneous—Central Ry. Co. v. Mackey, 103 Ill. App. 15.

6. Indiana, D. & W. Ry. Co. v. Ditto, 158 Ind. 669.

7. The carrier is entitled to have an instruction state that if a passenger refuses to comply with a request to leave the train after refusing to pay fare and resists and an injury happen, the company was not responsible—McCullen v. New York & N. S. Ry. Co., 68 App. Div. (N. Y.) 269.

8. Patterson v. Southern Pac. Co. (Tex. Civ. App.) 66 S. W. 308.

9. Chesapeake & O. Ry. Co. v. Saulsberry 23 Ky. L. R. 2341, 66 S. W. 1051.

10. Brace v. St. Paul City Ry. Co., 87 Minn. 292.

11. The transfer was incorrectly punched —Perrine v. North Jersey St. Ry. Co. (N. J. Law) 54 Atl. 799.

12. Monnier v. New York Cent. & H. R. R. Co., 70 App. Div. (N. Y.) 405.

13. Pleas held bad in action for ejection as not denying complaint or proper as confession and avoidance—Nashville, C. & St. L. Ry. v. Bates, 133 Ala. 447. Sufficiency of plea to place in issue the condition of a coin tendered as fare—Mobile St. Ry. Co. v. Watters, 135 Ala. 227.

14. 2 Burns' Rev. St. 1901, § 5458c, et seq. —Smith v. Indianapolis St. Ry. Co., 158 Ind. 425.

15. Kibler v. Southern Ry., 64 S. C. 242.

16. Complaint alleged offer of an unlimited ticket and defendant pleaded a rule that tickets should be good for continuous passage beginning on the date of sale, knowledge of such rule by plaintiff, and notice indorsed on the ticket—Louisville & N. R. Co. v. Bizzell, 131 Ala. 429.

17. Raynor v. Wilmington S. C. R. Co., 129 N. C. 195.

18. If plaintiff allege that ejection is without fault or negligence on his part and the allegation is denied by answer, an issue raised by proof of plaintiff's misconduct should be submitted though the only defense alleged in defendant's opening statement was that plaintiff was not a passenger —Bough v. Metropolitan St. Ry. Co., 115 N. Y. St. Rep. 771.

19. International & G. N. R. Co. v. Ing (Tex. Civ. App.) 68 S. W. 722.

20. Daniels v. Florida Cent. & P. R. Co., 62 S. C. 1.

21. Civ. Code Pr. § 526—Louisville & N. R. Co. v. Champion, 24 Ky. L. R. 87, 68 S. W. 143.

22. **Admissibility.** Where the conductor claimed that a ticket was out of date, it may be shown as a defense that the ticket was good for only one continuous passage—Louis-

Questions of law and fact.—The question of whether the conductor's act was the proximate cause of an injury may be for the jury;[23] so, also, the question of where plaintiff was ejected,[24] or what kind of a ticket plaintiff purchased.[25]

Instructions.[26]—An instruction that plaintiff may recover if a fare tendered was legal tender ignores the issue of whether the conductor could, from the condition of the coin, determine such fact.[27] Where the evidence was that the ticket was indorsed good for a continuous passage beginning on the day of sale, an instruction to the effect that there was nothing on the ticket to show the purchaser that he could not use it when he was disposed to do so, is properly refused.[28] Where the gist of the action is in the negligent expulsion of an intoxicated passenger in

ville & N. R. Co. v. Klyman, 108 Tenn. 304, 56 L. R. A. 769. Evidence that other passengers complained of plaintiff's language before his ejection may be admitted where plaintiff's allegation is that he was without fault and it is denied by answer—Bough v. Metropolitan St. Ry. Co., 115 N. Y. St. Rep. 771. Where it is alleged that the conductor on an offer of a third person to pay plaintiff's fare used violent language and declared that plaintiff should not ride, evidence of the offer is admissible—Weber v. Southern Ry. Co., 65 S. C. 356. Posted notices limiting the validity of tickets are not admissible unless it is shown that a passenger has read them or knows of their contents. Action for ejection on the ground that a ticket has expired—Georgia R. Co. v. Baldoni, 115 Ga. 1013. Evidence that plaintiff was drunk more than four hours after ejection is not admissible to corroborate evidence that he was drunk when ejected—Raynor v. Wilmington S. C. R. Co., 129 N. C. 195. The custom of conductors on payment of cash fares, to issue credit slips on contracts for rebate may be shown where passenger demanded such a slip—Holt v. Hannibal & St. J. R. Co., 87 Mo. App. 203. In an action for being wantonly pushed from a car platform, evidence of the conductor's general character and conduct toward lady passengers is inadmissible, where no attempt has been made to impeach him—Berger v. Chicago & A. Ry. Co. (Mo. App.) 71 S. W. 102. Questions relating to money subsequently obtained to pay fare are inadmissible, where the ground of action was the ejection of a passenger on the ground that a fare tendered was not legal tender—Mobile St. Ry. Co. v. Watters, 135 Ala. 227. Where defendant attempts to prove that plaintiff had been riding in another car than the one she alleges she was pushed from, plaintiff, in rebuttal, may show that she was not seen in such other car—Berger v. Chicago & A. Ry. Co. (Mo. App.) 71 S. W. 102. Where a passenger is expelled from a train for refusal to pay fare after having presented a mileage ticket without an exchange ticket which he had been unable to procure, evidence of conversations and transactions between the passenger and a ticket agent, or the conductor of a succeeding train after the ejection, is not admissible—Pennsylvania Co. v. Lenhart, 120 Fed. 61. Evidence of negotiations for a settlement of a claim for wrongful ejection by a conductor is not admissible to show a ratification of the conductor's action—Pennsylvania Co. v. Lenhart, 120 Fed. 61. Ground for cancellation of a contract of carriage not discovered until after the ejection and not urged at the time will not constitute a defense, as where a passenger was put off on the ground that his ticket had expired and subsequent discovery that his trunk contained merchandise instead of baggage—Georgia R. Co. v. Baldoni, 115 Ga. 1013. **Sufficiency:** Injuries from being wantonly pushed from car—Berger v. Chicago & A. Ry. Co. (Mo. App.) 71 S. W. 102. Identity of a conductor furnishing a transfer—Foley v. Metropolitan St. Ry. Co., 114 N. Y. St. Rep. 249. Ejection from a moving train—International & G. N. R. Co. v. Bohannon (Tex. Civ. App.) 71 S. W. 776. To demand submission to jury of the question whether plaintiff's delay, until an assault was made on him, before paying an extra charge for bridge toll, was for the purpose of increasing damages—Patterson v. Southern Pac. Co. (Tex. Civ. App.) 66 S. W. 308. Plaintiff's evidence that she had purchased a round trip ticket is sufficient to go to the jury. Plaintiff testified as to the regular fare from her starting point to her destination and on the occasion in question she bought a round trip ticket for a less amount—Daniels v. Florida Cent. & P. R. Co., 62 S. C. 1.

23. As where one who has boarded a freight train to inquire concerning the expected arrival of his wife, refuses to leave the train while it is in motion and on refusing to pay fare is locked out on the rear platform—Great Northern Ry. Co. v. Bruyere, 114 Fed. 540.

24. Evidence examined and held to be sufficiently contradictory—Gaukler v. Detroit, G. H. & M. Ry. Co. (Mich.) 90 N. W. 660.

25. Plaintiff having lost her ticket, secondary evidence of its contents was introduced in evidence by the agent as to what sort of tickets were sold for the excursion in question—Daniels v. Florida Cent. & P. R. Co., 62 S. C. 1.

26. Instruction held erroneous as withdrawing right to exact statutory minimum charge in addition to rebate charge—Kibler v. Southern Ry., 62 S. C. 252.

27. In an action for ejectment of a passenger for non-payment of fare, an instruction that a dime introduced in evidence was of legal tender quality is warranted by the evidence of defendant's conductor, who while denying that coin introduced was the one offered for plaintiff's fare, testified that such coin was a good, visibly lettered dime—Mobile St. Ry. Co. v. Watters, 135 Ala. 227.

28. Louisville & N. R. Co. v. Bizzell, 131 Ala. 429.

a dangerous place, the use of the word "ejectment" in an instruction does not require the jury to find the existence of force.[29]

Elements and measure of damages.[30]—Where a person boarding a freight train without a permit is put off without force, at the place he got on, he is not damaged, not being prevented from making his journey on that day and not having demanded the money paid for his ticket.[31] The carrier is liable for nominal damages for failure to obey a statutory requirement that trains shall be stopped before ejection of passengers, though the passenger is not injured.[32] Where a passenger is, by mistake, issued a ticket to a point prior to his destination and is there ejected, the mere cost of transportation to the proper destination is not the measure of damages.[33] Compensatory damages may be awarded only for loss of time, fare on another car, and injury to feelings.[34] Where coupons are wrongfully detached by a conductor from a ticket and are declined by a subsequent conductor, the amount of damage recoverable for ejection is the fare paid by plaintiff on the next car by which he arrives at his destination.[35] Where plaintiff sues for lost time, expenses incurred, and punitive damages resulting from an exclusion from defendant's train, the action is not for one of those torts included by a statute providing that where the entire injury is to the peace or feelings, no measure of damages can be prescribed.[36] A carrier may be liable for injury to feelings without physical injury in a case of wrongful expulsion.[37] Recovery may be had for sufferings resulting from apprehension of yellow fever, caused by being put off at an improper destination, the agent knowing of the prevalence of the disease there.[38] On ejection, damages for humiliation and disgrace may be recovered, though no one was present save the conductor and the brakeman.[39] They may be included as an element of damage, though not specifically pleaded and though there is no direct testimony thereto.[40] Improper conduct is admissible in mitigation.[41]

Exemplary and punitive damage.[42]—The right to punitive damages is for the jury.[43] The carrier is liable for exemplary damages if there is gross wantonness or willfully oppressive negligence.[44] Punitive damages cannot be awarded where the conductor refuses a ticket through an honest mistake and the passenger voluntarily leaves the train,[45] or is ejected.[46] Refusal to honor ticket not good

29. Bohannon's Adm'x v. Southern Ry. Co., 23 Ky. L. R. 1390, 65 S. W. 169.

30. See article "Damages" for general questions. Where a conductor has knowledge that plaintiff has an injured hand, enhanced pain therein caused by forcible ejection may be considered as bearing on damages—Texas & P. Ry. Co. v. Lynch (Tex. Civ. App.) 73 S. W. 65.

31. Ellis v. Houston, E. & W. T. Ry. Co. (Tex. Civ. App.) 70 S. W. 114.

32. Rev. St. 1899, § 1074—Holt v. Hannibal & St. J. R. Co., 87 Mo. App. 203.

33. Kansas City, M. & B. R. Co. v. Foster, 134 Ala. 244.

34. Jacobs v. Third Ave. R. Co., 71 App. Div. 199, 10 N. Y. Ann. Cas. 462.

35. Brown v. Rapid Ry. Co. (Mich.) 90 N. W. 290.

36. Civ. Code, 3907—Central of Georgia Ry. Co. v. Almand (Ga.) 43 S. E. 67.

37. Mabry v. City Electric Ry. Co. (Ga.) 42 S. E. 1025.

38. Kansas City, M. & B. R. Co. v. Foster, 134 Ala. 244.

39. Kansas City, Ft. S. & M. R. Co. v. Little (Kan.) 71 Pac. 820.

40. Berger v. Chicago & A. Ry. Co. (Mo. App.) 71 S. W. 102.

41. Bough v. Metropolitan St. Ry. Co., 115 N. Y. St. Rep. 771.

42. The jury may be instructed on the subject of punitive damages, where one unable to obtain a signature on his return trip ticket boarded a train without having it signed and stamped and though he explains to the conductor and offers to guaranty payment of his fare, is expelled early on a dark and rainy morning in a strange place—Southern Ry. Co. v. Wood, 114 Ga. 140, 55 L. R. A. 536. An instruction that the intentional doing of an unlawful act will be construed as malice so that plaintiff could have punitive damages is erroneous—Kibler v. Southern Ry., 62 S. C. 252.

43. Ejection because of expiration of the time limit of the ticket—Norman v. Southern Ry. Co., 65 S. C. 517; Louisville & N. R. Co. v. Bizzell, 131 Ala. 429.

44. Kansas City, Ft. S. & M. R. Co. v. Little (Kan.) 71 Pac. 820.

45. The date on the ticket was indistinct and the conductor was acting under a warning to look out for a particular ticket—Louisville & N. R. Co. v. Champion, 24 Ky. L. R. 87, 68 S. W. 143.

46. The mistake was due to plaintiff hurrying the issuing agent—Illinois Cent. R. Co. v. Moore, 79 Miss. 766.

on train is not ground for exemplary damages though the agent stated that the ticket was good on any train.[47] Exemplary damages may be recovered for an unnecessary assault.[48] Punitive damages may be awarded where a conductor speaks harshly to a passenger and wantonly pushes her from a car platform.[49] Where the holder of a limited ticket misses a connection and takes the next train after the limit has expired, if full fare is collected after expulsion the question of exemplary damages is for the jury.[50] Holdings as to excessive damages are grouped in the notes.[51]

§ 26. *Liability for personal injuries. A. General principles. What law governs.*—The degree of care required of a carrier is governed by the law of the state in which the injury is received.[52] A judgment will be reversed when it cannot be determined as to how far it was governed by a consideration of a repealed statute as to prima facie evidence of negligence.[53]

Degree of care required.—The degree of care required is variously defined as: "the utmost care and diligence,"[54] "the strictest diligence,"[55] "the highest degree of care,"[56] and as being liable for the "slightest negligence."[57] From the reverse standpoint the carrier's employes are not bound to exercise the "utmost human skill, diligence and foresight,"[58] "the highest degree of care,"[59] other than the highest degree of care that a very cautious person would exercise under similar circumstances,[60] or that high degree of care which would have been exercised by very cautious, prudent and competent persons,[61] though an instruction may require the highest degree of care where, by statute, a carrier is required to exercise the utmost

47. Yazoo & M. V. R. Co. v. Rodgers, 80 Miss. 200.

48. Ejection for nonpayment of fare though conductor was notified that fare was paid—Denison & S. Ry. Co. v. Randell (Tex. Civ. App.) 69 S. W. 1013.

49. Berger v. Chicago & A. Ry. Co. (Mo. App.) 71 S. W. 102.

50. Myers v. Southern R., 64 S. C. 514.

51. $150 is not excessive for an expulsion on a cold night where it was necessary for plaintiff to walk about ten miles and the conductor in the presence of other passengers used profane language towards him—Gisleson v. Minneapolis & St. L. R. Co., 85 Minn. 329. $250 for putting a child down at a wrong station is excessive where the child evidently suffered little distress—Louisville & N. R. Co. v. Jordan, 23 Ky. L. R. 1730, 66 S. W. 27. $450 not excessive, where plaintiff was held up as one trying to ride without a lawful right—Southern Ry. Co. v. Wood, 114 Ga. 140, 55 L. R. A. 536. $500 not excessive where refusal to pay extra charge was because of inability to secure ticket and passenger was with acquaintances—Monnier v. New York Cent. & H. R. R. Co., 70 App. Div. (N. Y.) 405. $1500 is not excessive for ejection of a passenger accompanied by an unpalliated assault—Foley v. Metropolitan St. Ry. Co., 114 N. Y. St. R. 249. $1500 not excessive—Texas & P. Ry. Co. v. Lynch (Tex. Civ. App.) 73 S. W. 65.

52. Louisville & N. R. Co. v. Harmon, 23 Ky. L. R. 871, 64 S. W. 640.

53. Action for injuries from an explosion of a steamboat boiler based on Act Congress July 7, 1838, c. 191, § 13 (5 Stat. 305) repealed by Act Congress Feb. 28, 1871, c. 100, § 71 (16 Stat. 440, 459)—Richtman v. Haley, 121 Fed. 353.

54. Norfolk & W. Ry. Co. v. Tanner (Va.) 41 S. E. 721; Texas & P. Ry. Co. v. Gray (Tex. Civ. App.) 71 S. W. 316. An instruction that negligence is the failure to use the high degree of care that would be exercised by a prudent person under like circumstances, is erroneous—Knauff v. San Antonio Traction Co. (Tex. Civ. App.) 70 S. W. 1011.

55. Le Blanc v. Sweet, 107 La. 355.

56. Carrier is liable for any negligence unless the passenger is contributorily negligent—Knauss v. Lake Erie & W. R. Co., 29 Ind. App. 216.

57. Sambuck v. Southern Pac. Co., 138 Cal. xix., 71 Pac. 174.

58. An instruction to such effect in an action for an injury resulting from a sudden stop is erroneous—Freeman v. Metropolitan St. Ry. Co., 95 Mo. App. 314.

59. It is sufficient to use the high degree of care and prudence that will be used by very cautious, prudent and competent persons under like circumstances—Williams v. International & G. N. R. Co. (Tex. Civ. App.) 67 S. W. 1085. Negligence when applied to carriers means a failure in the performance of duty imposed by law for the protection of others to exercise that degree of care which very competent and prudent persons would usually exercise under the same or similar circumstances—St. Louis S. W. Ry. Co. v. Harrison (Tex. Civ. App.) 73 S. W. 38.

60. Over an objection that it required the greatest care which would have been exercised by the most skillful and careful individuals to be found in the class named—St. Louis S. W. Ry. Co. v. Byers (Tex. Civ. App.) 70 S. W. 558.

61. Action for injuries resulting through the carriage of plaintiff's wife and child in an unheated car in cold weather without water and compelling the wife to stand and hold the child—St. Louis S. W. Ry. Co. v. Campbell (Tex. Civ. App.) 69 S. W. 451.

care.[62] There is an implied contract that passengers shall not be imperiled by even the slightest fault of servants,[63] but only in receiving, keeping, carrying and discharging passengers is extraordinary diligence required.[64] Carriers of passengers, while not insurers, are in Illinois held to the exercise of the highest degree of care, skill and diligence practically consistent with the efficient use of the mode of transportation adopted,[65] the passenger being in the exercise of ordinary care.[66] The question whether a carrier is bound to anticipate an unauthorized act of a passenger is for the jury,[67] as is the question of whether the omission or commission of particular acts is negligence, unless omissions are made negligence by law.[68] The burden is on plaintiff to show an act resulting from culpable negligence of defendant, which was the proximate cause of the injury; recovery cannot be had for mere accident.[69]

Street railway companies may be required to exercise the "highest degree" of care,[70] and an instruction that they must use great care and caution with regard to their machinery and appliances does not impose too great a liability,[71] or "reasonable care" may be all that is required.[72] Where the situation is not one from which grave injury may be expected, a street car company is not bound to exercise the highest degree of care and skill which human foresight can provide.[73] Use of electricity or steam as a motive power raises no difference as to the degree of care required.[74]

As to dangers and perils not incident to ordinary railway travel, the carrier must use ordinary care and diligence,[75] and must adopt all reasonable precautions for the safety and comfort of persons who are at his station as passengers.[76]

Carriage of passengers on freight trains.—A carrier is bound to the highest degree of care without regard to the vehicle used for conveyance;[77] the same care is required in the carriage of passengers on freight as on exclusively passenger trains,[78] and the carrier must exercise all care available for a passenger's safety consistent with the operation of the train.[79] The carrier must exercise the highest degree of care in the operation of mixed trains consistent with their use.[80] A drover being

62. Civ. Code, § 2100—Osgood v. Los Angeles Traction Co., 137 Cal. 280, 70 Pac. 169.

63. Clerc v. Morgan's L. & T. R. & S. S. Co., 107 La. 370.

64. Southern Ry. Co. v. Reeves (Ga.) 42 S. E. 1015.

65. Pennsylvania Co. v. Greso, 102 Ill. App. 252; Kane v. Cicero & P. Elec. Ry. Co., 100 Ill. App. 181.

66. Chicago City Ry. Co. v. Morse, 98 Ill. App. 662.

67. Where an intoxicated passenger uncoupled a rear coach, and the air brakes automatically set thereon were insufficient to stop it before it collided with the forward section of the coach—Texas & P. Ry. Co. v. Storey (Tex. Civ. App.) 68 S. W. 534.

68. Central of Georgia Ry. Co. v. McKinney, 116 Ga. 13.

69. Cleveland City Ry. Co. v. Osborn, 66 Ohio St. 45.

70. Citizens' Ry. Co. v. Craig (Tex. Civ. App.) 69 S. W. 239. The carrier is bound to use the highest degree of care and diligence reasonably practicable in securing the safety of passengers by keeping its cars and appliances in a safe condition and at all times under the control and management of skilled and competent servants—McAllister v. People's Ry. Co. (Del. Super.) 54 Atl. 743.

71. Dallas Consol. Elec. St. Ry. Co. v. Broadhurst (Tex. Civ. App.) 68 S. W. 315.

72. Instruction requiring a "very high degree of care" held erroneous. Passenger injured by collision with another passenger on jolt as the car rounded a curve—Merrill v. Metropolitan St. Ry. Co., 73 App. Div. (N. Y.) 401.

73. Such a situation is not shown in an action for injuries received in a collision between a street car and a wagon, where the wagon travelling in the opposite direction from the car was unable to turn out as quickly as usual on account of a heavy load, and plaintiff was injured by flying splinters in the ensuing collision.—Conway v. Brooklyn Heights R. Co., 115 N. Y. St. Rep. 878.

74. McAllister v. People's Ry. Co. (Del. Super.) 54 Atl. 743.

75. Chicago & A. R. Co. v. Murphy, 99 Ill. App. 126.

76. Southern Ry. Co. v. Reeves (Ga.) 42 S. E. 1015.

77. Southern Ry. Co. v. Crowder, 130 Ala. 256; Muth v. St. Louis & M. R. R. Co., 87 Mo. App. 422.

78. Erwin v. Kansas City, Ft. S. & M. R. Co., 94 Mo. App. 289.

79. Southern Ry. Co. v. Crowder, 130 Ala. 256.

80. Stembridge v. Southern Ry., 65 S. C. 440.

transported on a freight train is not entitled to the highest degree of care or skill consistent with the nature of the undertaking, but only such care as is consistent with the operation of the train.[81] A person riding in a freight car assumes the risks incident to the necessary jerking and pushing of the car against other cars.[82] In the coupling of cars to a freight train, the carrier must use such care, prudence and foresight as would be used by very cautious, prudent and competent persons under similar circumstances.[83]

Carriage of passengers in cabs.[84]—Where a person riding in a hack is injured by the collision of the hack with a street car, she may rely on the agent of the hack line to exercise proper care for her safety, but as toward the driver, the street car company is bound to exercise ordinary care.[85]

Liability to persons riding free.—The liability for negligence is the same toward one riding on a free pass as toward a regular passenger,[86] unless there is a special agreement;[87] so a passenger carried gratuitously or who has not paid his fare may maintain an action for negligence,[88] though a person riding on a free pass, issued in violation of statute, cannot.[89]

Duty toward intoxicated, infirm, or delicate persons.[90]—A carrier's duty toward an intoxicated passenger is not affected by the fact that he violated a law in becoming intoxicated. Whether the extent of intoxication rendered the passenger unable to care for himself is for the jury.[91] A carrier is liable for injuries to a passenger, though the condition rendering her susceptible to such injury is not disclosed.[92]

Liability of carrier transporting cars or using premises or vehicles of another.—A belt line may be a common carrier and liable to the diligence exacted thereof.[93] A street railway company is not liable to persons riding in the cars of another street railway company over its tracks under an agreement,[94] but where two street railroad lines connect, and each company operates cars over both lines under an agreement by which one company receives the fare and the other a rental for its cars, with privilege of through service, the companies are jointly liable.[95] The negligence of a lessee of the tracks of a railroad company is imputable to the lessor company.[96] The carrier is responsible for the negligence of persons not its em-

81. Western Md. R. Co. v. State, 95 Md. 637.

82. An instruction to such effect properly includes the word "necessary" and need not state that there can be no recovery if the car is handled in a usual and proper manner —Texas & P. Ry. Co. v. Adams (Tex. Civ. App.) 72 S. W. 81.

83. Chicago, R. I. & P. Ry. Co. v. Buie (Tex. Civ. App.) 73 S. W. 853.

84. Where a passenger in a cab was injured by a collision between the cab and a street car, an instruction that as toward the cab company the passenger was required only to sit passively in the cab to be in the exercise of ordinary care, is not erroneous as rendering the cab company an insurer of plaintiff's safety—Frank Bird Transfer Co. v. Krug (Ind. App.) 65 N. E. 309.

85. See for an instruction stating the distinction in the liability—Frank Bird Transfer Co. v. Krug (Ind. App.) 65 N. E. 309.

86. Young v. Missouri Pac. Ry. Co., 93 Mo. App. 267.

87. In re California Nav. & Imp. Co., 110 Fed. 670.

88. Russell v. Pittsburgh, C., C. & St. L. Ry. Co., 157 Ind. 305, 55 L. R. A. 253.

89. Newspaper editor riding on an annual pass violating Laws 1891, p. 277, c. 320, § 4. forbidding discrimination—McNeill v. Durham & C. R. Co., 132 N. C. 510.

90. A complaint states a cause of action which charges that defendant's servants with knowledge of plaintiff's intoxicated condition and his inability to care for himself, allowed him to stand in the baggage car between two open doors dancing and staggering—Wheeler v. Grand Trunk Ry. Co., 70 N. H. 607, 54 L. R. A. 955.

91. Wheeler v. Grand Trunk Ry. Co., 70 N. H. 607, 54 L. R. A. 955.

92. Injury to a pregnant woman caused by allowing a car to collide with a train—St. Louis S. W. Ry. Co. v. Ferguson, 26 Tex. Civ. App. 460.

93. Where it switches whole trains from a given station to the stock-yards—Fleming v. St. Louis & S. F. R. Co., 89 Mo. App. 129.

94. Plaintiff while so riding on the platform was struck by a tree growing near the track—Sias v. Rochester Ry. Co., 169 N. Y. 118.

95. Richard v. Detroit, R., R. & L. O. Ry. Co. (Mich.) 89 N. W. 52.

96. Chicago & W. I. R. Co. v. Doan, 195 Ill. 168.

ployes in whose hands it places a car;[97] so, where one company operates its cars over the road of another, it is liable to passengers for negligence of servants of the licensor.[98] One holding a legal title to a street railway in trust, managing it in accordance with the instructions of a committee, is not responsible for the negligence of an employe.[99] A switching crew employed by another company may be the servants of the carrier.[1] There is a liability to a passenger who, after being thrown from the carrier's train and stunned, is run over by a train belonging to another company using the tracks under an independent right.[2]

After a mail car has been placed on a side track at the termination of its journey, the carrier is not liable to a mail clerk for an injury sustained by reason of the negligence of another corporation.[3]

Where a carrier negligently shows a passenger who has applied for a berth, to a sleeper belonging to another company, causing him to be carried out of his way and ousted from the car by the conductor, it is not liable for wrongs inflicted by the company owning the sleeper.[4]

The lessor of a steamboat is not liable for injuries resulting from the negligence of the lessee.[5]

Union stations.—The carrier has been held liable for failure to keep premises used by it to receive and discharge passengers in safe condition, though they are a union depot under control of a receiver of the depot company,[6] but it has been also held that a railroad using a station built by a terminal company is freed from liability by discharge of its passenger at such station, and is not liable for injury received by him while going through the station.[7] The carrier operating the depot is liable for an injury to a person alighting from a train on another road, if its negligence concur, and it is not necessary that its negligence be the sole cause of the injury.[8]

(§ 26) *B. Condition and care of premises.*—The railroad company must be reasonably sure that its stations are safe, since the erection of them is an invitation to the public to enter on business, but is not liable for injuries unless the premises are unsafe and the likelihood of injury should have been foreseen.[9] A passenger is not bound to find out whether he is dealing with an agent of the carrier in the purchase of a ticket before assuming that the carrier is bound to furnish a safe approach to its depot.[10] An intending passenger to be entitled to protection as such

97. Clerc v. Morgan's L. & T. R. & S. S. Co., 107 La. 370.

98. Brady v. Chicago & G. W. Ry. Co., 114 Fed. 100, 57 L. R. A. 712.

99. The holder of the legal title received no compensation other than his salary as a bookkeeper, and had signed an agreement stating that he had purchased the road with the money of the committee as their agent and in trust for them, and agreed to convey on their request—O'Toole v. Faulkner, 29 Wash. 544, 70 Pac. 58.

1. As where one half the cost of switching at a certain point was paid by defendant company and there was no evidence of the terms of a contract concerning the joint business—Gulf. C. & S. F. Ry. Co. v. Shelton (Tex.) 72 S. W. 165.

2. Southern Ry. Co. v. Webb (Ga.) 42 S. E. 395.

3. Stoddard v. New York, N. H. & H. R. Co., 181 Mass. 422.

4. Instructions are erroneous for this reason, which require defendant to use a high degree of care in the transportation of the passenger to his destination under his ticket and allow the jury to take into consideration the manner of his injury, his mental distress, anguish and humiliation—International & G. N. R. Co. v. Evans (Tex. Civ. App.) 70 S. W. 351.

5. Where not a quasi public corporation with special privileges or benefits from the state—Phelps v. Windsor Steamboat Co., 131 N. C. 12.

6. Herrman v. Great Northern Ry. Co., 27 Wash. 472, 68 Pac. 82, 57 L. R. A. 390.

7. Construing Acts 1896, c. 516, §§ 1, 2, 3, 8, 9, 10, relative to the organization of the Boston Terminal Company, which allows construction of a station by five railroads—Frazier v. New York, N. H. & H. R. Co., 180 Mass. 427.

8. A passenger boarded a train at the station believing that it was the train of a certain road, and on finding his mistake jumped off while it was in motion, slipped on a greasy platform and was hurt—Newcomb v. New York Cent. & H. R. R. Co., 169 Mo. 409.

9. Mayne v. Chicago, R. I. & P. Ry. Co. (Okl.) 69 Pac. 933.

10. Action against a carrier for injury re-

must remain in the station house or on such part of the grounds as he has a legal right to be.[11] Allowing a freight train to stand so as to prevent passengers from reaching a station in time to procure tickets for their trains is negligence, but the company is not liable unless such negligence is the proximate cause of an injury which should have been foreseen under the circumstances.[12]

Duty to warm stations.—The carrier must keep fire in its stations when required for the comfort of prospective passengers, and failure to properly heat a waiting room is prima facie negligence.[13]

Duty to furnish safe platforms.—The platform must be reasonably safe for use and so located as to afford a convenient means of access to the cars.[14] Depots and platforms must be kept in a safe condition.[15] Platforms must be sufficiently high.[16] A platform used exclusively for the handling of freight, of which fact passengers have knowledge, need not be kept safe for their use.[17] Depressions in station platforms for the purpose of crossing tracks which are reached by moderate inclines do not show a negligent construction.[18] A carrier is liable for the maintenance of an unguarded stairway on its station platform, though the person injured is at the time intoxicated.[19] Where a street railroad company has adopted a platform and invited the public to use it, it must be kept in a reasonably safe condition for boarding or alighting from cars, whether it was built by the company or is in a public street,[20] but the carrier is not liable, though it permit a stump placed in the street by a third person to project above its platform.[21]

The carrier is liable for injuries to a person pushed by a crowd on to a defective spot in its platform.[22] Negligence in the construction and care of platforms may be a question for the jury.[23]

Duty to light platforms and premises.—The carrier is not bound to keep its grounds lighted at a distance from the depot where it has no reason to expect passengers to pass.[24] The platform must be sufficiently lighted,[25] and the negligence

ceived at a depot controlled by a union depot company which had charge of the sale of tickets over the carrier's road—Herrman v. Great Northern Ry. Co., 27 Wash. 472, 68 Pac. 82, 57 L. R. A. 390.

11. Instruction held proper in an action for injuries received by negligence in unloading of baggage—Holcombe v. Southern Ry. Co. (S. C.) 44 S. E. 68.

12. Mayne v. Chicago, R. I. & P. Ry. Co. (Okl.) 69 Pac. 933.

13. Sufficiency of instruction considered—St. Louis, I. M. & S. Ry. Co. v. Wilson, 70 Ark. 136.

14. Dotson v. Erie R. Co. (N. J. Err. & App.) 54 Atl. 827.

15. Barker v. Ohio River R. Co., 51 W. Va. 423; Duell v. Chicago & N. W. Ry. Co., 115 Wis. 516. A space not more than six feet wide between the tracks of two railroad companies filled with stone and cement and from five to seven inches below the track level is not a proper place to discharge passengers at a regular station—Chicago Terminal Transfer R. Co. v. Schmelling, 197 Ill. 619. The mere fact that the bumper of a car projects slightly over the edge of a platform will not show negligence on the part of the carrier—Dotson v. Erie R. Co. (N. J. Err. & App.) 54 Atl. 827.

16. It is negligence to leave 12 or 13 inches between the car steps and the platform—Gulf, C. & S. F. Ry. Co. v. Shelton (Tex. Civ. App.) 69 S. W. 653.

17. Houston, E. & W. T. Ry. Co. v. Grubbs (Tex. Civ. App.) 67 S. W. 519.

18. Action for injuries sustained by passenger jumping from moving train—Newcomb v. New York Cent. & H. R. R. Co., 169 Mo. 409.

19. Chicago & E. I. R. Co. v. Lawrence, 96 Ill. App. 635.

20. Haselton v. Portsmouth, K. & Y. St. Ry., 71 N. H. 589.

21. Stump placed by electric light company projected 11 inches above platform; plaintiff intending to board defendant's car tripped over the stump, fell on the track and was injured—Lucas v. St. Louis & S. Ry. Co. (Mo.) 73 S. W. 589.

22. Indianapolis St. Ry. Co. v. Robinson, 157 Ind. 414.

23. Haselton v. Portsmouth, K. & Y. St. Ry., 71 N. H. 589. Removing a gate which customarily protected a space between cars of an elevated train allowing the passenger to step into an unguarded hole, believing it to be the platform of an elevated car she was about to board, it being dark at the time—Lake St. El. R. Co. v. Burgess, 200 Ill. 628. Allowing platform to remain greasy—Newcomb v. New York Cent. & H. R. R. Co., 169 Mo. 409. Invitation to board the train at a place where there was a custom to stop, but where no platform was provided—Chicago & W. I. R. Co. v. Doan, 195 Ill. 168.

24. Spot 130 feet from the depot occupied as a wood-yard by a fuel company—Davis v. Houston, E. & W. T. Ry. Co. (Tex. Civ. App.) 68 S. W. 733.

25. Carrier held liable to a passenger injured in alighting from a moving train at

of a city in failing to furnish light will be imputed to the carrier, though it has made diligent efforts to have its premises properly lighted by the city.[26] The question of negligence is for the jury.[27]

Street near tracks of street railroad.[28]—A street car company, though not bound to furnish safe places to set down passengers, must warn them of dangers known to it or assist them where such dangers are unknown to the passenger.[29] Negligence may be found from the fact that a car is stopped in the nighttime so that in alighting a passenger steps into a trench.[30] If a city ordinance requires street car companies to pave and keep in repair a space between lines one foot outside the outside rails, the company is bound to keep in repair both pavements laid under the ordinance and pavements previously laid,[31] but such ordinance does not confer a right of action on passengers injured through nonrepair independent of the consideration of the general question of negligence.[32] A street car company must provide a reasonably safe place for passengers to alight.[33] A finding that a platform has been adopted as a place to receive and discharge passengers, and the public invited to use it, is justified by the fact that the company regularly stops there to take on and discharge passengers.[34]

(§ 26) *C. Taking on passengers. Duty to afford time to board trains.*—The carrier must afford a reasonable opportunity to board its trains to persons who, it having notice, purpose doing so, and who present themselves under such circumstances that they may be reasonably accepted, they being in the exercise of reasonable care and expedition.[35] Statutes requiring sufficient stop to allow passengers to get on or off apply to excursion trains.[36] The carrier must not start its train while a passenger is boarding it, no matter how long it has stopped.[37] Where the ticket office is closed just before the departure of the train, but a passenger attempting to board the train without a ticket is sent by the conductor to get one, the carrier is negligent if it start the train without giving him a reasonable time, and he is injured by attempting to board the train while it is in motion.[38]

It is negligence to start a *freight train* with a jerk before a passenger has had time to enter the caboose.[39]

Street railroads.—A street railway company is bound to stop at its regular crossing, on a seasonable signal, to receive passengers, and a rule that its cars shall not be backed when they have stopped beyond the crossing to receive a person

night at its direction—Gulf, C. & S. F. Ry. Co. v. Shelton (Tex. Civ. App.) 69 S. W. 653; Duell v. Chicago & N. W. Ry. Co., 115 Wis. 516.

26. Owen v. Washington & C. R. R. Co., 29 Wash. 207, 69 Pac. 757.

27. Chadbourne v. Illinois Cent. R. Co., 104 Ill. App. 333.

28. The fact that a street railway company engaged in an excavation for the purpose of laying down a new track, allows a pile of earth to remain on the street in broad daylight, and does not direct a person alighting from its car to take a safe course, plainly indicated by the situation, is not negligence rendering it liable to a person stepping on a pile of earth, thrown from the excavation and precipitated into the trench by the earth giving way—Lee v. Boston El. Ry. Co., 182 Mass. 454.

29. Sweet v. Louisville Ry. Co., 23 Ky. L. R. 2279, 67 S. W. 4.

30. Wolf v. Third Ave. R. Co., 67 App. Div. (N. Y.) 605.

31. Fielders v. North Jersey St. Ry. Co., 67 N. J. Law, 76.

32. Fielders v. North Jersey St. Ry. Co. (N. J. Err. & App.) 53 Atl. 404.

33. A street car company is liable to a passenger who on a dark night trips over a pile of lumber left near the track by the carrier on the day previous—Montgomery St. Ry. Co. v. Mason, 133 Ala. 508.

34. Haselton v. Portsmouth, K. & Y. St. Ry., 71 N. H. 589.

35. Chicago & A. R. Co. v. Flaharty, 96 Ill. App. 563. Liability cannot be based on knowledge of the carrier's employees that plaintiff was off its train and desired to get on again—Texas & P. Ry. Co. v. Gray (Tex. Civ. App.) 71 S. W. 316.

36. Rev. St. 1893, § 1687—Oliver v. Columbia, N. & L. R. Co., 65 S. C. 1.

37. Texas & P. Ry. Co. v. Gardner (C. C. A.) 114 Fed. 186.

38. Sayles' Ann. Civ. St. 1897, art. 4542, requires ticket offices to be kept open thirty minutes before the departure of trains—Missouri, K. & T. Ry. Co. v. Gist (Tex. Civ. App.) 73 S. W. 857.

39. Kelly v. Vicksburg, S. & P. Ry. Co., 108 La. 423.

who has properly signaled is unreasonable.[40] An intending passenger has a right to get on a car which is stopped, or in the act of stopping, or is so managed as to induce the passenger to think it is about to stop, and the carrier is liable for an injury resulting from starting before the passenger is safely seated,[41] and starting without warning may be negligence;[42] but where a car has been stopped solely to enable the conductor to go forward at a railroad crossing, the motorman is not negligent in starting without first ascertaining if any one is about to get on.[43] Though the car did not stop to receive passengers, the carrier is liable to one who has signaled it and attempts to board, unless he has been warned not to.[44] One attempting to board a car which has refused to stop for him cannot recover for an injury as due to the failure to stop and accept him.[45] Where the gates are abruptly closed so as to catch the dress of an intending passenger before she has time to board the car, the carrier is liable for injury sustained by her through being thrown on the starting of the car.[46] A concealed infirmity in the passenger does not excuse a starting while she is attempting to board the car.[47] There must be evidence that a passenger was seen by the conductor in his attempt to get on.[48]

A motorman is not required to foresee that one intending to board his car may fall on the track in front of it.[49] A person crossing in front of a car, after signaling it to stop, may assume that the motorman will use reasonable care for her safety.[50]

Starting while passenger is en route to seat.—It may be negligence to start a street car before a child has an opportunity to be seated.[51] The question of the carrier's negligence may be for the jury where it starts suddenly after slowing down to receive a passenger and after the passenger has stepped on the running board.[52]

(§ 26) *D. Means and facilities for transportation. Nature of accommodations.*—Female second-class passengers must not be compelled to ride in an illy ventilated smoking car occupied by men only.[53] The use of reasonable care and diligence in warming coaches and providing water is not sufficient.[54]

Construction of tracks and care as to adjacent objects.—A street-car company must, with regard to its tracks, use the highest degree of care consistent with the undertaking.[55] Long continued operation of the road without accident does not

40. A passenger signalled on a rainy night in a muddy road, car 40 feet beyond the crossing, it being necessary to walk seven blocks if he was not taken up—Jackson Elec. Ry., L. & P. Co. v. Lowry, 79 Miss. 431.

41. Austrian v. United Traction Co., 19 Pa. Super. Ct. 329.

42. While a young girl is trying to board it—Schoenfeld v. Metropolitan St. Ry. Co., 40 Misc. (N. Y.) 201.

43. There is no liability of a person thrown off by a sudden jerk incident to the starting of a car, he having attempted to board without giving notice of his intention to do so—Packard v. Toledo Traction Co., 22 Ohio Circ. R. 578.

44. No liability to one trying to board after warning sufficiently loud to be heard by an ordinary person—Maxey v. Metropolitan St. Ry. Co., 95 Mo. App. 303.

45. South Chicago City Ry. Co. v. Dufresne, 200 Ill. 456.

46. Brown v. Manhattan Ry. Co., 115 N. Y. St. Rep. 755.

47. Austrian v. United Traction Co., 19 Pa. Super. Ct. 329.

48. Monroe v. Metropolitan St. Ry. Co., 79 App. Div. (N. Y.) 587.

49. Winchell v. St. Paul City Ry. Co., 86 Minn. 445.

50. Copeland v. Metropolitan St. Ry. Co., 78 App. Div. (N. Y.) 418.

51. Child two years and nine months old thrown down while she was temporarily beyond the reach of the person with her—Herbich v. North Jersey St. Ry. Co., 67 N. J. Law, 574.

52. Powelson v. United Traction Co., 204 Pa. 474.

53. Plaintiff was sold tickets without knowledge that they were second class though she had informed the agent that she wished to go as cheaply as possible—Southern Ry. Co. v. Wood, 114 Ga. 159.

54. Duty is to exercise such a high degree of foresight and prudence as would have been used by very cautious, prudent and competent persons under similar circumstances—Arrington v. Texas & P. Ry. Co. (Tex. Civ. App.) 70 S. W. 551.

55. Galligan v. Old Colony St. Ry. Co., 182 Mass. 211.

show an absence of negligence as a matter of law. The question is for the jury.[56] Where a track passes through a cut not used for travel, the care required as to falling material is as if the tracks were on the land of the company.[57] Accidents from extraordinary natural causes may not impose liability.[58] It is negligence to leave a barrel of gravel so near the track as to derail a street car.[59] To place a freight car on a siding so that its doors extend over the main track is negligence,[60] and it is gross negligence to construct a freight platform so that freight thereon will strike the elbow of a passenger protruding but slightly from a passing car.[61] The question of whether a manner of construction of tracks is proper or not cannot be submitted to a jury.[62]

Construction and care of cars.—The duty of a street car company to keep car platforms and steps safe is relative to the practical operation of the road in consideration of the climate, temperature, and condition of the air with respect to snow, moisture, and frost,[63] and the fact that ice collects on the steps of a railway car does not show negligence, in the absence of evidence of time and opportunity to remove it.[64] As regards curtain rods on its cars, a street car company is not bound to the highest degree of care.[65] Fall of a window not shown to have been caused by any defects in the window or fastenings does not impose liability.[66] The fall of a fire extinguisher in a street car is prima facie evidence of negligence.[67] A carrier may be liable for the consequences of an electric shock received by a passenger.[68]

Use of usual and approved appliances.—A carrier is not liable for the use of an appliance furnished with the car by the best builder of cars and in the same condition, except as improved by the company, where it does not appear that a safer appliance is in use or could be procured,[69] though otherwise if the appliance is allowed to get out of order.[70] The most approved spark arrester in use must be provided to prevent the injury of passengers from the escape of sparks or cinders.[71]

Duty to inspect appliances.[72]—The carrier's duty to exercise the utmost care and skill which prudent men are accustomed to exercise under similar circumstances with regard to its appliances is not met by recent inspection or by inspection by a competent employe.[73] An inspection consistent with the reasonable

56. Passenger injured was on a foot-board of an open car, there were 18 inches of space between the edge of the foot-board and the bridge, and the car was going at an unlawful rate, no warning having been given—Anderson v. City & Suburban Ry. Co. (Or.) 71 Pac. 659.

57. Galligan v. Old Colony St. Ry. Co., 182 Mass. 211.

58. No liability where tree falls from outside the right of way across the track immediately before the accident—Alabama Midland Ry. Co. v. Guilford, 114 Ga. 627.

59. Ramson v. Metropolitan St. Ry. Co., 78 App. Div. (N. Y.) 101.

60. Clerc v. Morgan's L. & T. R. & S. S. Co., 107 La. 370.

61. Kird v. New Orleans & N. W. Ry. Co., 109 La 525.

62. The question is whether the highest degree of care for the safety of passengers has been exercised—Merchant v. South Chicago City Ry. Co., 104 Ill. App. 122.

63. Herbert v. St. Paul City Ry. Co., 85 Minn. 341.

64. Pittsburgh, C., C. & St. L. Ry. Co. v. Aldridge, 27 Ind. App. 498. Evidence held to show negligence in failing to prevent car steps from becoming slippery—Foster v. Old Colony St. Ry. Co., 182 Mass. 378.

65. Plaintiff was injured by the breaking of a rod in a storm and it was shown that the rods had been in use only two years, had been furnished by a maker of high standard and were in ordinary use. The break was clean and showed no flaw—Leyh v. Newburgh Elec. Ry. Co., 168 N. Y. 667.

66. Texas Midland R. v. Johnson (Tex. Civ. App.) 65 S. W. 382.

67. Allen v. United Traction Co., 67 App. Div. (N. Y.) 363.

68. Buckbee v. Third Ave. R. Co., 64 App. Div. (N. Y.) 360.

69. Injury from catching dress on plunger in floor of car—Smith v. Kingston City R. Co., 169 N. Y. 616.

70. Ring in a car floor was allowed to get into such a condition that it arose when the car started and remained so unless replaced—Kingman v. Lynn & B. R. Co., 181 Mass. 387.

71. St. Louis S. W. Ry. Co. v. Parks (Tex. Civ. App.) 73 S. W. 439.

72. Where it is shown that if certain bolts connected with a steamboat's machinery had been properly examined the injury might have been avoided, defendant's negligence is for the jury—Wilmington Steamboat Co. v. Walker, 120 Fed. 97.

73. Davis v. Paducah Ry. & Light Co., 24 Ky. L. R. 135, 68 S. W. 140.

dispatch of business is sufficient.[74] In some jurisdictions the carrier is liable for defects in its cars which could have been discovered by the exercise of the utmost precaution, care, and skill in their construction, though not discoverable after the cars came into the defendant's possession,[75] but in others is not liable for defective appliances, where the defects are not discoverable by the most careful inspection and the apparatus is of the best pattern, purchased of a manufacturer in high standing, and frequently inspected.[76] When a train is derailed by the breaking of an axle and plaintiff is induced to jump and receives injuries, the carrier may be liable though the breaking of the axle was not the immediate cause of injury, if it was the result of a defect which could have been discovered by an ordinary inspection.[77] Allowing a switch to remain closed, causing an air brake to fail to operate, is negligence.[78]

Duty to prevent exposure of passengers to danger.—The highest degree of care exacted of carriers of passengers does not require the company to adopt any particular method of construction or to make it impossible for passengers to expose themselves to danger.[79] The carrier may be negligent in inducing a passenger to assume a dangerous position,[80] though it is not negligence per se to receive a passenger on a crowded car,[81] nor to allow passengers to ride on the footboard of open cars, where all seats are occupied,[82] though circumstances may render it so.[83] If cars are allowed to become overcrowded, additional care and caution must be exercised, and if the passenger is received under such condition that he must stand on the platform, and his fare is accepted, he must be protected from accident as far as circumstances allow.[84] Negligence in failure to provide sufficient room inside cars is for the jury,[85] as is the question of whether seats were provided.[86]

(§ 26) *E. Operation and management of trains and other vehicles.*[87]—By statute, a carrier may be, as a matter of law, negligent in placing burden cars behind passenger coaches.[88] It is not negligence to place a car without vestibules in a train advertised as a solid vestibuled train.[89] The question of whether a carrier is negligent in not delaying a mail train in order to place a less crowded train in front on the day of an excursion is for the jury.[90] Opening a front platform gate before a full

74. A scientific inspection is not required to discover a defect in axle or brakes of a freight car received from another company—Western Maryland R. Co. v. State, 95 Md. 637.

75. Defects in street-car wheels—Siemsen v. Oakland, S. L. & H. Elec. Ry., 134 Cal. 494.

76. Breaking of a pin in a pipe preventing the turning of a switch—Buckland v. New York, N. H. & H. R. Co., 181 Mass. 3.

77. Western Maryland R. Co. v. State, 95 Md. 637.

78. McAllister v. People's Ry. Co. (Del. Super.) 54 Atl. 743.

79. Merchant v. South Chicago City Ry. Co., 104 Ill. App. 122.

80. Causing him to go on the steps where he is thrown off by a sudden stopping of the train—Southern Ry. Co. v. Roebuck, 132 Ala. 412.

81. Burns v. Boston El. Ry. Co. (Mass.) 66 N. E. 418; Houston & T. C. R. Co. v. Bryant (Tex. Civ. App.) 72 S. W. 885.

82. Anderson v. City & Suburban Ry. Co. (Or.) 71 Pac. 659.

83. Where a car is run at the speed of 15 miles an hour around a curve near which is a pole 14½ inches from the outside of an 8½ inch running board—Hesse v. Meriden, S. & C. Tramway Co. (Conn.) 54 Atl. 299.

84. Passenger on a front platform at the conductor's request, may recover if jostled therefrom by the action of the conductor in jumping upon the front steps of the car—McCaw v. Union Traction Co. (Pa.) 54 Atl. 893.

85. The passenger was allowed to ride on a platform so crowded that he was apt to be pushed off by employes operating the car—Cattano v. Metropolitan St. R. Co., 173 N. Y. 565.

86. Farnon v. Boston & A. R. Co., 180 Mass. 212.

87. Rev. St. art. 4517, does not render a carrier liable for failure to provide a handbrake and brakeman on the rear coach of a strictly passenger train—Texas & P. Ry. Co. v. Storey (Tex. Civ. App.) 68 S. W. 534.

88. Under Sand. & H. Dig. § 6195, the carrier is liable where a train is composed of a caboose in front, followed by several freight cars, and pushed by an engine in the rear, and the caboose is derailed, causing the death of the passenger—Prescott & N. Ry. Co. v. Smith, 70 Ark. 179.

89. Sansom v. Southern Ry. Co. (C. C. A.) 111 Fed. 887.

90. Where negligence alleged was in the permission of excursion trains to become overcrowded, and there was evidence that the order of the trains could have been changed so

stop is not negligence per se.[91] A guard opening an exit door of an elevated road, before the complete stopping of a train, was not negligent though in so doing he injured the hand of a passenger, he having no knowledge of its position.[92] Carrier is liable for willful running at a speed occasioning derailment.[93]

Frightening and misleading passengers.—Negligence of a street-car company in exposing a passenger to apparently imminent danger, causing him to jump from the car, is for the jury,[94] as is continuance of operation of a car after the motorman should have known that if it was not stopped the controller would burn out.[95] Negligence in the management of an electric car, creating a panic, may be regarded as the proximate cause of an injury resulting from the panic, if the conduct of the passengers was such as might reasonably be expected under the circumstances.[96]

Duty to avoid sudden jerks.[97]—Where hilly country necessitates frequent curves, the incidental lurching is not negligence.[98] A sudden and violent stopping of a street car is not evidence of negligence unless unusual in degree, caused by a defect in the car or track, or by an unusual or dangerous speed.[99] A jerk throwing a passenger from the front platform of a horse car may be negligence,[1] but one thrown off a street car by a sudden stop to avoid a collision which was not due to the carrier's negligence cannot recover.[2] Where a sudden increase in speed is due to avoid a collision with a railroad train on an intersecting track, it will not be regarded as negligent.[3] The mere fact that a person is injured by another passenger being thrown against her while a street car is rounding a curve does not render the carrier liable.[4] If by statute separate accommodations must be furnished negroes, the carrier is liable to a negro crowded on the platform by white men occupying the negro coach and thrown therefrom by the jolting of the car.[5] Negligence is not shown by the fact that the person on a rear platform is thrown off by a sudden stop.[6]

Management of mixed, freight, and cattle trains.—A carrier in the transportation of passengers on a mixed train is not relieved from negligence in the man-

as to place the less crowded train where the most people wished to board it, the question of negligence in the arrangement of the trains should be submitted by the instructions—Williams v. International & G. N. R. Co. (Tex. Civ. App.) 67 S. W. 1085.

91. Paginini v. North Jersey St. Ry. Co. (N. J. Sup.) 54 Atl. 218.

92. Hannon v. Boston El. Ry. Co., 182 Mass. 425.

93. Negligence and willfulness in running a mixed train on a new road is for the jury—Stembridge v. Southern Ry., 65 S. C. 440.

94. After the conductor signaled the motorman to come on across a railroad track he motioned him to stop, which he did not do, but crossed the track barely in time to avoid a collision—Robson v. Nassau Elec. R. Co., 80 App. Div. (N. Y.) 301.

95. Passenger was injured by panic occasioned by the explosion of controller—Dunlay v. United Traction Co., 18 Pa. Super. Ct. 206.

96. Defective appliances produced a flash of fire followed by smoke in the car—Davis v. Paducah Ry. & Light Co., 24 Ky. L. R. 135, 68 S. W. 140.

97. The question of negligence in running a train rapidly around the curve and throwing off a passenger, is for the jury—Macy v. New Bedford, M. & B. St Ry. Co., 182 Mass. 291. Negligence in running a train rapidly around sharp curves without devices to protect its platforms—Northern Pac. Ry. Co. v. Adams, 116 Fed. 324.

98. A railroad running through a hilly country, necessarily having frequent curves in its track, while bound to use the highest degree of care in its construction and the management of its trains, cannot avoid the lurching incidental to such condition—Sansom v. Southern Ry. Co. (C. C. A.) 111 Fed. 887.

99. Chicago City Ry. Co. v. Morse, 98 Ill. App. 662.

1. Where caused by the driver striking the team without warning—Eberhardt v. Metropolitan St. Ry. Co., 69 App. Div. (N. Y.) 560.

2. Cleveland City Ry. Co. v. Osborn, 66 Ohio St. 45.

3. The employees of the street car had used proper care to ascertain that no train was approaching before starting on the track—Corkhill v. Camden & S. Ry. Co. (N. J. Law) 54 Atl. 522.

4. Merrill v. Metropolitan St. Ry. Co., 73 App. Div. (N. Y.) 401.

5. Rev. St. 1895, arts. 4509, 4516—Williams v. International & G. N. R. Co. (Tex. Civ. App.) 67 S. W. 1085.

6. Passenger was not holding to anything; there was no showing of a defect in the car or rails or that the stop was not justifiable—Timms v. Old Colony St. Ry. (Mass.) 66 N. E. 797.

agement of the trains, or in the condition of the cars, by the fact that the passengers assume incidental discomforts,[7] but passengers on freight trains assume risks ordinarily incident to their operation,[8] and negligence will not be inferred from a jar in a sudden stopping of such a train.[9] If a conductor with knowledge that a person is in a car with stock does not warn him to get out of the car or prevent recklessness on the part of the employees, the carrier is liable for injuries resulting from sudden jolt, though plaintiff had no right to be in the car.[10]

Duty to avoid collision.[11]—A car driver who drives on a railroad crossing without stopping, looking, and listening is negligent, as where in so doing he also violates a city ordinance requiring a complete stop;[12] and failure to stop a street car and sound its gong before passing on a railroad track may be negligence per se.[13] Where a passenger is injured in a collision between a street car and a steam car, negligence of the railroad is immaterial if the street car company was also negligent.[14] Violation of rules as to the distance to be maintained between trains may be gross negligence, rendering the carrier liable for injuries from collision.[15] It is negligence to run a car at such a high rate of speed around a curve as to occasion a collision with another car.[16] The question of whether a grip-car driver is negligent in not sounding his gong is for the jury.[17] The carrier's negligence causing imminent danger of collision is the proximate cause of an injury to a passenger who jumps, or is pulled off, or is injured by one jumping on her after she has left the car.[18]

Passing cars receiving and discharging passengers.[19]—A carrier running a train past another, stopping for the purpose of receiving and discharging passengers at a station, must exercise the greatest care and caution.[20] It is negligence for a motorman passing a car stopping to discharge passengers to fail to sound his gong.[21] A car need not slow up when passing another which has just started after a stop to discharge passengers.[22] The carrier may be liable for the death of a child struck by a train on an intervening track while the child is crossing the track with its mother from a train discharging passengers at the station, there being a place provided for passengers to cross the track at that point and the conductor having

7. Symonds v. Minneapolis & St. L. Ry. Co. (Minn.) 92 N. W. 409.

8. One arising from his seat to take off his overcoat cannot recover for a sudden jar injuring him, in the absence of evidence of defects in track, train or appliances, nor of skill in handling or stoppage at an improper place—Wait v. Omaha, K. C. & E. R. Co., 165 Mo. 612.

9. Erwin v. Kansas City, Ft. S. & M. R. Co., 94 Mo. App. 289.

10. Bolton v. Missouri Pac. Ry. Co. (Mo.) 72 S. W. 530.

11. Street car company's care in not avoiding collision with a truck held to be a question for the jury—Suse v. Metropolitan St. Ry. Co., 80 App. Div. (N. Y.) 24.

12. Selma St. & Suburban Ry. Co. v. Owen, 132 Ala. 420.

13. Under an ordinance requiring such stop and prescribing a penalty on motormen disregarding it—Gulf, C. & S. F. Ry. Co. v. Holt (Tex. Civ. App.) 70 S. W. 591.

14. Gulf, C. & S. F. Ry. Co. v. Holt (Tex. Civ. App.) 70 S. W. 591.

15. Freight train making no stops and running at a speed of from 25 to 30 miles an hour left a station from 4 to 11 minutes behind a passenger train making many stops and running at a rate of 23 miles an hour—Louisville & N. R. Co. v. Richmond, 23 Ky. L. R. 2394, 67 S. W. 25.

16. Private car of the president was running around a curve at a high rate of speed with knowledge that there was another car out on the road which would come in at some time during the evening—Hennessy v. St. Louis & S. Ry. Co. (Mo.) 73 S. W. 162.

17. Action by a passenger injured in a collision between the grip-car and a buggy—West Chicago St. R. Co. v. Tuerk, 193 Ill. 385.

18. Birmingham Ry. & Elec. Co. v. Butler, 135 Ala. 388.

19. It is a question for the jury whether it is negligence to run an express train at a high speed into a station at about the time a local train is receiving or discharging passengers—Girton v. Lehigh Valley R. Co., 17 Pa. Super. Ct. 143.

20. The train ran between the stationary train and the station—Chicago & E. I. R. Co. v. Taylor, 102 Ill. App. 445.

21. Hornstein v. United Rys. Co. (Mo. App.) 70 S. W. 1105.

22. So held where the passenger on a north bound car attempting to alight from it in motion, was struck by a south bound car travelling at the rate of twelve miles an hour—Ackerstadt v. Chicago City Ry. Co., 194 Ill. 616.

directed them to do so.[23] It may be an element of negligence for a conductor to call "all aboard" at a time when a train in the opposite direction is bound to pass on an intervening track.[24] Signals provided for trains at public crossings are not applicable to passengers attempting to board trains at stations.[25] A carrier may be liable for the failure of a lookout to stop a train which is backing over a trestle in order to avoid injuries to intending passengers crossing such trestle.[26] Negligence in striking a passenger on a track near a station may be for the jury.[27]

The question of whether plaintiff was struck by a lump of coal from a passing train, rendering the carrier liable, is for the jury.[28]

(§ 26) *F. Setting down passengers.*—The carrier's duty is discharged by offering a safe place and a reasonable time to alight at the end of a journey.[29] After an intoxicated passenger leaves his train at its destination, the company is not bound to guard him further.[30] A passenger may leave a train at an intermediate station for a purpose not inconsistent with his character as a passenger, hence instructions that the carrier owes him no duty while so doing are erroneous.[31] A street car company may be not negligent in failing to discover an obstacle attached to the rear of the car by a trespasser.[32]

Duty to announce stations and direct as to place to alight.—It is not, as a matter of law, negligence for a railroad company to fail to announce the arrival of passenger trains at stations.[33] A porter is not bound to the exercise of reasonable care in directing passengers to alight, his duty being confined to announcing names of the stations.[34] Any employe may announce the stations.[35] Negligent calling of a station is the proximate cause of an injury to one induced to go on the platform at a point distant from the station and thrown off by a sudden jerk.[36]

Duty to avoid misleading passenger.—Failure to warn passengers that a stop, made shortly after the station is announced, is not at the station, is negligence,[37] though it is a question for the jury if it is negligence to stop a train at a crossing after a station has been announced without other warning to the passenger.[38] The fact that the conductor has told the passenger that the station is near does not

23. Girton v. Lehigh Valley R. Co., 17 Pa. Super. Ct. 143.

24. Sufficiency of evidence supporting the finding of negligence—Gulf, C. & S. F. Ry. Co. v. Morgan, 26 Tex. Civ. App. 378.

25. A carrier is not relieved from liability from injuring a person crossing the track at the station to board another train by the reason that the oncoming train has given the signals required by Rev. St. art. 4507—Gulf, C. & S. F. Ry. Co. v. Morgan, 26 Tex. Civ. App. 378.

26. The lookout warned the persons to run but made no effort to stop the train or signal the engineer—Chicago Terminal Transfer R. Co. v. Kotoski, 199 Ill. 383.

27. The person injured supposed that the train which was moving slowly was about to stop though it was not designed to do so—Redhing v. Central R. Co. (N. J. Err. & App.) 54 Atl. 431.

28. The evidence varied as to the speed of the train, it being placed from 40 to 70 miles an hour, and plaintiff testified that he saw the coal leave the tender, was struck by it, and it was crushed into small fragments—Louisville & N. R. Co. v. Reynolds, 24 Ky. L. R. 1402, 71 S. W. 516.

29. West Chicago St. R. Co. v. Buckley, 102 Ill. App. 314.

30. Not liable where he is run over by another train during the night—Nash v. Southern Ry. Co. (Ala.) 33 So. 932.

31. Instruction was that there was no duty to stop for any length of time at an intermediate station or to have its depot lighted or to stop at all—Galveston, H. & S. A. Ry. Co. v. Mathes (Tex. Civ. App.) 73 S. W. 411.

32. Plaintiff was tripped by a rope which had been attached to the car while it travelled about a mile and a half but which was not discovered because of darkness—La Fond v. Detroit Citizens' St. Ry. Co. (Mich.) 92 N. W. 99.

33. Houston & T. C. R. Co. v. Goodyear (Tex. Civ. App.) 66 S. W. 862.

34. A passenger alighted at the wrong station though the porter had twice announced its name, the carrier's employes having no knowledge that plaintiff was hard of hearing. Plaintiff testified that the porter took her grip and told her to sit still until the train stopped and in this was contradicted by the porter—Texas Midland R. Co. v. Terry, 27 Tex. Civ. App. 341.

35. Duty is not personal to the conductor—Southern Ry. Co. v. O'Bryan, 115 Ga. 659.

36. Cincinnati, H. & I. R. Co. v. Worthington (Ind. App.) 65 N. E. 557, 66 N. E. 478.

37. St. Louis, I. M. & S. Ry. Co. v. Farr, 70 Ark. 264.

38. Larson v. Minneapolis & St. L. R. Co., 85 Minn. 387.

authorize him to leave a moving train in the dark.[39] Where a passenger unnecessarily alights to change cars, there being proper coaches attached to the train, the conductor is negligent in having failed to inform him of such fact.[40]

Duty to avoid carrying passenger by station.—The carrier is liable for injuries received by a passenger through being set down at a wrong station,[41] or being carried by his station, and is not excused by the fact that the conductor does not know of the passenger's presence on the train,[42] but there may be no liability for the accidental carrying by of a passenger riding on a freight train.[43] The carrier is negligent if an employe, after instructing a passenger to alight, fails to stop the train to enable him to do so in safety.[44] The passenger must exercise ordinary care to assure himself that the train he enters is the proper one; it is not sufficient that he is received without protest and does not know that the train does not stop at the station he desires to reach.[45]

Duty to provide safe place to alight.—The carrier must not stop at a place unsuitable for alighting, though convenient for its employes.[46] The question of suitableness is for the jury.[47] Where a carrier has failed to provide a proper place to alight, it is not relieved from liability by the fact that a passenger between the tracks is struck by the train of another company.[48]

Duty to assist passenger.—In ordinary circumstances, the carrier is not bound to assist the passenger in alighting, though if it know of an infirmity it should render reasonable assistance,[49] as where a female passenger encumbered with baggage and children has requested assistance.[50] The duty is a question for the jury,[51] as is the duty to provide a stool for alighting passengers.[52] Failure to furnish a portable step is not negligence where the distance from the car step to the ground is not further than usual, and a large number of persons have previously alighted without accident.[53] Placing a stool on ground so soft that the stool overturns when stepped on may be negligence.[54]

Starting while passenger is alighting.—A carrier is liable for failure to stop sufficiently long to allow passenger to alight or if it start with knowledge that he is attempting to do so,[55] even though its train is late.[56] The reasonableness of the

39. Where a person on a train not stopping at his destination, is told that the train will slow up there and he attempts to get off while the train is crossing a high trestle at a rate of about 25 miles an hour, the carrier is not negligent though the conductor told him they were nearly at the station and beckoned him, but when the passenger got to the coach door the conductor was not in sight and the passenger swung off in the dark—Illinois Cent. R. Co. v. Hanberry, 23 Ky. L. R. 1867, 66 S. W. 417.

40. Gulf, C. & S. F. Ry. Co. v. Shelton (Tex. Civ. App.) 69 S. W. 655.

41. International & G. N. R. Co. v. Sampson (Tex. Civ. App.) 64 S. W. 692.

42. Twelve year old girl carried some distance past station—Rawlings v. Wabash R. Co. (Mo. App.) 71 S. W. 535.

43. Plaintiff desired to get off at a crossing. She was on a long freight train and the conductor could not signal the engineer in time to stop at the desired point but stopped and assisted her to alight at a crossing three quarters of a mile further. There was no showing of special damages—Smith v. Wilmington & W. R. Co., 130 N. C. 304.

44. Instruction was given with knowledge that the platform was not well lighted and there was considerable distance thereto—Gulf, C. & S. F. Ry. Co. v. Shelton (Tex. Civ. App.) 69 S. W. 655.

45. St. Louis S. W. Ry. Co. v. Campbell (Tex. Civ. App.) 69 S. W. 451.

46. Simmons v. Oregon R. Co., 41 Or. 151, 69 Pac. 440, 1022.

47. Question of whether hole in street made the place obviously unsafe and was the cause of injury—Sweet v. Louisville Ry. Co., 23 Ky. L. R. 2279, 67 S. W. 4. Question of whether an injury by reason of a defective pavement, which the carrier, by municipal ordinance, was required to keep in repair, is the result of negligence—Fielders v. North Jersey St. Ry. Co., 67 N. J. Law, 76.

48. Chicago Terminal Transfer R. Co. v. Schmelling, 197 Ill. 619.

49. Young v. Missouri Pac. Ry. Co., 93 Mo. App. 267.

50. Missouri, K. & T. Ry. Co. v. Buchanan (Tex. Civ. App.) 72 S. W. 96.

51. Southern Ry. Co. v. Reeves (Ga.) 42 S. E. 1015.

52. Missouri, K. & T. Ry. Co. v. Sherrill (Tex. Civ. App.) 72 S. W. 429.

53. Young v. Missouri Pac. Ry. Co., 93 Mo. App. 267.

54. Southern Ry. Co. v. Reeves (Ga.) 42 S. E. 1015.

55. Louisville & N. R. Co. v. Harmon, 23 Ky. L. R. 871, 64 S. W. 640.

time allowed is for the jury,[57] as is the sufficiency of notice to change cars and time therefor.[58] Where a car is stopped at a point customary for the discharge of passengers, employes must exercise extraordinary diligence, before starting a car, to see if any passengers desire to alight and to give a reasonable opportunity for so doing.[59] The conductor is bound not to signal the motorman to start until he sees that all passengers desiring to leave the car have alighted,[60] and, though the conductor may have been justified under the circumstances in thinking all the passengers had alighted, a reasonable time for all passengers to get off must nevertheless have expired.[61] Though a car was not stopped to discharge passengers, the carrier may be liable if it start the car with knowledge that a passenger is attempting to alight.[62] The stop may have been in the middle of the block,[63] and where the car is so stopped at the request of passengers desiring to alight, the carrier must use the utmost diligence for their safety, though it was not bound to make such a stop.[64] Where the speed of a car is slackened merely to permit a passenger to get on, the conductor is not bound to know that a passenger will attempt to get off.[65] It is negligence to start a car before the conductor sees that the passenger's skirts are free from the platform,[66] or to jerk or move the car while passengers are getting off,[67] or to couple a switch engine to a passenger train,[68] but an acceleration of speed while a passenger is on a bottom step of a platform preparing to alight is not negligence where the intention to alight has not been indicated to the conductor, though from the fact that he was in the front part of the car collecting fares he could not see the passenger intending to alight,[69] though the question may be for the jury.[70] If, through the passenger's negligence, she failed to alight within a reasonable time, she cannot recover for injury in attempting to alight without knowledge of defendant's employes.[71]

Where a starting signal is given, without the knowledge or authority of the conductor, by some one not in the company's employ, while a passenger is alighting, the company is not liable.[72]

Carrier by water.—A carrier assumes the risk if it attempts to land a passenger at night while the boat is in motion.[73]

56. St. Louis S. W. Ry. Co. v. Byers (Tex. Civ. App.) 69 S. W. 1009.

57. Crowded train, people standing in aisles, front door locked and other circumstances—Walters v. Chicago & N. W. R. Co., 113 Wis. 367.

58. Oliver v. Columbia, N. & L. R. Co., 65 S. C. 1.

59. Where cars are stopped in compliance with a city ordinance before reaching a grade crossing—Atlanta Ry. Co. v. Randall (Ga.) 43 S. E. 412; Ashtabula Rapid Transit Co. v. Holmes, 67 Ohio St. 153.

60. Bloomington & N. Ry. v. Zimmerman, 101 Ill. App. 184.

61. Walters v. Chicago & N. W. R. Co., 113 Wis. 367.

62. Stop to repair wire—Beringer v. Dubuque St. Ry. Co. (Iowa) 91 N. W. 931.

63. There had been a failure to stop at the corner but car had slowed up in such a manner as to clearly invite an attempt to alight—Betts v. Wilmington City Ry. Co. (Del. Super.) 53 Atl. 358. See for instruction where a person attempts to alight while a car was stopped in the center of a block—Beringer v. Dubuque St. Ry. Co. (Iowa) 91 N. W. 931.

64. West Chicago St. R. Co. v. Buckley, 102 Ill. App. 314.

65. An instruction requiring him to exercise the highest degree of care and ascertain whether any other person might be getting on or off, is erroneous—Ashtabula Rapid Transit Co. v. Holmes, 67 Ohio St. 153.

66. Evidence of negligence in a conductor's starting a car while standing on the skirt of a passenger who had attempted to alight, held sufficient—Citizens' St. R. Co. v. Shepherd (Ind. App.) 65 N. E. 765; Smith v. Kingston City R. Co., 55 App. Div. (N. Y.) 145.

67. Skelton v. St. Paul City Ry. Co. (Minn.) 92 N. W. 960.

68. Though the coupling is in the usual manner and with no more force than necessary—Raughley v. West Jersey & S. R. Co., 202 Pa. 43.

69. Sims v. Metropolitan St. Ry. Co., 65 App. Div. (N. Y.) 270.

70. Negligence in jerking a dummy train while approaching a customary stopping place and while plaintiff was standing on the bottom step of a platform—Sweet v. Birmingham Ry. & Elec. Co. (Ala.) 33 So. 886.

71. Defendant is entitled to an instruction to such effect if a station is distinctly called and the passenger negligently failed to hear the same—Galveston, H. & S. A. Ry. Co. v. Mathes (Tex. Civ. App.) 73 S. W. 411.

72. Krone v. Southwest Missouri Elec. Ry. Co. (Mo. App.) 71 S. W. 712.

73. Le Blanc v. Sweet, 107 La. 355.

(§ 26) *G. Protection from other passengers and train crew or third persons.*—A carrier is bound to protect the passenger's peace, comfort and personal safety from other passengers, strangers or its servants.[74] It is liable for the acts of its servants toward passengers, though not within the scope or course of their employment.[75] It is liable for the malicious tort of a conductor in the same manner as an individual would be,[76] and so is liable to a passenger assaulted by the conductor,[77] whether such assault constitutes negligence or not,[78] and the act of the conductor in insulting the passenger is the act of the carrier.[79] Liability exists, though the assault is in retaliation for an assault committed on him, or for abusive words, or in revenge or punishment, and the only case where the rule is otherwise is where the assault is under a necessity to defend himself or a passenger from battery or in rightfully ejecting a passenger,[80] though it was held that where the passenger's violence provoked an assault, a street car company was not liable,[81] and conduct of the passenger may be considered in mitigation of damages.[82] There is also a liability for insults and violence of employes toward passengers,[83] such as insulting language and gestures by a motorman toward a passenger carried by her destination against her will,[84] but the carrier is not liable where a conductor charges a passenger with lying,[85] or where the motorman gets off the car and assails a passenger who has left the car, deposited his bundles on the sidewalk and returned to the car.[86] The carrier may by its conduct ratify an assault by its conductor.[87] The carrier is liable where its agent locks a prospective passenger in the waiting room over his protest, where such act could have been prevented with the exercise of ordinary care.[88]

Assaults and injuries by third persons.—The carrier's employes must take proper precautions to prevent injuries to passengers from third persons which they know or can know are threatened,[89] but a carrier is not liable for an assault on

74. Birmingham Ry. & Elec. Co. v. Baird, 130 Ala. 334, 54 L. R. A. 752.

75. Birmingham Ry. & Elec. Co. v. Baird, 130 Ala. 334, 54 L. R. A. 752; Missouri Pac. Ry. Co. v. Divinney (Kan.) 71 Pac. 855. In a complaint in an action for assault it need not be alleged that the act was within the scope of the servant's duty, it being alleged that plaintiff was a passenger at the time—Birmingham Ry. & Elec. Co. v. Mason (Ala.) 34 So. 207.

76. Grayson v. St. Louis Transit Co. (Mo. App.) 71 S. W. 730.

77. The rule limiting the master's liability to acts within the scope of the servant's employment does not apply—Johnson v. Detroit, Y. & A. A. Ry. (Mich.) 90 N. W. 274; St. Louis S. W. Ry. Co. v. Johnson (Tex. Civ. App.) 68 S. W. 58; Willis v. Metropolitan St. R. Co., 76 App. Div. (N. Y.) 340.

78. Hence the carrier cannot complain of an instruction requiring the facts constituting the assault to constitute negligence—St. Louis S. W. Ry. Co. v. Johnson (Tex. Civ. App.) 68 S. W. 58.

79. Galveston, H. & S. A. Ry. Co. v. La Prelle, 27 Tex. Civ. App. 496.

80. Birmingham Ry. & Elec. Co. v. Baird, 130 Ala. 334, 54 L. R. A. 752; Galveston, H. & S. A. Ry. Co. v. La Prelle, 27 Tex. Civ. App. 496.

81. James v. Metropolitan St. Ry. Co., 80 App. Div. (N. Y.) 364.

82. Grossly insulting language used to a conductor—Houston & T. Cent. R. Co. v. Batchler (Tex. Civ. App.) 73 S. W. 981; Galveston, H. & S. A. Ry. Co. v. La Prelle, 27 Tex. Civ. App. 496.

83. Murphy v. St. Louis Transit Co., 96 Mo. App. 272. It is actionable for a conductor to tell a woman in a loud and insulting manner so as to be heard by her children and other passengers, "The idea of a woman trying to board a train with her child without a ticket; you can go on this time but do not undertake such a thing again." Such language reasonably supports an inference of dishonesty, and though it should not it is insulting and calculated to humiliate and mortify whether the conductor intended to charge her with dishonesty or not—Texas & P. Ry. Co. v. Tarkington, 27 Tex. Civ. App. 353.

84. San Antonio Traction Co. v. Crawford (Tex. Civ. App.) 71 S. W. 306.

85. In answer to a passenger's statement that his son was nine years old, the conductor said; "You can't give me a stiff like that, he is fourteen years old"—Grayson v. St. Louis Transit Co. (Mo. App.) 71 S. W. 730.

86. The act not being within the scope of the motorman's employment—Palmer v Winston-Salem Ry. & Elec. Co., 131 N. C. 250.

87. Ratification of the act of a conductor in assaulting a passenger may be shown by the fact that the company paid his fine therefor, defended him by its attorneys, and retained him in their employ, the general manager having been present at the trial—Denison & S. Ry. Co. v. Randell (Tex. Civ. App.) 69 S. W. 1013.

88. St. Louis, I. M. & S. Ry. Co. v. Wilson, 70 Ark. 136.

89. Employes are not charged with knowledge that tramps stealing a ride will, if brought into the car, make an assault, while endeavoring to escape, upon passengers who

a passenger in its train during the absence of the train crew at dinner at a regular eating station.[90] The carrier is liable for injury sustained by a prospective passenger at a waiting room through failure to exercise ordinary care to protect him from injury by disorderly persons there congregated, which might have been prevented or lessened by the agent in charge.[91]

Where plaintiff's evidence tends to establish that he had been insulted and assaulted by fellow passengers, the conductor making no effort to prevent their acts, his complaint should not be dismissed.[92]

A street car company is not guilty of negligence in attempting to operate its cars during a strike, and need exercise only ordinary care and prudence to guard against the lawless acts of third persons not under its direction or control.[93]

The carrier may not be chargeable with the negligent performance of acts by third persons at the direction of employes.[94]

Securing arrest of passenger.—Where the rules give conductors authority to call policemen, the company is liable for wrongful act of a conductor in calling a policeman to arrest a passenger on a car.[95]

Protection of passenger from arrest.—Though the carrier is bound to use extraordinary diligence to protect passengers from violence or injury from third persons, it need not inquire into the legality of their arrest by an officer of the law, and is not liable for failure to prevent an arrest of a passenger or to refuse to stop the train to allow him to be removed by the officer, nor is it bound to see that the officer uses only the force necessary to make the arrest.[96]

Third person putting child off at wrong station.—The fact that a conductor promised to put a child off at its proper destination does not render the carrier liable where she is assisted from the train by another person before she reaches her destination.[97]

(§ 26) *H. Contributory negligence of passenger.*—The law of the state wherein the accident occurred with regard to contributory negligence, as admitted by the pleadings, may be submitted in instructions.[98] Slight contributory negligence will bar recovery,[99] but only ordinary care is required of the passenger,[1] the test being whether a person of ordinary prudence in the same situation and with the same knowledge would have done the alleged negligent act.[2] The passenger is not bound

are not interfering with such escape—Savannah, F. & W. Ry. Co. v. Boyle, 115 Ga. 836.

90. The assault was not one which could be reasonably anticipated—Thweatt v. Houston, E. & W. T. Ry. Co. (Tex. Civ. App.) 71 S. W. 976.

91. St. Louis, I. M. & S. Ry. Co. v. Wilson, 70 Ark. 136. A carrier is liable for damages sustained by a female passenger in its station through its allowance of an intoxicated person to enter, use indecent language and assault her with a knife—Houston & T. C. R. Co. v. Phillio (Tex.) 69 S. W. 994.

92. Koch v. Brooklyn Heights R. Co., 75 App. Div. (N. Y.) 282.

93. It was not negligence justifying recovery against the carrier to fail to pull down the car blinds or stretch canvas over the outside to protect a passenger from missiles thrown by a mob of strikers—Fewings v. Mendenhall (Minn.) 93 N. W. 127.

94. A carrier is not guilty of negligence where a passenger's hand is injured by the closing of a car door by a third person at the direction of a brakeman who has his back turned toward the door and passenger.—Brineger v. Louisville & N. R. Co., 24 Ky. L. R. 1973, 72 S. W. 783.

95. Grayson v. St. Louis Transit Co. (Mo. App.) 71 S. W. 730.

96. In this case the carrier had no notice that the arrest was illegal—Brunswick & W. R. Co. v. Ponder (Ga.) 43 S. E. 430.

97. Louisville & N. R. Co. v. Jordan, 23 Ky. L. R. 1730, 66 S. W. 27.

98. Louisville & N. R. Co. v. Harmon, 23 Ky. L. R. 871, 64 S. W. 640.

99. Passenger jumping from moving train and slipping on greasy platform—Newcomb v. New York Cent. & H. R. R. Co., 169 Mo. 409.

1. Carroll v. Charleston & S. R. Co., 65 S. C. 378.

2. Clerc v. Morgan's L. & T. R. & S. S. Co., 107 La. 370. An instruction that the measure of care against accident which one must take to avoid responsibility, is that which a person of ordinary prudence and caution would use if his interests were to be affected and the whole risk were his own, is not erroneous as imposing on plaintiff a higher degree of care than she was bound to exercise—Citizens' St. R. Co. v. Shepherd (Ind App.) 65 N. E. 765.

to do things which in the exercise of ordinary care do not occur to him or seem feasible.[3] If carrier and passenger are equally at fault, the passenger cannot recover,[4] but negligence of the passenger in regard to a matter not the cause of the injury will not preclude recovery.[5] A boy ten years old may be negligent,[6] or one of sixteen,[7] but a plaintiff sixteen years of age cannot be held to know the seating accommodations of cars.[8] In some states contributory negligence must be based on acts, showing a willful disregard of danger, committed under circumstances making them obviously perilous.[9] Under statutes requiring criminal negligence, gross negligence amounting to a reckless disregard of safety, a willful indifference to consequences likely to follow, is intended.[10] Where drunkenness is the proximate cause of injury, there can be no recovery.[11]

Acts due to impulse of sudden danger.—Where an act is incited by sudden peril, the imputation of negligence may be removed therefrom,[12] and where the passenger has been put into a position of danger, preventing the exercise of clear judgment, he is bound only to ordinary care under the circumstances;[13] so one may leave a moving street car without negligence to avoid a merely apparent danger, and need not notify the persons in charge before jumping,[14] but absence of fault cannot be inferred from the general and known disposition of men to take care of themselves and keep out of the way of difficulty.[15] Where a driver passes on to a railroad crossing without looking for trains, his negligence is the proximate cause of an injury to a passenger who jumps to avoid an apparently imminent collision.[16]

Acts done at direction of employes.[17]—An attempt to board a moving train at the direction of an employe, which does not lead the person into apparent danger

3. West Chicago St. R. Co. v. Horne, 100 Ill. App. 259.

4. Central of Georgia Ry. Co. v. McKinney, 116 Ga. 113; Doolittle v. Southern Ry., 62 S. C. 130.

5. The fact that a person is riding on a bumper will not preclude a recovery where he is not injured by that reason but because he had to jump off to avoid a collision—Paquin v. St. Louis & S. Ry. Co., 90 Mo. App. 118; Doolittle v. Southern Ry., 62 S. C. 130.

6. In protruding his head from a car window—Knauss v. Lake Erie & W. R. Co., 29 Ind. App. 216.

7. Extending his person beyond the line of the car—Benedict v. Minneapolis & St. L. R. Co., 86 Minn. 224, 57 L. R. A. 639.

8. A boy 16 years old who passes through seven cars of an excursion train, composed of 14 or 15 cars, without being able to obtain a seat, may be found to have been in the exercise of due care, if the jury find that plaintiff believed that the cars ahead were as crowded as those through which he went—Farnon v. Boston & A. R. Co., 180 Mass. 212.

9. Chicago, B. & Q. R. Co. v. Winfrey (Neb.) 93 N. W. 526.

10. Comp. St. c. 72, art. 1, § 3—Chicago, B. & Q. R. Co. v. Winfrey (Neb.) 93 N. W. 526.

11. The passenger acted with prudence in taking a position on the car platform but would not have fallen but for his drunkenness—Houston & T. C. R. Co. v. Bryant (Tex. Civ. App.) 72 S. W. 885.

12. An instruction to such effect was held proper where a person jumped from a derailed car, though had he remained therein he would have suffered little or no injury—Western Maryland R. Co. v. State, 95 Md. 637. The fact that an old and infirm passenger thrown by a sudden start of the car while alighting catches hold of a running board and is dragged does not show contributory negligence, his act being due to the impulse of sudden danger—Indiana Ry. Co. v. Maurer is dragged does not show contributory negligence for a young girl to continue her hold on a hand rail though the car starts while she is boarding it, and though she is dragged some distance—Schoenfeld v. Metropolitan St. Ry. Co., 40 Misc. (N. Y.) 201.

13. Instruction that if plaintiff stepped to the ground voluntarily and without necessity while the car was in motion, she could not recover, is erroneous, where the evidence was that plaintiff was crippled in her left leg and while putting her left foot on the ground and holding to the handle bar of the car, the car started—United Rys. & Elec. Co. v. Beidelman, 95 Md. 480.

14. Jumping from a moving car may be excused by the fact that the passenger saw an engine coming at a high rate of speed, a collision being apparently imminent though there was no actual collision—Selma St. & Suburban Ry. Co. v. Owen, 132 Ala. 420.

15. Instruction to contrary effect is not justified in a case where a drover was killed by jumping to avoid injury on the derailment of a train—Western Maryland R. Co. v. State, 95 Md. 637.

16. Selma St. & Suburban Ry. Co. v. Owen, 132 Ala. 420.

17. It is a question for the jury where a passenger ignorant of railroad travel alights from a moving train in obedience to a supposed invitation of an employe—Doolittle v. Southern Ry., 62 S. C. 130.

such as a prudent person would not assume, is not contributory negligence, and it cannot be stated as a matter of law that an attempt to board a train in motion is negligence,[18] unless the danger is so obvious that it would be undertaken only by a reckless man.[19] One who neglects to alight while train is stopped, and steps off after it starts at the advice of a brakeman, is negligent.[20] It is not negligence to alight from a slowly moving train in the dark, on the station platform, at the request of an employe; it may be shown that there was no offer to stop or caution the passenger not to alight; and the fact that a passenger is asleep and does not hear an announcement as to change of cars does not relieve the carrier, where the passenger has been misled by information from the conductor that a change of cars was necessary.[21] A passenger may presume that a member of a switching crew in charge of a train has authority to direct him to alight.[22]

Approaching car or train.[23]—One who signals an approaching car is not negligent per se in failing to look behind her where she starts diagonally across the tracks in front of the car to its stopping place.[24] The question of whether a passenger crossing a railroad track to take a train is negligent is for the jury, though there was a space between two of the tracks on which he might have walked,[25] and it is not negligence per se to fail to look and listen when crossing an intervening track to a train standing at a station to receive passengers.[26] An attempt to board a train from the wrong side is not negligent per se,[27] nor an attempt to pass in front of a slowly approaching train at a station.[28] The passenger's use of a platform at a station must be limited to the purposes for which it is manifestly adapted, and he should keep such distance from passing trains as to avoid being struck by usual projections.[29] Street car passengers are not bound to look out for dangerous holes near the entrance of the cars or to be on the lookout for the removal of former safe guards.[30] One with knowledge that a step must be lowered before a car is ready to receive passengers, who attempts to board it before the step is lowered, takes the risk of being struck thereby.[31]

Boarding moving train or cars.—Whether a person is negligent in getting on a moving train is a question for the jury under the entire evidence.[32] It is not contributory negligence per se to board a moving street car,[33] unless under special

18. Pence v. Wabash R. Co., 116 Iowa, 279. One who attempts to board a moving train at the direction of the conductor, having alighted at an intermediate station, may be guilty of negligence, though the train is a freight. It is a question for the jury, the direction of the conductor, the speed of the train, and other circumstances being considered—Illinois Cent. R. Co. v. Glover, 24 Ky. L. R. 1447, 71 S. W. 630. Where plaintiff alleges that he was in the exercise of ordinary care in getting on a moving train, he may show that he acted at the direction of the conductor—Chicago & A. R. Co. v. Gore, 202 Ill. 188.

19. Chicago & A. R. Co. v. Gore, 202 Ill. 188.

20. Pittsburgh, C., C. & St. L. Ry. Co. v. Gray, 28 Ind. App. 588.

21. Gulf, C. & S. F. Ry. Co. v. Shelton (Tex. Civ. App.) 69 S. W. 653, 70 S. W. 359.

22. Gulf, C. & S. F. Ry. Co. v. Shelton (Tex. Civ. App.) 69 S. W. 653, 70 S. W. 359.

23. The question of whether one walking along a platform to secure a seat in an open car is negligent is for the jury—Haselton v. Portsmouth, K. & Y. St. Ry., 71 N. H. 589.

24. Copeland v. Metropolitan St. Ry. Co., 78 App. Div. (N. Y.) 418.

25. Chicago, St. P., M. & O. Ry. Co. v. Lagerkrans (Neb.) 91 N. W. 358.

26. Gulf, C. & S. F. Ry. Co. v. Morgan, 26 Tex. Civ. App. 378.

27. Question for the jury where plaintiff owing to the crowd at the station was compelled to go to the outside of the track on the crowd being parted to make way for the train—Begley v. Pennsylvania R. Co., 201 Pa. 84.

28. Redhing v. Central R. Co. (N. J. Err. & App.) 54 Atl. 431.

29. Dotson v. Erie R. Co. (N. J. Err. & App.) 54 Atl. 827.

30. Lake St. El. R. Co. v. Burgess, 99 Ill. App. 499. An instruction declaring without qualification that a person who steps into a hole or on a rotten board in a platform is negligent if she fails to look or take precautions to ascertain the danger should not be given—Indianapolis St. Ry. Co. v. Robinson, 157 Ind. 414.

31. Clark v. Metropolitan St. Ry. Co., 68 App. Div. (N. Y.) 49.

32. Chicago & A. R. Co. v. Gore, 96 Ill. App. 553.

33. An instruction that it is imprudent to board a moving public vehicle should not be given—Lobsenz v. Metropolitan St. Ry. Co., 72 App. Div. (N. Y.) 181; South Chicago City Ry. Co. v. Dufresne, 200 Ill. 456, 102 Ill. App. 493; Birmingham Ry. & Elec. Co. v. Brannon.

circumstances.[34] Slowing of a car at a street crossing is not an invitation to board it before it stops.[35]

Boarding crowded car.—It is a question for the jury whether one who, before he starts on a journey, is aware of the crowded condition of the train, is not contributorily negligent in failing to leave it.[36]

Riding in dangerous position.—A passenger who continues in a dangerous position with knowledge that it is so, or that the rules of the carrier forbid him to be there, is as a rule held negligent, unless the negligence of the carrier has been such as to be the controlling or proximate cause of the injury. Illustrative cases are grouped in the notes.[37] The rule does not apply to an intoxicated person accepted as a passenger.[38]

Riding on platform or running board of street car.—One is not per se negligent who stands on a street car platform, knowing that it is overcrowded, unless he has knowledge of other facts exposing him to danger,[39] but a rule that passengers ride on front platforms of street cars at their own risk is reasonable, and if knowingly violated by a plaintiff, precludes a recovery,[40] and is not waived by the fact that other passengers are on the front platform when plaintiff enters it.[41] It is not per se negligence to stand or walk on the running board of a crowded street car,[42] but a person riding on the side steps of a street car, where there is room inside.

132 Ala. 431. Car moving slower than a man can walk—Kimber v. Metropolitan St. Ry. Co., 69 App. Div. (N. Y.) 353.

34. Where all the witnesses except plaintiff testify that he was injured while trying to board a moving car on a curve, a verdict for plaintiff must be set aside—Wolf v. Metropolitan St. Ry. Co., 115 N. Y. St. Rep. 257.

35. The jury should be so instructed in an action where plaintiff is injured by a jerk of a slowly moving car which he has stepped on after signaling it—Monroe v. Metropolitan St. R. Co., 79 App. Div. (N. Y.) 587.

36. Texas & P. Ry. Co. v. Rea, 27 Tex. Civ. App. 549.

37. Held negligence per se. Riding on bumper of street car after warning—Nieboer v. Detroit Elec. Ry., 128 Mich. 486. Sitting in a chair in caboose, knowing that train is switching—Freeman v. Pere Marquette R. Co. (Mich.) 91 N. W. 1021; Chicago, R. I. & P. Ry. Co. v. Buie (Tex. Civ. App.) 73 S. W. 853. Stepping onto a forward platform from a car which was to be separated from the train and, on hearing a brakeman call "Look out," stepping back and falling between the cars—Butts v. Cleveland, C., C. & St. L. R. Co. (C. C. A.) 110 Fed. 329. Standing in an open door with hand against the casing. Injury received through the closing of the door—Brineger v. Louisville & N. R. Co., 24 Ky. L. R. 1973, 72 S. W. 783.

Held not negligence per se. Being in cattle car while train is at a stand though there is no right to be there while the train is in motion—Bolton v. Missouri Pac. Ry. Co. (Mo.) 72 S. W. 530. Remaining in furniture car while it is being switched, because of lack of knowledge as to when the journey will be resumed—Texas & P. Ry. Co. v. Adams (Tex. Civ. App.) 72 S. W. 81. Standing in car with goods during switching—Texas & P. Ry. Co. v. Adams (Tex. Civ. App.) 72 S. W. 81. Being on bow-deck of a barge exposed to injury from a towing hauser—Hill v. Starin, 65 App. Div. (N. Y.) 361. White person riding in a car reserved for colored passengers though violating the rules of the company and the direction of the conductor—Florida Cent. & P. R. Co. v. Sullivan, 120 Fed. 799. Failure to secure a seat, where there were but a few vacant seats in the front cars of a train of fourteen and plaintiff passed through seven coaches looking for a seat in vain—Farnon v. Boston & A. R. Co., 180 Mass. 212. Passing from a smoking car to another coach and stepping down on the top step of the car holding by the hand rail—St. Louis, I. M. & S. Ry. Co. v. Leftwich, 117 Fed. 127.

38. Negligence of the carrier in the care of an intoxicated person, accepted by it as a passenger, is not excused by the passenger's negligence in occupying a dangerous position—Wheeler v. Grand Trunk Ry. Co., 70 N. H. 607, 54 L. R. A. 655.

39. Passenger riding on a front platform with others and thrown off by the jostling of the crowd through the driver's attempt to apply brakes—Cattano v. Metropolitan St. R. Co., 173 N. Y. 565.

40. Cincinnati, L. & A. Elec. St. R. Co. v. Lohe (Ohio) 67 N. E. 161. Riding on platform of interurban car, there being vacant seats within the car—Cincinnati, L. & A. Elec. St. R. Co. v. Lohe (Ohio) 67 N. E. 161.

41. Burns v. Boston El. Ry. Co. (Mass.) 66 N. E. 418.

42. Sheeron v. Coney Island & B. R. Co., 78 App. Div. (N. Y.) 476; Anderson v. City Ry. Co., 42 Or. 505, 71 Pac. 659. Riding upon the running board facing in—Purington-Kimball Brick Co. v. Eckman, 102 Ill. App. 183. Passenger thrown back against a pole as the car rounded a curve—Hesse v. Meriden, S. & C. Tramway Co. (Conn.) 54 Atl. 299. A large man walking back on the running board of an open car is not negligent per se so as to preclude a recovery if struck by the girder of a bridge near the track, though the only obstruction in the centre aisle was the dresses of lady passengers sitting near it—San Antonio Traction Co. v. Bryant (Tex. Civ. App.) 70 S. W. 1015.

assumes the risk of being struck by poles near the track.[43] One passing vacant seats while passing along the running board of an open car is negligent if struck by a passing car, though the car that struck plaintiff was a new one of greater width than old ones, and plaintiff cannot show that he had been on the running board on previous occasions without injury.[44] Where a passenger leaning outward from a running board strikes a wagon, the conductor's negligence in increase of speed is not the cause of the injury.[45]

Riding on platform of railroad train.—If, without reasonable excuse, a passenger rides in a place not designed for the carriage of passengers, such as a car platform or steps, he is negligent;[46] though elsewhere it is held that it is not negligence per se to stand on the platform of a moving car,[47] though in violation of a rule of the company.[48] The rules of negligence applicable to street cars do not apply to persons on the platforms of interurban electric railroad cars.[49] A petition which does not show that plaintiff was not unnecessarily and voluntarily riding on a rear platform has been held demurrable.[50]

One who goes on the platform when the train starts to move and jumps in order to avoid being struck by a telegraph pole cannot recover.[51]

The question of whether a negro compelled to ride on the platform by the fact that the car set apart for negroes is crowded by whites, and by the fact that a conductor has refused to transfer him to a train following, is guilty of negligence, is for the jury.[52]

Allowing body to project from car.—Where a safe place is established within the coach, passengers have no right to ride on the platform or extend their persons beyond the car line.[53] Negligence in allowing an arm to extend from the sill of a car window is for the jury,[54] but it is held also that a passenger going to sleep and allowing his arm to project from a car window is negligent per se.[55] One who leans outward from the running board of a street car to signal the conductor is negligent,[56] though the contrary has been held of one on the footboard of an

43. Woodroffe v. Roxborough, C. H. & N. Ry. Co., 201 Pa. 521.

44. Moody v. Springfield St. Ry. Co., 182 Mass. 158.

45. Flynn v. Consolidated Traction Co., 67 N. J. Law, 546.

46. St. Louis, I. M. & S. Ry. Co. v. Leftwich (C. C. A.) 117 Fed. 127; Denny v. North Carolina R. Co., 132 N. C. 340. Person on platform in violation of rule—Kerr v. Chicago, R. I. & P. Ry. Co., 100 Ill. App. 148. Standing on platform in violation of rule and request though there was a custom to violate the rule—Houston & T. C. R. Co. v. Bryant (Tex. Civ. App.) 72 S. W. 885.

47. Doolittle v. Southern Ry., 62 S. C. 130. Riding on platform of a freight caboose in front of several cars of freight and lumber, pushed by the engine from the rear, believing that to ride inside was dangerous—Prescott & N. Ry. Co. v. Smith, 70 Ark. 179.

48. St. Louis S. W. Ry. Co. v. Ball (Tex. Civ. App.) 66 S. W. 879.

49. Cincinnati, L. & A. Elec. St. R. Co. v. Lohe (Ohio) 67 N. E. 161.

50. It is not sufficient to state that not being able to secure a seat in a rear coach which he boarded because of its crowded condition he stood on the rear platform—Meyere v. Nashville, C. & St. L. Ry. (Tenn.) 72 S. W. 114.

51. Lindsay v. Southern Ry. Co., 114 Ga. 896.

52. An instruction that plaintiff was not guilty of contributory negligence, is properly refused—Williams v. International & G. N. R. Co. (Tex. Civ. App.) 67 S. W. 1085.

53. Benedict v. Minneapolis & St. L. R. Co., 86 Minn. 224, 57 L. R. A. 639. A person standing in a place of safety on a street car is guilty of contributory negligence per se if he extends his head outside a railing protecting the platform into the path of a car approaching on the parallel track—Merchant v. South Chicago City Ry. Co., 104 Ill. App. 122.

54. Injury sustained by striking the open door of a freight car left on the switch track—Clerc v. Morgan's L. & T. R. & S. S. Co., 107 La. 370. It is not negligence per se for a passenger reading beside an open window to allow his elbow to extend some three inches beyond the sill—Tucker v. Buffalo Ry. Co., 169 N. Y. 589.

55. Plaintiff testified that he did not think his arm was outside of the car but two witnesses testified that he was asleep and that his arm projected and that there were no marks on the side of the car showing contact with an external object—Chicago, R. I. & P. R. Co. v. Hoover, 3 Ind. T. 693.

56. Struck by passing wagon—Flynn v. Consolidated Traction Co., 67 N. J. Law, 546.

open car who leaned back to place change in his pocket or looked toward a friend also on the footboard.[57]

There can be no recovery where a passenger negligently extends his person beyond the car line from curiosity, though the carrier has permitted his cars to be overcrowded and required passengers to ride on the platform.[58]

Derailment of car.—There is no question of contributory negligence where a person is injured by the derailment of a car in which she is seated.[59]

Acts preparatory to alighting.—Where one, after notifying the conductor to stop at a certain point, rises and places her arm about a child to protect him from falling, and is thrown out while the car goes around a curve after failing to stop, the question of contributory negligence is for the jury.[60] The carrier is not liable for an injury to an infirm passenger occasioned by her arising before the train stopped, there being no unusual jerk, and she having been told by the conductor to wait until there was a stop.[61] It is not negligence per se for a person, after a station has been called, to go on the platform steps of a moving train in readiness to alight,[62] but the question may be for the jury.[63] One standing on the steps of a car about to stop cannot recover for a fall occasioned by the jerking of the car where it was not greater than usual.[64] A passenger is not warranted in assuming that a car will stop on the nearer side of the street so as to permit him to recover for being thrown from the footboard by a jolt, the crossing of the street not being at an unusual speed.[65]

Failure to ask assistance.—Failure to inform employes of a disability, and to ask for assistance in alighting, may be negligence.[66]

Leaving moving train or car.—One unnecessarily and knowingly leaving a railroad train in motion is as a matter of law contributorily negligent.[67] Knowledge of motion is not in all cases required.[68] In some jurisdictions it is held not necessarily negligence to alight from a slowly moving train,[69] or under circumstances

57. Anderson v. City Ry. Co., 42 Or. 505, 71 Pac. 659.

58. It is contributory negligence for a boy sixteen years old, on the platform of a crowded train, to lean out, allowing his head to come in contact with posts—Benedict v. Minneapolis & St. L. R. Co., 86 Minn. 224, 57 L. R. A. 639.

59. Ramson v. Metropolitan St. Ry. Co., 78 App. Div. (N. Y.) 101.

60. Whitaker v. Staten Island Midland R. Co., 72 App. Div. (N. Y.) 468.

61. Passenger arose in obedience to the cry "All hands get out here," her head being bundled up and she being unable to hear well—Illinois Cent. R. Co. v. Boles, 24 Ky. L. R. 2282, 73 S. W. 1034.

62. Southern Ry. Co. v. Roebuck, 132 Ala. 412.

63. Sweet v. Birmingham Ry. & Elec. Co. (Ala.) 33 So. 886. Passenger was holding a valise in one hand and her skirts with the other and train started before she had time to alight but she did not return to the car or hold to the railing and was thrown by a jerk incident to a second stop—Smalley v. Detroit & M. Ry. Co. (Mich.) 91 N. W. 1027.

64. Philips v. St. Charles St. R. Co., 106 La. 592.

65. Nies v. Brooklyn Heights R. Co., 68 App. Div. (N. Y.) 259.

66. A passenger with a weak ankle attempted to alight without looking to see whether there was a portable step or to ascertain the distance to the platform—Young v. Missouri Pac. Ry. Co., 93 Mo. App. 267.

67. Walters v. Chicago & N. W. R. Co., 113 Wis. 367; Illinois Cent. R. Co. v. Cunningham, 102 Ill. App. 206. A woman encumbered by parcels attempting to alight from a moving train in the night, especially if she has been warned—McMichael v. Illinois Cent. R. Co. (La.) 34 So. 110. Plaintiff was permitted to ride on a freight train only as a matter of accommodation and was thrown from the train as it was moving rapidly past his station, though he had been told it stopped there and one of the servants had told him it was time to prepare to get off—Peak's Adm'r v. Louisville & N. R. Co., 23 Ky. L. R. 2157, 66 S. W. 995. Jumping from a train in rapid motion to avoid being carried by his station at which the train has not stopped—Chicago, B. & Q. R. Co. v. Martelle (Neb.) 91 N. W. 364. Evidence held sufficient—La Pointe v. Boston & M. R. R., 182 Mass. 227.

68. Galveston, H. & S. A. Ry. Co. v. Hubbard (Tex. Civ. App.) 70 S. W. 112. Passenger did not look—Brown v. New York, N. H. & H. R. Co., 181 Mass. 365. Jumping in the dark without looking—Oxsher v. Houston, E. & W. T. Ry. Co. (Tex. Civ. App.) 67 S. W. 550. Prevented from seeing by a veil—La Pointe v. Boston & M. R. R., 179 Mass. 535.

69. Pittsburgh, C., C. & St. L. Ry. Co. v. Gray, 28 Ind. App. 588. It is a question for the jury where plaintiff attempted to alight from a vestibuled train at night which had begun to move again after a stop. Plaintiff testified that he did not know the train was moving but there was evidence that the conductor told him to wait and he would

misleading as to speed.[70] An attempt to alight from a moving train is not necessarily gross negligence, as where one preparing to alight alights after the train begins to move.[71] Where there is evidence that the train stopped long enough to allow plaintiff to alight, the jury should be instructed on the question of plaintiff's contributory negligence in failing to use proper diligence to leave the train before it started.[72] Negligence in alighting from a moving street car is for the jury,[73] to be determined from the attending circumstances.[74]

Where the carrier is not negligent, one stepping from a moving street car assumes the risk, though such act is not negligence per se.[75] The person attempting to alight from a moving street car cannot recover for injuries, though he has been unable to notify the conductor to stop.[76]

Alighting at dangerous place.—As a general rule, a passenger assumes the risk when he attempts to alight at a place where he is not invited to do so,[77] but it may be a question for the jury whether a passenger is negligent in getting off at a crossing stop,[78] or in alighting from the side of the train opposite the platform.[79] A passenger is not negligent in alighting from a train, where, after his station has been called, the train stops opposite a building which indicates that the stop was for a station.[80] A street car passenger is not bound to inquire whether the place of stopping is reasonably safe to alight.[81]

Care required after alighting.—One alighting at a regular stopping place is not bound to look for approaching trains on parallel tracks,[82] but a passenger who

stop it, but as to whether plaintiff heard this warning the evidence was conflicting—Walters v. Chicago & N. W. R. Co., 113 Wis. 367. Plaintiff must show he was carefully trying to alight safely—Brown v. New York, N. H. & H. R. Co., 181 Mass. 365.

70. A petition does not show contributory negligence per se where it alleges that plaintiff jumped from a train while it was moving rapidly in the dark, though it was still at the station and plaintiff believed it was moving slowly, no lights being placed so that he could estimate the speed—Texas & P. Ry. Co. v. Crockett, 27 Tex. Civ. App. 463.

71. Chicago, B. & Q. R. Co. v. Winfrey (Neb.) 93 N. W. 526.

72. Texas & P. Ry. Co. v. McKenzie (Tex. Civ. App.) 70 S. W. 237.

73. Canfield v. North Chicago St. R. Co., 98 Ill. App. 1. Slowly moving car—Betts v. Wilmington City Ry. Co. (Del. Super.) 53 Atl. 358. Injury while alighting by a sudden jerking of the car, evidence that plaintiff had signaled conductor to stop, that car had slowed up, and that he had seen the conductor's hand go up as if to signal—Harris v. Union Ry. Co., 69 App. Div. (N. Y.) 385. An instruction that the fact that a car starts before a passenger can alight does not entitle her to jump from it while it is in motion should be modified by requiring that the car must not be going at a rate of speed making it dangerous to do so—Indianapolis St. Ry. Co. v. Hockett (Ind.) 66 N. E. 39. Continuing an attempt to alight after the car started—Indianapolis St. Ry. Co. v. Lawn (Ind. App.) 66 N. E. 508.

74. Bloomington & N. Ry. v. Zimmerman, 101 Ill. App. 184. One who attempts to alight from a car in motion without knowledge of the car employees, may relieve them from negligence in increasing the speed of the car. Evidence held sufficient to show such facts—Blakney v. Seattle Elec. Co., 28 Wash. 607, 68 Pac. 1037.

75. Jones v. Canal & C. R. Co., 109 La. 213. One attempting to get off a street car in motion while the motorman is slowing up after failure to observe a request to stop is negligent—Campbell v. Los Angeles Ry. Co., 135 Cal. 137, 67 Pac. 50.

76. Foran v. Union Traction Co., 22 Pa. Super. Ct. 10.

77. Leaving train at coal chute—Bohannon's Adm'x v. Southern Ry. Co., 23 Ky. L. R. 1390, 65 S. W. 169. Train stopped on switch not to discharge passengers—Chicago, R. I. & P. Ry. Co. v. Sattler (Neb.) 90 N. W. 649, 57 L. R. A. 890. One who, wishing to go to the rear of car of a train, steps off the platform to go back on the outside and is injured by falling through a bridge, it being dark and the passenger being familiar with the station and the bridge, is negligent—Kellogg v. Smith, 179 Mass. 595. One attempting to alight from a rear platform when he knows that assistance will be afforded him at the front end of the car cannot recover for a fall due to the slippery steps, it being raining, snowing and freezing at the time—Pittsburgh, C., C. & St. L. Ry. Co. v. Aldridge, 27 Ind. App. 498.

78. Larson v. Minneapolis & St. L. R. Co., 85 Minn. 387.

79. Owen v. Washington & C. R. R. Co., 29 Wash. 207, 69 Pac. 757.

80. St. Louis, I. M. & S. Ry. Co. v. Farr, 70 Ark. 264.

81. Montgomery St. Ry. Co. v. Mason, 133 Ala. 508. Question is for the jury where plaintiff was injured by stepping into a trench on alighting from a car at night, plaintiff testifying that she received no warning, did not see any ditch, barrier, or light—Wolf v. Third Ave. R. Co., 67 App. Div. (N. Y.) 605.

82. Chicago Terminal Transfer R. Co. v. Schmelling, 197 Ill. 619.

is injured while alighting, through proceeding in a direction where he has not been invited and the carrier has no reason to expect him to be, is not in the exercise of ordinary care,[83] though passengers may leave cars by any exit unless forbidden.[84] A passenger is not bound to keep a greater lookout for defects in a platform than is suggested by ordinary prudence; so it is not contributory negligence to step backward into a hole while the passenger is attempting to safely dispose of her children.[85] Where the passenger was injured in an attempt to reach the depot after being compelled to alight, at a distance therefrom in the dark, the question of negligence may be for the jury.[86]

Directions of passenger to driver of cab.—A passenger of a transfer company is not contributorily negligent in directing the driver to stop at a place not necessarily dangerous, though the driver stops so near a car track that the cab is overturned by a car.[87]

Miscellaneous acts considered as constituting or not constituting negligence are collected in the footnotes.[88]

Questions for jury.—The question of negligence is a matter of law only when the facts are not in controversy, or but one rational inference may be drawn therefrom.[89] Ordinarily, the question is for the jury,[90] and always where the testimony is conflicting.[91] Contributory negligence of a passenger on a mixed train may be for the jury.[92] Negligence of a person attempting to assist a passenger injured while boarding a street car is for the jury.[93]

83. Chicago, B. & Q. R. Co. v. Harrison, 100 Ill. App. 211.

84. Chicago Terminal Transfer R. Co. v. Schmelling, 99 Ill. App. 577.

85. Barker v. Ohio River R. Co., 51 W. Va. 423.

86. Harkness v. Kansas City, M. & B. R. Co. (Miss.) 33 So. 77.

87. Frank Bird Transfer Co. v. Krug (Ind. App.) 65 N. E. 309.

88. A pregnant woman undertaking a journey not negligent unless the undertaking was dangerous in her condition—St. Louis S. W. Ry. Co. v. Ferguson, 26 Tex. Civ. App. 460. A woman is not negligent in wearing a long skirt though her dress catches on the plunger of a street car while she is alighting—Smith v. Kingston City R. Co., 169 N. Y. 616. The fact that plaintiff made a misstep while boarding a train does not require an instruction on the subject of contributory negligence—Texas & P. Ry. Co. v. Gardner (C. C. A.) 114 Fed. 186. Where a husband sues for an injury to his wife caused by the crowded condition of a train compelling her to stand and hold a child, his contributory negligence in permitting her to carry the child is a question for the jury—Texas & P. Ry. Co. v. Rea, 27 Tex. Civ. App. 549. One walking sidewise and holding the rails of a moving street car cannot recover for an injury sustained by falling into an open manhole—Sellers v. Union Traction Co., 21 Pa. Super. Ct. 5. One who steps on a street car without grasping a railing is not per se negligent. After stepping on the platform, plaintiff caught the hand hold with the hand farthest from it, reaching across his body, the other hand being occupied with packages—Birmingham Ry. & Elec. Co. v. Brannon, 132 Ala. 431. A mail agent, thrown from a mail car, cannot recover where he did not have the lower doors across the door opening closed, though the safety bar was so tight in its socket that it could not be placed across the door, it not being defective and the agent having made no attempt to find anything with which to dislodge it—Martin v. Philadelphia & R. Ry. Co., 200 Pa. 603. The question of whether one whose thumb is mashed by the closing of a door of a freight caboose on a sudden jerk of the train is guilty of negligence is for the jury, as is the question of whether a jerk was an extraordinary one—Illinois Cent. R. Co. v. Crady, 24 Ky. L. R. 643, 69 S. W. 706. It is a question for the jury whether a passenger is negligent in passing an unvestibuled sleeper to visit a dining car—Northern Pac. Ry. Co. v. Adams (C. C. A.) 116 Fed. 324.

89, 90, 91. Chicago, B. & Q. R. Co. v. Winfrey (Neb.) 93 N. W. 526. The question of contributory negligence must be submitted to the jury where the inference may result from defendant's evidence that the accident did not occur in the manner contended for by the plaintiff's witnesses without contributory negligence on plaintiff's part—Wimpleberg v. Yonkers R. Co., 115 N. Y. St. Rep. 963. On a conflict of evidence as to whether plaintiff attempted to alight while car was in motion or whether he was thrown there from by a sudden jerk, the question of the locus of negligence is for the jury—Schilling v. Union R. Co., 77 App. Div. (N. Y.) 74; Comerford v. New York, N. H. & H. R. Co., 181 Mass. 528. Where plaintiff was standing in a passenger coach, at the time of injury, the question whether there were vacant seats in forward cars may be left to the jury though defendant's evidence shows that there were some 1102 seats on the train and 952 passengers, and that there were plenty of seats in the two front cars, since defendant's witness might have been mistaken or the jury have disbelieved him—Farnon v. Boston & A. R. Co., 180 Mass. 212.

92. Symonds v. Minneapolis & St. L. Ry. Co. (Minn.) 92 N. W. 409.

(§ 26) *I. Liability of initial or connecting carrier.*—Where the carrier limits its liability toward a passenger to its own line, it is liable for an injury occurring while running its cars a short distance over a connecting line before turning them over thereto.[94]

(§ 26) *J. Limitation of liability.*—Statutes may provide the extent to which liability may be limited.[95] Where there is a custom to carry passengers generally on certain freight trains, contracts with passengers releasing the company from all liability while riding on such freight trains are void, though tickets are furnished by reason thereof at a reduced rate,[96] and one on a freight train in charge of freight is a passenger concerning whom the carrier cannot limit its liability to gross negligence or exempt itself from the exercise of care and diligence.[97] An agreement between a carrier and a person for whom it agrees to haul goods and employees, whereby such person agrees to indemnify the carrier for any damages to which it may be held liable in excess of a certain amount, is valid.[98] Acceptance of a reduced rate ticket, with an indorsement that the person using it assumes the risk of accident and damage, places the duty on the passenger of affirmatively proving negligence.[99] Where tickets are given in consideration of the grant of a right of way subject to a sole condition of personal use, a provision in the tickets exempting the carrier from liability for injury is without consideration and not assented to by use of the ticket.[1]

If it is provided that a person in charge of stock shall ride in the caboose and that if he leave it or pass over or along the cars or track, he assumes the risk, the carrier is nevertheless liable for an injury received by him while in the cattle car, caring for stock, through other cars being bumped into it, the duty of caring for the stock being on him under the contract.[2]

Provisions in passes.—It has been held that provisions in a free pass exempting the carrier from liability for negligence are binding,[3] and contra,[4] an exemption in a free ticket for injury to the person or loss and damage to property does not cover the death of the passenger.[5] A condition for a release of the carrier from all claims for damages for personal injuries, from whatever cause, does not release the carrier from liability for negligence.[6]

Contracts with employes of sleeping car companies.—A carrier transporting a sleeping car is entitled to the benefit of a release from liability for personal injuries, executed by an employe of the sleeping car company to the sleeping car company, since the railroad company is under no legal duty to furnish sleeping

93. Schoenfeld v. Metropolitan St. Ry. Co., 40 Misc. (N. Y.) 201.

94. Oliver v. Columbia, N. & L. R. Co., 65 S. C. 1.

95. Comp. St. c. 72, art. 1, § 5, does not confer the right to limit liability by stipulation, since section 3 confines such right to the exceptions provided therein—Chicago, R. I. & P. R. Co. v. Hambel (Neb.) 89 N. W. 643.

96. Richmond v. Southern Pac. Co., 41 Or. 54, 67 Pac. 947.

97. Pennsylvania Co. v. Greso, 102 Ill. App. 252.

98. Contract to haul defendant's circus train and to provide accommodations on passenger train for defendant's agent, contained a provision that plaintiff should not be liable for any injury to an amount more than $50, and if held liable for a greater sum, defendant would repay the excess—Seaboard Air Line Ry. Co. v. Main, 132 N. C. 445.

99. Common law rule making the carrier liable for a passenger's safety, is waived.—Crary v. Lehigh Val. R. Co., 203 Pa. 525.

1. Dow v. Syracuse, L. & B. Ry., 81 App. Div. (N. Y.) 362.

2. Bolton v. Missouri Pac. Ry. Co. (Mo.) 72 S. W. 530.

3. Payne v. Terre Haute & I. Ry. Co., 157 Ind. 616. Where one riding on a free pass assumes all the risks of accidents, he cannot recover for negligence, though the pass is a breach of statutes relating to interstate commerce—Duncan v. Maine Cent. R. Co., 113 Fed. 508.

4. Code, § 1296, provides that a carrier cannot agree for exemption from liability for injury from its own negligence—Norfolk & W. Ry. Co. v. Tanner (Va.) 41 S. E. 721. Against public policy—Missouri, K. & T. Ry. Co. v. Flood (Tex. Civ. App.) 70 S. W. 331.

5. Northern Pac. Ry. Co. v. Adams, 116 Fed. 324.

6. Dow v. Syracuse, L. & B. Ry., 81 App. Div. (N. Y.) 362.

cars, and where the employe releases the carrier from liability of any nature or character whatsoever, personal injuries caused by the negligence of the carrier are included.[7]

(§ 26) *K. Damages.*[8]—Where the carrier carries the passenger by his station, it is liable for any injuries which may be reasonably foreseen,[9] but he cannot recover for mere mental suffering.[10] One holding a ticket to a point at which a train stops only on signal cannot recover damages for being carried by, where she has informed no one connected with the train as to her destination and voluntarily leaves it though the conductor offers to transport her to the next stop and send her back.[11]

Elements of damage.—Where a woman has been compelled to stand, she may recover for injury on account of having to hold a child not her own, which she assumed to take care of.[12] An officer may show the amount of fees lost by his prevention of completion of his journey.[13] Loss through inability to attend to business may be an element of damage.[14] It may be shown that after his injuries plaintiff still collected his salary as a government employe.[15] An instruction need not call attention to the amount claimed for the expense of nursing and medical services.[16] The question of whether injured feelings are connected with bodily injury is for the jury, as is the question of whether negligence is the proximate cause of injuries.[17]

Excessive damages.—See foot note for consideration of particular verdicts.[18]

Punitive damages may be awarded in cases of gross negligence.[19] The passenger must have been injured by the negligence.[20] There must be willful and reckless disregard of the passenger's right, together with gross negligence, to warrant exemplary damages.[21] Punitive damages may be awarded for a malicious assault by a conductor on a passenger,[22] or for insolence and ridicule of a passenger by an employe.[23] Where an instruction as to punitive damages is given, defendant is entitled to have an instruction as to actual damages in the absence of malice.[24]

7. Russell v. Pittsburgh, C., C. & St. L. Ry. Co., 157 Ind. 305, 55 L. R. A. 253.

8. Merely a few peculiar cases are treated here. For a comprehensive review of all cases see article "Damages."

9. Passenger sustained severe injuries from being compelled to remain several hours in a cold, unlighted depot and in driving to her destination—St. Louis S. W. Ry. Co. v. Ricketts (Tex.) 70 S. W. 315. Evidence of fright after being discharged at a station beyond the proper one, is inadmissible, unless it is shown that the locality was one to occasion fright and that the carrier had knowledge—Central of Ga. Ry. Co. v. Dorsey (Ga.) 42 S. E. 1024. A carrier is not liable for the robbery of a passenger after he is put off at a point beyond his station, defendant having failed to awaken him at the proper place, unless it is shown that the agents had knowledge of the moral repute of the locality where he was ejected—Atkinson v. Pacific Ry. Co., 90 Mo. App. 489. Damages sustained from sickness incurred by a child from falling in the mud and being wet and frightened cannot be recovered where he was carried a short distance past his station and put off without injury and without malice or inhumanity—Rawlings v. Wabash R. Co. (Mo. App.) 71 S. W. 534.

10. Kansas City, Ft. S. & M. R. Co. v. Dalton, 65 Kan. 661, 70 Pac. 645.

11. Pence v. Louisville & N. R. Co., 23 Ky. L. R. 1207, 64 S. W. 905.

12. Texas & P. Ry. Co. v. Rea, 27 Tex. Civ. App. 549.

13. Chicago, R. I. & P. R. Co. v. Hoover, 3 Ind. T. 693.

14. Storrs v. Los Angeles Traction Co., 134 Cal. 91, 66 Pac. 72.

15. Louisville & N. R. Co. v. Carothers, 23 Ky. L. R. 1673, 65 S. W. 833, 66 S. W. 385.

16. International & G. N. R. Co. v. Sampson (Tex. Civ. App.) 64 S. W. 692.

17. Rawlings v. Wabash R. Co. (Mo. App.) 71 S. W. 535.

18. $125 is not excessive where passenger is carried beyond her station and sustains abrasions and bruises while crossing a cattle guard on the way back to the station and falls at other places and becomes thoroughly wet—Rawlings v. Wabash R. Co. (Mo. App.) 71 S. W. 535. $1450 ordered to be reduced to $500 where the arrest of a passenger on a street car was ordered by the conductor, the passenger was released on recognizance and was discharged on the following day, there being no appearance against him—Grayson v. St. Louis Transit Co. (Mo. App.) 71 S. W. 730.

19. Louisville & N. R. Co. v. McClain, 23 Ky. L. R. 1878, 66 S. W. 391.

20, 21. Oliver v. Columbia, N. & L. R. Co., 65 S. C. 1. Evidence that a train was run at the rate of 60 miles an hour over a defective track is sufficient—Griffin v. Southern Ry., 65 S. C. 122.

22. Lexington Ry. Co. v. Cozine, 23 Ky. L. R. 1137, 64 S. W. 848.

23. Street railway company failed to stop at the proper signal and employee insulted the person on his becoming a passenger on

(§ 26) *L. Remedies and procedure. Form of action.*—An action based on negligence in maintenance of a road bed is in tort, though the plaintiff alleges a contract to carry him safely as a passenger.[25]

Venue.—An action by a nonresident against a railroad corporation for personal injuries received in another state must be brought in the county in which the chief officer of the defendant resides or in which it has its chief office.[26]

Defenses.—Recovery under accident policies is not a bar to recovery against the carrier.[27]

Pleading.[28]—Allegations of separate breaches of duty growing out of the same facts do not state separate causes of action.[29] It is not sufficient to show that plaintiff was a passenger to aver that an assault was committed "while plaintiff was engaged in or about becoming a passenger on said car."[30]

Negligence may be alleged generally in the absence of a motion for more specific statement.[31] Use of the word "negligent" may be unnecessary.[32] The fact that elements of negligence are alleged conjunctively does not render proof of all necessary.[33] An allegation that an act was done with knowledge or notice does not charge wantonness.[34] Cases in which the general sufficiency of pleading of negligence is considered are grouped in the notes,[35] so also cases of sufficiency of negativing contributory negligence.[36]

the return trip—Jackson Elec. Ry., L. & P. Co. v. Lowry, 79 Miss. 431.

24. Failure to stop a passenger train in response to a signal at a flag station—Yazoo & M. V. R. Co. v. White (Miss.) 33 So. 970.

25. Chesapeake & N. Ry. Co. v. Hanmer, 23 Ky. L. R. 1846, 66 S. W. 375.

26. Eichorn v. Louisville & N. R. Co., 23 Ky. L. R. 1640, 65 S. W. 797.

27. Averments in an answer that plaintiff is asserting claims for his injuries under accident policies which he held, are properly stricken out—Louisville & N. R. Co. v. Carothers, 23 Ky. L. R. 1673, 65 S. W. 833, 66 S. W. 385.

28. See articles "Negligence" and "Pleading" for discussion of general rules.

29. A complaint alleging in one count that defendant negligently and carelessly caused a train to be suddenly started while plaintiff was alighting, and in another that reasonable time was not allowed plaintiff to alight, does not state two causes of action—Chicago & E. I. R. Co. v. Wallace, 104 Ill. App. 55.

30. Birmingham Ry. & Elec. Co. v. Mason (Ala.) 34 So. 207.

31. Charge of having carelessly and negligently started a car with a sudden jerk while plaintiff was alighting, throwing her to the ground and injuring her, is sufficient—South Chicago City Ry. Co. v. Zerler (Ind. App.) 65 N. E. 599. Where negligence alleged is the failure to provide a safe place to alight, the complaint need not aver what constitutes a safe place or give a minute description of the place where the stop was made, and of the injuries—Montgomery St. Ry. Co. v. Mason, 133 Ala. 508.

32. An averment that while plaintiff was attempting to alight, after the carrier had caused its passengers to go on the platform for the purpose of getting off, the train suddenly jerked and threw her off the car, is sufficient—Cincinnati, H. & I. R. Co. v. Worthington (Ind. App.) 66 N. E. 478.

33. Duell v. Chicago & N. W. Ry. Co., 115 Wis. 516.

34. Birmingham Ry. & Elec. Co. v. Butler, 135 Ala. 388.

35. Pleading sudden jerk—Gorman v. St. Louis Transit Co., 96 Mo. App. 602. Petition where a passenger was injured by reason of the distance from a car step to the ground held good against general demurrer—International & G. N. R. Co. v. Clark (Tex. Civ. App.) 71 S. W. 587. Allegation that plaintiff was injured by the negligence of the driver of the carriage in which she was transported in stopping it too near the track, and by the negligence of the street car company in failing to operate its cars so as to avoid a collision, is sufficient against a demurrer for want of facts—Frank Bird Transfer Co. v. Krug (Ind. App.) 65 N. E. 309. A declaration setting forth relation of carrier and passenger and averring defendant failed to comply with its duty to provide suitable gates, safeguards to prevent persons falling between cars, by reason of which plaintiff was injured, is sufficient as against a motion in arrest of judgment for plaintiff—Lake St. El. R. Co. v. Burgess, 200 Ill. 628. Plaintiff alleging that a train was so negligently managed that while running at a speed of 10 miles an hour, it was suddenly stopped and plaintiff injured by being thrown with violence from his seat, is good as against a demurrer that no rate of speed can be said to be negligence per se—Baltimore & O. S. W. R. Co. v. Harbin (Ind.) 67 N. E. 109. An averment that defendant negligently failed to carry plaintiff safely and so negligently and unskillfully conducted itself that plaintiff was thrown to the floor, is sufficiently certain—Southern Ry. Co. v. Crowder, 135 Ala. 417. Petition construed as to whether it presented the issue of failure to open a ticket office promptly, warranting the giving of an instruction on such theory—St. Louis S. W. Ry. Co. v. Cannon (Tex. Civ. App.) 71 S. W. 992. Sufficiency of complaint for injuries received while crossing a track after alighting from defendant's train—Savannah, F. & W. Ry. Co. v. Hatcher,

Allegations as to manner and cause of the accident become immaterial where defendant admits the derailment by reason of which the injuries were sustained.[37]

Where contributory negligence is set up as a defense, it must be alleged that plaintiff failed to exercise ordinary and reasonable care or that he saw the cause of the accident.[38]

A complaint alleging that plaintiff was rendered unable to attend to business may be amended at the trial to show the nature of his business.[39] The complaint may be amended to conform to proof, where the variance does not affect the cause of action but merely plaintiff's contributory negligence.[40]

Conformity of pleadings and proof and variance.—Proof of the accident must conform to the allegations.[41] If negligence is pleaded specifically, the proof will be confined to the allegations,[42] and negligence not pleaded cannot be shown.[43] Evidence of particular acts, not set out in detail in the petition, done at the time of the injury may be admissible to illustrate the manner in which plaintiff claimed the injury occurred.[44] Matters of inducement need not be established.[45]

115 Ga. 379. It is not an allegation of specific negligence to allege "that the running gear, that is to say the wheels, axles and other machinery, by means of which the said car ran along said track, were defective and out of order and not fit for the purpose of supporting said car on said track," and, after averring knowledge, that the defendant "ran the said car along the said track and into said curve at a high rate of speed"—Johnson v. St. Louis & S. Ry. Co. (Mo.) 73 S. W. 173. Complaint is sufficiently specific which alleges that plaintiff's father, while a passenger on defendant's train, was killed by its derailment occasioned by the negligence of defendant's servants and agents in charge—Galveston, H. & S. A. Ry. Co. v. Contreras (Tex. Civ. App.) 72 S. W. 1051. Sufficiency of a pleading as to averments that an injury was due to the negligence of the lessee of a lessor company made defendant—Chicago & W. I. R. Co. v. Doan, 195 Ill. 168.

36. An allegation that it was the duty of a brakeman to assist passengers in safely alighting, is a sufficient averment that advice and assistance to a passenger to alight from a moving train was in the scope of his employment—Pittsburgh, C., C. & St. L. Ry. Co. v. Gray, 28 Ind. App. 588. An allegation that a car was about to collide with a locomotive is a sufficient allegation that a collision was imminent—Selma St. & Suburban Ry. Co. v. Owen, 132 Ala. 420.

37. McNeill v. Durham & C. R. Co., 130 N. C. 256.

38. It is not sufficient to allege facts indicating that it could have been seen—Montgomery St. Ry. Co. v. Mason, 133 Ala. 508.

39. Buckbee v. Third Ave. R. Co., 64 App. Div. (N. Y.) 360.

40. A complaint averring that plaintiff was thrown by a sudden start of the car after it had stopped, may be amended to conform to proof that the jerk occurred before the car had quite stopped—Scarry v. Metropolitan St. Ry. Co., 115 N. Y. St. Rep. 284.

41. **Variance held fatal.** Averments that plaintiff was thrown between cars while attempting to board and proof of being thrown under a car after stepping on its platform—Birmingham Ry. & Elec. Co. v. Brannon, 132 Ala. 431. Allegation that a motorman negligently permitted a minor to ride on the foot board during his journey, and evidence that he rode on the front platform until within a block of his home, where the motorman intended to let him off and there stepped down on the foot board to leave the car—Richmond Ry. & Elec. Co. v. West, 4 Va. Sup. Ct. 112, 40 S. E. 643. Averments that plaintiff was thrown to the ground by the force of a collision, proof that plaintiff jumped to escape the collision—McAllister v. People's Ry. Co. (Del. Super.) 54 Atl. 743. Allegations that while plaintiff was in the act of alighting from a car which had completely stopped, it started with great suddenness and velocity throwing her, proof that plaintiff stepped off a car before it had come to a full stop—Coleman v. Metropolitan St. Ry. Co., 115 N. Y. St. Rep. 836.

Immaterial variance. Allegation that a car was caused to lurch back and forward, evidence that the lurch was sideways—Hicks v. Galveston, H. & S. A. Ry. Co. (Tex.) 72 S. W. 835. Allegation that plaintiff paid his fare to a certain point and proof that he paid it to a point a mile beyond when, on being informed that the train did not stop at the latter point, with the assent of the conductor he proposed to get off at the nearer one—Southern Ry. Co. v. Lollar, 135 Ala. 375. Allegation that a conductor in charge of a street car was unfit, is supported by proof that the conductor wilfully knocked plaintiff from a car step—Willis v. Metropolitan St. Ry. Co., 76 App. Div. (N. Y.) 340. An allegation that a conductor negligently and recklessly interfered with plaintiff while attempting to board a car, is supported by proof that the conductor wilfully knocked plaintiff from the car steps—Id.

42. Derailment of a train—Johnson v. Galveston, H. & N. Ry. Co., 27 Tex. Civ. App. 616. Under a declaration alleging a defective airbrake, evidence that control of the car was lost through a snap switch being closed which should have been open, is not admissible—McAllister v. People's Ry. Co. (Del. Super.) 54 Atl. 743.

43. Absence of light at a station—Milligan v. Texas & N. O. Ry. Co., 27 Tex. Civ. App. 600. Bad condition of track—Nies v. Brooklyn Heights R. Co., 68 App. Div. (N. Y.) 259. In the absence of an averment, plaintiff cannot show that while standing on the foot board he lost his balance by reason of jolting, due to the rough condition of the track—Richmond Ry. & Elec. Co. v. West, 4 Va. Sup. Ct. 112, 40 S. E. 643.

44. Central of Georgia Ry. Co. v. McKinney, 116 Ga. 13.

In an action for an assault, plaintiff may testify to remarks of the employes after assaulting him, where it is alleged that after the assault, the employes continued to insult and abuse plaintiff.[46]

Under a *general denial* in an action for injury to one in charge of stock, while in the car tending the stock, a provision in the contract requiring plaintiff to ride in the caboose may be admitted.[47]

Special pleas which fail to negative the averments of negligence of the complaint are subject to demurrer.[48]

Presumptions and burden of proof.—To render the doctrine res ipsa loquitur applicable, the thing must indicate the negligence of defendant.[49] The doctrine applies to the derailment of street cars operated by mechanical or electrical means.[50] Evidence of a contract of carriage and injury to plaintiff while a passenger thereunder throws the burden of showing freedom from negligence on defendant,[51] or of showing that the injury arose from the negligence of the passenger or the violation of some regulation of the carrier known to him.[52] The rule extends to carriers by street cars,[53] or by steamboat.[54] The presumption of negligence from the happening of an accident does not arise unless there is evidence tending to connect the carrier or its employes or some of the appliances of transportation with the injury,[55] but a showing of an injury from a defect in anything which a carrier is bound to supply,[56] or from an apparatus wholly within the control of the carrier, is sufficient.[57] Particular cases are grouped in the notes.[58] Where injuries

45. Where it is alleged that a door was opened by the conductor and that sparks escaping from the engine, struck plaintiff, it is not necessary to establish the fact that the door was opened by the conductor, or submit it as an issue—St. Louis S. W. Ry. Co. v. Parks (Tex. Civ. App.) 73 S. W. 439.

46. Statement of porter "That is my bread and butter and I would do it again"—Shaefer v. Missouri Pac. Ry. Co. (Mo. App.) 72 S. W. 154.

47. Bolton v. Missouri Pac. Ry. Co. (Mo.) 72 S. W. 530.

48. An averment that plaintiff was thrown by the starting of a train as she was attempting to board it as a passenger by invitation of an agent or servant of defendant having authority to extend such invitation is not negatived by a plea that the train had stopped sufficiently long for her to have boarded the train safely, or by pleas that she was attempting to get on without knowledge of the conductor or persons in charge of the train—Alabama Midland Ry. Co. v. Horn, 132 Ala. 407.

49. Paynter v. Bridgeton & M. Traction Co., 67 N. J. Law, 619.

50. Adams v. Union Ry. Co., 80 App. Div. (N. Y.) 136.

51. Texas & P. Ry. Co. v. Gardner (C. C. A.) 114 Fed. 186; Le Blanc v. Sweet, 107 La. 355.

52. Chicago, B. & Q. R. Co. v. Winfrey (Neb.) 93 N. W. 526; Texas & P. Ry. Co. v. Gardner (C. C. A.) 114 Fed. 186.

53. Brimmer v. Illinois Cent. R. Co., 101 Ill. App. 198.

54. Where it is shown that a passenger on a steamboat was drowned in an attempt to transfer her to the shore, the burden is on the carrier to show that the accident was without its fault—Le Blanc v. Sweet, 107 La. 355.

55. It is not sufficient to show that a foreign body came through a window and struck plaintiff without other explanation of what the body was or how it happened to come into the car—Ault v. Cowan, 20 Pa. Super. Ct. 616. Negligence in jerking the train while stopping, causing a door to be violently closed upon plaintiff's hand, she having placed it on the door jamb to prevent herself from being thrown down, must be established by plaintiff—Denver & R. G. R. Co. v. Fotheringham (Colo. App.) 68 Pac. 978.

56. Davis v. Paducah Ry. & Light Co., 24 Ky. L. R. 135, 68 S. W. 140.

57. Chicago City Ry. Co. v. Morse, 98 Ill. App. 662.

58. **Facts raising presumption.** Injury by sparks escaping from the engine—St. Louis S. W. Ry. Co. v. Parks (Tex. Civ. App.) 73 S. W. 439. Starting of car while passenger is alighting—United Rys. & Elec. Co. v. Beidelman, 95 Md. 480. Collision with car of another company (Construing Code Civ. Proc. §§ 1869, 1981, 1963)—Osgood v. Los Angeles Traction Co., 137 Cal. 280, 70 Pac. 169. Collision—Sambuck v. Southern Pac. Co., 138 Cal. xix., 71 Pac. 174. Shock on taking hold of the rail of a street car to board it after a stop for such purpose—Dallas Consol. Elec. St. Ry. Co. v. Broadhurst (Tex. Civ. App.) 68 S. W. 315. Falling of trolley pole—Chicago City Ry. Co. v. Carroll, 102 Ill. App. 202. Passenger at a station being struck by a lump of coal from the tender of a passing train—Louisville & N. R. Co. v. Reynolds, 24 Ky. L. R. 1402, 71 S. W. 516. Breaking of an axle injuring a drover riding on a freight train—Western Maryland R. Co. v. State, 95 Md. 637.

Failure of presumption. Mere fall without showing of cause—Paynter v. Bridgeton & M. Traction Co., 67 N. J. Law, 619. Mere fact that a drover in charge of stock is killed—Western Maryland R. Co. v. State, 95 Md. 637. The mere presence of saw dust and shavings and fragments of wood on an elevated rail-

result from derailment and plaintiff does not rest on the presumption arising from the fact, he must show by his evidence, negligence on the part of defendant.[59] Where negligence is alleged to have been in having caused plaintiff to jump by reason of an appearance of imminent danger, the plaintiff should show that the appearance was such as to convince a reasonable person of the imminence of such danger.[60] If a blow is shown to have resulted from the carrier's negligence, and plaintiff is shown to suffer from shock, the result of a jar to her nervous system, she is not bound to show that the shock was the consequence of the blow, it being presumed that the jar and blow were due to the same cause.[61] The burden may remain on plaintiff after all the proof is in to show negligence,[62] as where there has been a showing of contributory negligence.[63] The fact that plaintiff fails to establish a certain theory of the accident does not relieve defendant from the duty of showing that it was free from negligence,[64] and see for sufficiency of evidence to shift burden.[65]

Admissibility of evidence.—Decisions as to admissibility of evidence in actions against carriers for personal injuries are collected in the foot notes.[66]

road structure is not evidence of negligence where a passenger is injured thereby, and if plaintiff testifies that she does not know whether the saw dust was thrown or blown down and it is proved that there was considerable wind at the time, she cannot recover under the doctrine of res ipsa loquitur—Wadsworth v. Boston El. R. Co. (Mass.) 66 N. E. 421.

59. Buckland v. New York, N. H. & H. R. Co., 181 Mass. 3.

60. Birmingham Ry. & Elec. Co. v. Butler, 135 Ala. 388.

61. Homans v. Boston El. Ry. Co., 180 Mass. 456.

62. As where he has made a prima facie case in an action for injuries sustained in a derailment, that the car was going at "a pretty good rate" and that the accident happened, where there was a junction with side tracks—Hollahan v. Metropolitan St. Ry. Co., 73 App. Div. (N. Y.) 164.

63. Richmond Pass. & Power Co. v. Allen (Va.) 43 S. E. 356.

64. Failure of a passenger to establish that an accident was due to defective insulation—D'Arcy v. Westchester Elec. Ry. Co., 115 N. Y. St. Rep. 952.

65. Evidence held insufficient to discharge the burden on the carrier of explaining an accident resulting from the refusal of an engine to work—Walker v. Wilmington Steam Boat Co., 117 Fed. 784. Proof of an accident by the sudden and unexplained stopping of a street car, raises a presumption of negligence not overcome by evidence of the use of the best known appliances, careful supervision and skillful service—Langley v. Metropolitan St. Ry. Co., 36 Misc. (N. Y.) 804.

66. In general. Evidence of negligence may go to the jury though not shown to be the proximate cause of the injury—Doolittle v. Southern Ry., 62 S. C. 130. Possession of money to pay fare and intention to become a passenger is admissible where plaintiff's intestate was killed at a station—Chicago & E. I. R. Co. v. Huston, 95 Ill. App. 350. Injury to plaintiff's hat, after he left the place where he was injured cannot be shown—Louisville & N. R. Co. v. Carothers, 23 Ky. L. R. 1673, 65 S. W. 833, 66 S. W. 385. What took place in the car at the time of the accident is admissible—Id. Where negligence is charged in starting the car with a jerk after a stop a conductor cannot be examined as to speed before coming to the stop—Birmingham Ry. & Elec. Co. v. Ellard, 135 Ala. 433. If alleged that plaintiff, the morning after the accident, was arraigned for intoxication, the officer who took her to court should be allowed to state what plea he made at her request and what admissions she had made as to her condition the night before—Link v. Brooklyn Heights R. Co., 64 App. Div. (N. Y.) 406. Where there is evidence of negligence in that a steamboat was being driven with more than usual speed, the usual speed may be properly submitted to the jury. Plaintiff was injured by reason of the boat striking a tree knocking it over on him, while it was being attempted to make a landing, bow on, the river being bank full, and there being an eddy in front of the landing—Louisville & E. Mail Co. v. Gilliland, 24 Ky. L. R. 2081, 72 S. W. 1101. Plaintiff having been compelled to stand on the platform of an excursion train by reason of its overcrowded condition, it may be shown that the excursion was advertised and large crowds expected—Williams v. International & G. N. R. Co. (Tex. Civ. App.) 67 S. W. 1085. Where an element of damage alleged in compelling the plaintiff to ride in a second class car, though holding a first class ticket, was that rough language was used in her presence, evidence of the profanity of one of the passengers is admissible—Texas & P. Ry. Co. v. Kingston (Tex. Civ. App.) 68 S. W. 518. Where an accident occurred from the failure of an engineer to obey signals of the conductor, evidence that the conductor thought the passenger had alighted is immaterial, it not appearing that his action would have been different—Simmons v. Oregon R. Co., 41 Or. 151, 69 Pac. 440, 1022. In an action for negligently showing a passenger into the wrong car, the unused portion of a ticket may be admitted to show the contract of transportation—International & G. N. R. Co. v. Evans (Tex. Civ. App.) 70 S. W. 351. Use of steps and station platform is admissible to show their adoption by defendant as part of its accommodations—Smoak v. Savannah, F. & W. R. Co., 65 S. C. 299. It may be shown that others jumped off just ahead of plain-

Sufficiency of evidence.—Where evidence is equally consistent with the absence and presence of negligence, plaintiff cannot recover.[67] Under a general denial,

tiff under similar circumstances, as showing that plaintiff thought he might jump with safety—Texas & P. Ry. Co. v. Crockett, 27 Tex. Civ. App. 463; evidence of a custom to notify passengers of the approach of a curve is inadmissible, where there is no evidence that such notice was not given. Where the injury occurred by a person being thrown against plaintiff while the car was rounding a curve, evidence that the person so thrown was talking to the conductor just before the accident is immaterial, and evidence of the peculiar motion of the car in going around a curve at other times is inadmissible, there being no allegation that the road bed was improper or out of order, or that the car was not a proper one, properly equipped—Merrill v. Metropolitan St. Ry. Co., 73 App. Div. (N. Y.) 401. Evidence that blood was seen running from the heads of other persons after the collision, is admissible to show its violence—Larkin v. Chicago & G. W. Ry. Co. (Iowa) 92 N. W. 891. A surgeon in defendant's employ sent to the scene of the accident may be asked as to his efforts to find out who were injured—Pittsburgh, C., C. & St. L. Ry. Co. v. Story, 104 Ill. App. 132. If it is alleged that the plaintiff alighted at a wrong station at defendant's porter's invitation, it may be shown that the porter is only required to announce stations and assist passengers to alight and not required to notify particular passengers where they should get off—Texas Midland R. v. Terry, 27 Tex. Civ. App. 341. Where the injury was from an electric shock, another person may testify that he was shocked on the same day on the same car—Dallas Consol. Elec. St. Ry. Co. v. Broadhurst (Tex. Civ. App.) 68 S. W. 315. Where the person for whom recovery is sought was one to whom defendant omitted no duty, the question as to whether it was negligence to allow two trains to collide in the day time is irrelevant, and in the same case a witness need not be allowed to testify that he had been examined before a railroad commission as to double headers—Crawleigh v. Galveston, H. & S. A. Ry. Co. (Tex. Civ. App.) 67 S. W. 140. Where defendant claims that plaintiff is chargeable with knowledge of the nearness of poles to the track by the fact that he has passed other similar poles, it may be shown that such poles were placed at a safe distance from the track—Hesse v. Meriden, S. & C. Tramway Co. (Conn.) 54 Atl. 299.

Construction of cars. Proof that appliances on new cars were not used on old cars does not tend to show negligence in the use of the latter—Moody v. Springfield St. Ry. Co., 182 Mass. 158. Where plaintiff was injured while seated in defendant's car, evidence of the car's construction and furnishing is admissible as part of the res gestae —Southern Ry. Co. v. Crowder, 130 Ala. 256.

Condition of tracks and premises. Where the declaration charges that the car was so run as to throw defendant out by a violent lurch, the condition of the track and rails at the place of the accident may be shown—Fitch v. Mason City & C. L. Traction Co., 116 Iowa, 716. On an injury from a broken rail, evidence that broken rails had been seen on other portions of the road is inadmissible, either to rebut evidence that an examination a short time before the wreck would have shown a broken rail, had there been one, or to show that the rail was broken before the train went on it—Whittlesey v. Burlington, C. R. & N. Ry. Co. (Iowa) 90 N. W. 516. Where it is alleged that there was too great a distance from the car step to the ground, the presence of a ditch at the place of accident may be shown, and a witness may testify that there was a fill at the place of accident as tending to show the absence of a platform and the distance to the ground—International & G. N. R. Co. v. Clark (Tex. Civ. App.) 71 S. W. 587.

Sufficiency of stop. In order to show that a train did not make a reasonable stop, it may be shown that a third person who had purchased a ticket was, by reason of its starting, unable to board the train—Texas & P. Ry. Co. v. Crockett, 27 Tex. Civ. App. 463. Evidence of a crowded condition of cars and the possibility of getting on another coach may be admitted as bearing on the reasonableness of time given to change cars—Oliver v. Columbia, N. & L. R. Co., 65 S. C. 1.

Carrier's rules. Rules of the company having no relation to the issues, cannot be introduced—Deutschmann v. Third Ave. R. Co., 78 App. Div. (N. Y.) 413.

City ordinances. Where plaintiff was injured while passing from the car to the sidewalk, an ordinance requiring a street railroad company to keep a space about one foot outside its tracks in repair is admissible—Fielders v. North Jersey St. Ry. Co., 67 N. J. Law, 76. Where a passenger sustained an injury by stepping into a hole on alighting from a street car, a resolution of the council giving authority to a paving company to take up the paving laid by the street car company and keep the street in accordance with the city's specifications, is admissible to show that the carrier had been relieved from the obligation of keeping the street in repair; or, though the street car company was not relieved of the obligation to keep the street in repair by the city's action, as bearing on the question of negligence (construing Railroad Law, § 98; Syracuse City Charter, §§ 30, 138)—Welch v. Syracuse Rapid Transit Ry. Co., 70 App. Div. (N. Y.) 362. Where negligence alleged is in running at a speed violating a city ordinance, the ordinance is admissible in evidence. Passenger was knocked from the running board by a bridge girder—San Antonio Traction Co. v. Bryant (Tex. Civ. App.) 70 S. W. 1015.

Conversations and statements of employes. Statements of a railroad commissioner to a railroad official are admissible to show notice of the condition of a depot and platform—Smoak v. Savannah, F. & W. R. Co., 65 S. C. 299. Evidence of conversation with a brakeman about holding a train is admissible, where the contention is concerning the holding of a train at a regular stopping place to allow plaintiff to alight and secure a ticket, and it may also be shown that plaintiff was directed by the conductor to get off at the station and purchase a ticket—Chicago & A. R. Co. v. Flaharty, 96 Ill. App. 563. Where plaintiff was thrown to the floor by a sudden stop, a conversation with the

there must be evidence that defendant owned or operated the road or car on which plaintiff was a passenger.[68] Where plaintiff's case rests on her unsupported testimony partially contradicted by her own witnesses, it is not sufficient as against clear evidence of contributory negligence.[69] Where it is alleged that injuries were received through the negligence of servants in charge of certain cars, it is not necessary that it be shown which servant was negligent.[70] A statement by the passenger that he was not thrown, but that a ring on his hand was caught on a car handle, tearing his finger, is not contradictory of a claim at the trial that his finger was torn by a sudden forward movement of the car.[71] Cases in which the sufficiency of evidence with regard to particular allegations of negligence has been considered are grouped in the foot notes.[72]

conductor by plaintiff on entering the car is admissible to show the carrier's knowledge that plaintiff was a cripple—Louisville, H. & St. L. R. Co. v. Bowlds, 23 Ky. L. R. 1202, 64 S. W. 957. Evidence that a brakeman when he announced the station told plaintiff to follow him, inducing her to leave her seat, is admissible. The fact that plaintiff while standing up in the aisle was thrown to the floor by a sudden jerk was pleaded—Id.

67. Injury received through stepping on a nail when leaving a street car—Cahn v. Manhattan Ry. Co., 37 Misc. (N. Y.) 824.

68. Indianapolis St. Ry. Co. v. Lawn (Ind. App.) 66 N. E. 508.

69. Attempt to alight from moving car—Hogan v. Metropolitan St. Ry. Co., 71 App. Div. (N. Y.) 614.

70. The rule that if plaintiff pleads specific negligence he must prove it, does not apply to an averment that defendant "did by the servants in charge of said car and its servants in charge of another of the cars, so carelessly manage and control said cars as to cause and suffer the same to collide"—Malloy v. St. Louis & S. Ry. Co. (Mo.) 73 S. W. 159.

71. Tooker v. Brooklyn Heights R. Co., 80 App. Div. (N. Y.) 371.

72. To show payment of fare causing person to become passenger on freight train—Crawleigh v. Galveston, H. & S. A. Ry. Co. (Tex. Civ. App.) 67 S. W. 140. To connect injury with accident—Hicks v. Galveston, H. & S. A. Ry. Co. (Tex. Civ. App.) 71 S. W. 322; Nicholson v. Northern Pac. Ry. Co. (C. C. A.) 114 Fed. 89; Buckbee v. Third Ave. R. Co., 64 App. Div. (N. Y.) 360. To connect an injury with an accident so as to permit testimony of the condition resulting from the injury two and a half years after the accident—Muller v. Metropolitan St. R. Co., 77 App. Div. (N. Y.) 221. Throwing passenger from street car—South Chicago City Ry. Co. v. Dufresne, 200 Ill. 456; Ackerstadt v. Chicago City Ry. Co., 194 Ill. 616; Witherington v. Lynn & B. R. Co., 182 Mass. 596, 66 N. E. 206; Berry v. Utica Belt Line St. R. Co., 76 App. Div. (N. Y.) 490. Sudden stop—Chicago City Ry. Co. v. Morse, 197 Ill. 327; Erwin v. Kansas City, Ft. S. & M. R. Co., 94 Mo. App. 289; Smalley v. Detroit & M. Ry. Co. (Mich.) 91 N. W. 1027. Person boarding car—Winchell v. St. Paul City Ry. Co., 86 Minn. 445. Jerking of freight train—Southern R. Co. v. Vandergriff, 108 Tenn. 14. Evidence held insufficient to show mismanagement of a freight train by which plaintiff riding in charge of stock was thrown out of a bunk—Frohriep v. Lake Shore & M. S. Ry. Co. (Mich.) 91 N. W. 748. To show negligence in the operation of a mixed train—Symonds v. Minneapolis & St. L. Ry. Co. (Minn.) 92 N. W. 409. To overcome prima facie case of negligence resulting from a train breaking in two—Larkin v. Chicago & G. W. Ry. Co. (Iowa) 92 N. W. 891. To require submission to the jury of the question as to whether a motorman on a car which struck a passenger after alighting, sounded his gong—Hornstein v. United Rys. Co. (Mo. App.) 70 S. W. 1105. Missiles thrown by strikers—Fewings v. Mendenhall (Minn.) 93 N. W. 127. Damages sustained in the ensuing panic after explosion of controller—Dunlay v. United Traction Co., 18 Pa. Super. Ct. 206. Evidence held sufficient to support defendant's theory that an assault by its conductor was provoked by plaintiff after he had jumped from the car while in motion and during the course of a conversation with the conductor, who had alighted to make inquiries—James v. Metopolitan St. Ry. Co., 80 App. Div. (N. Y.) 364. Negligent construction of car window—International & G. N. R. Co. v. Phillips (Tex. Civ. App.) 69 S. W. 107. To establish knowledge of plaintiff's employee of use of profane language by a fellow passenger, and that plaintiff was suffering from the overheated condition of a car, it is sufficient to show that the conductor had taken up tickets in the car and that other employees swept it out after plaintiff was a passenger—Texas & P. Ry. Co. v. Kingston (Tex. Civ. App.) 68 S. W. 518. To show that a derailment was caused by defects in the flange of a wheel—Johnson v. St. Louis & S. Ry. Co. (Mo.) 73 S. W. 173. Street car jumping track—Hollahan v. Metropolitan St. Ry. Co., 73 App. Div. (N. Y.) 164. Evidence that plaintiff's foot caught and that he fell when he pulled to get it loose as he was getting off a car, does not establish negligence of the carrier—Howell v. Union Traction Co., 202 Pa. 338. Verdict for plaintiff not sustained on evidence that an accident resulted from the effects of an eddy and a stiff wind which, while possible of being overcome by the use of greater speed, use of such speed was prevented by due care of passengers—Louisville & E. Mail Co. v. Gilliland, 24 Ky. L. R. 2081, 72 S. W. 1101. Evidence held insufficient to show that a car was not stopped at a safe place or that the conductor was negligent in failing to warn a person of an excavation with which the street car company was in no way connected—MacKenzie v. Union Ry. Co., 115 N. Y. St. Rep. 748. A mere map designating the railroad company by name is not sufficient to show ownership of a street railway at the

Confusing and misleading instructions.—Decisions as to the definiteness and singleness of issues presented by instructions are grouped in the footnotes.[73]

Instructions as to burden of proof.[74]—Instructions should be so framed as to indicate the burden of proof without expressly referring to it.[75] An instruction denying the weight of the accident itself as an evidentiary fact proving negligence is not error, where plaintiff's theory as to the cause of the accident has been overthrown by sufficient evidence.[76]

Instructions invading province of jury.—The existence of negligence or of disputed facts should not be assumed.[77]

scene of the accident—Citizen's St. R. Co. v. Stockdell, 159 Ind. 25.

Starting or jerking while passenger is alighting. Toler v. Yazoo & M. V. R. Co. (Miss.) 31 So. 788; Baldwin v. Grand Trunk R. Co., 128 Mich. 417; Steinle v. Metropolitan St. Ry. Co., 69 App. Div. (N. Y.) 85; Ludeman v. Third Ave. R. Co., 72 App. Div. (N. Y.) 26; Muller v. Metropolitan St. R. Co., 77 App. Div. (N. Y.) 221; Houston & T. C. R. Co. v. Harris (Tex. Civ. App.) 70 S. W. 335; Bartle v. Houghton County St. Ry. Co. (Mich.) 93 N. W. 620; Doolittle v. Southern Ry., 62 S. C. 130. Rapid rounding of a curve, while plaintiff was standing preparing to alight—Whitaker v. Staten Island Midland R. Co., 72 App. Div. (N. Y.) 468. Starting of car by negligence of defendant's employees, where it is contended that a starting signal was given by some one on the rear platform—O'Neil v. Lynn & B. R. Co., 180 Mass. 576.

Negligence with regard to tracks or premises. Ice on street car steps—Herbert v. St. Paul City Ry. Co., 85 Minn. 341; Richmond Ry. & Elec. Co. v. West, 4 Va. Sup. Ct. 112, 40 S. E. 643; Foster v. Old Colony St. Ry. Co., 182 Mass. 378. Injury from being thrown under a car at a station by a crowd, the car having entered the station at a dangerous rate of speed and there being no one to control or direct the movements of the crowd—Muhlhause v. Monongahela St. Ry. Co., 201 Pa. 237. Passenger's arm struck by defective mail crane—Baltimore & O. S. W. Ry. Co. v. Sims, 28 Ind. App. 544. Evidence held insufficient to show that a derailment was due to negligence in the construction of a track, as against a theory that a rail had been intentionally removed—Whipple v. Michigan Cent. R. Co. (Mich.) 90 N. W. 287. Platform not sufficiently lighted—Duell v. Chicago & N. W. Ry. Co., 115 Wis. 516. Unlighted platform—Kansas City, M. & B. R. Co. v. McShan (Miss.) 33 So. 223. Failure to keep station grounds lighted and safe—Davis v. Houston, E. & W. T. Ry. Co. (Tex. Civ. App.) 68 S. W. 733; Duell v. Chicago & N. W. Ry. Co., 115 Wis. 516. Express invitation by agent to pass over dangerous grounds—Davis v. Houston, E. & W. T. Ry. Co. (Tex. Civ. App.) 68 S. W. 733. Ninety-one year old plaintiff got off on the wrong side of the train, being told by the conductor that it was safe, and when after the train left, while walking along, what he supposed was the platform, in the dark, fell off and was injured, held sufficient against motion for nonsuit—Owen v. Washington & C. R. R. Co., 29 Wash. 207, 69 Pac. 757. To show that a cold contracted by an infant plaintiff was due to the negligence of the carrier in failing to heat its cars—St. Louis S. W. Ry. Co. v. Duck (Tex. Civ. App.) 72 S. W. 445.

Contributory negligence. Berry v. Utica Belt Line St. R. Co., 76 App. Div. (N. Y.) 490. Attempting to alight from a street car—Cincinnati, H. & I. R. Co. v. Worthington (Ind. App.) 65 N. E. 557. Sudden starting of train—Illinois Cent. R. Co. v. Taylor, 24 Ky. L. R. 1169, 70 S. W. 825. Standing on the platform preparing to alight—Baltimore Consol. Ry. Co. v. Foreman, 94 Md. 226. Standing on platform—Farnon v. Boston & A. R. Co., 180 Mass. 212. Care with regard to slippery steps—Foster v. Old Colony St. Ry. Co., 182 Mass. 378. Passing around the rear of a street car, after alighting, on the track of a car moving in the opposite direction—Harten v. Brightwood Ry. Co., 18 App. D. C. 260; Hornstein v. United Rys. Co. (Mo. App.) 70 S. W. 1105. Fall from running board after sudden jerk of car—Sheeron v. Coney Island & B. R. Co., 78 App. Div. (N. Y.) 476. Leap from the street car to avoid a collision with a railroad train—Robson v. Nassau Elec. R. Co., 80 App. Div. (N. Y.) 301. Alighting from moving train or car—Chicago, B. & Q. R. Co. v. Winfrey (Neb.) 93 N. W. 526; Johnson v. Atlantic & N. C. R., 130 N. C. 488; Bruce v. Brooklyn Heights R. Co., 68 App. Div. (N. Y.) 242; United Rys. & Elec. Co. v. Beidelman, 95 Md. 480.

73. Definiteness. Injury to person in charge of stock—Bolton v. Missouri Pac. Ry. Co. (Mo.) 72 S. W. 530. Use of word "station" concerning a street railway not erroneous—Maxey v. Metropolitan St. Ry. Co., 95 Mo. App. 303. Permission to consider lack of the statutory number of brakemen does not allow recovery on mere ground of violation of the statute—Comerford v. New York, N. H. & H. R. Co., 181 Mass. 528.

Double issues. Insufficiency of time to board and starting with a sudden jerk may be submitted together.—Texas & P. Ry. Co. v. Gray (Tex. Civ. App.) 71 S. W. 316. Not confusing as submitting together failure to stop and making of a sudden start.—Indianapolis St. Ry. Co. v. Hockett (Ind.) 66 N. E. 39.

74. Instructions held to properly state the rule as to burden of proof—Freeman v. Collins Park & B. Ry. Co. (Ga.) 43 S. E. 410. An instruction that if it is found that plaintiff was injured and suffered pain and that such injury was caused by the carelessness of defendant he might recover does not place the burden of proving defendant's negligence on plaintiff—Whittlesey v. Burlington, C. R. & N. Ry. Co. (Iowa) 90 N. W. 516.

75. Form of instructions suggested—Davis v. Paducah Ry. & Light Co., 24 Ky. L. R. 135, 68 S. W. 140.

76. Johnson v. Galveston, H. & N. Ry. Co., 27 Tex. Civ. App. 616.

77. Assuming negligence in going to sleep and jumping from moving train in the dark—Gulf, C. & S. F. Ry. Co. v. Shelton (Tex. Civ. App.) 69 S. W. 653. In opening and shutting

Instructions emphasizing or omitting particular facts.—Facts to be established by plaintiff may be grouped in an instruction, if in such a manner as not to confuse the jury or pass an opinion on the evidence.[78]

Conformity of instructions with evidence.—Instructions not justified by the evidence should not be given.[79]

Conformity of instructions with issues.—Where there are several distinct charges of negligence, instructions should not limit plaintiff's right to recover to one only.[80] Where there is no evidence to support a count, recovery on such count should be excluded by an instruction.[81] The fact that evidence on a question not in issue was received without objection does not authorize an instruction on such question.[82] Instructions should be so worded as to preclude recovery for want of care not contributing to the accident,[83] and should not be so worded as to permit a recovery if defendant was negligent in one respect and plaintiff was injured from another cause.[84] Decisions as to the relevancy of instructions to the issues are collected in the notes.[85]

Instructions as to the extent of the carrier's liability where the decisions appear to be based on the form of the instruction, rather than the substance, are grouped below. The substantive law regarding liability has been treated in a preceding section.[86]

car door—St. Louis S. W. Ry. Co. v. Ball (Tex. Civ. App.) 66 S. W. 879. Error to assume that car was not in sole charge of plaintiff's employer—Gulf, C. & S. F. Ry. Co. v. Carter (Tex. Civ. App.) 71 S. W. 73. Error to withdraw credibility of defendant's witness and contributory negligence—Kellegher v. Forty-Second St., M. & St. N. Ave. R. Co., 171 N. Y. 309. Not erroneous as assuming that a train was being made up (Texas & P. Ry. Co. v. Adams [Tex. Civ. App.] 72 S. W. 81); as assuming that injury was disputed—Whittlesey v. Burlington, C. R. & N. Ry. Co. (Iowa) 90 N. W. 516.

78. St. Louis S. W. Ry. Co. v. Byers (Tex. Civ. App.) 70 S. W. 558. Instruction held not objectionable as singling out particular facts in an action for injury by a collision—Fleming v. St. Louis & S. F. R. Co., 89 Mo. App. 129. Omitting to mention spreading rails or loose spikes is not error—Johnson v. Galveston, H. & N. Ry. Co., 27 Tex. Civ. App. 616.

79. Evidence held insufficient to warrant instructions on failure of signal by plaintiff to stop and invitation by defendant to board (South Chicago City Ry. Co. v. Dufresne, 200 Ill. 456); on theory of unavoidable accident; on theory of misunderstanding not negligence (Hennessy v. St. Louis & S. Ry. Co. [Mo.] 73 S. W. 162); on punitive damages for improper language and mental suffering (St. Louis, I. M. & S. Ry. Co. v. Wilson, 70 Ark. 136); on lack of knowledge of plaintiff's presence on a stock car (Gulf, C. & S. F. Ry. Co. v. Carter [Tex. Civ. App.] 71 S. W. 73); on theory that language should be such as to humiliate person of peculiar temperament (Texas & P. Ry. Co. v. Tarkington, 27 Tex. Civ. App. 353); on effect of guard rail as adding to safety (Whitaker v. Staten Island Midland R. Co., 65 App. Div. [N. Y.] 451); that plaintiff was thrown forward from his seat (Chitty v. St. Louis, I. M. & S. Ry. Co., 166 Mo. 435); on duty to prevent insults by station agents (St. Louis, I. M. & S. Ry. Co. v. Wilson, 70 Ark. 136); on scope of authority of porter of chair car (Texas & P. Ry. Co. v. Kingston [Tex. Civ. App.] 68 S. W. 518); that neglect to make rules and regulations for protection of passengers is negligence—Merrill v. Metropolitan St. Ry. Co., 73 App. Div. (N. Y.) 401.

80. Where negligence is alleged in careless management of a car, in starting while plaintiff was getting on, and in jerking the car, an instruction that "If you believe from the evidence that by the starting of the car plaintiff was jerked, slung, or thrown one way, and by the stopping of the car plaintiff was not jerked, slung or thrown the other way, your verdict must be for defendant," is erroneous—Birmingham Ry. & Elec. Co. v. Ellard, 135 Ala. 433.

81. Birmingham Ry. & Elec. Co. v. Brannon, 132 Ala. 431.

82. Where negligence alleged was in the starting of a car before plaintiff had time to alight, the jury should not be instructed on the duty of defendant to assist plaintiff off—Indiana Ry. Co. v. Maurer (Ind.) 66 N. E. 156.

83. Suse v. Metropolitan St. Ry. Co., 80 App. Div. (N. Y.) 24.

84. Where negligence in moving a car and in having an improperly constructed platform are submitted together—Missouri, K. & T. Ry. Co. v. Hay (Tex. Civ. App.) 67 S. W. 171.

85. Assumption of risk by passenger after alighting (Indianapolis St. Ry. Co. v. Whitaker [Ind.] 66 N. E. 433); on care in running and management of train (Western Md. R. Co. v. State, 95 Md. 637); on duty to carry passenger to destination (West Chicago St. R. Co. v. Lieserowitz, 197 Ill. 607); on similar duties of railroad company in action against street railroad (Gilmore v. Seattle & R. R. Co., 29 Wash. 150, 69 Pac. 743); on jerking before stopping—Metropolitan St. Ry. Co. v. Hudson (C. C. A.) 113 Fed. 449.

86. See ante, § 26 A et seq. Instructions as to negligence need not be carefully drawn where the carrier's negligence is gross—Central Tex. & N. W. Ry. Co. v. Smith (Tex. Civ. App.) 73 S. W. 537. **Instructions held not erroneous.** To the effect that the carrier owes a passenger the greatest care to save him from

Instructions as to contributory negligence.—Instructions as to contributory negligence should be given where asked and required by the evidence.[87] Where the evidence is contradictory and no motion to instruct the jury was presented at the close of plaintiff's evidence, the jury need not be instructed after all the evidence is in that defendant may avail itself of contributorily negligent acts of plaintiff, whether established by the evidence of plaintiff or defendant, if the jury are instructed to say from the whole evidence whether there was contributory negligence.[88] The defendant has a right to instructions as to negligence of plaintiff in attempting to board a train while in motion.[89] Miscellaneous holdings as to instructions on contributory negligence are grouped in the notes.[90]

Instructions cured by other instructions.—Instructions improper as ignoring particular issues or failing to state the relative liabilities of the parties with sufficient particularity may sometimes be cured by the construction of instructions as a whole. For examples, see the footnotes.[91]

harm, and that whether the carrier has exercised the degree of care depends on circumstances and on the jury's conception of what was the highest degree of care—Carroll v. Charleston & S. R. Co., 65 S. C. 378. Not erroneous as making carrier an insurer (Clukey v. Seattle Elec. Co., 27 Wash. 70, 67 Pac. 379); as requiring too great care to avoid collision (Memphis St. R. Co. v. Norris, 108 Tenn. 632); as demanding the highest degree of care consistent with the undertaking (Galligan v. Old Colony St. Ry. Co., 182 Mass. 211); as not considering the practicable prosecution of business (Larkin v. Chicago & G. W. Ry. Co. [Iowa] 92 N. W. 891); as not stating care required of pregnant woman (St. Louis S. W. Ry. Co. v. Ferguson, 26 Tex. Civ. App. 460); as limiting necessity of notice of intention to alight to porter only (Texas & P. Ry. Co. v. Funderburk [Tex. Civ. App.] 68 S. W. 1006); as imposing absolute liability for boisterous language of station agent (St. Louis, I. M. & S. Ry. Co. v. Wilson, 70 Ark. 136); not restricting liability for defects in cars of other company and eliminating contributory negligence (Western Md. R. Co. v. State, 95 Md. 637); as to taking care in extent of stop (St. Louis S. W. Ry. Co. v. Harrison [Tex. Civ. App.] 73 S. W. 38); as rendering carrier liable for concurrent negligence (Southern Ry. Co. v. Roebuck, 132 Ala. 412); as withdrawing question of defendant's negligence (Louisville & M. R. Co. v. Steenberger, 24 Ky. L. R. 761, 69 S. W. 1094); as requiring highest degree of care under the circumstances—Chicago & A. R. Co. v. Murphy, 198 Ill. 462.

Instructions held erroneous as not submitting defendant's negligence (Foley v. Brunswick Traction Co., 66 N. J. Law, 637); as requiring only ordinary care in starting (St. Louis S. W. Ry. Co. v. Harrison [Tex. Civ. App.] 73 S. W. 38); as imposing too great a duty to keep ticket offices open (Missouri, K. & T. Ry. Co. v. Mills, 27 Tex. Civ. App. 245); as assuming duty to anticipate collision with a truck—Suse v. Metropolitan St. Ry. Co., 80 App. Div. (N. Y.) 24.

87. So it is improper to refuse an instruction that if plaintiff acted contrary to the way an ordinarily prudent person would have acted and his conduct contributed to the injury, he could not recover—Selma St. & Suburban Ry. Co. v. Owen, 132 Ala. 420. In an action based on the ground that plaintiff became ill through failure to heat a station, an instruction that plaintiff could not recover if she remained out of doors after a fire was built in the depot, and that such act which would not have been done by a person of ordinary care caused her sickness, should have been given—St. Louis S. W. Ry. Co. v. Patterson (Tex. Civ. App.) 73 S. W. 987. As where evidence conflicts as to whether plaintiff was warned that it was dangerous to remain on the platform or whether he was there at the invitation of the conductor—St. Louis S. W. Ry. Co. v. Ball (Tex. Civ. App.) 66 S. W. 879.

88. Chicago, R. I. & P. R. Co. v. Hoover, 3 Ind. T. 693.

89. Brown v. Manhattan Ry. Co., 115 N. Y. St. Rep. 755.

90. Proper to require plaintiff's acts to be voluntary (Gorman v. St. Louis Transit Co., 96 Mo. App. 602); to instruct that there can be no recovery for concurrent negligence—Hornstein v. United Rys. Co. (Mo. App.) 70 S. W. 1105. Improper to instruct that plaintiff must act with reasonable care and judgment for her own safety especially if the car was unusually overcrowded (Davis v. Paducah Ry. & Light Co., 24 Ky. L. R. 135, 68 S. W. 140); to instruct that it is not negligence of itself to stand on a car platform but that the jury must determine negligence from all the circumstances (St. Louis S. W. Ry. Co. v. Ball [Tex. Civ. App.] 66 S. W. 879); not to submit the question of whether the act would have been done by a prudent man—Missouri, K. & T. Ry. Co. v. Hay (Tex. Civ. App.) 67 S. W. 171. An instruction that the jury should find for the defendant if the accident was not caused by defendant's negligence, impliedly excludes contributory negligence—Maxey v. Metropolitan St. Ry. Co., 95 Mo. App. 303. Instruction held not to deprive defendant of the benefit of the defense of negligence arising out of plaintiff's evidence—Chicago, R. I. & P. Ry. Co. v. Buie (Tex. Civ. App.) 73 S. W. 853. An instruction concerning a dangerous position assumed by plaintiff must require that such position contributed to the injury—Gulf, C. & S. F. Ry. Co. v. Carter (Tex. Civ. App.) 71 S. W. 73.

91. Error cured. Ignoring partial cause of accident or excusing negligence (Johnson v. Galveston, H. & N. Ry. Co., 27 Tex. Civ. App. 616); allowing passenger to hold to car rail after getting off—Gilmore v. Seattle & R. R.

Questions for jury.—A conflict of evidence as to facts showing negligence is for the jury.[92] Matters of common knowledge should not be submitted to the jury.[93]

Verdict and findings.—A finding that plaintiff was not injured by defendant's negligence, but by her own, precludes a recovery even on the theory that plaintiff was a passenger.[94] A finding that a passenger had so far lost his bodily powers as to be incapable of the exercise of care when he was received as a passenger can be reviewed on appeal.[95] Where it is found that there was negligence in not giving a passenger reasonable time to board a train, and in starting the train with an unusual jerk, a finding for plaintiff is conclusive against contributory negligence.[96]

Part 5. Carriage of baggage and passenger's effects. § 27. *Rights, duties, and liabilities.*—A transfer company accepting a passenger and his baggage becomes liable for the baggage without regard to the existence of a custom to transfer baggage.[97] In the absence of contract, the carrier's liability for baggage extends only to articles carried by the passenger for his personal use and convenience, and the carrier is not made liable as such for merchandise in a trunk by the fact that excess charges are paid thereon.[98] Knowledge of the contents of baggage may be inferred from a long custom to accept it with knowledge of the owner's occupation.[99]

§ 28. *Care of baggage and effects.*—A sleeping-car company is liable for passengers' effects only where it has been negligent or they have been stolen by its

Co., 29 Wash. 150, 69 Pac. 743. Failure to limit negligence to proximate cause of injury—Indianapolis St. Ry. Co. v. Hockett (Ind.) 66 N. E. 39. Failure to instruct as to burden—West Chicago St. R. Co. v. Lieserowitz, 197 Ill. 607. Failure to instruct that it is not negligence to allow a passenger to ride on a foot-board (Anderson v. City Ry. Co., 42 Or. 505, 71 Pac. 659); making a recovery depend on position of plaintiff (Chicago, R. I. & P. R. Co. v. Hoover, 3 Ind. T. 693); failure to submit question of plaintiff's being a trespasser in an action for assault (Murphy v. St. Louis Transit Co., 96 Mo. App. 272); failure to submit question of whether plaintiff voluntarily alighted—Southern Ry. Co. v. Coursey, 115 Ga. 602. An instruction which requires it to be found that defendant's servants or employes were not at fault before a verdict for defendant can be rendered, though there was contributory negligence, is not cured by the giving of a correct charge on request which does not refer to the erroneous one—International & G. N. R. Co. v. Anchonda (Tex. Civ. App.) 68 S. W. 743. Where instructions are given as to the duty of elevated railroads not to start until the gates have been firmly closed, until passengers on the platforms have actually boarded the cars, and that the plaintiff has the right to assume that a train which she started to board would not be prematurely started, an instruction for defendant should be given that defendant had a right to close its gates and start its train when all the persons who desired to stop at the station had left the train, and all those had entered who in a manner apparent to the crowds were actually evincing a desire to board it—Brown v. Manhattan Ry. Co., 115 N. Y. St. Rep. 755. A charge that if plaintiff negligently failed to hear a station announced and under the impression that she had reached her detination attempted to alight without knowledge of defendant's employes after the train had been held a reasonable time, and the train was started without any jerk when started, then the finding should be for defendant, does not cover a request for an instruction that plaintiff could not recover if the station was distinctly called in her presence and hearing just before the train arrived, and she negligently failed to hear the same, and the train was held a reasonable time for passengers to alight, and she attempted to alight without the knowledge of defendant's employes and was injured in such attempt—Galveston, H. & S. A. Ry. Co. v. Mathes (Tex. Civ. App.) 73 S. W. 411.

92. The case cannot be dismissed at defendant's motion—Parlier v. Southern Ry. Co., 129 N. C. 262.

93. Knowledge of a passenger on a freight train as to liability of jerks and jars is not for the jury—Southern Ry. Co. v. Crowder, 135 Ala. 417.

94. Weeks v. Chicago & N. W. Ry. Co., 198 Ill. 551.

95. Wheeler v. Grand Trunk Ry. Co., 70 N. H. 607, 54 L. R. A. 955.

96. Texas & P. Ry. Co. v. Gray (Tex. Civ. App.) 71 S. W. 316.

97. City Transfer Co. v. Draper, 115 Ga. 954.

98. Ky. St. § 783—Illinois Cent. R. Co. v. Matthews, 24 Ky. L. R. 1766, 72 S. W. 302.

99. Merchandise had been carried by plaintiff over defendant's route for six years in trunks different from the usual ones and there was evidence that a baggageman had stated that the trunks contained ladies' dresses, though they were received as baggage—Amory v. Wabash R. Co. (Mich.) 90 N. W. 22.

servants.[1] Its liability is that of a bailee for hire and not of an insurer. It is liable for theft by its servants to a limited extent, and is bound to maintain a reasonable watch during the night to protect passengers' personal belongings.[2] Its employes may be negligent in failing to keep windows closed at stations so as to prevent theft.[3] Where a passenger is allowed to occupy a bed in the smoking compartment of a sleeper, the duties of the company toward him are the same as if he were in a regular berth, and he does not assume any greater risks as to his personal belongings. His articles of wearing apparel, etc., are in the mixed custody of the passenger and the company, and the fact that he retires with the window open to his knowledge does not render him negligent unless it was left open at his request, and even in such case he may recover unless his property is stolen from the outside through the window by a stranger.[4] The liability of a carrier for baggage is that of an insurer as to articles necessary for the passenger's comfort, but for additional articles it is but a bailee and is not compelled to carry them unless paid an additional compensation.[5] The carrier is not liable for the theft of money, by one of its employes, which has been placed on a car window sill and temporarily forgotten. It is not liable for such as a bailee, and such money, if not for traveling expenses, is not baggage.[6] Heavy rain, as an act of God, will not excuse damage to baggage unless injury could not have been prevented by any reasonable care.[7] The carrier's liability is as warehouseman for baggage left unclaimed in its station.[8] Where trunks are forwarded in the usual manner and are destroyed while being detained in a custom house, a steamship company which was the initial carrier is not liable.[9] The last of connecting carriers is not liable for baggage lost, unless it is shown that the baggage has come in its possession, or that there was a joint contract or partnership, or a ratification of a contract of preceding carriers, and proof that it employed tracers for lost baggage does not show that it is a party to the original contract, nor is a ticket bought from an initial carrier over several lines, which is signed by the last line named, sufficient to render such line liable for baggage lost, without showing that it came into its possession.[10] The fact that the agent of the initial carrier is also agent of a connecting carrier does not render it liable for injuries occasioned by connecting carriers, if the contract limit its liability to its own line.[11]

§ 29. *Limitation of liability for baggage.*—The fact that a ticket provides that a contract of carriage shall be governed by the English law does not render valid an exemption from liability for negligence with regard to baggage contrary to the public policy of the United States.[12] The company may limit its liability

1. Pullman Sleeping Car Co. v. Hatch (Tex. Civ. App.) 70 S. W. 771.

2. Liability is for the necessary baggage or money of the passenger, regard being had to the character, duration and purposes of the journey though the passenger was negligent—Morrow v. Pullman Palace Car Co. (Mo. App.) 73 S. W. 281.

3. Evidence held sufficient for such purpose—Pullman Palace Car. Co. v. Arents (Tex. Civ. App.) 66 S. W. 329.

4. Morrow v. Pullman Palace Car Co. (Mo. App.) 73 S. W. 281.

5. Passenger cannot recover for an embroidered table center piece or a dress belonging to her mother, lost from her personal baggage—Bullard v. Delaware, L. & W. R. Co., 21 Pa. Super. Ct. 583.

6. Levins v. New York, N. H. & H. R. Co. (Mass.) 66 N. E. 803.

7. J. Harzburg & Co. v. Southern Ry. Co., 65 S. C. 539; Henry Sonneborn & Co. v. Southern Ry., 65 S. C. 502.

8. Where baggage arriving at nine A. M. is not called for and is stolen from the baggage-room during the night, the carrier's liability is that of a warehouseman—St. Louis & S. F. Ry. Co. v. Terrell (Tex. Civ. App.) 72 S. W. 430.

9. The steamship agent gave a receipt of the trunks "for transfer by slow freight" to an interior town—Parker v. North German Lloyd S. S. Co., 74 App. Div. (N. Y.) 16.

10. Texas & N. O. R. Co. v. Berry (Tex. Civ. App.) 71 S. W. 326.

11. Askew v. Gulf, C. & S. F. Ry. Co. (Tex. Civ. App.) 73 S. W. 846.

12. Limitation of a carrier's liability for a passenger's baggage to $50 on a first cabin passage across the Atlantic in a first class steamship is unreasonable; especially where not called to the attention of a passenger

for baggage by regulations, of which the passenger has notice, which are reasonable and consistent with statute or public duty, and such limitation may be by notice printed on an excursion ticket.[13] Unless negligence is alleged, the validity of a stipulation relieving the company from liability for negligence cannot be questioned.[14]

§ 30. *Damages.*—There can be no recovery for deprivation of the use of articles or for inconvenience and mental distress; the measure of damages is the actual value of the articles destroyed.[15]

§ 31. *Remedies and procedure for injury to, or loss of, baggage.*—One liable to the owner of goods which he checks as baggage may be regarded as their owner in an action for damage.[16]

The petition must state an itemized list of baggage destroyed with the value of each article and the extent of damage thereto.[17] Where a plea is in confession and avoidance, it is defective if it merely admit hypothetically.[18] If a demurrer to an answer setting up a limitation of liability is sustained, recovery on the evidence need not be restricted to the amount limited.[19]

The presumption of negligence arising from a derailment is not rebutted by the fact that the derailment was caused by a slide of dirt and rocks.[20] The passenger must prove a delivery of the baggage to the carrier.[21]

The right of a carrier to limit its liability for baggage is a question for the court, though the reasonableness of its limitation is for the jury,[22] as is the question of negligence.[23] Holdings are grouped below as to admissibility of evidence,[24] sufficiency of evidence,[25] and instructions.[26]

CASE, ACTION ON.

Case is the proper remedy in Rhode Island for recovery of a tax under a stat-

and loss results from a theft or conversion by the carrier's servants—The New England, 110 Fed. 415.

13. Jacobs v. Central R. Co., 19 Pa. Super. Ct. 13.

14. Houston, E. & W. T. Ry. Co. v. Seale (Tex. Civ. App.) 67 S. W. 437.

15. Houston, E. & W. T. Ry. Co. v. Seale (Tex. Civ. App.) 67 S. W. 437.

16. Illinois Cent. R. Co. v. Matthews, 24 Ky. L. R. 1766, 72 S. W. 302.

17. Insufficient to state "The articles destroyed consisted of three dresses worth $300, that the articles injured consisted of shirt waists, collars, cuffs and ladies' undergarments"—Houston, E. & W. T. Ry. Co. v. Seale (Tex. Civ. App.) 67 S. W. 437.

18. Plea in action for loss of passenger's baggage stating that if the baggage was received it was on an express limitation of liability that the law of New Jersey governed the contract if any, and that by such law defendant's liability was limited—Saleeby v. Central R., 40 Misc. (N. Y.) 269.

19. Houston, E. & W. T. Ry. Co. v. Seale (Tex. Civ. App.) 67 S. W. 437.

20. Thomas v. Southern R. Co., 131 N. C. 590.

21. Evidence held insufficient to show delivery of baggage to carrier—Lustig v. International Nav. Co., 38 Misc. (N. Y.) 802.

22. Houston, E. & W. T. Ry. Co. v. Seale (Tex. Civ. App.) 67 S. W. 437.

23. The negligence of the sleeping car company and contributory negligence of the passenger as well as the sufficiency of evidence to show theft by an employe may be questions for the jury—Morrow v. Pullman Palace Car Co. (Mo. App.) 73 S. W. 281.

24. On an issue of wilful negligence, special damage may be shown where trunks are put off during a severe rain without protection—Henry Sonneborn & Co. v. Southern Ry., 65 S. C. 502.

25. Evidence that a trunk which had been delivered by a passenger to a steamship company contained her wearing apparel and was returned to her empty sometime after the termination of the voyage is sufficient, if there is no other evidence, to justify a finding that it was opened and rifled by the company's servants—The New England, 110 Fed. 415. Where a carrier refuses to transfer a box as baggage and demanded the return of a check given for it, which was done on the agent agreeing to forward the box by freight, conflicting evidence tending to show that the box was negligently treated and damaged will justify a recovery—Southern Ry. Co. v. Wood. 114 Ga. 159. Evidence held insufficient to show taking of property by sleeping car porter, rendering the company liable—Pullman Sleeping Car Co. v. Hatch (Tex. Civ. App.) 70 S. W. 771. Proof that when the passenger received baggage from the transfer company to which the carrier delivered it as his agent, certain articles were missing will not render the carrier liable—Galveston, H. & S. A. Ry. Co. v. Schafermeyer (Tex. Civ. App.) 72 S. W. 1037.

26. A charge that the giving of a check for a trunk imposing the burden of care in transporting and delivering it is not a charge on the facts—J. Harzburg & Co. v. Southern Ry. Co., 65 S. C. 539.

ute,[27] and case, not trespass, is the proper remedy for injuries resulting from wrongful acts of agents or servants without authority of the principal, but for which he is responsible.[28] In case for purchase of lumber by defendant with notice of a timber owner's lien, plaintiff has the burden of showing that defendant had notice of the lien as alleged.[29]

CAUSES OF ACTION AND DEFENSES.

This article deals only with abstract and fundamental principles. To collect all applications of them would be an impossible as well as useless labor. Specific articles as well as the general practice titles, herein referred to, must be consulted. Some right in the plaintiff is essential,[30] whence the court refuses to decide moot questions.[31] Some right and not a mere declaration of rights must be the object.[32] A mere anticipation of injury is not actionable.[33] Whether a cause of action is one arising out of contract or by a tort becomes material in applying certain remedies.[34] The existence of a claim implies a right of action.[35] The question most often arises as one of pleading, where it is objected that there is a misjoinder or a splitting of causes. Such cases will be found in "Pleading." In like manner questions of joinder and splitting are also referable to the title "Pleading." Joinder of parties will be treated under "Parties," and the consolidation or severance of actions under the article on "Trial." A single act may be several torts.[36] Separate obligations under one contract may each support an action.[37]

Defenses.—Impropriety of a plaintiff's motives is not a defense.[38] An offer in the nature of a disclaimer must be without reserve or condition.[39] The omission of an attorney to pay an occupation tax is not a defense against his client's action.[40] That plaintiff may have so acted as to afford a defense to action against a third person is no defense.[41] The existence of an equitable remedy is not generally a defense to an action at law,[42] but the converse is true.[43] Violation of the terms of a policy sued on is defense, but not matter of abatement.[44] An answer setting up a divorce

27. Franklin v. Warwick & C. Water Co. (R. I.) 52 Atl. 988.

28. Assault on a customer in a store by servants of proprietor—Mossessian v. Callender (R. I.) 52 Atl. 806.

29. Thornton v. Dwight Mfg. Co. (Ala.) 34 So. 187.

30. Adversary's wrong is not enough—Home Fire Ins. Co. v. Barber (Neb.) 93 N. W. 1024.

31. State v. Lambert, 52 W. Va. 248; State v. Savage (Neb.) 91 N. W. 557; State v. Broatch (Neb.) 94 N. W. 1016. Whether office is held by election or appointment held moot—Johnson v. Smith, 24 Ky. L. R. 883, 70 S. W. 192.

Moot questions give no right to appeal or review. See Appeal.

32. Southern Ry. Co. v. State (Ga.) 42 S. E. 508. Rights of members of insurance company—In re Hurst Home Ins. Co., 23 Ky. L. R. 940, 64 S. W. 512.

33. Priewe v. Fitzsimons (Wis.) 94 N. W. 317.

34. For example Assumpsit or Trover which see. Also to determine whether attachment will issue as on a "claim arising out of contract." See Attachment.

35. Ayres v. Thurston County, 63 Neb. 96.

36. Injury to person and property by same act—Eagan v. New York Transp. Co., 39 Misc. (N. Y.) 111. Distinct injuries to husband and wife—Stewart v. Alvis (Ind. App.) 65 N. E. 937. A survivable tort to the person cannot be joined with a cause of action for death by wrongful act—Thomas v. Star & C. Milling Co., 104 Ill. App. 110.

37. Instalments under one contract—Colwell v. Fulton, 117 Fed. 931. Suing for the balance after settlement by mistake does not split the cause though an assignee sues—Goodson v. National Acc. Ass'n, 91 Mo. App. 339.

38. Suit by a stock holder to enjoin issue of bonds—Hodge v. United States Steel Corp. (N. J. Eq.) 53 Atl. 553.

39. Offer to surrender to trustee in bankruptcy provided other claims be waived—Frank v. Musliner, 76 App. Div. (N. Y.) 616.

40. Ft. Worth & D. C. Ry. Co. v. Carlock (Tex. Civ. App.) 75 S. W. 931.

41. Roach v. Springer (Tex. Civ. App.) 75 S. W. 933.

42. Garcelon v. Commercial Trav. Acc. Ass'n (Mass.) 67 N. E. 868.

43. See the title Equity citing Jones v. MacKenzie (C. C. A.) 122 Fed. 390; Inglis v. Freeman (Ala.) 34 So. 394; Metz v. McAvoy Br'g Co., 98 Ill. App. 584, and many other cases.

The strictness of the rule is modified by the circumstances—Vannatta v. Lindley, 98 Ill. App. 327.

44. Refusal to be examined concerning a

to an action against a husband for deserting his wife whom he had married to avoid prosecution is not in abatement.[45] A defense of prematurity may be waived by going to trial.[46] As against a denial, the court will not lightly infer from pleadings that parties have colluded to confer jurisdiction.[47]

CEMETERIES.[48]

Cemetery associations.—In Kansas, cemetery associations are public and not private corporations;[49] and lot owners may vote on all matters to the same extent as ordinary stockholders in other corporations.[50] The laws of Minnesota do not authorize the incorporation of cemetery associations for private speculation and profit.[51] The officers of the association therefore become trustees of the lot owners as to money derived from sales of lots, and the lot owners may sue to compel recognition of the trust relation and a restoration of misapplied funds to the treasury.[52] Grants of power to cemetery associations should be strictly construed.[53]

Public control of location of cemeteries.—The control of the location of cemeteries by the public is within the police power of the state.[54] On refusal of an application for location of a cemetery by the New Jersey local authorities, an appeal lies to the state board of health,[55] and interested persons have a right to be heard.[56] The state board on such proceeding is not required to examine witnesses, though their action is of a judicial nature,[57] and is not confined to sanitary considerations in determining the appeal.[58] On review of their action by the courts, there is a presumption that the decision was based on proper grounds which can only be overcome by the clearest proof.[59] Location near dwellings is not necessarily a nuisance,[60] but where so situated that life or health of persons, living in the vicinity will be endangered, the location may be enjoined,[61] and one specially injured or threatened with a special injury by the location may question the legality of steps taken to acquire the land.[62]

Acquisition of land for cemetery purposes and disposition thereof.—A cemetery company may take title to land for cemetery purposes by parol,[63] and the land so acquired may not be sold without the consent of the stockholders and persons who have interred dead therein on the faith of its perpetual use for burial purposes.[64]

fire loss—Scottish Union & Nat. Ins. Co. v. Strain, 24 Ky. L. R. 958, 70 S. W. 274.

45. State v. Lannoy (Ind. App.) 65 N. E. 1052.

A statutory legal remedy in a different but concurrent jurisdiction does not prevent resort to equity—Peck v. Ayers Tie Co. (C. C. A.) 116 Fed. 273.

46. Lake v. Anderson, 76 App. Div. (N. Y.) 189.

47. Robinson v. Lee, 122 Fed. 1010.

48. See Estates of Decedents, for expense of monument as funeral expense. See, Taxes, for taxation of cemeteries.

49, 50. Davis v. Coventry, 65 Kan. 557, 70 Pac. 583.

51. Gen. St. 1894, §§ 2913-2929—Brown v. Maplewood Cemetery Ass'n, 85 Minn. 498.

52. A complaint alleging that the association has no capital stock, that the directors have appropriated to their own use moneys received by the sale of the lots and have refused to account for the same or return the money into the treasury of the association is sufficient—Brown v. Maplewood Cemetery Ass'n, 85 Minn. 498.

53. Palmer v. Hickory Grove Cemetery, 116 N. Y. St. Rep. 973.

54. Laws of 1892, N. Y. p. 297, c. 73, governing the acquisition of lands by rural cemeteries, is a valid exercise of legislative power under a constitution giving the legislature a power to uphold general and special acts relative to corporations—Palmer v. Hickory Grove Cemetery, 116 N. Y. St. Rep. 973.

55. P. L. 1885, p. 165, § 6—Dodd v. State Board of Health, 67 N. J. Law, 463.

56. Dodd v. State Board of Health, 67 N. J. Law, 463.

57. They may consider a committee report made on a previous hearing of the same matter—Dodd v. Francisco (N. J. Law) 53 Atl. 219.

58, 59. Dodd v. Francisco (N. J. Law) 53 Atl. 219.

60. Braasch v. Cemetery Ass'n (Neb.) 95 N. W. 646.

61. Braasch v. Cemetery Ass'n (Neb.) 95 N. W. 646.

62. Palmer v. Hickory Grove Cemetery, 116 N. Y. St. Rep. 973.

63. Woodland Cemetery Co. v. Ellison, 23 Ky. L. R. 2222, 67 S. W. 14.

64. Directors selling a portion of a burial tract in good faith will not be held personally liable on setting aside the sale—Woodland Cemetery Co. v. Ellison, 23 Ky. L. R. 2222, 67 S. W. 14.

A deed to cemetery trustees, reciting a designation of trustees by town authorities with power to manage as they should deem best, gives the trustees power to sell small parcels from land so conveyed,[65] and after a long lapse of time, a presumption of proper performance of duties in this respect will be indulged.[66] A grant to a community for cemetery purposes, too indefinite to confer title, will not be allowed to fail for that reason, but equity will appoint trustees.[67] In Illinois, unincorporated towns may condemn lands for cemetery purposes.[68] That a notice of purpose to acquire land recited that it was done by order of the board of directors is not sufficient evidence that it was the act of the corporation, where rights of third persons are affected.[69] A purchase-money mortgage for cemetery lands given by a cemetery association may be foreclosed.[70]

Title to and rights in burial lots.—There is presumption of payment for a cemetery lot, where the record shows continuous ownership for thirty-seven years,[71] and trustees have no right to sell to another, unless the first purchaser has abandoned the lot by removal from the neighborhood or by other acts amounting to an abandonment.[72] One tenant in common of a lot may not appropriate a portion of a lot by the erection of a monument without consent of his co-tenants.[73] Purchasers of burial lots acquire merely a right to use the lot, subject to reasonable regulations of the cemetery association,[74] and it makes no difference that the lot was conveyed by warranty deed.[75]

Licenses for burial purposes.—In Pennsylvania, a cemetery association may grant an exclusive license to bury dead in particular lot.[76]

Grave fees.—The association may adopt regulations requiring purchasers to pay the fees for the opening and filling of graves to the superintendent, without regard to whether he does the work, where the fees are reasonable and uniform in all cases,[77] and the courts may not determine the amount to be paid.[78]

Removal of bodies.—The New York act, allowing removal of the body of the widow of the lot owner by consent of the heirs, is limited to lots set apart to particular families, and does not authorize removal of such body from an individual grave in an undivided portion of the cemetery, without the consent of the corporation.[79]

Improvements.—A cemetery company may forbid work on lots by individual lot owners and require all work in the care of graves to be performed under the direction of the superintendent at specified rates,[80] and a gardener employed by a lot owner having no contractual relations with the association, may not question the reasonableness of these regulations.[81] A bequest of a permanent fund to an individual trus-

65, 66. City of Tacoma v. Tacoma Cemetery, 28 Wash. 238, 68 Pac. 723.

67. It will not be declared a public cemetery under the control of selectmen and cemetery commissioners—Hunt v. Tolles (Vt.) 52 Atl. 1042.

68. Phillips v. Town of Scales Mound, 195 Ill. 353.

69. Palmer v. Hickory Grove Cemetery, 116 N. Y. St. Rep. 973. Under an act empowering supervisors to authorize the acquisition of lands for cemetery purposes, requiring notice of the application to be published once a week for six weeks, in two newspapers having the largest circulation therein, no jurisdiction is conferred where the application was first published 38 days before the day set for hearing and was not published in newspapers having the largest circulation in the county—Id.

70. Ross v. Glenwood Cemetery Ass'n, 81 App. Div. (N. Y.) 357. Property not used for interments is not prevented from being sold on foreclosure by the statute denying the supreme court the right to order sale by the cemetery association of realty used for actual interments—Id.

71. McWhirter v. Newell, 200 Ill. 583.

72. Purchaser with knowledge will not be protected—McWhirter v. Newell, 200 Ill. 583. Abandonment is not shown by the fact that interments were made by a later purchaser where the owners on learning thereof insisted on removal and afterwards brought suit to compel removal of bodies—Id.

73. And other tenants may remove the monument without incurring liability (Rev. L. c. 78, §§ 26, 27)—Capen v. Leach, 182 Mass. 175.

74, 75. Roanoke Cemetery Co. v. Goodwin (Va.) 44 S. E. 769.

76. Congregation Shaarai Shomayim v. Moss, 22 Pa. Super. Ct. 356.

77, 78. Roanoke Cemetery Co. v. Goodwin (Va.) 44 S. E. 769.

79. In re Cohen, 76 App. Div. (N. Y.) 401.

80, 81. Cedar Hill Cemetery Co. v. Lees, 22 Pa. Super. Ct. 405.

tee for the improvement of a cemetery is not authorized by the California act, allowing formation of cemetery improvement corporations.[82]

Abandonment.—On abandonment of lands granted to the public for cemetery purposes, the title will revert to the original donors.[83] An ordinance prohibiting burials will not work an abandonment.[84]

Injuries to cemetery lands will be enjoined.[85]

CENSUS AND STATISTICS.

Census.—A federal census is not conclusive on the question of population,[86] and a city may take a census under a state law, within two months after the federal census, and this particularly where territory had been added in the meantime.[87] Where an ordinance providing for a census did not confine the enumerator to any particular territory, a recanvass of his work by another enumerator is not irregular.[88] An enumerator acts in his official capacity in correcting schedules after the expiration of the time for making the enumeration, and is liable under the federal statute for making a false return.[89]

Vital statistics.—In a prosecution for failure to report a case of consumption, the question whether consumption is to be classed with other dangerous diseases may not be submitted,[90] and it is not a defense that a physician may not disclose information acquired while attending a patient.[91]

CERTIORARI.

§ 1. Nature, Occasion and Propriety of the Remedy.
§ 2. Right to Certiorari; Parties.
§ 3. Procedure for Writ; Writ; Service and Return.—Application; Bond; Writ; Notice; Return; Objections and Amendments to Return; Effect of Writ; Quashal or Dismissal.
§ 4. Hearing, and Questions Which May be Raised or Settled.
§ 5. Judgment.
§ 6. Costs.
§ 7. Review of Certiorari.

§ 1. *Nature, occasion and propriety of the remedy.*—Its office is very generally regulated by statute. The common-law remedy lies to reach jurisdictional errors,[92] or as a prerogative writ of appellate courts to supervise lower courts,[93] and only upon acts of a judicial nature,[94] which are final,[95] and which are not wholly void.[96]

82. In re Gay's Estate, 138 Cal. 552, 71 Pac. 707.

83, 84. Kansas City v. Scarritt, 169 Mo. 471.

85. Hunt v. Tolles (Vt.) 52 Atl. 1042.

86. State v. Davis (Neb.) 92 N. W. 740.

87. Census was taken to determine limit of debt according to population—Lancaster v. Owensboro, 24 Ky. L. R. 1978, 72 S. W. 731.

88. Lancaster v. Owensboro, 24 Ky. L. R. 1978, 72 S. W. 731.

89. 30 Stat. 1020, c. 419—Ching v. United States (C. C. A.) 118 Fed. 538.

90, 91. People v. Shurly (Mich.) 91 N. W. 139.

92. People v. Warden, 37 Misc. (N. Y.) 545, 109 N. Y. St. Rep. 1114. An act need not be grossly abusive of power—People v. Adam, 74 App. Div. (N. Y.) 604.

Errors affecting jurisdiction. Judgment by a justice which he could in no event render—Starry v. State, 115 Wis. 50. Embracing irrelevant papers in order for examination before trial and failing to limit time—State v. District Ct., 27 Mont. 441, 71 Pac. 602. Judgment after jurisdiction lost by adjournment—Vandervoort v. Fleming (N. J. Law) 53 Atl. 225.

Not going to jurisdiction. Refusal of continuance—Bisque v. Herrington (Cal.) 72 Pac. 336. Rulings on trial and judgment of dismissal—State v. District Ct., 27 Mont. 280, 70 Pac. 981. Refusal to dismiss appeal—Eels v. Bailee (Iowa) 92 N. W. 668. Refusal to dismiss an appeal for want of justification of sureties—State v. District Ct., 27 Mont. 179, 70 Pac. 516. Refusal to remand cause improperly transferred—State v. Circuit Ct. (Wis.) 93 N. W. 16. Jurisdiction to appoint receiver pendente lite for cause not enumerated in statute sustained—Gibbs v. Morgan (Idaho) 72 Pac. 733. A decision on appeal held not an excess of jurisdiction as deciding points not in issue—People v. Court of Appeals (Colo.) 69 Pac. 606.

93. A ruling below on the sufficiency of the supersedeas bond may be so reviewed—Home Sav. & Tr. Co. v. District Ct. (Iowa) 95 N. W. 522. When the district court has jurisdiction, a writ of certiorari to the supreme court of New Jersey must now rest on the latter court's supervisory common law powers and not on the "District Court act" which allows certiorari only to question the jurisdiction [applied on question of costs]—

It will not issue when inadequate because of the necessity of affirmative relief,[97] or when the relator must in any event fail,[98] or where the writ will be futile.[99]

It should not be allowed in the first instance if another adequate remedy exists,[1] for instance, appeal or error.[2] But appeal is inadequate when the taking of it would waive the defect,[3] and failure to resort to appeal is excused by lack of knowledge of the judgment.[4] It may lie, though the error is capable of rectification in the proceeding brought up.[5]

C. B. Smith & Co. v. State (N. J. Law) 52 Atl. 308. It will so issue when an attempt is made to take property unlawfully by eminent domain and there is no appeal—Seattle & M. R. Co. v. Bellingham Bay & E. R. Co., 29 Wash. 491, 69 Pac. 1107; State v. Superior Ct., 30 Wash. 219, 232, 70 Pac. 484. A prerogative writ reviews only the jurisdiction and not the merits—State v. Smith (Mo.) 73 S. W. 211.

94. Gaster v. State (Wis.) 94 N. W. 787. A state auditor acts judicially in determining a controversy as to where property shall be taxed—State v. Dunn, 86 Minn. 301. Judicial act defined.—Id. Proceeding by city council of Brunswick to dismiss policeman is judicial —Gill v. Brunswick (Ga.) 44 S. E. 830. Acts of penitentiary commission in Arkansas are purely administrative—McConnell v. Arkansas Mfg. Co., 70 Ark. 568. Making a civil service classification is administrative—People v. Burt, 170 N. Y. 620. A determination of the public character of a use for which land is to be taken is judicial—Seattle & M. R. Co. v. Bellingham Bay & E. R. Co., 29 Wash. 491, 69 Pac. 1107. Act of city council in annexing territory is judicial—Moore v. City Council (Iowa) 93 N. W. 510.

Hence mandamus and certiorari are not concurrent—Flanders v. Roberts, 182 Mass. 524.

95. Unger v. Fanwood Tp. (N. J. Law) 55 Atl. 42. Order refusing to dismiss for want of jurisdiction not final—State v. Miller, 109 La. 704. Refusal to enter judgment against garnishee not final—Singer Mfg. Co. v. McNeal, etc., Co. (Ga.) 44 S. E. 801. Discharge on habeas corpus is final—Commonwealth v. Butler, 19 Pa. Super. Ct. 626.

96. Levadas v. Beach, 117 Ga. 178. Fine was imposed ex parte by board of health—People v. Board of Health, 83 App. Div. (N. Y.) 571.

97. As where a cause was to be transferred back—State v. Circuit Ct. (Wis.) 93 N. W. 16.

98. His pleadings stated no case—Echols v. Crawford, 116 Ga. 771.

99. As to review taxes which are by statute not to be changed because current—City of Hoboken v. Jersey City (N. J. Law) 53 Atl. 595.

1. The defense that property is not subject to taxation [Gen. St. 1894, § 1559] being applicable only to exempt property and not to that taxed in the wrong place, certiorari lies—State v. Dunn, 86 Minn. 301. No other remedy lies to review an order depleting an officer's salary while he is absent—State v. Lauder, 11 N. D. 136. Certiorari not available to review road proceedings when review by freeholders is allowed—Devine v. Olney (N. J. Law) 53 Atl. 466.

Application to the original tribunal is dispensed with where futile because proceeding is wholly void—People v. Feitner, 39 Misc. (N. Y.) 474.

2. Morse v. Baake (N. J. Law) 53 Atl. 693. Lies where there is no appeal from justice—Loloff v. Heath (Colo.) 71 Pac. 1113. **Appealable:** Judgment for recovery of land in eminent domain is appealable and with it the order allowing the propriety of the condemnation. It is not necessary to wait for adjudication of damages—Tennessee Cent. R. Co. v. Campbell (Tenn.) 75 S. W. 1012. Order for partial distribution—State v. District Ct., 26 Mont. 378, 68 Pac. 411. Judgment imposing fine for violation of ordinance, and overruling demurrer and objection to jurisdiction—State v. Lockhart, 28 Wash. 460, 68 Pac. 894. Judgment of a justice on verdict—Falconer v. Simmons, 51 W. Va. 172. Judgment for a material-man—Weldon v. Superior Ct., 138 Cal. 427, 71 Pac. 502. Refusal of district court to dismiss appeal from lower court—Eels v. Bailee (Iowa) 92 N. W. 668. Judgment in district court on appeal from mayor's court—State v. Miller, 109 La. 704. Injunctional order relating to possession of property—State v. Superior Ct., 30 Wash. 177, 70 Pac. 256. Refusal of justice to set aside default—State v. Laurendeau, 27 Mont. 522, 71 Pac. 754. Judgment rendered after an adverse decision of a jurisdictional fact—Kent v. Crenshaw (Iowa) 94 N. W. 1131. Order of highway commissioners laying road and justice's judgment assessing damages—Hagenbaumer v. Heckenkamp, 202 Ill. 621. Intermediate order reviewable on appeal with final order is not reviewable by certiorari—State v. District Ct. (Mont.) 72 Pac. 867. **Not appealable:** Question of public use in eminent domain—State v. Superior Ct., 30 Wash. 219, 232, 70 Pac. 484.

An order of distribution notwithstanding a pending appeal from annulment of another will is appealable by the executor who resisted it—State v. Superior Ct., 28 Wash. 677, 69 Pac. 375.

Appeal is not inadequate to review a receivership order merely because it would absorb "profits" of a business; but property must be hazarded to a loss or standing of parties jeopardized—State v. Superior Ct., 28 Wash. 584, 68 Pac. 1052.

Criminal Proceedings. Since 1884 certiorari is superseded by appeal (Code Cr. Proc. § 515) as a mode of reviewing conviction and sentence on a prosecution not by indictment —People v. Crane, 37 Misc. (N. Y.) 639, 109 N. Y. St. Rep. 1111. Will not lie under N. Y. Code to review cause of imprisonment of one at large on bail—People v. Pool, 77 App. Div. (N. Y.) 148. Commitment for criminal contempt is not appealable, but certiorari lies—In re Teitelbaum, 116 N. Y. St. Rep. 887. Certiorari as prerogative writ may lie after appeal is abandoned—State v. Pettigrew, 109 La. 132.

3. Cause was tried outside the jurisdiction—Swain v. Brady, 19 Pa. Super. Ct. 459.

4. Justice's judgment made without notice,

Various proceedings which are not appealable are reviewable by certiorari.[6] It is a proper remedy in Michigan, if promptly pursued, to review the establishment of a school district.[7]

The matter ousting jurisdiction must be substantial.[8] It is sufficient that error and prejudice co-exist.[9] A verdict or judgment is not contrary to law and evidence if there is any evidence to support it,[10] or if it is conflicting.[11] It is sufficient that an attempt is made to take property for a use alleged to be private.[12]

Ancillary certiorari.—Sometimes the writ issues as ancillary to another proceeding.[13]

A prerogative writ from a court of last resort will not issue where a court of general jurisdiction,[14] or a lower court[15] affords a remedy, but it may concur with the power of a lower court to issue the writ.[16] A failure to follow decisions is not necessarily a conflict warranting it.[17] The power to issue prerogative writs "in aid" of appellate jurisdiction forbids such issue to a court whence appeal cannot come.[18] The lower court's discretion will not be disturbed unless it has been abused.[19]

§ 2. *Right to certiorari; parties.*—A litigable interest in relator or plaintiff is necessary,[20] for which purpose private or individual rights are distinct from a representative capacity.[21] The original record rather than a printed copy will determine who are proper petitioners.[22]

One who is in default below may lose the right,[23] as well as one who is tardy in seeking his remedy,[24] unless the proceeding is wholly unlawful.[25]

time for appeal having elapsed—Elder v. Justice's Ct., 136 Cal. 364, 68 Pac. 1022.

5. Error improperly brought may be attacked by certiorari—Security Trust Co. v. Dent, 187 U. S. 237.

6. Condemnation proceedings for a ditch—Leyba v. Armijo (N. M.) 68 Pac. 939.

7. Huyser v. School Inspectors (Mich.) 91 N. W. 1020.

8. Not baseless claim of right under federal laws—State v. Bland, 168 Mo. 1.

9. Evidence necessarily harmful—Dougan v. Dunham, 115 Ga. 1012; Dye v. Napier (Ga.) 43 S. E. 860. Prejudice is presumed from wrong—State v. Sackett (Wis.) 94 N. W. 314.

10. Osborne v. Sims, 115 Ga. 97; Wall v. Macon, D. & S. R. Co., 115 Ga. 778; Southern Ry. Co. v. Fincher, 116 Ga. 966.

11. Clevenger v. Murray (Tex. Civ. App.) 67 S. W. 469; Lambert Floral Co. v. Lambert, 117 Ga. 188.

12. One railroad for another's right of way—Seattle & M. R. Co. v. Bellingham Bay & E. R. Co., 29 Wash. 491, 69 Pac. 1107.

13. Mandamus and not certiorari is the remedy to bring up a record on appeal—Ex parte Grubbs, 80 Miss. 288. To bring up the record on appeal to affirm but not to reverse —Turman v. Whaley (Fla.) 32 So. 811. In aid of habeas corpus to fetch up the record—Gaster v. State (Wis.) 94 N. W. 787. To bring up a correction of record—Johnston v. Arrendale (Tex. Civ. App.) 71 S. W. 44. Clerical errors cannot be corrected in appellate court—Smith v. Bunch (Tex. Civ. App.) 73 S. W. 559.

14. State v. Wilson, 90 Mo. App. 154. The sole question affected an individual's rights under an illegal tax—Duluth El. Co. v. White, 11 N. D. 534.

15. Certiorari not allowed by supreme court until rehearing denied by court of appeals—Frellsen v. Ruddock Cypress Co., 108 La. 37.

16. Eminent domain proceedings not otherwise reviewable are open to certiorari despite the fact that inferior courts have constitutional power to issue the writ, the constitution in that respect being declaratory and not restrictive—Tennessee Cent. R. Co. v. Campbell (Tenn.) 75 S. W. 1012.

17. The court below had not regarded it as a conflict requiring certification—State v. Smith (Mo.) 73 S. W. 211.

18. Police court case cannot go to court of appeals on an original certiorari—Sullivan v. Dist. of Columbia, 19 App. D. C. 210.

19. Home Sav. & Tr. Co. v. District Ct. (Iowa) 95 N. W. 522.

20. A military officer having a voting right may review an order for an election of officers—Smith v. Wanser (N. J. Law) 52 Atl. 309. Resident taxpayers may sue respecting annexation to municipality—Moore v. City Council (Iowa) 93 N. W. 510. No one not specially injured can assail a public ordinance—Unger v. Inhabitants of Fanwood Tp. (N. J. Law) 55 Atl. 42. Townships may sue to reverse a proceeding to apportion debts of a disorganized county among the several townships which composed it—Fitch v. Auditors (Mich.) 94 N. W. 952.

21. Administrator not privately interested in order to turn over property—State v. District Ct., 26 Mont. 369, 68 Pac. 856.

22. Real parties in interest are—Fitch v. Auditors (Mich.) 94 N. W. 952.

23. As where he absented himself and hence no objection was made to evidence before a medical board which revoked a license —Stevens v. Hill, 74 Vt. 164. Where he made no defense—West v. Parkinson (Mich.) 90 N. W. 27.

24. Huyser v. School Inspectors (Mich.) 91 N. W. 1020, citing many cases and distinguishing them. Year's delay—Coward v. Bayonne, 67 N. J. Law, 470. Two months' delay under statute requiring notice within 10

Several petitioners should not join unless one adjudication will determine their rights,[26] but one co-party can apply alone.[27] The attorney general should apply for a prerogative writ.[28] Officers who proceed improperly are the sole respondents,[29] but unnecessary parties if interested may be admitted to defend.[30]

§ 3. *Procedure for writ; writ, service and return.*—*Application* must be timely.[31] In New York, an attorney may verify the petition.[32] In Missouri, none is required.[33] Lack of jurisdiction is to be specifically averred.[34] There must be a showing that primary remedies are inadequate or not available,[35] as well as sufficient grounds for the writ.[36] Original papers should not be attached to it.[37] Application for a prerogative writ should show a want of remedy in lower courts.[38] Matters not of record may be answered to show that despite error no injustice has resulted.[39]

In New York, a reference of fact may be ordered in tax cases if the petition tenders an issue going to reduction or cancellation of the assessment.[40] A judge of the reviewing court should allow the writ.[41] Non-entry of allowance of the writ is not fatal.[42]

The statutory bond bearing the proper signature and approval is prerequisite to issuance of the writ,[43] but not in criminal cases.[44] The bond under the Georgia code can be made by an "agent" only when he is specially authorized.[45] The affidavit in forma pauperis must substantially fulfill the statute, or the writ is void.[46]

days—Blumfield Tp. v. Brown (Mich.) 90 N. W. 284.

Unless excused (as by ignorance)—Elder v. Justice's Ct., 136 Cal. 364, 68 Pac. 1022. 18 months' delay after docketing case on error held too long—Ayres v. Polsdorfer, 187 U. S. 585. Party having knowledge of suit must attack it within time—Jacobs v. Brooke (Mich.) 92 N. W. 783. Six years' delay with knowledge—Budd v. Camden (N. J. Law) 54 Atl. 569.

25. Eminent domain—Slocum v. Neptune Tp. (N. J. Law) 53 Atl. 301.

26. Statute allows joinder to assail the "same" matter [L. 1896, c. 908, § 250]—People v. Feitner, 74 App. Div. (N. Y.) 130.

27. "Any party" may (Code, § 481)—Ex parte Bogatsky, 134 Ala. 384.

28. Duluth El. Co. v. White, 11 N. D. 534.

29. Adverse party to the cause should not be joined—Chamberlain v. Edmonds, 18 App. D. C. 332.

30. The city though interested is not necessary party to proceeding against tax board—In re Belmont, 40 Misc. (N. Y.) 133.

31. On drain proceedings must be within 10 days—Blumfield Tp. v. Brown (Mich.) 90 N. W. 284. Finality from which time is reckoned begins when judgment is announced—Kyle v. Richardson (Tex. Civ. App.) 71 S. W. 399. An order must be recorded before it becomes final and time for review begins to run—People v. Vandewater, 83 App. Div. (N. Y.) 60. See as to tardiness defeating right to certiorari, supra.

32. In re Belmont, 40 Misc. (N. Y.) 133.

33. An illegal verification harmless because unnecessary—State v. Bennett (Mo. App.) 73 S. W. 737.

34. Presumption favors it—Hegenbaumer v. Heckenkamp, 202 Ill. 621.

35. Frellsen v. Ruddock Cypress Co., 108 La. 37.

36. Weldon v. Ayers, 116 Ga. 181. Allegations that property is being taken for a use not public and without right held sufficient—Seattle & M. R. Co. v. Bellingham Bay & E. R. Co., 29 Wash. 491, 69 Pac. 1107. Error must be assigned—Clements v. McCormick H.-M. Co., 115 Ga. 851. Allegation that substantial rights are affected is mere conclusion and needless—Ferguson v. Byers, 40 Or. 468, 67 Pac. 1115, 69 Pac. 32. Allegations not sufficient to plead over valuation for taxation—People v. Feitner, 39 Misc. (N. Y.) 463. Allegations should show want of knowledge of facts in order to negative acquiescense—Stevens v. Somerset County Com'rs, 97 Me. 121.

Prerogative writ will not issue to court of limited appeal unless some excess of jurisdiction appears—State v. Smith (Mo.) 73 S. W. 211.

37. Brannon v. Dunahoo (Ga.) 44 S. E. 991.

38. State v. Wilson, 90 Mo. App. 154.

39. Hence that writ should not issue—Ward v. Aldermen, 181 Mass. 432.

40. Whether conveyors of a public service company are on private land or in the street [for the purpose of applying the proper method of taxation] is a fact to be decided by reference; but the allegation that property should have been assessed below a given sum does not raise such an issue of fact as to overvaluation—People v. Feitner, 39 Misc. (N. Y.) 463.

41. Comp. Laws, § 937, authorizing a court commissioner "of any county" does not mean "any other" county—Monroe v. Reynolds (Mich.) 90 N. W. 1065.

42. People v. Stillings, 76 App. Div. (N. Y.) 143.

43. The trial justice had mentally approved it but had not yet signed—Dykes v. Twiggs County, 115 Ga. 698. Approval allowed nunc pro tunc under Mo. statute—Gossett v. Devorss (Mo. App.) 73 S. W. 731.

44. Colvard v. State (Ga.) 43 S. E. 855.

45. Alabama Midland Ry. Co. v. Stevens, 116 Ga. 790. And it cannot be ratified retroactively—Id. Chief clerk of local depot not

The writ should be directed to a municipality whose act is to be reviewed, and not to officers.[47] It must issue from a court and not from chambers.[48] It should be served on the clerk of a respondent body when its members have gone out of office.[49] It is not a summons which an officer must serve.[50] Serving a copy and filing the original when exact duplicates is unimportant.[51]

Notice of writ to parties in original cause and service.—Adverse litigants and persons who are required to appear should have notice.[52] Plaintiff must be diligent in procuring timely service.[53] A telegram properly delivered has been held a sufficient written notice to the adverse litigant.[54] A certificate of service should be dated, and if not served by an officer should be verified.[55]

The return should be signed by respondent,[56] and be sufficiently authenticated.[57] All proceedings, papers or matter in the cause must be returned,[58] and others may be in proper cases.[59] Records brought before the court on application for the writ may, if identified by the answer, be regarded as returned.[60] The return by a court of review may be the transcript from the court below.[61]

Objections and amendments.—Exceptions must be specific.[62] The relator should except to, or traverse a return which leaves it doubtful what, if anything, was done below,[63] else it will conclude him.[64] Unless the petitioner excepts to an irresponsive answer, the assignments in the petition cannot be heard.[65] If only law points be raised by a traverse, it is equivalent to a demurrer.[66] Motion to order certification of omitted material facts and not motion to quash the record is the proper remedy.[67] After the writ issues, the record is conclusive; hence, any agreed statement made on application for the writ cannot be avoided or discharged, except on application in the nature of a writ of review on grounds of mistake warranting vacation of the judgment.[68] Impeaching amendments cannot be made,[69] thus, when

an "agent" competent to give bond for railroad party—Id.

46. Hill v. State, 115 Ga. 833.

47. To "township" not clerk and trustees —Young v. Crane, 67 N. J. Law, 453.

48. Const. Colo. art. 6, § 3, empowers supreme "court"—People v. District Ct. (Colo.) 69 Pac. 1066. [In this case prohibition was prayed for.]

49. Their order was on file with him—State v. Losby, 115 Wis. 57. Ex officers may be served alone if their return will be complete without that of the custodian of records or their successors (N. Y. Code Civ. Proc.)—People v. Stillings, 75 App. Div. (N. Y.) 569.

50. Service by private person sufficient—Gossett v. Devorss (Mo. App.) 73 S. W. 731.

51. Monroe v. Reynolds (Mich.) 90 N. W. 1065.

52. Required by Georgia Code, § 4644—Sheppard v. Walker (Ga.) 44 S. E. 801. The solicitor-general, who is required to appear, must have notice on a writ to the city court from the superior court—Culbreth v. State, 115 Ga. 242.

53. Atlanta, K. & N. Ry. Co. v. Whitaker, 115 Ga. 644.

54. May be signed by relator or attorney —W. U. Tel. Co. v. Bailey, 115 Ga. 725.

55. Hardy v. Miller, 115 Ga. 107.

56. Not by counsel only—Warren v. Hart, 183 Mass. 119.

57. Certificate of evidence in inapt form and signed before writ issued held insufficient—Southern Ry. Co. v. Leggett, 117 Ga. 31.

58. Even an indictment originally presented to the reviewing court and by it transferred down—Georgia So. & F. Ry. Co. v. State, 116 Ga. 845. Tax assessors should return evidence on which they based an assessment—People v. Feitner, 78 App. Div. (N. Y.) 313. Justice's answer under Georgia practice includes evidence—Southern Ry. Co. v. Leggett, 117 Ga. 31.

59. Other assessments may be brought up to show inequality—State v. Sackett (Wis.) 94 N. W. 314.

Evidence must be set out by justice only in prosecution which is summary—N. J. Soc. for Prevention of Cruelty v. Mickeloit (N. J. Law) 54 Atl. 559.

60. Warren v. Hart, 183 Mass. 119.

61. A transcript in error may be sent up on certiorari to the proceeding in error—Security Trust Co. v. Dent, 187 U. S. 237.

62. Exception for omission held sufficient—Daniels v. State (Ga.) 44 S. E. 818.

63. Tyner v. Leake (Ga.) 44 S. E. 812. If he does not the writ will be overruled—Buckner v. State, 115 Ga. 238. Answer must show a judgment—Garrett v. McIntosh, 116 Ga. 911.

64. Taylor v. Sandersville (Ga.) 44 S. E. 845; People v. Pool, 77 App. Div. (N. Y.) 148.

65. Stoner v. Magins, 116 Ga. 797.

66. A traverse to a magistrate's return that it showed no warrant held in effect a demurrer to the return—People v. Crane, 37 Misc. (N. Y.) 639, 109 N. Y. St. Rep. 1111.

67. Tileston v. Street Com'rs, 182 Mass. 325.

68. Application was made to discharge agreed statement—Warren v. Hart, 183 Mass. 119.

the record is silent and the officers who made it are out of office, the return cannot be amended to show by their supplemental return that they considered evidence which would make the proceeding invalid.[70]

Effect of writ; stay.—In New York, a stay does not result, but may be allowed for sufficient reasons.[71] A recognizance for supersedeas must be before the proper officer.[72] A certiorari in aid does not bring up a cause where the principal proceeding is defective.[73]

Quashal or dismissal.—The court issuing a writ may hear a motion to quash,[74] or dismiss[75] before return. The court may dismiss if parties are remiss in not moving to correct a bad return.[76] In the note are collected grounds for dismissal.[77] While a renewal may be allowed, yet if it be dismissed as void, there is nothing to renew.[78]

§ 4. *Hearing and questions which may be raised or settled.*—The writ reaches only the judgment and not irregularities and mere errors.[79] Proper and timely objections should be made below,[80] though it has been held that exceptions are unnecessary.[81] Errors should be sufficiently assigned.[82] Extraneous matters,[83] even when pleaded as a reason why the writ should be refused will not, though traversed, be heard or determined on hearing.[84] The return is conclusive of facts found on the

69. Street commissioners cannot amend their record by declaring that an assessment was for a purpose other than that expressed —Warren v. Hart, 183 Mass. 119.

70. Applied where former police commissioners returned amendments to show that the record of an officer's prior conduct had been considered on the question of his guilt contrary to law—People v. York, 78 App. Div. (N. Y.) 432.

71. Code Civ. Proc. § 2131 does not enlarge rights to or grounds for a stay. Prejudice of relator's superior should not stay removal from office, nor should allegations of error; and when removal for cause was after hearing a stay until review is improper—People v. Sturgis, 39 Misc. (N. Y.) 448.

72. If taken by a justice other than the one who rendered judgment is invalid and judgment cannot be entered on it—Wesley v. Sharpe, 19 Pa. Super. Ct. 600.

73. Huguley Mfg. Co. v. Galeton Mills, 184 U. S. 290, 46 Law. Ed. 546.

74. State v. Fraker, 168 Mo. 445.

75. Motion to dismiss is in the nature of a demurrer—People v. Peck, 73 App. Div. (N. Y.) 89.

76. Failed to except to want of authentication—Southern Ry. Co. v. Leggett, 117 Ga. 31.

77. Tardy service because of which return was not made in time for return term—Atlanta, K. & N. Ry. Co. v. Whitaker, 115 Ga. 644. Irregularity in attaching original papers to petition not cause for dismissal—Brannon v. Dunahoo (Ga.) 44 S. E. 991. Want of sufficient answer and of motion to compel it—Fain v. Shy, 115 Ga. 765; Tyner v. Leake (Ga.) 44 S. E. 812. Issuance before approval and indorsement of bond renders writ dismissable —Dykes v. Twiggs County, 115 Ga. 698. Petition assigned no error—Clements v. McCormick H.-M. Co., 115 Ga. 851. Failure to make a full return (writ and bond omitted) may be cured—Monroe v. Reynolds (Mich.) 90 N. W. 1065. Bond improper because signed by agent cannot be made valid after motion to dismiss—Alabama Midland Ry. Co. v. Stevens, 116 Ga. 790.

Case or question become moot: Voluntary dismissal of proceeding below—State v. Third Judicial Dist. Ct. (Nev.) 71 Pac. 664. Certiorari against resolution calling charter election is moot after election at which charter is rejected—Smith v. Jersey City (N. J. Law) 53 Atl. 811.

78. There was no valid bond—Southern Ry. Co. v. Goodrum, 115 Ga. 689.

79. If the order of an assessment board taxes "capital" of a partnership, certiorari will not reverse it because earlier in the proceeding the words "capital stock" were used—State v. Lewis (Wis.) 95 N. W. 388.

80. People v. Feitner, 39 Misc. (N. Y.) 463. Impropriety of conduct of counsel—Lanier v. Byrd, 115 Ga. 200. See applications of analogous rule in the article "Saving Questions for Review." Errors were consented to below—Ford v. Vinegar Co., 116 Ga. 793.

81. Because certiorari is an original and not an appellate proceeding—Coffey v. Gamble, 117 Iowa, 545.

82. Stanton v. Board of Educ'n (N. J. Law) 53 Atl. 236. Averment that judgment is unlawful may suffice if error is apparent on record—Marcellus v. Treasurer (N. J. Law) 52 Atl. 233. Averments held to specify but one error—Wing v. Blocker, 115 Ga. 778. Allegations of amount of benefit and of assessment held too inferential to charge error consisting in inequality—Tileston v. Street Com'rs, 182 Mass. 325. An objection insufficiently made was not newly averred in petition for certiorari—People v. Feitner, 39 Misc. (N. Y.) 463.

83. Stipulations—Knoell v. Jordan (N. J. Law) 53 Atl. 207. Evidence of a wrong ruling not contained in record—State v. Losby, 115 Wis. 57. Evidence of good faith—Janvrin v. Poole, 181 Mass. 463. Affidavits of jurors as to whether improper evidence was considered—Gildea v. Hill, 115 Ga. 136. Affidavits which are not part of petition or return will be ignored—Chamberlain v. Edmonds, 18 App. D. C. 332.

84. Facts alleged to make error harmless —Ward v. Aldermen, 181 Mass. 432.

evidence,[85] but this conclusiveness may, it seems, be waived.[86] Evidence is considered only so far as affects jurisdiction, and not as to sufficiency.[87] Presumptions will not be indulged against facts in the record,[88] and will favor the court below,[89] but the rulings will not be sustained on a different ground from that taken by the court.[90] In many instances the review has been extended by statute to the facts.[91]

§ 5. *Judgment.*—Such order only will be made as is proper on the record.[92] Final judgment should be rendered if the case admits without infringing on the trial court,[93] otherwise a remand will be made.[94] If the court below is sustained, final judgment may be entered, though evidence is conflicting.[95] A verdict in excess of the ad damnum clause may be reduced by consent,[96] or an illegal part written off and the writ overruled.[97] General judgment on the bond is not proper practice on an affirmance.[98] Findings, it seems, are not required.[99]

§ 6. *Costs.*—Costs are usually made discretionary, unless specifically allowed by statute.[1] A successful party is not taxed with costs merely because a judgment

85. Return of an assessment proceeding—People v. Feitner, 38 Misc. (N. Y.) 204. As that a policeman was absent without leave whereupon relator police board dismissed him—People v. York, 73 App. Div. (N. Y.) 445. Answer that road was completed and benefits were ascertained conclusive though record showed only assessment of the sum—Janvrin v. Poole, 181 Mass. 463. Question of lunatic's residence—Commonwealth v. Harrold, 204 Pa. 154. Necessity of a road—Stowe Tp. Road, 20 Pa. Super. Ct. 404.

86. Facts relative to an assessment were agreed to—Jones v. Metropolitan Park Com'rs, 181 Mass. 494.

87. West Donegal Tp. Road, 21 Pa. Super. Ct. 620; Commonwealth v. Harrold, 204 Pa. 154; Sims v. Sims, 116 Ga. 679. Only jurisdictional facts on face of record—State v. Baker, 170 Mo. 383. If there is any evidence to support a commitment on a preliminary hearing, the jurisdiction is upheld—People v. Warden, 37 Misc. (N. Y.) 545, 109 N. Y. St. Rep. 1114. Certiorari in aid of habeas corpus only brings up the jurisdiction and not evidence on a commitment for contempt—State v. District Ct., 26 Mont. 365, 68 Pac. 409, 471. Condition of cause and record held to admit of review of an assessment on merits—People v. Feitner, 81 App. Div. (N. Y.) 118.

88. Thus it is not supposed that an ordinance was introduced at a prior meeting against the fact that the only ordinance shown to have been introduced at the prior meeting differed in terms—Delaware & A. Tel. Co. v. Township Committee, 67 N. J. Law, 531.

89. Record was silent as to whether one was misled by other's nonresidence—Harris v. Doyle (Mich.) 90 N. W. 293. As to relationship disqualifying road commissioners, the record being silent—Stevens v. County Com'rs, 97 Me. 121.

90. Writ was quashed as become void by failure to return and not because of laches—Guarantee Safe Deposit Co. v. Nebeker (N. J. Law) 53 Atl. 558.

91. Allowing new trial where evidence was conflicting is not necessarily error if the sufficiency of evidence was questioned—Carter v. Garrett, 115 Ga. 595. On certiorari to review an assessment there is substantially a new trial admitting of additional proof—People v. Wells, 116 N. Y. St. Rep. 564.

92. Warren v. Hart, 183 Mass. 119. Proper order in a tax certiorari in N. Y.—People v. Feitner, 78 App. Div. (N. Y.) 313. Where return shows subsequent satisfaction of the judgment it should not be set aside—State v. Laurendeau, 27 Mont. 522, 71 Pac. 754.

93. Error was one of law—Maxwell v. Collier, 115 Ga. 304. For this purpose a finding of facts is equivalent to a special verdict on which final judgment will pass—Sullivan v. Visconti (N. J. Law) 53 Atl. 598. Final judgment may be given in discretion of court in possessory warrant case—Sheriff v. Thompson, 116 Ga. 436.

94. So where a different result on the facts should have been reached—Pike v. Sutton, 115 Ga. 688. As where fact was involved—Williams v. Bradfield, 116 Ga. 705.

95. Ford v. Vinegar Co., 116 Ga. 793.

96. Seaboard Air Line Ry. v. Christian, 115 Ga. 742.

97. Ford v. Vinegar Co., 116 Ga. 793.

98. Suit to foreclose a lien—Barnett v. Tant, 115 Ga. 659. In entering final judgment against relator after correcting the error complained of he cannot be charged on his bond for costs—McInnis v. Greaves, 80 Miss. 632.

99. At least when hearing is on petition and return—Elder v. Justice's Ct., 136 Cal. 364, 68 Pac. 1022.

1. So in Supreme Court of New Jersey when hearing a common law certiorari in exercise of its appellate jurisdiction. P. L. 1898, p. 556, § 94 is applicable only where district court had no jurisdiction—C. B. Smith & Co. v. Holshauer (N. J. Law) 52 Atl. 308. On reversal which does not result in final judgment costs are not usually awarded by the supreme court—Id. They were refused a prosecutor on dismissal of a writ which had become futile for lack of a real question—Smith v. Jersey City (N. J. Law) 53 Atl. 811. On setting aside a liquor license granted without a hearing of substantial objections remonstrant who prosecuted was allowed costs—Bachman v. Inhabitants of Phillipsburg (N. J. Law) 53 Atl. 620. An arbitrary act done in ignorance by unskilled men and like the custom was held not so gross as to warrant costs—People v. Rushford, 81 App. Div. (N. Y.) 298. In Iowa costs are controlled by rules applicable to error or appeal—Coffey v. Gamble (Iowa) 94 N. W. 936. Costs on motion to correct an error will

goes against him.[2] The relator should have costs if respondent voluntarily dismisses the case below and thereby causes dismissal of the writ.[3]

§ 7. *Review of certiorari.*—Certiorari, being at law, is reviewable only by technical legal procedure.[4] On appeal from certiorari, questions not properly raised are ignored,[5] and the decision below is sustained, unless error is shown.[6] The facts are not reviewed.[7] Parties may not complain that extraneous matter was considered at their instance.[8] An intermediate court which adopts the highest court's judgment of dismissal and sends it down, reserving a question of right to reinstate the cause, confers no rights but merely preserves existing ones.[9]

CHAMPERTY AND MAINTENANCE.

A gambling or trafficking in litigation is champertous.[10] A layman cannot contract to procure employment for an attorney and collect evidence for a portion of the fees earned.[11] A lienor, though not of record in the action, may agree to maintain an action which will protect his lien.[12]

The rule against conveyances of land held adversely[13] does not apply to judicial sales,[14] nor to grants of franchises by the public in opposition to a conflicting claim of a franchise.[15] A quitclaim deed by a mortgagor, after foreclosure under a power of sale, passes an equity of redemption and not a mere right to attack the sale,[16] and a mortgagor's voluntary grantee may require the mortgagee to account.[17] In New Jersey, no policy forbids the transfer of a right of entry.[18] Possession under an adverse claim must exist[19] when lands are conveyed.[20] The adverse possession need not have ripened into a title,[21] and it need not be actual over the entire tract, but may be in part constructive.[22] In Connecticut, the possession of a mortgagee is adverse.[23]

be charged to the party in fault—Fitch v. Auditors (Mich.) 94 N. W. 952.

2. The original judgment was modified at his complaint—McInnis v. Greaves, 80 Miss. 632.

3. Regardless whether certiorari was proper—State v. Third Judicial Dist. Ct. (Nev.) 71 Pac. 664.

4. By exception and not appeal when writ is denied by single justice of supreme judicial court. Appeals in law cases lie from superior court only—Inhabitants of Brockton v. Com'rs, 183 Mass. 42.

5. There was no traverse—Lanier v. Byrd, 115 Ga. 200. Error in overruling petition cannot be considered where answer did not admit or otherwise show any judgment in case reviewed—Stoner v. Magins, 116 Ga. 797. Not assigned below—Suburban Land Imp. Co. v. Borough of Vailsburgh (N. J. Law) 53 Atl. 388.

6. General grounds urged were sufficient—D. M. Ferry & Co. v. Mattox (Ga.) 44 S. E. 1005.

7. Suburban Land Imp. Co. v. Borough of Vailsburgh (N. J. Law) 53 Atl. 388.

8. As by agreeing to a given fact not shown by the record—Barnett v. Tant, 115 Ga. 659.

9. Lovelady v. Nursery Co., 115 Ga. 714.

10. Casserleigh v. Wood (C. C. A.) 119 Fed. 308. But the state court held that the same contract was not offensive to public policy—Wood v. Casserleigh, 30 Colo. 287, 71 Pac. 360.

11. It is said to be against public policy—Langdon v. Conlin (Neb.) 93 N. W. 389, 60 L. R. A. 429.

12. Hall v. Deaton, 24 Ky. L. R. 314, 68 S. W. 672.

13. Lyttle v. Fitzpatrick, 24 Ky. L. R. 93, 67 S. W. 988; Eisemann v. Lapp, 38 Misc. (N. Y.) 14. Cf. Gray v. Williams, 130 N. C. 53.

14. Griffin v. Dauphin, 133 Ala. 543.

15. People's Elec. Light Co. v. Capital Gas & Elec. Co. (Ky.) 75 S. W. 280.

16. Land was fraudulently bought in—Houston v. National Mut. B. & L. Ass'n, 80 Miss. 31.

17. Gribbel v. Brown, 202 Pa. 10. Evidence held insufficient to show that a suit was champertous because of another independent contract to sue for a certain advantage in respect to same property—Id.

18. Semble that it is a transferable expectancy—Bouvier v. Baltimore & N. Y. Ry. Co., 67 N. J. Law, 281.

19. One claiming under a remainderman cannot hold adversely to the life tenant—Davis v. Willson, 25 Ky. L. R. 21, 74 S. W. 696.

20. Claimant's tenant attorned to grantor before sale was actually made—Griffin v. Dauphin, 133 Ala. 543.

Deed is valid if grantor has a final and conclusive judgment against the tenant though writ of possession has not been served—Miller v. Farmers' Bank (Ky.) 75 S. W. 218.

21. So by statute in Tennessee—Green v. Cumberland Coal Co. (Tenn.) 72 S. W. 459.

22. Green v. Cumberland Coal Co. (Tenn.) 72 S. W. 459. The land so held must be within the boundaries recited—Slatton v. Tennessee C., I. & R. Co. (Tenn.) 75 S. W. 926.

23. Mead v. Fitzpatrick, 74 Conn. 521.

A conveyance by a disseised tenant in common is void as against the other.[24] A dispute as to a boundary is not an adverse claim to the intervening strip.[25]

If a deed is void as to the adverse possessor only, and under the law the grantee may sue in the grantor's name, a later statute giving him the same remedies as if the grantor had been in possession is purely remedial, and the grantee may sue in his own name.[26]

The common-law rule that attorneys could not contract for a fee dependent on the event of recovery or payable thereout is now largely regulated by statute.[27] An attorney must not acquire an interest in or control or direction of the action,[28] so as to take away that of the assignor.[29] Whenever a contingent fee is legal, he may agree to pay associates out of it.[30] An agreement by an attorney to prosecute at his own expense for a compensation is bad, as agreeing to advance money, and as promising a valuable consideration for the purpose of receiving a demand for suit.[31]

Under statutes prohibiting "attorneys," a layman may agree with an attorney to divide the recovery and the agreement is enforceable against the attorney.[32] Officers cannot make their fees payable out of a recovery.[33]

Champerty is a defense only to the contract infected by it.[34] Despite the invalidity of a champertous agreement for a contingent fee, a quantum meruit may be recovered,[35] and proper amendments for that purpose should be allowed.[36]

Champerty must be pleaded as a defense,[37] but champertous conveyances may be regarded as void, even by the grantor, and without pleading invalidity.[38]

CHARITABLE AND CORRECTIONAL INSTITUTIONS.[39]

Institutions Included; Soldiers' Homes; Commitment of Minors; Officers and their Powers; Labor of Inmates; Custody and Control of Inmates; Maintenance and Support; Transfers; Remission of Sentences; Discipline; Liability for Injuries to Inmates; Escapes.

Institutions included in term.—An incorporated industrial school and orphan asylum to which boys are committed from different counties by overseers of the

24. Berry v. Tennessee & C. R. Co., 134 Ala. 618.

25. Small v. Hamlet, 24 Ky. L. R. 238, 68 S. W. 395; Perciful v. Coleman, 24 Ky. L. R. 1685, 72 S. W. 29. Overhanging encroachments do not avoid a deed—Norwalk H. & L. Co. v. Vernam (Conn.) 55 Atl. 168.

26. Campbell v. Equitable L. & T. Co. (S. D.) 94 N. W. 401. Compare Galbraith v. Paine (N. D.) 96 N. W. 258.

27. In Michigan he may receive a share—Fletcher v. McArthur (C. C. A.) 117 Fed. 393. So in Illinois (collection of policy on life)—Robinson v. Sharp, 201 Ill. 86. But it must not be overreaching or fraudulent—Id. Compare title Attorneys and Counselors, ante, p. 270 et seq.

28. An assignment to him to collect and pay over surplus after taking out expenses, fees and advances is void—Ravenal v. Ingram, 131 N. C. 549. No settlement was to be made unless he was present and directed it—Davis v. Chase, 159 Ind. 242. An agreement to represent several clients bringing one test case on a contingent fee for each, held valid—Tron v. Lewis (Ind. App.) 66 N. E. 490. Agreement that a tax-ferret should pay all expenses and attorney fees for half of recovery held not champertous—Shinn v. Cunningham (Iowa) 94 N. W. 941.

29. Brown v. Ginn, 66 Ohio St. 316.

30. In re Fitzsimons, 174 N. Y. 15.

31. Statutes construed—Stedwell v. Hartmann, 74 App. Div. (N. Y.) 126. Promise to defray all expenses is one to give "a valuable thing" for employment; but to take an interest in the action to secure fees is not void—Ft. Worth & D. C. Ry. Co. v. Carlock (Tex. Civ. App.) 75 S. W. 931.

32. Code Civ. Proc. § 74 construed—Irwin v. Curie, 171 N. Y. 409.

33. Edgerly v. Hale, 71 N. H. 138; Watson v. Fales, 97 Me. 366.

34. Not in the original action (Hall v. Deaton, 24 Ky. L. R. 314, 68 S. W. 672); nor in a suit to cancel a release of judgment entered in a suit where the attorney was acting champertously—Hearn v. Hearn, 24 R. I. 328. Defendant cannot plead champerty between plaintiff and plaintiff's attorney—Isherwood v. H. L. Jenkins Lumber Co., 87 Minn. 388.

35. The condition for no pay in case of failure is void with that for a percentage—Leonard v. Boyd, 24 Ky. L. R. 1320, 71 S. W. 508.

36. Leonard v. Boyd. 24 Ky. L. R. 1320, 71 S. W. 508.

37. Held in action to enjoin employment of attorney by county to discover and collect unpaid taxes—Disbrow v. Cass County Sup'rs (Iowa) 93 N. W. 585.

38. Green v. Cumberland Coal Co. (Tenn.) 72 S. W. 459.

39. See Public Works and Improvements, for exemption of hospital property from as-

poor, and having only a slight income from the sale of farm products, is a charitable institution.[40] The Illinois state reformatory is not a charitable, but a penal institution.[41]

Soldiers' homes.—National soldiers' homes are regarded as part of the government of the United States, and may not be sued in tort, and the fact that the act gives power to sue and be sued at law and in equity does not change this rule, as that has reference solely to matters within the scope of the corporate powers of the institution.[42]

Commitment of minors to reformatories.—A child under sixteen years, convicted of petit larceny, must, under the New York Penal Code, be committed to some reformatory authorized by law to receive minors.[43]

Officers, their powers, duties and liabilities.—Courts of equity may not remove officers of penal institutions.[44] Generally the sheriff is entitled to the charge and custody of the county jail.[45] The warden of a penitentiary, under a law making him the custodian of funds belonging to the penitentiary, is not a mere bailee, but is an insurer of such funds and liable for their loss.[46] A like liability attaches to the treasurer of a state asylum for insane criminals.[47] Failure of the governor to approve a warden's bond will not affect its validity as against the warden and his bondsmen.[48]

Labor of inmates.—The proper officers may, in the exercise of their discretion, let out the convict labor by contract,[49] and the contract is not invalid because for a period beyond the term of the officers making the contract.[50] A convict labor contract is invalid unless the bond required by law has been duly approved,[51] and officials charged with the duty of passing on such bonds have discretion in the matter of the hiring.[52] A convict labor bond, conditioned for payment of money to become due and for the humane treatment of convicts, permits recovery for inhumane treatment only to the amount of actual damages resulting to the county.[53] The laws of Georgia prohibit the working of convicts in private chain gangs controlled by private individuals.[54] Inmates of insane asylums physically fit for labor may be employed without the grounds of the institution, where the laws do not require confinement within the grounds of the institution.[55] An act providing that not less than fifty convicts shall be hired to any person, but where convicts are worked in the county of conviction, less than fifty may be worked in one place, is not violated by a contract for hire of all convicts of a certain county to labor in another county, no number being specified.[56] A convict employed under a convict bond may be returned to custody by agreement between the hirer and the judge.[57]

sessments for municipal improvements. See Taxation, for liability of charitable institution to taxation.

40. Corbett v. St. Vincent's Industrial School, 79 App. Div. (N. Y.) 334.

41. Marshall v. Board of Managers, 201 Ill. 9.

42. Overholser v. National Home, 68 Ohio St. 236.

43. People v. New York Catholic Protectory, 38 Misc. (N. Y.) 660.

44. Marshall v. Board of Managers, 201 Ill. 9.

45. Sturr v. Buckley (N. J. Law) 52 Atl. 692. The fact that the state constitution invests a sheriff with the common law duties of such officer will not invalidate a statute taking from the sheriff the control of a jail, as the legislature has the power to change his rights and duties—Beasley v. Ridout, 94 Md. 641.

46, 47, 48. Ramsay's Estate v. People, 197 Ill. 572.

49. Comp. St. 1901, c. 86, § 16—State v. Mortensen (Neb.) 95 N. W. 831; McConnell v. Arkansas Brick & Mfg. Co., 70 Ark. 568.

50. McConnell v. Arkansas Brick & Mfg. Co., 70 Ark. 568.

51. Rev. St. § 3062—Camp v. McLin (Fla.) 32 So. 927. Comp. St. 1901, c. 86, § 16—State v. Mortensen (Neb.) 95 N. W. 831.

52. Rev. St. § 3062—Camp v. McLin (Fla.) 32 So. 927.

53. Rev. St. 1895, art. 3746—Ellis v. Ft. Bend County (Tex. Civ. App.) 74 S. W. 43.

54. Simmons v. Georgia Iron Co. (Ga.) 43 S. E. 780.

55. Clough v. Worsham (Tex. Civ. App.) 74 S. W. 350.

56. Rev. Code, § 4476, and in a suit on a bond for convicts worked in another county, a plea of invalidity because at the time

Custody and control of inmates.—Under laws releasing parents from all duties to children committed to state institutions, the authority of the officers thereof during minority is superior to the rights of a guardian, unless voluntarily relinquished,[58] and the discretion of the officers as to release will not be interfered with by courts.[59]

Maintenance of institutions and support of inmates.—An orphans' home giving moral training and religious and secular education is an asylum and not a school within the constitution of New York, prohibiting the distribution of public moneys to sectarian schools.[60] The city of New York is not liable to an asylum for the support of an incorrigible child, unless duly committed pursuant to the rules of the state board of charities.[61] In counties maintaining a poorhouse, townships are not chargeable with support of the poor.[62] A legislature may not fix one rate for pay patients admitted into a state insane asylum and a greater rate for patients admitted as paupers, who afterwards become able to pay.[63] The legal settlement of an insane person is the one primarily liable for his support if a pauper.[64] The persons or districts chargeable with the maintenance of insane persons, need not be notified of the proceedings under which the insane person was sent to the asylum.[65] After a lapse of six years, a county may not recover back amounts erroneously paid by it to the state for the support of insane sent from that county.[66] The expenses of the criminal insane are to be borne in the first instance by the county from which the insane person was sent.[67] The sheriff may appoint guards for prisoners at the county's expense when necessary.[68]

Transfer to other institutions.—A transfer of an inmate to another institution under an unconstitutional statute will not operate as a discharge.[69] An act giving

of its execution defendant did not have fifty convicts as required by law was insufficient—Griffin v. Randolph County, 136 Ala. 310.

57. Ex parte Miller (Tex. Cr. App.) 72 S. W. 183.

58, 59. Armstrong v. Board of Control (Minn.) 93 N. W. 3.

60. Sargent v. Board of Education, 76 App. Div. (N. Y.) 588. Laws of New York, allowing distribution of the school moneys to children educated in orphan asylums were not repealed by the constitution prohibiting distribution of public moneys to sectarian schools—Id.

61. Laws of 1896, c. 546, § 9, subd. 8, requires board of Charities to establish rules—In re New York Juvenile Asylum, 172 N. Y. 50.

62. Town of Clearwater v. Town of Garfield (Neb.) 91 N. W. 496. On refusal to receive a pauper because afflicted with a contagious disease, the county is liable for money thereafter expended by the township for such pauper's support and maintenance—Rockaway Tp. v. Board of Freeholders (N. J. Law) 52 Atl. 373.

63. Schroer v. Central Ky. Asylum, 24 Ky. L. R. 150, 68 S. W. 150. Under an act changing the name of an asylum to a hospital, transferring the properties and giving the treasurer of the new institution power to sue, he may recover for the care of an inmate sent to the asylum before the change—Napa State Hospital v. Yuba County, 138 Cal. 378, 71 Pac. 450.

64. Clay County v. Adams County (Neb.) 95 N. W. 58. Where a sane person, a man, has his residence in one county and moved to another with intent to make it his home, the county from which he removed will not be liable for his support as an insane person, where he did not become insane within thirty days after abandoning his former residence—Clay County v. Adams County (Neb.) 95 N. W. 58.

65. Juniata County v. Overseers of Poor, 22 Pa. Super. Ct. 187. The finding of a jury that a lunatic is a pauper will not prevent a subsequent inquiry by the state authorities as to his ability to pay—Central Ky. Asylum v. Drane, 24 Ky. L. R. 176, 68 S. W. 149; Schroer v. Central Ky. Asylum, 24 Ky. L. R. 150, 68 S. W. 150.

66. Trustees of State Hospital v. Philadelphia County, 205 Pa. 336.

67. Napa State Hospital v. Yuba County, 138 Cal. 378, 71 Pac. 450. Rev. St. 1899, §§ 4867, 4874-4878, 4883, 4887—Thomas v. Macon County (Mo.) 74 S. W. 999. It is not conclusive on the question of the convict's residence that the indictment used the words "late of the county aforesaid"; nor is conviction of a person by court of a county, prima facie proof that the person so convicted was a resident—Thomas v. Macon County (Mo.) 74 S. W. 999.

68. Dakota County v. Eastcott (Neb.) 93 N. W. 679.

69. People v. Mallary, 195 Ill. 582. The doctrine of voluntary escape would have no application to such situation because that doctrine is without application to criminal cases—Id. Constitutionality of act allowing transfer of incorrigible prisoners may be tested by habeas corpus—Id.

a board power to transfer inmates to another institution, on a showing of certain facts, invests the board with judicial powers and is unconstitutional.[70]

Remission of sentence.—Courts generally are without power to remit a portion of a sentence where there is no proceeding in error; that power being vested in other officers.[71]

Discipline.—Guards have no right to whip convicts in the absence of rules conferring that power,[72] and where a convict is whipped by a guard, he may sue for assault and battery.[73]

Liability of institutions or officers for injuries to inmates.—A charitable institution exercising due care in the selection of employes is not liable for injuries to an inmate, through the negligence of an employe.[74] An institution conducted for profit is liable for negligence of its physician treating a pay patient.[75] The surgeon in chief of a hospital, and paid by the month for his services, is the servant of the hospital and not an employe of the patient.[76] A patient in a private sanitarium may recover for unnecessary assault inflicted when he was delirious.[77] Money paid for an injury to one in the erection of a building required by a bequest will be regarded as an incident to the management, and may be charged as an item of cost of such management.[78] A convict may recover for injuries inflicted while employed under convict contract,[79] his right not affected by disobedience of orders of state officers.[80] A superintendent of an insane asylum is not personally liable for negligence of a patient employed in work outside the grounds, where the fitness of inmate to labor was passed upon by the physicians.[81]

Liability for escape.—A jailer negligently allowing escape is liable, though effected without intent on his part.[82]

CHARITABLE GIFTS.[83]

§ 1. Validity in General.
§ 2. Capacity of Donee or Trustee.
§ 3. Interpretation and Construction.
§ 4. Administration and Enforcement.

§ 1. *Validity in general.*—The motive of a charitable gift cannot be considered in determining its validity.[84] Statutory provisions restrictive of the right to devise or bequeath to a charity may, it is held, be waived by agreement of testator and the persons protected by such laws.[85] To be valid it must be for a public use,[86] as for the establishment of a church and mission of a particular denomination,[87] or for the support and maintenance of a pastor thereof,[88] or for foreign and home missions

70. People v. Mallary, 195 Ill. 582.
71. State v. Dalton (Tenn.) 72 S. W. 456.
72. Davis v. State (Miss.) 33 So. 286.
73. Acts 1896, p. 99; Code 1892, § 2747—Davis v. State (Miss.) 32 So. 922.
74. Corbett v. St. Vincent's Industrial School, 79 App. Div. (N. Y.) 334; Pepke v. Grace Hospital (Mich.) 90 N. W. 278.
75. Brown v. La Societe Francaise de Bienfaisance Mutuelle, 138 Cal. 475, 71 Pac. 516. Want of care in selecting physicians who proved to be unskillful should be alleged —Plant System Relief Dept. v. Dickerson (Ga.) 45 S. E. 483.
76. Brown v. La Societe Francaise de Bienfaisance Mutuelle, 138 Cal. 475, 71 Pac. 516.
77. And a hundred dollars is not an excessive amount—Galesburg Sanitarium v. Jacobson, 103 Ill. App. 26.
78. Though will prohibited a diversion of the fund—Winnemore v. Philadelphia, 18 Pa. Super. Ct. 625.
79, 80. San Antonio & A. P. Ry. Co. v. Gonzales (Tex. Civ. App.) 72 S. W. 213.
81. Clough v. Worsham (Tex. Civ. App.) 74 S. W. 350.
82. Lynch v. Commonwealth, 24 Ky. L. R. 2180, 73 S. W. 745.
83. See Charitable and Correctional Institutions for liability of such institutions or the trustees thereof for torts.
84. As that the intention of testatrix was to perpetuate the family name—Appeal of Eliot, 74 Conn. 586.
85. In re Beers' Will, 117 N. Y. St. Rep. 67.
86. Grant v. Saunders (Iowa) 95 N. W. 411. A use for a cemetery is not charitable merely because held by trustees—Congregation Shaarai v. Moss, 22 Pa. Super. Ct. 356.
87. Is for a charitable object within Conn. Gen. St. § 2951—Appeal of Eliot, 74 Conn. 586.
88. Farmers' & Merchants' Bank v. Robinson, 96 Mo. App. 385.

connected therewith,[89] or for a home for old and infirm persons who may become connected therewith,[90] or a gift for the benefit of a public library,[91] or a humane society,[92] or incorporated mutual benefit associations,[93] or an incorporation for the purpose of maintaining an industrial school and asylum for the sustenance and education of male orphan children, supported by contributions and from sale of products,[94] or a gift to a city for a college for the education of orphan boys,[95] or for masses for the repose of the soul of testator,[96] but a gift for the benefit of the deceased members of a fraternal society is not for a public charity,[97] nor is a bequest of a permanent fund to maintain testator's place of interment.[98]

It is essential that there be a beneficiary named or capable of being ascertained,[99] or created as an institution by organization or incorporation.[1] A grant to an aggregation of people within certain municipal limits is not a sufficient designation of grantees.[2]

Uncertainty as to the trustee will not necessarily defeat the trust.[3] A bequest to a "nephew" is not invalid as creating a personal trust.[4] That the trustee appointed was permitted to select his co-trustees will not invalidate the trust.[5]

In some states a limitation on the amount which can be devised to charitable uses has been fixed by statute.[6] If the heirs knowingly permitted the trustees to en-

89. Bruere v. Cook, 63 N. J. Eq. 624.

90. Gen. St. Conn. § 2951—Appeal of Eliot, 74 Conn. 586.

91. As the Boston Library and the Boston Atheneum—Minns v. Billings, 183 Mass. 126.

92. Minns v. Billings, 183 Mass. 126.

93. As typographical society, teachers association and bank officers association, which are open to all qualified to join, though the gift is for the benefit of members only—Minns v. Billings, 183 Mass. 126.

94. Corbett v. St. Vincent's Industrial School, 79 App. Div. (N. Y.) 334.

95. St. 43 Eliz. c. 4, held in force and act 1901 authorizing the city to accept and enforce the bequest was an expression of the policy of the state—Clayton v. Hallett, 30 Colo. 231, 70 Pac. 429, 59 L. R. A. 407.

96. But there is a conflict in the decisions whether this is a charitable use; see 5 Am. & Eng. Enc. Law (2d Ed.) pp. 927-929—Coleman v. O'Leary's Ex'r, 24 Ky. L. R. 1248, 70 S. W. 1068.

97. Troutman v. De Boissiere's School Ass'n (Kan.) 71 Pac. 286.

98. In re Gay's Estate, 138 Cal. 552, 70 Pac. 707.

99. Beneficiaries need not be limited as to any particular place—Grant v. Saunders (Iowa) 95 N. W. 411. Gift held invalid because no existing Protestant Episcopal diocese corresponded to that named—Mount v. Tuttle, 40 Misc. (N. Y.) 456. A bequest for a college for poor white male orphans "born of reputable parents" sustained though it did not define the word "reputable"—Clayton v. Hallett, 30 Colo. 231, 70 Pac. 429, 59 L. R. A. 407. A bequest for "the purpose of religion or education," or "to be applied to any charitable" use is uncertain and unascertainable—Coleman v. O'Leary's Ex'r, 24 Ky. L. R. 1248, 70 S. W. 1068. A bequest in aid of "deserving, aged native born, needing such aid" is sufficiently certain—Fay v. Howe, 136 Cal. 599, 69 Pac. 423. A bequest that the income of a certain sum be applied as "rewards of merit to pupils in the parochial poor schools in" a certain city is sufficiently definite as to purpose—Coleman v. O'Leary's Ex'r, 24 Ky. L. R. 1248, 70 S. W. 1068. A bequest for the purchase of nonsectarian books on the philosophy of spiritualism to be placed where all could read, is certain—Jones v. Watford (N. J. Law) 53 Atl. 397. A bequest for a home for "poor men" is sufficiently certain and under 1 Rev. St. p 235 it is not necessary that the poor, be "aged or impotent." The trustees will have power to act under the chancellor's direction—Coleman v. O'Leary's Ex'r, 24 Ky. L. R. 1248, 70 S. W. 1068. "To the poor" to be selected by the trustee is definite—Grant v. Saunders (Iowa) 95 N. W. 411; Thompson's Ex'r v. Brown, 25 Ky. L. R. 371, 75 S. W. 210. A bequest for maintaining and aiding a kindergarten in a certain city is sufficiently certain—Owatonna v. Rosebrock (Minn.) 92 N. W. 1122.

1. A bequest for the establishment of an institution not in existence at the time of the donor's death is valid—Appeal of Eliot, 74 Conn. 586.

2. Hunt v. Tolles (Vt.) 52 Atl. 1042.

3. Bequest to the board of missions of the Baptist church of New Jersey for foreign and home missions, there being no such board, held a valid gift to the home and foreign missions of that church—Bruere v. Cook, 63 N. J. Eq. 624.

4. Fay v. Howe, 136 Cal. 599, 69 Pac. 423.

5. Coleman v. O'Leary's Ex'r, 24 Ky. L. R. 1248, 70 S. W. 1068.

6. Cal. Civ. Code, § 1313. Property described as community property by the surviving widow as executrix will be so treated in estimating the amount of the estate. In determining the one third of the widow's estate devised, where she died leaving surviving no next of kin, but two nieces of her deceased husband, property conveyed to her by her husband and another will not be considered—In re McCauley's Estate, 138 Cal. 432, 71 Pac. 512. The execution of a codicil revoking a charitable bequest within 30 days of testator's death is not a reexecution of the will so as to invalidate other charitable devises—Morrow's Estate, 204 Pa. 484; In re McCauley's Estate, 138 Cal. 432, 71 Pac. 512.

ter upon the performance of the void trust, there can be no recovery for expenditures or losses by investments thereunder.[7]

§ 2. *Capacity of donee or trustee.*—Corporations, municipal or private, may take a bequest for charitable purposes.[8] In case of municipal corporations, the power need not be expressly given by its charter,[9] and if its charter gave it power to assist charitable organizations, it has power to accept a bequest in trust for the establishment of a college for the education of orphan boys.[10] Merely because the donee corporation already held property up to the charter limitation will not invalidate the donation,[11] and if the disability is removed before the time for payment of the legacy, there is no failure of a trustee.[12] A charter of a corporation for charitable purposes, limiting the amount of property which it can hold free from taxation, is a limitation of its capacity to acquire property.[13] If one of the purposes of incorporation was to aid destitute seamen, it may accept a bequest for that purpose.[14]

§ 3. *Interpretation and construction.*—The cy pres doctrine will be applied only where the purposes of the trust are ascertainable.[15] A bequest to executors to expend a certain sum for charitable purposes constitutes them trustees of the fund.[16] A bequest in trust to be transferred to a municipality, where it shall be authorized to administer such a trust, does not make it the beneficiary but the trustee.[17] A bequest to "my nephew," naming him, does not create a personal trust which terminated on his death.[18]

§ 4. *Administration and enforcement.*—Incapacity,[19] or maladministration,[20] or refusal of the trustee to act,[21] or a failure of the donor to appoint a trustee,[22] or to name a successor to the appointee in case of his death will not defeat the trust,[23] nor will death of the trustee terminate it,[24] but in such case equity will administer

7. Coleman v. O'Leary's Ex'r, 24 Ky. L. R. 1248, 70 S. W. 1068.

8. Equity has adopted 43 Eliz. c. 4, to this extent, though not adopted by express legislation—State v. Toledo, 23 Ohio. Circ. R. 327. The common law of England by statute supplies defects in the state statutes, and act 1901 authorizing the city to accept the request was an expression of the policy of the state in favor of the common law—Clayton v. Hallett, 30 Colo. 231, 70 Pac. 429, 59 L. R. A. 407. Under Conn. Gen. St. § 2075 the Episcopal church has power to accept a bequest to establish a home for old and infirm ladies connected with the church—Appeal of Eliot, 74 Conn. 586. An act authorizing a municipality to accept a trust fund for educational purposes is not unconstitutional for want of corporate power to accept trusts (Rev. St. § 4105, am'd 94 Ohio Laws, p. 241)—State v. Toledo, 23 Ohio Circ. R. 327.

9. State v. Toledo, 23 Ohio. Circ. R. 327.

10. Clayton v. Hallett, 30 Colo. 231, 70 Pac. 429, 59 L. R. A. 407.

11, 12, 13, 14. Appeal of Eliot, 74 Conn. 586.

15. A trust for "the benefit of the poor" generally upheld—Thompson's Ex'r v. Brown, 25 Ky. L. R. 371, 75 S. W. 210. And see Grant v. Saunders (Iowa) 95 N. W. 411. The board of home missions, the board of the church erection fund, and the board of aid for colleges and academies, held to be legatees, under a bequest to the "boards of the Presbyterian church, to be used in home missions, church erections and aid for colleges"—Harris v. Keasbey (N. J. Ch.) 53 Atl. 555. A bequest to an institution "in the city of" need not be confined to an institution within the corporate limits; the word "in" will be regarded as equivalent to "at" and an institution within a mile of the city will be entitled to the bequest—Old Ladies Home v. Hoffman, 117 Iowa, 716. A bequest to the "Bishop of the Catholic Diocese of Louisville for poor Catholic men" was construed to require to establishment of the home in and the beneficiaries to be selected from the diocese of Louisville—Coleman v. O'Leary's Ex'r, 24 Ky. L. R. 1248, 70 S. W. 1068. Gift to "Society for Disabled Ministers" held to mean "Disabled Ministers' Fund" etc.—Reformed Presbyterian Church v. McMillan (Wash.) 72 Pac. 502.

16. Jones v. Watford (N. J. Law) 53 Atl. 397.

17. And it was the duty of the trustees to transfer the fund to the city on statutory qualification to act—Owatonna v. Rosebrock (Minn.) 92 N. W. 1122.

18. Fay v. Howe, 136 Cal. 599, 69 Pac. 423.

19. Clayton v. Hallett, 30 Colo. 231, 70 Pac. 429, 59 L. R. A. 407; Appeal of Eliot, 74 Conn. 586.

20. Von Hoven v. Immanuel Presbyterian Church, 108 La. 274.

21. The refusal of a town to accept a bequest for cemetery purposes unless certain cemetery lots owned by testator were conveyed to it will not affect a reversion of the bequest or authorize the executors to convey the lots—Campbell v. Clough, 71 N. H. 181.

22. Bruere v. Cook, 63 N. J. Eq. 624.

23. In re Gay's Estate, 138 Cal. 552, 71 Pac. 707.

24. Fay v. Howe, 136 Cal. 599, 69 Pac. 423.

it by the appointment of a trustee.[25] The executor may apply for the appointment of a trustee in case the will does not name one,[26] and the members of the church devisee may compel the board of trustees thereof to administer the trust.[27] On capacitation of a corporation trustee, the court could appoint it trustee.[28]

The provisions of the trust and not the charter of incorporation for the purpose of carrying out the trust will govern.[29] The church has implied power to determine the manner in which the bequest should be invested, where the will gave the wardens the power.[30] The trustee has implied power to select the particular persons to be benefited of a definite class of beneficiaries.[31]

A sale of part of the trust estate by the trustees, being such as would have been authorized on application to the court, will be deemed valid.[32] The presumption is that the trustee faithfully discharged his duty as he understood it.[33]

CHATTEL MORTGAGES.[34]

§ 1. What Constitutes a Chattel Mortgage.
§ 2. Subject Matter.—What may be Mortgaged; Title of Mortgagor; Description of Property; Property Covered.
§ 3. Consideration.
§ 4. Fraudulent Conveyances.
§ 5. Form, Execution and Delivery.—Acknowledgment; Extension.
§ 6. Filing or Recording and Notice of Title.
§ 7. Title and Ownership.
§ 8. Right of Possession.
§ 9. Liens and Priorities; Waiver.
§ 10. Disposal of Property by Mortgagor.
§ 11. Assignment of Mortgage.
§ 12. Payment and Discharge.
§ 13. Redemption.
§ 14. Foreclosure.
§ 15. Remedies Between the Parties.
§ 16. Remedies Against Third Persons.

§ 1. *What constitutes a chattel mortgage.*—At common law a chattel mortgage is a sale of a chattel on a condition subsequent, upon the performance of which, the title revests in the mortgagor, and on breach of which, the mortgagee's title becomes absolute.[35]

An instrument to have the effect of a chattel mortgage must be executed with the intention or purpose of operating as a security.[36] It is not absolutely essential that it contain an express defeasance; it is sufficient if it expressly evidences a sale to secure a debt and implies a defeasance.[37]

Distinguished from other transactions.—A chattel mortgage is distinguished from a conditional sale wherein title is retained by the seller, until the performance of some condition, in that no title passes from the debtor to the creditor, but the creditor merely retains title which the debtor never had.[38] There is a sale and

25. Hunt v. Tolles (Vt.) 52 Atl. 1042.
26. Bruere v. Cook, 63 N. J. Eq. 624.
27. Von Hoven v. Immanuel Presbyterian Church, 103 La. 274.
28. Appeal of Eliot, 74 Conn. 586.
29. State v. Toledo, 23 Ohio Circ. R. 327.
30, 31. Appeal of Eliot, 74 Conn. 586.
32. As where by deed land had been conveyed to a town for cemetery purposes and the trustees sold part thereof, the proceeds being expended in improving the cemetery; particularly where the grantees were in peaceable possession for fourteen years with knowledge of the donor, the town and the cemetery trustees—Tacoma v. Tacoma Cemetery, 28 Wash. 238, 68 Pac. 723.
33. Tacoma v. Tacoma Cemetery, 28 Wash. 238, 68 Pac. 723.
34. See, Bankruptcy, for chattel mortgages as preferences or fraudulent transfer under bankruptcy act. See, Limitation of Actions, for operation of limitation laws on chattel mortgage. See Fraudulent Conveyances, for mortgage in fraud of creditors.
35. Hammon, Chat. Mortg.
36. Long v. State (Fla.) 32 So. 870. An instrument reciting indebtedness of a certain amount on land and that to secure the debt parties mortgaged certain animals, and duly signed, is a mortgage to secure the payment of the money and not an obligation to pay it —Acton v. Walker's Ex'x, 24 Ky. L. R. 2377, 74 S. W. 231.
37. Dothan Guano Co. v. Ward, 132 Ala. 380. In this case an instrument under which one promised to pay a certain amount of cotton or the market value thereof to the payee and to secure the note, granted, bargained and sold to the payee all his live stock, giving the payee after maturity the right to seize and sell as he deemed best, was held a mortgage—Id.
38. McCormick Harvesting Mach. Co. v. Mills (Neb.) 89 N. W. 621. Conditional sales, see Sales. In Missouri, Kentucky and Texas the retention of title by seller until consideration is paid, makes the instrument a chattel mortgage—Fairbanks, Morse & Co. v.

not a mortgage where a stock of goods is sold to one residing in another town, and the purchaser informs all parties interested of the purchase, and files a bill of sale in the clerk's office and removes the sign of the seller from his door.[39] So there is an executory contract for the manufacture and sale of lumber, and not a chattel mortgage under a contract for the output of a mill, the purchaser to make advances as required to procure logs and pay operating expenses, the logs and the lumber manufactured therefrom to bear purchaser's brand and be his property.[40] As between parties, a lease binding the property of lessee for the payment of the rent is a mortgage.[41]

§ 2. *Subject-matter—What may be mortgaged.*—The rule allowing mortgage of any chattel or chattel interest capable of sale and transfer excludes real estate[42] and liquor licenses.[43] One giving a chattel mortgage on property is estopped to deny its character as personalty.[44]

Title and interest of mortgagor.—The mortgagor's title to property need not be absolute in order to render the mortgage effective,[45] thus a series of chattel mortgages is not rendered invalid by the fact that at the date of the first, the goods covered by the mortgage had not all been acquired.[46] A mortgage on property not in existence is invalid.[47] Ownership is presumed from the fact of giving the mortgage,[48] but not as against one not a party to a mortgage.[49] In Alabama, executors are without power to mortgage crops to secure future advances necessary to raise crop.[50] A lessee's mortgage of crops will not cover crops raised by a sublessee, an order for which had previously been given to a third person.[51]

Description of property.—Except as between the parties and persons having actual notice, a mortgage of chattels must so describe them either expressly or by reference, that a stranger following the inquiry suggested by the description may definitely identify the property.[52] An erroneous geographical location may be re-

Baskett (Mo. App.) 71 S. W. 1113; Rankin v. McFarlane Carriage Co., 25 Ky. L. R. 258, 75 S. W. 221; Parlin & Orendorff Co. v. Davis' Estate (Tex. Civ. App.) 74 S. W. 951.

39. Fisher v. Stout, 74 App. Div. (N. Y.) 97.

40. Stelling v. G. W. Jones Lumber Co. (C. C. A.) 116 Fed. 261.

41. Feller v. McKillip (Mo. App.) 75 S. W. 379.

42. Rev. St. § 3385—Beeler v. C. C. Mercantile Co. (Idaho) 70 Pac. 943.

43. Christian Feigenspan v. Mulligan (N. J. Law) 53 Atl. 1124. The fact that the mortgage of a liquor license requires a sale for the best price obtainable does not authorize the mortgagee to take possession of the license—Id.

44. Gordon v. Miller, 28 Ind. App. 612.

45. Where at the time of the mortgage, neither the mortgagor nor his vendor had any title to the mortgaged property, the mortgage was void as to subsequent mortgagees from the vendor of the mortgagor, who was in possession when both mortgages were executed—New England Nat. Bank v. Northwestern Nat. Bank, 171 Mo. 307. One in possession of chattels under conditional contract of sale, has a mortgageable interest in the property—Cutting v. Whittemore (N. H.) 54 Atl. 1098; Friedman v. Phillips, 116 N. Y. St. Rep. 96. Mortgage of a registered trade-mark duly described, giving mortgagee the right to manufacture a remedy, is sufficient for that p irpose though the certificate of registration is invalid—Tuttle v. Blow (Mo.) 75 S. W. 617.

46. In re Durham, 114 Fed. 750.

47. McKinney v. Ellison (Tex. Civ. App.) 75 S. W. 55.

48. Mathew v. Mathew, 138 Cal. 334, 71 Pac. 344.

49. Syck v. Bossingham (Iowa) 94 N. W. 920.

50. Jones v. Peebles, 133 Ala. 290.

51. Norfleet v. Baker, 131 N. C. 99.

52. First Nat. Bank v. Johnson (Neb.) 94 N. W. 837; City Nat. Bank v. Goodloe-McClelland Commission Co., 93 Mo. App. 123. Where the description is too indefinite to furnish aid in identifying the property, the mortgage is void as to subsequent purchasers—Young v. Bank of Princeton, 97 Mo. App. 576; First Nat. Bank v. Hughes (Neb.) 92 N. W. 986. As description of animals solely by number—Hardaway v. Jones (Va.) 41 S. E. 957. A mortgage is void as to innocent purchasers, where the property is described as in one place when in fact it is in another—Jones Bros. Commission Co. v. Long, 90 Mo. App. 8. Erroneous description of subject matter may be disregarded where there is sufficient in the descriptive parts of the mortgage to definitely locate the property—Swinney v. Merchants' Bank, 95 Mo. App. 185.

There can be no mortgage lien on specific chattels by a mortgage of a certain number out of a mass without identifying them—First Nat. Bank v. Johnson (Neb.) 94 N. W. 837.

Future crops are sufficiently described by the words "all my crops I may raise during the year 1901" evidence showing that mort-

jected as surplusage where a construction of the entire instrument will sufficiently locate the property.[53] Recitals as to character of mortgagee[54] or place of business are not conclusive.[55] Insufficiency of description cannot be taken advantage of by a creditor with actual notice that the property is covered by a mortgage.[56] Possession taken by the mortgagee will cure a defective description of the property.[57] An erroneous description of property in the petition is cured by a correct description in the judgment rendered in an action to enforce the mortgage.[58] The question of the identity of the property covered by the mortgage is for the jury.[59]

Property covered by mortgage.—A mortgage on after acquired property is valid,[60] particularly where possession is taken before the rights of third parties attach.[61] The mortgage binds a purchaser from the mortgagor assuming his obligations under the mortgage.[62] A mortgage of machinery used for a particular purpose and necessary additions will not cover other machinery and appliances not used in that particular line.[63] A general description of merchandise covers only merchandise in stock when the mortgage was executed and not stock afterwards added by the purchaser.[64] A mortgage of a liquor license will be presumed to cover the privilege conferred by the license and not the license itself,[65] and will not authorize a mortgagee to take possession of the instrument for the purpose of preventing the mortgagor from conducting the business.[66] A chattel mortgage collateral to an agricultural lien may cover items not strictly protected by the lien.[67]

§ 3. *Consideration.*—In Missouri a chattel mortgage to secure a usurious loan is void.[68] The fact that a mortgage is given to secure a debt of a third person does not make the mortgagor personally liable for the debt in the absence of an express covenant to pay the money.[69] Where there is an entire failure of consid-

gagor owned land during the entire year in that county and that crop in question was raised on the land in that year—Woods v. Rose, 135 Ala. 297. After acquired property is not covered by a clause mortgaging "all cord wood and pilings cut by or for me"—Galveston, etc., R. Co. v. Hill Merc. Co. (Tex. Civ. App.) 71 S. W. 797.

Held sufficient: "All goods in the store of the makers doing business in a certain city," mortgagor having but one place of business in such city and the stock was the one referred to in the mortgage—Davis v. Turner (C. C. A.) 120 Fed. 605. "12 two year old heifers (2 past 3 in spring) 8 spring calves, 1 bay mare 8 years old, 1 roan mare 10 years old, increase above included"—Ward v. Johnson (Kan.) 72 Pac. 242. A mortgage describing property as "1000 lbs. of lint (good cotton) corn, fodder" made or to be made on the mortgagor's land will convey the corn—Graves v. Currie, 132 N. C. 307. A mortgage of cattle as a certain number of yearlings, is sufficient to cover the cattle intended though at the time of execution of the mortgage none of the cattle were 12 months old—Sparks v. Deposit Bank, 24 Ky. L. R. 2333, 74 S. W. 185.

53. City Nat. Bank v. Goodloe-McClelland Commission Co., 93 Mo. App. 123.

54. Elston v. Roop, 133 Ala. 331.

55. Gilbert v. Sprague, 196 Ill. 444.

56. Cohee v. First Nat. Bank (Neb.) 95 N. W. 610.

57. Nichols & Shepard Co. v. Bishop (Okl.) 70 Pac. 188. Possession may be taken by any acts amounting to an assumption of possession, and control and a particular ceremony or formality is not required—Id.

58. Day & C. Lumber Co. v. Mack, 24 Ky. L. R. 640, 69 S. W. 712.

59. Third Nat. Bank v. Blosser, 65 Kan. 859, 70 Pac. 373. It is for the court to determine whether description is sufficient to identify any property and for the jury to decide whether it is sufficient to cover the property in dispute, there being an erroneous recital as to location of the property—Livingston v. Stevens (Iowa) 94 N. W. 925.

60. A chattel mortgage on a street railroad constructed and to be constructed covers additions which become an essential part of the road, though the property added was furnished under a contract that the title must remain in the seller until paid for—Westinghouse Elec. Mfg. Co. v. Citizens' St. R. Co., 24 Ky. L. R. 334, 68 S. W. 463. Under a mortgage on stock that the mortgagor might have from time to time to secure advances up to a certain value for a year, stock purchased within the year and after the stock in existence at the time of the execution of the mortgage was destroyed by fire, are covered by the mortgage—Cooper v. Rouse, 130 N. C. 202.

61. Burford v. First Nat. Bank (Ind. App.) 66 N. E. 78.

62, 63. In re Sentenne, etc., Co., 120 Fed. 436.

64. E. A. Godfrey & Sons Co. v. Citizens' Nat. Bank (Neb.) 90 N. W. 239.

65, 66. Christian Feigenspan v. Mulligan (N. J. Law) 53 Atl. 1124.

67. Bostick v. Ammons, 63 S. C. 302.

68. Bell v. Mulholland, 90 Mo. App. 612; Adams v. Moody, 91 Mo. App. 41; Coleman v. Cole, 96 Mo. App. 22.

69. Adams v. Moody, 91 Mo. App. 41.

eration for a mortgage, the mortgagee may not recover where the property covered is turned over to another in satisfaction of a valid claim.[70]

§ 4. *Fraudulent conveyances.*—A mortgage allowing possession to remain in the mortgagor with authority to sell in the usual course of business is void as to creditors,[71] unless the mortgage requires the application of the proceeds to the debt,[72] but not where the proceeds are used to pay other creditors.[73] The failure to take possession or record will postpone the mortgage to claims of creditors.[74] Creditors intended by a statute making a mortgage void as to creditors where possession is retained are those who have legally fastened a lien or charge upon the property.[75] Between the parties it is valid.[76] Under the New Jersey chattel mortgage act, invalidating mortgages where possession is retained by the mortgagee, unless an affidavit of consideration is filed, the affidavit should show that the affiant is the holder of the mortgage, or his agent or attorney.[77] The affidavit may not be made by an agent or attorney, unless the agency relates to the holding of the mortgage,[78] and the mortgagor is not permitted to act as agent of the holder.[79] A mortgagee of after acquired property is not entitled to priority as against a subsequent mortgage, where at the time of the later mortgage he had not taken possession.[80] The mortgagee's possession must be actual, constructive possession not being sufficient as against creditors.[81] Possession may be taken at any time before the rights of third persons intervene.[82] Reasonable dispatch is required, and it is a question of fact whether reasonable dispatch has been exercised.[83] An oral agreement that a mortgage should secure future advances to the mortgagor is void as to creditors.[84]

§ 5. *Form, execution and delivery.*—Strictness of form is not required.[85] As between the parties, it is not necessary that the mortgage should be in writing.[86] The clearest evidence is required to show that an instrument, in form a bill of sale, is in reality a mortgage.[87] In Kentucky a seal is not required where the mort-

70. Hezel v. Schatz (S. D.) 95 N. W. 926.

71. Enck v. Gerding, 67 Ohio St. 245; Stevens v. Curran (Mont.) 72 Pac. 753.

72. State v. Fidelity & Deposit Co., 94 Mo. App. 184; Burford v. First Nat. Bank (Ind. App.) 66 N. E. 78. Retention of possession will invalidate a mortgage given within four months of bankruptcy though it requires payment of proceeds on mortgage—Egan State Bank v. Rice (C. C. A.) 119 Fed. 107.

73. Bank of Liberal v. Anderson (Mo. App.) 75 S. W. 189.

74. 2 Gen. St. p. 2113—Hardcastle v. Stiles (N. J. Law) 55 Atl. 104. Comp. St. 1899, c. 32, § 14—Johnson v. Spaulding (Neb.) 95 N. W. 808; Hillebrand v. Nelson (Neb.) 95 N. W. 1068.

75. Folsom v. Peru Plow Co. (Neb.) 95 N. W. 635.

76. Rev. St. Mo. 1899, §§ 3307, 3404, invalidating mortgages not recorded in the county where the mortgagor resides applies only as to creditors and purchasers—Bagley v. Harmon, 91 Mo. App. 22.

77, 78, 79. Watson v. Rowley, 63 N. J. Eq. 195.

80. New England Nat. Bank v. Northwestern Nat. Bank, 171 Mo. 307.

81. In this case the mortgagee merely laid his hands on the articles covered by the mortgage saying that they were his property and that he demanded and took possession but removed nothing and the mortgagor continued to use the property in connection with his business—Sloan v. National Surety Co., 74 App. Div. (N. Y.) 417; Rice v. Sally (Mo.) 75 S. W. 398. The requirement is not satisfied where the attorney of the mortgagee goes to the tenant of the mortgagor and states to him that he takes possession of the property, and requests him not to allow it to pass out of his hands without some authority (3 Rev. St. [9th Ed.] p. 2013)—Wild v. Porter, 173 N. Y. 614. Evidence insufficient to show a bona fide change of possession under an unrecorded mortgage—Rice v. Sally (Mo.) 75 S. W. 398.

82. McFarlan Carriage Co. v. Wells (Mo. App.) 74 S. W. 878.

83. Hardcastle v. Stiles (N. J. Law) 55 Atl. 104.

84. F. Gross & Co. v. First Nat. Bank (Tex. Civ. App.) 72 S. W. 402.

85. Davis v. Turner (C. C. A.) 120 Fed. 605. Under a statute requiring a mortgage to be in writing the fact that the parties used a form suitable to another kind of mortgage and failed to strike out an irrelevant provision will not invalidate—Harris v. State (Tex. Cr. App.) 67 S. W. 327.

86. Reiss v. Argubright (Neb.) 92 N. W. 988.

87. Powers v. Benson (Iowa) 94 N. W. 929. Evidence of insolvency of a firm is admissible in a suit to have a bill of sale of plaintiff's interest in the firm to defendant declared security for the firm's indebtedness to defendant, as corroborating plaintiff's statement that the bill was merely intended to secure defendant on account of the firm's indebtedness to him—Donnelly v. McArdle, 117 N. Y. St. Rep. 193.

gage is otherwise properly executed.[88] In some states joint execution by husband and wife is required where the mortgage covers exempt property[89] and household goods.[90] A mortgage obtained by duress[91] or imposition[92] is invalid. Failure of mortgagor to read the instrument will not defeat the title of a purchaser at a foreclosure sale.[93] New Jersey requires an affidavit of consideration which must show how the relation of debtor and creditor arose,[94] and a mortgage, invalid as against a creditor for failure of affidavit, is void as against an assignee under the assignment laws.[95] In South Dakota the acknowledgment of the receipt of a copy of the mortgage must be indorsed on the mortgage over the mortgagor's signature,[96] and this defect may be attacked by subsequent mortgagees and attaching creditors.[97] As between the parties, a chattel mortgage is not invalid by failure to attach the affidavit of good faith required by the laws of Idaho.[98] This statute only invalidates the mortgage against subsequent creditors and purchasers in good faith.[99] The Illinois act requiring the mortgage to state on its face the fact of security for notes does not apply where the mortgage is held by the mortgagee, the purpose of the act being to regulate the assignment of the notes.[1] The question as to whether a mortgage is to be construed in connection with other collateral agreements affecting its character is one for the jury.[2] A mortgage signed by a member of a firm without authority or knowledge of his partners is not binding on the other partners, where delivered after dissolution of the firm and knowledge of the facts by mortgagee.[3] Mortgages valid in the state of execution will be considered valid in other states.[4]

Acknowledgment and extension.—An unacknowledged chattel mortgage is valid as between the parties.[5] In Illinois a mortgage is properly acknowledged before a justice in the town where a corporation has its office, within the statute requiring

88. Burkamp v. Healey, 24 Ky. L. R. 1926, 72 S. W. 759.

89. Gen. St. 1901, § 4255—Searle v. Gregg (Kan.) 72 Pac. 544; Alexander v. Logan, 65 Kan. 505, 70 Pac. 339; Kindall v. Lincoln Hardware & Implement Co. (Idaho) 70 Pac. 1056.

Foreclosure of mortgage executed by the husband alone will be restrained by injunction—Kindall v. Lincoln Hardware & Implement Co. (Idaho) 70 Pac. 1056. The Iowa laws providing for joinder of husband and wife in the mortgage of exempt property, do not require that the husband and wife both join in the acknowledgment where it has been signed by both (Code Iowa, § 2906)—Brown v. Koenig (Mo. App.) 74 S. W. 407.

90. 2 Gen. St. p. 2111, § 41—Dunham v. Cramer, 63 N. J. Eq. 151. The New Jersey Statute requiring the signature of the mortgagor's wife to a mortgage covering household goods has no application where it is not shown that the goods were in the use and possession of the family in that state—Id. It is void as to creditors independent of the question of bad faith or intent to defraud—Id.

91. Sufficiency of evidence to sustain allegation of duress—Iowa Sav. Bank v. Frink (Neb.) 92 N. W. 916; Reichle v. Bentele, 97 Mo. App. 52. There is duress invalidating chattel mortgage where a wife executes the mortgage for her husband's debt under a threat to seize the stock on the farm and sell same at forced sale—Searle v. Gregg (Kan.) 72 Pac. 544.

92. Mis-reading instrument to illiterate and concealing its nature—Layson v. Cooper (Mo.) 73 S. W. 472. A chattel mortgage will be cancelled where mortgagor was imposed upon by representations that the instrument was a conditional contract of sale—W. W. Kimball Co. v. Deaton (Mo. App.) 74 S. W. 427. Evidence that the property included in the mortgage did not belong to mortgagor, held admissible to support contention of plaintiff that he, an illiterate, was imposed upon and the mortgage was not correctly read to him—Id.

93. Jumiska v. Andrews, 87 Minn. 515; Forker v. Crockett (Iowa) 92 N. W. 76.

94. Dunham v. Cramer, 63 N. J. Eq. 151.

95. Watson v. Rowley, 63 N. J. Eq. 195.

96. Acknowledgment below mortgagor's signature is not sufficient (L. 197, c. 95, § 2)—Park v. Robinson, 15 S. D. 551.

97. Park v. Robinson, 15 S. D. 551.

98. Rev. St. 1887, § 3380—Marchand v. Ronaghan (Idaho) 72 Pac. 731. An affidavit otherwise sufficient will satisfy the law, though the word "defraud" is omitted (Rev. St. Idaho, § 3386) Deseret Nat. Bank v. Kidman, 25 Utah, 379, 71 Pac. 873.

99. Deseret Nat. Bank v. Kidman, 25 Utah, 379, 71 Pac. 873.

1. Laws 1895, p. 260—Smith v. Schey, 101 Ill. App. 223.

2. Hargadine, etc., Co. v. Bradley (Ind. T.) 69 S. W. 862.

3. Meyer v. Michaels (Neb.) 95 N. W. 63.

4. Brown v. Koenig (Mo. App.) 74 S. W. 407.

5. McFarlan Carriage Co. v. Wells (Mo. App.) 74 S. W. 878; Brown v. Koenig (Mo. App.) 74 S. W. 407.

acknowledgment before a justice in the town of the mortgagor's residence.[6] The statute of that state governing the extension of chattel mortgages is to be strictly construed, where the rights of third parties are involved, as the statute is in derogation of the common law of pledges.[7] The failure to file the affidavit with the justice will defeat an extension.[8] The act was intended only for the protection of innocent parties, and is not required as between the parties.[9] In determining whether the affidavit was filed in time, days of grace are considered.[10] One becoming a general creditor after renewal cannot take advantage of failure to renew the mortgage within thirty days preceding the expiration of the year from the time of its record.[11]

§ 6. *Filing or recording and notice of title or rights.*—Recording acts include all conveyances intended to operate as mortgages.[12] They do not affect the validity of the instrument as between the parties.[13] A mortgage covering both real and personal property is valid as against creditors as to the personalty only where filed as a chattel mortgage.[14] In Texas unrecorded chattel mortgages are void which cover both exempt and nonexempt property.[15] Under the Colorado assignment law, saving valid and subsisting liens, an unrecorded mortgage is void and not entitled to preference.[16] Where the mortgagee takes possession before other rights attach, it is not important that the mortgage was not recorded.[17] In some states a chattel mortgage must be recorded in the county of the owner's residence, if he has a place of residence in the state,[18] though the property is in another county.[19] In other states it may be recorded in the county where the property is situated or in the county of the mortgagor's residence, if he lives in the state.[20] In Nebraska there can be no sale of mortgaged chattels in a county other than that in which the mortgage was originally filed, unless the mortgage is also filed in the county of sale.[21] Under the California statute requiring record in the county where the property is situated, a mortgage on property situated in more than one county and recorded in one only of such counties is valid only as to the property in the county of record.[22] The mortgage must be recorded within a reasonable time,[23] where

6. Gilbert v. Sprague, 196 Ill. 444.

7, 8. Griffen v. Henry, 99 Ill. App. 284.

9. Allcock v. Loy, 100 Ill. App. 573.

10. Gilbert v. Sprague, 196 Ill. 444.

11. Baker v. Becker (Kan.) 72 Pac. 860.

12. Dunham v. Cramer, 63 N. J. Eq. 151; Clark v. Baker (Colo.) 69 Pac. 506; Chitwood v. Lanyon Zinc Co., 93 Mo. App. 225. A lease binding the property of lessee for the payment of the rent—Feller v. McKillip (Mo App.) 75 S. W. 379.

13. In re Williams, 120 Fed. 542; Warner v. Warner (Ind. App.) 66 N. E. 760; Allcock v. Loy, 100 Ill. App. 573; McFarlan Carriage Co. v. Wells (Mo. App.) 74 S. W. 878. The instrument is not void as to one who takes the mortgaged property under a mistaken belief of his own ownership of it (Gen. St. 1901, § 4244)—Drumm-Flato Commission Co. v. First Nat. Bank, 65 Kan. 746, 70 Pac. 874. An unrecorded mortgage good between the parties is good as against the mortgagor's assignee for the benefit of creditors—In re Thompson, 122 Fed. 174.

14. Hillebrand v. Nelson (Neb.) 95 N. W. 1068.

15. Baughn v. Allen (Tex. Civ. App.) 68 S. W. 207.

16. Clark v. Baker (Colo.) 69 Pac. 506.

17. First Nat. Bank v. Barse Live Stock Commission Co., 198 Ill. 232.

18. Day & C. Lumber Co. v. Mack, 24 Ky. L. R. 640, 69 S. W. 712. A purchaser at the foreclosure of an agister's lien is protected against a mortgage of the stock recorded in a county other than the one in which mortgagor resides—Duke v. Duke, 93 Mo. App. 244.

19. Rev. St. Mo. 1899, § 3404—Rice v. Sally (Mo.) 75 S. W. 398. In New York must be filed in the towns where members of partnership reside (Laws 1833, p. 402, c. 279, § 2) —Russell v. St. Mark, 83 App. Div. (N. Y.) 543.

20. Bank v. Bond, 64 Kan. 346, 67 Pac. 818. In the county of mortgagor's residence, must show that a mortgagor was a resident of the county in which the mortgage was filed and not that in which plaintiff's mortgage was filed—Hockaday-Gray Co. v. Jonett (Tex. Civ. App.) 74 S. W. 71.

21. McCormick Harvesting Mach. Co. v. Preitauer (Neb.) 91 N. W. 499.

22. Civ. Code Cal. §§ 2959, 2962—Guras v. Porter, 118 Fed. 668.

23. Dunham v. Cramer, 63 N. J. Eq. 151. The question of the validity of a mortgage, withheld from record for sixteen months, is a question of fact for the jury where the evidence is conflicting as to whether it was so withheld by agreement of the parties—E. A. Godfrey & Sons Co. v. Citizens' Nat. Bank (Neb.) 90 N. W. 239.

the statute fails to fix the time for record,[24] and is effective as notice only from the time of record.[25] Texas requires a filing forthwith.[26] Where the record on the removal of goods to another jurisdiction would be useless, it is not required, and failure so to record will not be regarded as a badge of fraud.[27] A trustee in bankruptcy attacking it for failure to record must show that there was an agreement to withhold or that prejudice resulted to creditors therefrom.[28] The question of the priority of a mortgage filed in bankruptcy proceedings and withheld from record for an unreasonable time is to be determined by the statutes of the state where the mortgage was executed.[29] A variance between a copy of a chattel mortgage filed for record and the original, to be fatal, must be in some material part.[30] The record to be notice should show correct names of the parties.[31] Whether the record of a chattel mortgage is constructive notice under the statute depends on the sufficiency of the description.[32] Under the laws of New Jersey a mortgage is invalid where recorded in the wrong book, and it is not material on the question of validity whether the negligence was that of the mortgagee or of the clerk.[33] A mortgagee under a mortgage, void as to a portion of the property for failure to record, has the burden of proving the property as to which the mortgage is valid.[34] Under acts invalidating unrecorded mortgages as against creditors, the reasons for withholding the mortgage from record are not important.[35]

Notice of title or rights.—A purchaser of mortgaged property after the making and filing of a mortgage on such property takes subject to the mortgage.[36] One who gives credit without notice of a prior lien is not affected by the lien of an unrecorded mortgage.[37] One having knowledge of a prior unrecorded mortgage takes subject thereto.[38] A creditor is not required to examine the records in another state for mortgages on his debtor's property.[39] There is notice to put mortgagee on inquiry where the mortgagor informs mortgagees that a prior mortgage was

24. Rev. St. Wis. 1898, §§ 2313, 2314—In re H. G. Andrae Co., 117 Fed. 561.

25. Rev. L. c. 198, § 1—Harrison v. J. J. Warren Co. (Mass.) 66 N. E. 589.

26. Austin v. Welch (Tex. Civ. App.) 72 S. W. 881. Requirement is not satisfied where the mortgagee takes the mortgage at 2 o'clock in the afternoon and at 5 o'clock of the same afternoon passes the clerk's office without filing, the filing taking place on the next day—Id.

27. Foster v. McAlester (C. C. A.) 114 Fed. 145. Under the Texas law requiring record within four months after the goods have been removed from the county where the mortgage was taken, the mortgagee loses his rights as against a subsequent purchaser in another state to which the goods were removed after their surreptitious return to Texas notwithstanding the mortgage could not have been recorded in such other state—Greene v. Bentley (C. C. A.) 114 Fed. 112.

28. Deland v. Miller & Chaney Bank (Iowa) 93 N. W. 304.

29. In re H. G. Andrae Co., 117 Fed. 561.

30. Central Nat. Bank v. Brecheisen, 65 Kan. 807, 70 Pac. 895.

31. A. W. Dixon, not notice that J. W. Dixon was mortgagor—Johnson v. Wilson (Ala.) 34 So. 392.

32. Code, § 2468—Hardaway v. Jones (Va.) 41 S. E. 957.

33. Gen. St. p. 2113, § 52—Knickerbocker Trust Co. v. Penn Cordage Co. (N. J. Ch.) 55 Atl. 231.

34. Guras v. Porter, 118 Fed. 668.

35. Rev. St. 1899, § 3404—Harrison v. South Carthage Min. Co., 95 Mo. App. 80.

36. Huber v. Ehlers, 76 App. Div. (N. Y.) 602; Woods v. Rose, 135 Ala. 297. Constructive notice of a chattel mortgage is not furnished by a mortgage made by one not the owner of the property or by one using a fictitious name—New England Nat. Bank v. Northwestern Nat. Bank, 171 Mo. 307.

37. Westinghouse Elec. Mfg. Co. v. Citizens' St. R. Co., 24 Ky. L. R. 334, 68 S. W. 463; Richards v. Jewett (Iowa) 92 N. W. 689. Failure to file or record is not fraud on creditors in the absence of an agreement that the mortgage was not to be recorded or that the creditors were induced to give credit on the faith that no mortgage was in existence—Miller-Arthur Drug Co. v. Curtis (Mo. App.) 67 S. W. 712. A purchaser without notice of the subject matter will take free from the lien of an unregistered mortgage—McArthur v. Mathis (N. C.) 45 S. E. 530.

38. Russell v. St. Mark, 83 App. Div. (N. Y.) 543; Burford v. First Nat. Bank (Ind. App.) 66 N. E. 78; Reiss v. Argubright (Neb.) 92 N. W. 988. One knowing that another was engaged in the business under a business name and had executed a mortgage under such name who purchases at an execution sale of such mortgaged property against such party in his individual name is not a bona fide purchaser—Crawford v. Benoist, 97 Mo. App. 219.

39. Syck v. Bossingham (Iowa) 94 N. W. 920.

given without consideration and to protect him against creditors.[40] Persons who may avail themselves of failure to file or record a mortgage must have an interest in the property such as lienors, judgment creditors, officers, etc.[41] A statute invalidating an unrecorded mortgage as against creditors invalidates a mortgage as against an execution on the property, notwithstanding the judgment debt was in existence at the time of the execution of the mortgage.[42] One defending against a defectively executed mortgage, on the ground that he is a good-faith purchaser, must plead such defense,[43] and has the burden of proof.[44] A mortgagee is under no obligation to a subsequent incumbrancer to care for and protect the security, where he has no notice of the later incumbrance.[45]

§ 7. *Title and ownership.*—In South Dakota the legal title of the mortgaged property is in the mortgagor, though he has defaulted and delivered possession.[46] In other states a mortgagee, on failure of the mortgagor to pay the debt at maturity, has an absolute title to the property, subject only to the right of the mortgagor to redeem,[47] and the property may not be levied on for mortgagor's debt.[48] The mortgagor in possession is the general owner of the property in law; his ownership rests on the equitable right to clothe himself with the full legal title.[49] The mortgagee's title is special, so that until the right of redemption is extinguished, his property interest is limited to the amount due.[50] A second mortgagee cannot recover for conversion against the first mortgagee in possession, unless the property was worth more than the amount due on the first mortgage.[51] The fact that a mortgage authorized the mortgagor to remain in possession of wood mortgaged and use the same does not authorize him to sell such wood.[52] A mortgage of a trade-mark and a formula for a remedy, the mortgagor giving the secret formula to be used in case it became necessary to foreclose, conveys the right to manufacture and sell the preparation under the trade-name, though the act under which the trade-mark was registered was later declared invalid.[53]

§ 8. *Right of possession.*—The mortgagee is entitled to possession of the property after condition broken,[54] without the consent of the mortgagor,[55] and may maintain replevin.[56] In Iowa a mortgage may stipulate for possession to be taken whenever the mortgagee chooses to do so.[57] A mortgagee taking possession of property in any other manner than that provided by statute is guilty of conversion.[58] A mortgage may allow possession to be taken for an unreasonable depreciation of the value of the mortgaged property,[59] and the mortgagor on account of a contem-

40. Salmon v. Norris, 115 N. Y. St. Rep. 892.

41. Allcock v. Loy, 100 Ill. App. 573. The Texas statute protecting subsequent purchasers intends only purchasers by contract and does not include a purchaser in attachment proceedings—Scott v. Cox (Tex. Civ. App.) 70 S. W. 802.

42. Pierson v. Hickey (S. D.) 91 N. W. 339.

43, 44. Deseret Nat. Bank v. Kidman, 25 Utah, 379, 71 Pac. 873.

45. Penney v. Miller (Ala.) 33 So. 668.

46. This case held that the mortgagor could properly sue on an attachment bond where a third party levied on the mortgagor's interest and the action was dismissed—Jencks v. Murphy, 15 S. D. 425.

47. Klinkert v. Fulton Storage Co., 113 Wis. 493; Illinois Trust & Sav. Bank v. Alexander Stewart Lumber Co. (Wis.) 94 N. W. 777. Rev. St. 1892, § 3206a—St. Mary's Mach. Co. v. National Supply Co. (Ohio) 67 N. E. 1055; Western Realty Co. v. Musser, 97 Mo. App. 114.

48. Anderson v. Montgomery County Nat. Bank, 64 Kan. 587, 67 Pac. 1110. Notwithstanding possession by mortgagor long after note becomes due—Burge v. Hunter, 93 Mo. App. 639.

49, 50. Illinois Trust & Sav. Bank v. Alexander Stewart Lumber Co. (Wis.) 94 N. W. 777.

51. Dempster Mill Mfg. Co. v. Wright (Neb.) 95 N. W. 806.

52. Meyer v. Munro (Idaho) 71 Pac. 969.

53. Tuttle v. Blow (Mo.) 75 S. W. 617.

54. Edmonston v. Jones, 96 Mo. App. 83; Elston v. Roop, 133 Ala. 331.

55. Singer Mfg. Co. v. Rios (Tex.) 71 S. W. 275.

56. Feller v. McKillip (Mo. App.) 75 S. W. 379.

57. Hocking Val. Coal Co. v. Climie (Iowa) 92 N. W. 77.

58. Marchand v. Ronaghan (Idaho) 72 Pac. 731.

59. An instruction that depreciation means such depreciation as impairs any clause of the security and prevents it from being as good as when the mortgage is

plated removal to another location may not reduce the stock substantially,[60] nor live out of the goods to an unreasonable extent.[61] Rights under insecurity clause of mortgage must not be arbitrarily exercised.[62] The facts authorizing possession under an insecurity clause must be such as did not exist at the time of taking the mortgage, or, if they did, mortgagee was ignorant of the same.[63] Under an insecurity clause in New York, a party may take possession where there has been a failure to comply with the condition of the mortgage as to payment.[64] A first mortgagee is entitled to possession under an insecurity clause as against a second mortgagee, though his debt has not matured while that of the second mortgagee is past due.[65] A mortgagee unreasonably delaying to take possession loses his lien.[66] A wrongful seizure of the property by the mortgagor will not affect the mortgagee's rights under a possession previously taken.[67] A sale of goods by a vendor after default of the vendee under a bill of sale intended as a mortgage operates as a conversion.[68] A refusal by the mortgagor to yield possession on demand after default amounts to a conversion, where the mortgage authorizes possession on default.[69] Where the terms of a mortgage entitle a mortgagee to a crop at the time it was converted, it is not important that the mortgagee had not foreclosed his mortgage.[70] For withholding possession of mortgaged property after maturity of the mortgage debt, the mortgagee's recovery is limited to the amount due on the mortgage.[71] One selling mortgaged property and disbursing the proceeds is liable for the proceeds, though not in possession.[72] A mortgagee allowing a mortgagor to remain in possession and sell at private sale and account for the proceeds may not take possession and sell under the mortgage.[73] The character of possession under conflicting evidence is a question for the jury.[74]

§ 9. *Liens and priorities; waiver.*—A chattel mortgage takes precedence of a later agister's claim.[75] A factor's mortgage lien will protect a balance due the factor, where the proceeds of shipments have been partially applied on other accounts at the principal's request.[76] Release of a surety on a note and the taking of a new

given, was held too restrictive—Krebs v. Zumwalt, 91 Mo. App. 404. What constitutes an unreasonable depreciation is a question for the jury—Id.

60, 61. Krebs v. Zumwalt, 91 Mo. App. 404.

62. Meyer v. Michaels (Neb.) 95 N. W. 63. The exercise of the right is authorized where the mortgagor is about to do some act tending to impair the security of the mortgage, as where a sale of a substantial part of the property covered is made without the consent of the mortgagee—Allen v. Cerny (Neb.) 94 N. W. 151.

63. Meyer v. Michaels (Neb.) 95 N. W. 63.

64. Stage v. Van Leuven, 112 N. Y. St. Rep. 960.

65. Russell v. St. Mark, 83 App. Div. (N. Y.) 543.

66. Pfirshing v. Peterson, 98 Ill. App. 70.

67. First Nat. Bank v. Barse Live Stock Commission Co., 198 Ill. 232.

68. Frick v. Kabaker, 116 Iowa, 494.

69. Mathew v. Mathew, 138 Cal. 334, 71 Pac. 344. A conversion defeating the mortgagee's right to the property is not excused by the fact that for several years previous an agent of the mortgagee had sanctioned such conversion—First Nat. Bank v. Minneapolis & N. Elevator Co., 11 N. D. 280.

70. La Rue v. St. Anthony & D. Elevator Co. (S. D.) 95 N. W. 292. Under a stipulation that there need be no delivery if mortgagor failed to raise more than ten bushels per acre, mortgagee's testimony that judging from the looks of the crop it must have been considerably over that amount, is sufficient proof of that fact in the absence of other evidence on the question—Id. There is sufficient evidence to establish the grade of wheat raised on certain land where the grade of one load taken from the tract is shown and there is no conflicting evidence on that point—Id.

71. Klinkert v. Fulton Storage Co., 113 Wis. 493; Illinois Trust & Sav. Bank v. Alexander Stewart Lumber Co. (Wis.) 94 N. W. 777; Anderson v. B. T. Adams & Co. (Ga.) 43 S. E. 982. And not the damages for loss of use thereof, unless it is shown that he could have used it if it had not been withheld—Klinkert v. Fulton Storage Co., 113 Wis. 493. In Virginia, the trustee is entitled to recover the hire of animals from the time of demand—Hardaway v. Jones (Va.) 41 S. E. 957.

72. City Nat. Bank v. Goodloe-McClelland Commission Co., 93 Mo. App. 123.

73. F. Groos & Co. v. First Nat. Bank (Tex. Civ. App.) 72 S. W. 402.

74. E. A. Godfrey & Sons Co. v. Citizens' Nat. Bank (Neb.) 90 N. W. 239.

75. The fact that the mortgagee ratified one contract of agistment with the mortgagor will not bind him to other agreements between the mortgagor and agister—Harding v. Kelso, 91 Mo. App. 607.

76. In re Williams, 120 Fed. 542.

note by the purchaser of a note, secured by mortgage on stock, will not affect the lien of the mortgage on such stock.[77] The Alabama agricultural lien law, making the lien paramount, protects one becoming a landlord by reason of tenant's default under a contract of purchase, as against one becoming a mortgagee before the default, where the mortgagee was not an innocent purchaser.[78] The rule in Illinois, giving purchase-money mortgages priority, only applies to purchase-money mortgages on realty,[79] yet a mortgagee in that state is charged with notice of the terms on which the purchase of the mortgaged property was made, and of all facts of which he is put on inquiry.[80] The right to rescind a sale is superior to a mortgage to secure a debt contracted before sale sought to be rescinded,[81] but is inferior to right of mortgage where debt created after sale,[82] and party seeking rescission has burden of proof that mortgagee knew of the buyer's fraud or that the debt was created before the sale.[83] Equity has jurisdiction of an action to decree as to priority between chattel mortgages, the remedy at law being inadequate.[84] In Missouri it is held that the renewal of a loan and the execution of a new mortgage to secure the same will not affect the priority of the original mortgage.[85] A waiver of a mortgage lien need not be in writing.[86] Where a waiver of a lien amounts to an estoppel in favor of subsequent purchasers, it is no objection that there was no consideration therefor.[87] A mortgagee does not waive his mortgage lien by attaching the property.[88] A waiver of a mortgage lien by the mortgagee may be shown in an action by the mortgagee for the recovery of mortgaged property bought by defendant from the mortgagor.[89]

§ 10. *Disposal of the property by mortgagor.*—While the general property in chattels remains in the mortgagor, he may sell the same subject to the mortgage,[90] and the purchaser is estopped to question its validity.[91] The sale of the mortgaged property by consent of mortgagee invests purchaser with title free of the lien.[92] A mortgagee cannot recover for conversion as against a purchaser of the mortgaged property, where both instruments are void under the bankruptcy law and the conversion was merely technical.[93] The New York Penal Code, punishing the seller of mortgaged property, requires proof of an intent to defraud thereby.[94] The Mississippi Code, making the offense consist of the sale without consent of the mortgagee and without discharging incumbrances immediately, is not violated by a sale without paying the debt, where the debt is not due at the time of the sale.[95] In a prosecution for selling mortgaged property and representing it free from incumbrance, an averment that the seller knew that a certain corporation had a mort-

77. Mayers v. McNeese (Tex. Civ. App.) 71 S. W. 68.

78. British & A. Mortg. Co. v. Cody, 135 Ala. 622.

79. Clark v. Woodruff, 100 Ill. App. 18.

80. Jones v. Glathart, 100 Ill. App. 630.

81, 82, 83. George D. Mashburn & Co. v. Dannenberg Co. (Ga.) 44 S. E. 97.

84. Salmon v. Norris, 115 N. Y. St. Rep. 892.

85. Drovers' Live Stock Commission Co. v. Wilson County Bank, 95 Mo. App. 251.

86. Livingston v. Stevens (Iowa) 94 N. W. 925.

87. Livingston v. Heck (Iowa) 94 N. W. 1098.

88. First Nat. Bank v. Johnson (Neb.) 94 N. W. 837.

89. In this case evidence of prior and subsequent transactions between mortgagee and mortgagor showed that mortgagor was authorized to sell property and account to the mortgagee for the proceeds—Livingston v. Stevens (Iowa) 94 N. W. 925.

90. Illinois Trust & Sav. Bank v. Alexander Stewart Lumber Co. (Wis.) 94 N. W. 777.

91. In re Standard Laundry Co. (C. C. A.) 116 Fed. 476.

92. It is not important that the mortgagor does not at the time know of the consent—Livingston v. Stevens (Iowa) 94 N. W. 925.

93. Stanley v. Southwick (Iowa) 94 N. W. 1120.

94. In this case the mortgage authorized an election to consider the debt entirely due on a removal without written consent. There was a removal but the mortgagee with knowledge accepted payment in installments. A later removal of the goods was made to another state and when requested to make further payments, the mortgagor informed the mortgagee of his location and made further payments—People v. Staton, 114 N. Y. St. Rep. 2.

95. State v. Sullivan, 80 Miss. 596.

gage on the property is sufficiently explicit to admit proof of such mortgage.[96] It is no defense that the prosecuting witness could have protected himself by examining the records.[97]

§ 11. *Assignment of the mortgage.*—The assignment of a note carries with it a chattel mortgage executed as security therefor.[98] A mortgagee transferring part of the mortgage debt is not thereby made a trustee for his assignee, except as to collections over his debt, but is bound to act in good faith to his assignee,[99] and is guilty of a conversion where he collects only a portion of his debt and permits an impairment of the property.[1] The assignee is estopped to impeach the mortgage debt.[2] The assignee of a chattel mortgage may maintain an action for the mortgaged property.[3] The assignee of a portion of a mortgage debt may, in a bill to compel an accounting, enforce a claim as to a second mortgage acquired by him.[4] On the question of title to a mortgage, bought from a corporation, the minutes of the directors' meeting reciting sale by the directors in connection with the by-laws of the corporation, vesting this power in the directors, is admissible.[5] Generally, the assignee of a mortgage on goods procured under fraudulent sale stands in the position of the mortgagee as to the seller.[6]

§ 12. *Payment and discharge.*—Payment of a mortgage indebtedness to the original mortgagee before due is at the peril of the party making the payment,[7] particularly where the mortgage does not expressly or by implication authorize the mortgagee to receive payment after transfer of the security.[8] Payments by mortgagor will ordinarily amount to payment satisfying the mortgage and not a sale of the mortgage.[9] Where mortgagee takes the goods under the mortgage and retains them instead of selling them, the debt is paid to the extent of the value of the goods taken.[10] A mortgagee paying off a prior mortgage may require the assignment of such mortgage to him.[11] The vendee of a mortgagor required to pay off the mortgage is entitled to be subrogated to the rights of the mortgagee in any other security he may have for the payment of the mortgage debt.[12] He may compel application of payments on the mortgage without reference to any agreement between mortgagor and mortgagee to which he is not a party.[13] Recitals in the mortgage as to order of payment will control.[14]

In states imposing a penalty for failure to satisfy of record, a mortgagee cannot assign the mortgage after it has been paid so as to avoid the penalty.[15] Notice to a corporation and its president to have all mortgages paid by the mortgagee satisfied of record is sufficient.[16] In an action therefor, a plea that defendant did not own the mortgage is insufficient, without alleging a transfer prior to its payment.[17] A recovery may not be had where there has been merely a tender of pay-

96, 97. Keyes v. People, 100 Ill. App. 163.

98. Swift v. Bank of Washington (C. C. A.) 114 Fed. 643; Penney v. Miller (Ala.) 33 So. 668.

99, 1, 2. Penney v. Miller (Ala.) 33 So. 668.

3. Clem v. Wise, 133 Ala. 403.

4. Penney v. Miller (Ala.) 33 So. 668.

5. Clem v. Wise, 133 Ala. 403.

6. George D. Mashburn & Co. v. Dannenberg Co. (Ga.) 44 S. E. 97.

7. Swift v. Bank of Washington (C. C. A.) 114 Fed. 643.

8. City Nat. Bank v. Goodloe-McClelland Commission Co., 93 Mo. App. 123. Payment is at his risk though the mortgage provides that when the mortgaged property is ready for market it should be consigned to mortgagee and the proceeds applied to the debt—Swift v. Bank of Washington (C. C. A.) 114 Fed. 643.

9. A purchase of notes and not a payment is shown, where the person claiming to purchase gave his check payable to bearer and intrusted it to the mortgagor for delivery to the custodian, the purchaser testifying positively that he bought the notes—Powers v. McKnight (Tex. Civ. App.) 73 S. W. 549.

10. M. Groh's Sons v. Feldman, 40 Misc. (N. Y.) 303; Babcock v. Wells, 25 R. I. 23.

11. Williams Bros. Co. v. Hanmer (Mich.) 94 N. W. 176.

12, 13. Illinois Trust & Sav. Bank v. Alexander Stewart Lumber Co. (Wis.) 94 N. W. 777. A release of a mortgage on consideration that the proceeds of sale be applied on the debt may be enforced—California Wine-Makers' Corp. v. Sciaroni (Cal.) 72 Pac. 990.

14. Rice v. Davis (Mo. App.) 74 S. W. 431.

15, 16, 17. Dothan Guano Co. v. Ward, 132 Ala. 380.

ment and the amount due is brought into court with the suit.[18] The mortgage is admissible, though it describes the note as due at an impossible date by reason of failure to fill a blank.[19] The construction of the statute may not be submitted to the jury.[20]

An erroneous satisfaction of a mortgage may be canceled.[21] A purchaser of mortgaged property, obtaining a release from the mortgagee on the property bought, is protected against liens of the mortgagee on the remainder of the mortgaged property.[22]

§ 13. *Redemption.*—A mortgagor is not excused from making a tender of the amount necessary to redeem by the fact that the property has been attached.[23] A tender conditional on the property being returned to the place from which it was taken is insufficient.[24]

§ 14. *Foreclosure.*—Jurisdiction of equity to adjudicate as to the rights of parties to a chattel mortgage is not defeated by a stipulation for foreclosure by advertisement.[25] In Oklahoma a mortgage may be foreclosed by sale of property in the manner prescribed by the mortgage or by proceedings under the civil code,[26] and probate courts have jurisdiction where the debt is within the jurisdictional amount.[27] A federal court is not deprived of jurisdiction to foreclose because the mortgagee could take possession and sell under the state statute.[28] A receiver may be appointed.[29] A creditor may maintain a suit to foreclose in his own name, though the mortgage is taken by a third person named as a trustee of the creditor.[30] A judgment for the debt or for the value of property cannot be entered against one made a party to the foreclosure action by reason of his being in joint possession of the property,[31] nor will it be granted where the property is destroyed or so changed as to be impossible of identification.[32] The Iowa Code allows a decree in a chattel mortgage foreclosure to direct the issuance of special executions to different counties,[33] and such decree cannot be collaterally attacked, though the mortgage provides for its sale in the home county.[34] An appellate court will reverse a judgment in an action of foreclosure, where it is clearly apparent that the judgment is for an insufficient amount.[35] A mortgagee selling mortgaged property must show that conditions have been broken so as to warrant the sale,[36] and the question depends upon the conditions and their performance by the mortgagor and not on facts occurring at the execution of the mortgage.[37] A mortgagee in possession who sells without special compliance with the statute must account to subsequent lien

18. Hamaker v. Bynum (Ala.) 34 So. 405. A purchaser of mortgaged property from the mortgagor whose mortgage secured a nonnegotiable note making payment to the original payee may make the same defense against the transferee of the mortgage that he could have made against the mortgagee —City Nat. Bank v. Gunter Bros. (Kan.) 72 Pac. 842.

19. Long Bros. v. Jennings (Ala.) 33 So. 857.

20. Dothan Guano Co. v. Ward, 132 Ala. 380.

21. Frost v. George, 181 Mass. 271. One taking mortgaged property subject to mortgage, and marked paid on the record by mistake, and who has paid nothing for the mortgage, may not testify as to statements of the vendor that the mortgage was paid, it not being shown that such purchaser relied on such statements—Id.

22. Drumm-Flato Commission Co. v. Barnard (Kan.) 72 Pac. 257.

23. Marsden v. Walsh (R. I.) 52 Atl. 684.

24. Gen. L. c. 207, § 13—Marsden v. Walsh (R. I.) 52 Atl. 684.

25. Meeker v. Waldron (Neb.) 90 N. W. 755.

26. Pettee v. John Deere Plow Co., 11 Okl. 467, 68 Pac. 735.

27. Stahl v. Wade, 11 Okl. 483, 69 Pac. 301.

28. H. B. Claflin Co. v. Furtick, 119 Fed. 429.

29. H. B. Claflin Co. v. Furtick, 119 Fed. 429; Haggard v. Sanglin (Wash.) 71 Pac. 711; Tuttle v. Blow (Mo.) 75 S. W. 617.

30. H. B. Claflin Co. v. Furtick, 119 Fed. 429.

31. McLain v. McCollum (Tex. Civ. App.) 72 S. W. 1027.

32. Flanagan Bank v. Graham, 42 Or. 403, 71 Pac. 137, 790.

33. Code, §§ 3772, 3955—King v. Nelson (Iowa) 94 N. W. 1095.

34. King v. Nelson (Iowa) 94 N. W. 1095.

35. Marchand v. Ronaghan (Idaho) 72 Pac. 731.

36, 37. Davis v. Bowers Granite Co. (Vt.) 54 Atl. 1084.

holders for its value.[38] Proof that notices were posted at or near certain residences is too indefinite to satisfy a requirement that notices be posted at public places.[39] A liquor license may not be sold without the consent of the city to a transfer of the license.[40] In Texas the mortgagor of exempt and non-exempt property may require the sale of non-exempt property first, and have its proceeds applied.[41] Attorney's fees are properly refused where an amount nearly equal to the amount due was tendered, and other proceedings were with reference to another claim in which the mortgagee was unsuccessful.[42] The report of the sale to be delivered to mortgagor should include an itemized statement of the necessary and reasonable expenses for taking, keeping and selling the property.[43] A failure to comply with the South Dakota act making it the duty of the mortgagee to file a report of the sale in the office of the register of deeds invalidates the sale.[44] A mortgagor fully apprised of the terms of the sale and the items of expenses may not complain of a failure to serve notice.[45]

A good faith purchaser at foreclosure sale takes without notice of mortgagor's fraud in obtaining the goods.[46] The purchaser of property at a defective foreclosure sale takes the interest of the mortgagee in the property,[47] and is liable to the mortgagor only for the excess in the value of the property over the indebtedness.[48] No title is acquired by a purchaser with knowledge of facts invalidating the sale as against a creditor.[49]

§ 15. *Remedies as between the parties.*—Mortgagor may recover the value of his property less the amount of the mortgage debt, where the mortgagee removes the property to another county and sells without first filing his mortgage in such county.[50] Accounting for proceeds may be had.[51] An equitable claim to proceeds deposited in bank is waived where, pending the action, mortgagee sues on mortgage notes and garnishes the money so deposited as the property of the mortgagor.[52] A mortgage collateral to a contract for the sale of a crop to secure advances does not give purchaser a lien for damages for seller's breach of the contract of sale.[53] In replevin by mortgagor under a mortgage allowing a mortgagee to take possession on sale of mortgaged property, or attempts to sell the same without the permission of the mortgagee, defendant has the burden of showing a sale or attempt to sell without consent.[54]

§ 16. *Remedies against third persons.*—The assumption of dominion over mortgaged property by one having knowledge of a mortgage thereon amounts to a conversion.[55] A mortgagee having right of possession may recover for injuries to the mortgaged property by a third person,[56] and a description of the property, suf-

38. Dempster Mill Mfg. Co. v. Wright (Neb.) 95 N. W. 806.
39. Powell v. Hardy (Minn.) 94 N. W. 682.
40. Christian Felgenspan v. Mulligan (N. J. Law) 53 Atl. 1124.
41. Baughn v. Allen (Tex. Civ. App.) 73 S. W. 1063.
42. Lilienthal v. McCormick (C. C. A.) 117 Fed. 89.
43. Geo. J. Stadler Brg. Co. v. Weadley, 99 Ill. App. 161.
44. Edmonds v. Riley, 15 S. D. 470.
45. Starr & C. Ann. St. 1896, c. 95, par. 27—Marvel v. McKinzey, 105 Ill. App. 165.
46. George D. Mashburn & Co. v. Dannenberg Co. (Ga.) 44 S. E. 97.
47. Powell v. Hardy (Minn.) 94 N. W. 682.
48. Berg v. Olson (Minn.) 93 N. W. 309.
49. Stuart v. Mitchum, 135 Ala. 546.
50. McCormick Harvesting Mach. Co. v. Preitauer (Neb.) 91 N. W. 499.
51. Averments of a transfer of part of the notes secured by a mortgage in consideration of complainant's furnishing money to discharge a prior incumbrance will not imply that the defendant thereby became bound to account for the specific proceeds included in the property—Penney v. Miller (Ala.) 33 So. 668.
52. Young v. Bank of Princeton, 97 Mo. App. 576.
53. Lilienthal v. McCormick (C. C. A.) 117 Fed. 89.
54. Matthews v. Granger, 196 Ill. 164. Defendant pleading sale of products in violation of mortgage, is restricted to such averment and may not show a mortgage of other property covered by the mortgage—Id.
55. Woods v. Rose, 135 Ala. 297.
56. O'Brien v. Miller, 117 Fed. 1000.

ficient as between the parties, is sufficient as between the mortgagee and trespasser.[57] Failure of a mortgagee to intervene in an action against a third person for conversion of chattels will not deprive the mortgagee of his lien as against the party converting the chattels.[58] Mortgagees holding under different mortgages may join in an action against a sheriff for conversion of the goods without regard to the fact that their mortgages are of varying priority,[59] or that one of the mortgages was without consideration.[60] An action for conversion cannot be maintained by the mortgagee against a third person before the law day of the mortgage,[61] and a mortgagee must show that it occurred after his right to take possession had accrued.[62] Under a mortgage covering certain crops raised during a given year in specified county, mortgagee must show that crop was raised in the county during the year mentioned.[63] A mortgagee in replevin must recover on the strength of the title of the mortgagor, if at all, where title is denied.[64] In an action for conversion, evidence to show title in a third person is admissible to defeat the action.[65] In replevin of mortgaged property, the mortgage itself and evidence of plaintiff that he had a mortgage on the property in controversy, will sustain a verdict that he had a lien on such property.[66]

CITIZENS.[67]

Citizenship may be state or federal, the former of course necessitating the latter.[68] A more or less extended meaning is that given to jurisdictional citizenship.[69] An inmate of a national soldiers' home may have a voting state citizenship.[70] Residence is not equivalent to citizenship.[71] Citizenship, when not original, may be acquired by naturalization,[72] or by allotment, if a tribal Indian,[73] or by marriage,[74] or by adoptive force of a treaty of accession. A Porto Rican is not an adopted citizen.[75] Since the French and Spanish treaties of 1803 and 1819 left citizenship of inhabitants unchanged, a Spanish born child, within what is now New Mexico, could not become an adoptive citizen except as provided by the treaty of Guadalupe Hidalgo.[76] Expatriation results from marriage of an American woman to a foreigner.[77] The burden of proving a claim of citizenship is supported by a mere claim, after which it shifts.[78]

CIVIL ARREST.[79]

§ 1. **Privilege from Arrest.**
§ 2. **Arrest on Mesne Process.**—When Allowable; Procedure; Bond; Order and Writ.
§ 3. **Execution Against the Body.**—Occasion and Propriety; Procedure; Order and Writ.
§ 4. **Supersedeas, Bail or Discharge.**

§ 1. *Privilege from arrest.*—A citizen of another state cannot be arrested while attending as a witness.[80]

57. O'Brien v. Miller, 117 Fed. 1000. A complaint is sufficient under the Connecticut law which states that a demand for possession had been made more than two months before the trespass complained of and it is not necessary to give the date—Id.
58. Scott v. Cox (Tex. Civ. App.) 70 S. W. 802.
59, 60. Trompen v. Yates (Neb.) 92 N. W. 647.
61, 62. Johnson v. Wilson (Ala.) 34 So. 392.
63. Geo. M. Truss & Co. v. Byers (Ala.) 34 So. 616.
64. Sweeney v. Rejto (Neb.) 95 N. W. 669.
65. Reynolds v. Fitzpatrick (Mont.) 72 Pac. 510; Beyer v. Fields, 134 Ala. 236.
66. Cathey v. Bowen, 70 Ark. 348.
67. Compare related matters in titles Aliens, Domicile.
68. Situs of state citizenship and residence qualifications for election purposes, see Elections.
69. See Jurisdiction, Removal of Causes.
70. Such home is not an "asylum"—Cory v. Spencer (Kan.) 73 Pac. 920.
71. And it cannot be so pleaded—Gale v. Southern B. & L. Ass'n, 117 Fed. 732.
72. See Aliens, ante, p. 70.
73. In re Celestine, 114 Fed. 551.
74. Moore v. Ruckgaher (C. C. A.) 114 Fed. 1020.
75. In re Gonzalez, 118 Fed. 941.
76. De Baca v. United States, 37 Ct. Cl. 482.
77. Moore v. Ruckgaher (C. C. A.) 114 Fed. 1020.
78. Evidence held insufficient to show Illinois citizenship of one who claimed to reside in Indiana and yet had an office and a room in Chicago—Adams v. Shirk (C. C. A.) 117 Fed. 801.
79. Inhibition of imprisonment for debt, see Constitutional Law.
80. He was entitled to discharge under Pub. St. c. 221, § 10 or § 12, though he gave

§ 2. *Arrest on mesne process. When allowable.*[81]—Defendant in a civil action in the municipal court of New York may be arrested on proof that he has disposed of his property with intent to defraud creditors.[82] It must appear when application is grounded on refusal to pay that the debtor had means sufficient to pay but refused.[83] A principal cannot have his agent arrested for fraud directed against a third person and not against the principal.[84] An agent arrested in a proceeding against him for failure to account may show that he had not appropriated the principal's property to his own use but that its loss resulted from other conditions; if his contract does not prevent him from selling goods on credit, he cannot be arrested for bad sales or failure in collection, no misappropriation or embezzlement being shown, and in such case the order of arrest is properly vacated and civil judgment entered for the amount.[85] Officers of a defendant corporation not parties cannot be committed by the sheriff in trover when bail may be required.[86]

A law authorizing imprisonment to enforce a license tax is not unconstitutional.[87] An award of alimony unaccrued is not a "debt."[88] Whenever an action is to recover damages for a wrong inflicted on plaintiff, malice is the gist of the action so as to warrant issue of a capias ad satisfaciendum.[89] The constitutional provision against imprisonment for debt unless in case of fraud excludes the right to arrest, where defendant was guilty of fraud in contracting the debt and in receiving a transfer of property from an insolvent, but action was not on the debt but to assail the transfer in equity.[90] An execution against the person will issue on a judgment rendered in favor of an administratrix for wrongful death of her intestate, that being an action to recover for injuries to the property rights of the beneficiaries.[91] In an action for conversion of proceeds of a sale of property an answer admitting that the property was placed with defendant for sale on plaintiff's account and tendering the proceeds less commission claimed will not change the action to one for money had and received so as to preclude execution against the person.[92]

Procedure to obtain order of arrest.[93]—An order for arrest given on two causes of action fails where the right to the order fails as to one of them.[94] A complaint is necessary in New York to an order of arrest in divorce.[95] That the summons shows an action for absolute divorce and the affidavit demands alimony is insufficient proof on which to issue an order of arrest.[96] An exemplified or

bail immediately on arrest—Dickinson v. Farwell, 71 N. H. 213.

81. Sufficiency of showing of fraud for issuance of warrant under fraudulent debtor's act—William Barie Dry Goods Co. v. Casler (Mich.) 90 N. W. 670.

82. Laws 1902, p. 1508, c. 580—Auerbach v. Rogin, 83 N. Y. Supp. 154.

83. Gen. St. § 1347—Atwater v. Slepcow, 74 Conn. 761. The gist of the action must be fraud in respect to the debt—Id.

84. Fraudulent extension of credit—Holland Coffee Co. v. Johnson, 38 Misc. (N. Y.) 187.

85. Arrest under Code, § 291 (2)—Southern Grocery Co. v. Davis (N. C.) 43 S. E. 591.

86. Hall & B. Woodworking Mach. Co. v. Barnes, 115 Ga. 945.

87. Rosenbloom v. State (Neb.) 89 N. W. 1053.

88. In re Cave, 26 Wash. 213, 66 Pac. 425. But commitment for contempt may be made (Rev. St. § 5640)—State v. Cook, 66 Ohio St. 566.

89. Penoyer v. People, 105 Ill. App. 481.

90. Const. art. 1, § 15, as applied to Code Civ. Proc. § 479—Cooper v. Nolan, 138 Cal. 248, 71 Pac. 179.

91. Code Civ. Proc. §§ 1487, 3343—People v. Gill, 83 N. Y. Supp. 135.

92. Holmes v. Leighton, 83 N. Y. Supp. 164.

93. Sufficiency of affidavits for capias ad respondendum on ground that certain goods were obtained by false pretenses by defendant with intention not to pay for them; of proof of defendant's non-residence to sustain an order to hold him to bail in action for conversion (Kryn v. Kahn [N. J. Sup.] 54 Atl. 870); of evidence to show waiver of provision in recognizance for appearance of debtor at time stated for examination before magistrate—Speirs Fish Co. v. Robbins, 182 Mass. 128.

94. Holland Coffee Co. v. Johnson, 38 Misc. (N. Y.) 187.

95. An affidavit alone is insufficient (Code Civ. Proc. § 550)—Lichstrahl v. Lichstrahl, 38 Misc. (N. Y.) 331.

96. Code Civ. Proc. § 550—Lichstrahl v. Lichstrahl, 38 Misc. (N. Y.) 331.

sworn copy of the record is necessary to prove that accrued alimony is due plaintiff by a decree of the court so as to issue a writ of arrest against defendant; and a statement by defendant to plaintiff as shown by her affidavit that he was about to leave the state, taking his property with him, does not show an intent to defraud creditors authorizing arrest.[97] Direct proof of payments to an agent, or excuse for failure of such proof, is necessary to an affidavit for an order for his arrest for failure to account for moneys collected.[98]

Bond; undertaking; security.—A bond to secure an order for arrest conditioned to pay all damages which defendants or either of them may sustain may be enforced by defendants severally; his recovery on the bond could not be defeated on the ground that it would leave the other party without any remedy;[99] and on vacation of the undertaking one defendant imprisoned under the order may sue without joining the others as a party and without demand. The measure of damages on the undertaking is payment for time and expense lost and nothing for injury to the person.[1]

The order and writ for arrest.—In civil arrest, a warrant is absolutely necessary.[2] An order to vacate an order of arrest may be made before a judge in the district other than the one who granted the order.[3] Where application for vacation is made to the judge who granted it, notice of the application is necessary as the judge in his discretion deems proper.[4] Omission of plaintiff's attorney to indorse on the back of a capias ad respondendum the name of the county of service and the address of the attorneys issuing the writ may be corrected by amendment, if no injury results thereby to defendant. That the affidavits and order for a capias ad respondendum were not filed in the clerk's office, until the day after the issuance of the writ and the arrest, is not ground for quashing the writ.[5]

§ 3. *Execution against the body. Occasion and propriety.*—Malice as a statutory ground of action for the imprisonment of a debtor applies to wrongs inflicted with evil intent and under improper motives.[6] The right to arrest may depend on whether the action was in tort. An action by administratrix to recover for wrongful death of her intestate, is an action to recover for injuries to property rights of beneficiaries.[7] In an action for conversion of the proceeds of property sold, an answer admitting that plaintiff's assignor placed the property in defendant's hands to be sold "on her account" for a certain amount less commissions, did not change the action into an action for money had and received.[8] A judgment debtor sent to the reformatory of another county is not a resident of the county so that an execution against his person issued to that county during his confinement, and returned unsatisfied, is a sufficient ground for arrest.[9] The New York statute providing that a defendant discharged from arrest for failure to take out an execution shall not be arrested on execution on the judgment, does not apply to municipal courts.[10] Former statutes in the District of Columbia permitted arrest

97. Her affidavit of award of alimony is insufficient (Practice Act, § 58 [2 Gen. St. p. 2543])—Innes v. Innes (N. J. Sup.) 53 Atl. 1041.

98. Holland Coffee Co. v. Johnson, 38 Misc. (N. Y.) 187.

99. Krause v. Rutherford, 81 App. Div. (N. Y.) 341.

1. Krause v. Rutherford, 37 Misc. (N. Y.) 382.

2. Park v. Taylor (C. C. A.) 118 Fed. 34.

3. Wm. Skinner Mfg. Co. v. Fagenson, 38 Misc. (N. Y.) 121.

4. Code Civ. Proc. §§ 568, 769—Wm. Skinner Mfg. Co. v. Fagenson, 38 Misc. (N. Y.) 121.

5. 2 Gen. St. p. 2541, § 46; p. 2543, § 58—Kryn v. Kahn (N. J. Sup.) 54 Atl. 870.

6. Hurd's Rev. St. 1899, p. 966, § 2—Jernberg v. Mix, 199 Ill. 254; Penoyer v. People, 105 Ill. App. 481.

7. Code Civ. Proc. § 1487, construed in connection with § 549 and Code § 3343—People v. Gill, 83 N. Y. Supp. 135.

8. Holmes v. Leighton, 83 N. Y. Supp. 164.

9. Code Civ. Proc. § 1489—American Surety Co. v. Cosgrove, 40 Misc. (N. Y.) 262.

10. Code Civil Proc. § 572—Rogow v. Clark, 40 Misc. (N. Y.) 208.

for fraud in conveying real as well as personal property but except as to pending actions they have been repealed.[11]

Procedure to obtain writ.—Either written pleadings or an indorsement on the summons must in the Municipal Court of New York apprise the debtor that the action is one in which he is liable to arrest.[12] Where a complaint for assault properly verified sets out facts sufficient for cause of arrest under the statute, execution against the person may issue after execution against the property returned unsatisfied, without a previous affidavit or order of arrest.[13]

Plaintiff in an action to foreclose a lien on personal property is not entitled to execution against the person, where no order of arrest has been issued.[14] An affidavit for a capias ad satisfaciendum made by the treasurer and agent of a corporation, who is the plaintiff in the suit in which the writ is issued on information and belief, is sufficient.[15] A special finding of malice in an action of tort will support a finding of malice by the court so as to warrant arrest of the defendant.[16] Where the general verdict against one imprisoned under a capias ad satisfaciendum is guilty and responds to all the counts, the burden is on petitioner to show that the verdict and judgment were based on a count not founded on malice; and he is not estopped by the judgment from showing that it was based on a count in which malice was not the gist of the action, where malice appeared in only one of the three counts.[17]

The order and writ.—A writ of execution against the body of a defendant requiring the officer to bring him before the justice issuing the writ at the time specified must be strictly followed.[18]

§ 4. *Supersedeas bail or discharge from arrest. Mesne process.*—Plaintiff has no interest in money deposited with an officer on release of defendant by him, where he returned on the capias that defendant was in custody, the return being conclusive on the officer and the parties, unless application is made to amend or set it aside.[19]

Final process.[20]—One arrested in assumpsit is not entitled to release under the Insolvent Debtor's act, providing for release when malice is not the gist of the action, where the declaration shows intentional injury or wrong to plaintiff, since malice in that case is the gist of the action.[21] An application for discharge from arrest must be granted if plaintiff fails to take out execution on the judgment before the expiration of 24 hours after he is entitled to it, but the failure to take out execution within such time and the discharge will not defeat plaintiff's right to a subsequent issue of body execution.[22] Where it appears in an action for breach of a poor debtor's recognizance, that he was legally arrested, that his creditor was a non-resident, that the attorney for the latter was a resident of the county,

11. Rev. St. §§ 794 and 795. These provisions were repealed by Code, § 1638, repealing Acts of General Assembly of Maryland and of the Legislative Assembly of District of Columbia—Costello v. Palmer, 20 App. D. C. 210.

12. Judgment cannot contain an order of arrest unless the summons was properly indorsed where pleadings were oral—Municipal Court Act, § 39 (Laws 1902, c. 580)—Auerbach v. Rogin, 83 N. Y. Supp. 154.

13. Code Civ. Proc. §§ 260, 291—Huntley v. Hasty, 132 N. C. 279.

14. L. 1902, p. 1486, c. 580, and Code Civ. Proc. § 1487—Liederman v. Rovner, 115 N. Y. St. Rep. 606.

15. Capias issued under Rev. St. 794, 795—Costello v. Palmer, 20 App. D. C. 210.

16. Hurd's Rev. St. 1899, p. 966, § 2—Jernberg v. Mix, 199 Ill. 254.

17. Jernberg v. Mix, 199 Ill. 254.

18. In re Jennison, 74 Vt. 40.

19. Loewenthal v. Wagner (N. J. Sup.) 52 Atl. 298.

20. Sufficiency of showing under Pub. St. c. 162, § 32, that creditor in an action for breach of a recognizance by a poor debtor was a non-resident so as to require notice of a desire to take the poor debtor's oath to be served on his agent or attorney—Griffin v. Betts, 182 Mass. 323.

21. Hurd's Rev. St. c. 72, § 2—Penoyer v. People, 105 Ill. App. 481.

22. Under Municipal Court act (L. 1902, p. 1511, c. 580, § 68; L. 1902, p. 1568, c. 580, § 271)—Rogow v. Clark, 40 Misc. (N. Y.) 208.

but no notice of a desire to take the poor debtor's oath was served upon such attorney as required by statute, a judgment for the creditor on the undertaking is authorized; the verdict for breach of his recognizance should be for the amount thereof as shown by the amount for which execution should issue, to be determined in the action.[23] Statutes providing for discharge of a defendant for delay in issuing execution against the person on the judgment under certain circumstance, applies only to procure discharge from arrest on mesne process.[24] Denial of a motion to vacate an order of arrest in a civil action for insufficiency of the papers is not in conflict with a decision that the judgment is improper in providing for arrest because of insufficiency of the pleadings and summons.[25]

CIVIL RIGHTS.

§ 1. *What rights are civil.*—By the term "civil rights" is meant general rights of a personal nature belonging to individuals as citizens. The term is most generally applied to the rights secured by the thirteenth and fourteenth amendments to the United States constitution and the statutes pursuant thereto and analogous state legislation.[26]

§ 2. *Violations of such rights and prosecutions thereon.—Places of public accommodation embrace* a bowling alley at a pleasure resort,[27] and a bootblack stand in the corridor of an office building, in which discrimination on account of race is unlawful.[28]

Separation of races.—The laws requiring separate schools for colored[29] or Asiatic children do not violate the 14th amendment, where the schools offer the same advantages as other public schools.[30] The constitution is not violated by a state law requiring street railroads to provide separate accommodations for white and colored passengers, where the accommodations are equal.[31]

Composition of juries.—There is unlawful discrimination against a negro on trial, where all persons of his own race are excluded solely on the ground of color.[32]

Persons liable for discrimination.—The word "person" in the Ohio Civil Rights act includes a corporation.[33]

Removal of causes.—A case cannot be removed to the federal court under act authorizing removal of criminal prosecutions against persons denied civil rights in the state courts, where the act punishing the offense does not discriminate between the races as to the punishment.[34]

23. Rev. Laws, c. 168, § 66—Griffin v. Betts, 182 Mass. 323.

24. People v. Gill, 83 N. Y. Supp. 135.

25. Suerbach v. Rogin, 83 N. Y. Supp. 154.

26. Cyc. Law Dict.

27. Johnson v. Humphrey Pop Corn Co., 24 Ohio Circ. R. 135.

28. Burks v. Bosso, 81 App. Div. (N. Y.) 530.

29. Laws 1879, p. 163, c. 181—Reynolds v. Board of Education (Kan.) 72 Pac. 274. A constitutional provision that white and colored races should be taught in separate schools, but that neither shall be discriminated against, is violated by an act providing that if there shall be so few of either race in the district that it shall be regarded inadvisable to organize a school for that race, the pro rata proportion of the school fund for such children should be given to an adjoining district, unless there are no children of either race in the district to be discriminated against or not enough children of both races to warrant a school for each (Pub. Laws 1901, c. 497, § 8)—Hooker v. Town of Greenville, 130 N. C. 472.

30. Wong Him v. Callahan, 119 Fed. 381.

31. State v. Pearson (La.) 34 So. 575.

32. Code, § 1722, making payment of taxes, good moral character and sufficient intelligence, qualification for jury service—State v. Peoples, 131 N. C. 784. Not shown where only a small percentage of the voters of the county were negroes and only a few of these were shown to be qualified and the jury commissioners denied discrimination—Martin v. State (Tex. Cr. App.) 72 S. W. 386; Hubbard v. State (Tex. Cr. App.) 67 S. W. 413. Evidence held sufficient to show discrimination in the formation of a jury to try a negro charged with crime—Smith v. State (Tex. Cr. App.) 69 S. W. 151.

33. Johnson v. Humphrey Pop Corn Co., 24 Ohio Circ. R. 135.

34. Rev. St. U. S. § 641—People v. Bennett, 113 Fed. 515.

CLERKS OF COURT.

§ 1. The Office; Induction into and Removal from Office; General Duties.
§ 2. Fees and Compensation.—In General; United States Courts.
§ 3. Liabilities and Breach of Bond.

§ 1. *The office; induction into and removal from office; general duties.*[35]—If the clerk of a county court has legal authority to appoint a deputy, and neither his official term nor his right of removal is limited, the latter power is incident to that of appointment and may be used at pleasure without notice or legal liability; hence a contract between the clerk and a deputy, providing that the latter should hold office at a certain salary during the entire term of the clerk, is against public policy and no action will lie for the breach thereof.[36] It cannot be objected that no county or deputy county clerk was in attendance on a prosecution at time of trial where one who had previously been appointed deputy and to whom a commission had been issued was present and acted, and it did not appear that the appointment had ever been revoked, or that she had resigned, though she had not acted for a year.[37] An appeal will not lie from an order of the judge of the circuit court in Wisconsin, denying a petition for removal of the clerk for malfeasance.[38]

It is his duty to record judgments, orders and proceedings of the court.[39] His receipt for money paid on a judgment is not evidence showing that the creditor received the money.[40] The certificate of the clerk under the court's seal shows prima facie that it is a court of record.[41] One who acts as deputy clerk of the city court by authority of the clerk of that court may legally sign processes issuing therefrom.[42] The clerk of the United States circuit court, with permission of the court, may receive money paid into court by a private party in a pending cause.[43] Mandamus will lie to compel a clerk to perform the ministerial duties of his office.[44]

§ 2. *Fees and compensation.*[45]—The right of the clerk to fees on all fines, forfeitures or moneys collected for the state does not apply to civil actions by the state to recover penalties, such fees being regulated by another law.[46] Costs will not be allowed to a clerk for making and sending up a transcript in which he failed to incorporate the judgment.[47] Where one who acted both as circuit court clerk and county recorder retains sufficient fees on a severance of the offices to compensate him for work as recorder, but afterward collected fees for services as clerk

35. Time of election and term of office of clerks of courts of common pleas under Rev. St. § 1240, and Act April 30, 1902—State v. Hall, 67 Ohio St. 303. Constitutionality of Act April 30, 1902, amending Rev. St. § 1240, providing that successors of clerks of common pleas whose terms expire in 1903 shall be elected at next general election following the amendment—Id. Sufficiency of evidence to show that a county had less than a certain population required for the establishment of the office of clerk of the district court—State v. Davis (Neb.) 92 N. W. 740.

36. Horstman v. Adamson (Mo. App.) 74 S. W. 398.

37. Hollar v. State (Tex. Cr. App.) 73 S. W. 961.

38. Neither petitioner nor the county can suffer pecuniary loss from the order—In re Aldrich, 114 Wis. 308.

39. Boynton v. Crockett (Okl.) 69 Pac. 869.

40. Matusevitz v. Hughes, 26 Mont. 212, 66 Pac. 939, 68 Pac. 467.

41. Civ. Code, § 3621—Ford v. Nesmith (Ga.) 43 S. E. 483.

42. The power existed while Act Dec. 10, 1902, was in force—Tietjen v. Merchants' Nat. Bank (Ga.) 43 S. E. 730.

43. Rev. St. U. S. § 828, construed in connection with §§ 798, 995, 936, 5504, 5505—Howard v. United States, 184 U. S. 676.

44. To compel inclusion of certain officers in a notice of election (People v. Knopf, 198 Ill. 340); to obey an order of court allowing a change of venue and to transmit papers of the case—State v. Chapman, 67 Ohio St. 1.

45. Amount of fees to clerk for taxing bill of costs in criminal prosecution (Rev. St. 1898, § 747)—Green Lake County v. Waupaca County, 113 Wis. 425. Sufficiency of title of act fixing fees of clerks of civil and criminal district courts of parish of Orleans—Grinage v. Times-Democrat Pub. Co., 107 La. 121.

46. Code Crim. Proc. art. 1143, construed in connection with Sayles' Rev. Civ. St. art. 2423—State v. Hart (Tex.) 70 S. W. 947.

47. State v. Crook, 132 N. C. 1053.

before the settlement and paid them through mistake to the county, he could not recover such fees paid over to the county, but his remedy was to recover compensation out of fees earned while he was clerk and collected by his successor.[48] A contract will be implied to pay fees customarily allowed where counsel procures a loan of the record from the clerk of the court of appeals in Kentucky.[49] The county board in its discretion may allow supplemental compensation for services of the clerk of the county court after the services have been rendered.[50] No compensation can be recovered by the clerk in Wisconsin for issuing receipts for witnesses' certificates; nor for filing statements of witnesses' services and mileage prepared by the attorneys but not required by statute; nor for issuing affidavits to witnesses proving mileage.[51] The clerk of the circuit court in Alabama may charge compensation for entering the caption of an indictment on final record; but not under the general statute for entering the order setting the day for trial, the judgment on verdict and the sentence pronounced.[52] After passage of a law giving the clerk of the Minnesota district court a fixed salary instead of the perquisites previously given he cannot retain fees collected during office hours for furnishing unauthenticated statements to commercial or abstract companies from records in his custody.[53] The clerk of the superior court of Georgia is entitled to fees paid as for similar services in other cases for services performed after recording judgment in certiorari.[54] The clerk of the common pleas of Baltimore is not entitled to interest accruing on license fees collected by him and deposited in bank.[55] The laws providing fees to be charged by the clerk of the superior court of Washington from the beginning of suits down to entry, collection and satisfaction of final judgment does not apply to another action for reviving the judgment, such proceedings being in all respects a new suit.[56]

The clerk of the district and circuit court of the United States is entitled to his statutory per diem compensation for days on which in the absence of a judge he entered orders, decrees and proceedings on the journal transmitted to him by different judges composing the courts of the district,[57] and he is entitled to allowance of a day while the court is actually in session whether business is transacted or not;[58] but cannot claim a fee for filing various papers given to his custody by circuit court commissioners, on abolition of their office under the statute, where the filing was not required by statute nor a rule of court.[59] He may charge for filing and marking depositions and exhibits in a criminal case, and for continuances though the date of the term at which they were taken is not given, or for a certified copy of a mittimus left with the jailor, or for making duplicate copies of orders to pay jurors which the statute requires to be kept in his office for public inspection, or for copies of papers furnished United States attorneys at their request;

48. Corbin v. Adair County, 171 Mo. 385.

49. Shackelford v. Phillips, 24 Ky. L. R. 154, 66 S. W. 419, 68 S. W. 441.

50. Sess. Laws 1897, p. 239, c. 34, provide that the board may fix the compensation of the clerk of the county court—Adams County v. Bowen (Neb.) 95 N. W. 869.

51. Rev. St. 1898, §§ 747, 4060—Green Lake County v. Waupaca County, 113 Wis. 425.

52. The caption is a part of the indictment and should be copied under the charging part (Code, § 934, subsec. 9, §§ 4893, 4511); the last named items cannot be allowed under Code, § 2642, being provided for by Acts 1896-7, p. 1532—Carmichael v. Matthews, 134 Ala. 210.

53. Sp. Laws 1891, c. 373, §§ 2-6—Board of County Com'rs v. Dickey, 86 Minn. 331.

54. He is entitled to collect $3 for services performed in certiorari including entry of official judgment and record of the proceedings if required to be recorded by law (under Civ. Code 1895, § 5397)—McMichael v. Southern Ry. Co. (Ga.) 43 S. E. 850.

55. Construction of various provisions of the constitution in connection with various provisions of the Code—Vansant v. State, 96 Md. 110.

56. Under Laws 1893, p. 421, §§ 1, 2—State v. Collins (Wash.) 72 Pac. 98.

57. Compensation provided by Act March 3, 1887, c. 362—United States v. Finnell, 185 U. S. 236.

58. Under Organic Act, § 13, and Rev. St. c. 16, especially § 823—United States v. Warren (Okl.) 71 Pac. 685.

59. Under Act May 28, 1896—United States v. Van Duzee, 185 U. S. 278.

but not for copies of an order excusing jurors or of estimated costs furnished to internal revenue collectors, nor for making copies of interrogatories in depositions in a criminal case, nor for a copy of an indictment furnished the accused at his request if not under an order of the court, nor for cartage of court dockets, files and minute books.[60] He is not prevented from recovering fees in a suit begun before passage of a law requiring an account for fees to be presented and allowed by the auditing department because, through inadvertence or a mistake to postpone the charges until the close of the cause, he had not presented some of the charges until after passage of the law; and his right to fees for entering in his minute book a memorandum of the court business transacted, and of adjournment, does not depend upon his furnishing an itemized statement of charges.[61] The court will not interfere to allow fees suspended by the department for explanation until they have been passed upon.[62]

§ 3. *Liabilities of clerk in general; bond and liabilities thereon.*—Where a clerk of court delivered a transcript on appeal before action on a rule by the Supreme Court to show cause why he should not deliver it, the rule will be discharged at his cost.[63] A city court sitting in equity cannot entertain a motion against the registrar in chancery acting ex officio on the chancery side of that court for default in payment of proceeds of property sold under decrees.[64] A motion will not lie to require the clerk of the District Court to pay over money received by him on a judgment and appropriated, since it is not his duty to receive it and he is not officially liable for its conversion.[65]

The bondsmen of a county court clerk are not liable to the purchaser of a warrant forged by the clerk and sold at a discount, such act not being within his official duties.[66] A clerk and his sureties are liable on his official bond for money received in his official capacity in court in condemnation proceedings which he deposited in his name as clerk in a solvent bank without order of court and which was afterward lost by failure of the bank.[67] The clerk of the superior court receiving proceeds from partition commissioners and receipting for it as clerk is liable therefor on his bond and claimants may sue for recovery thereon.[68] The clerk of the common pleas of Baltimore will be liable on his bond for interest received on license fees received by him and deposited in bank.[69] A special bond given by a clerk in a particular proceeding as a cumulative security will not prevent liability on his general bond in that proceeding.[70] Where it appears in an action on a clerk's bond to recover interest collected on funds of the state that other money might have been mingled with the funds by the clerk in depositing funds in his custody in a bank, the burden is on him to show what part if any of the fund deposited belonged to him.[71] The bond of a United States circuit court clerk is meant for the protection of any party injured by failure of the clerk to perform

60. The last item should be allowed as miscellaneous expenses in the department of justice and presented by the marshal to the attorney general—Marvin v. United States, 114 Fed. 225.

61. Acts June 27 and July 1, 1898—Marvin v. United States, 114 Fed. 225.

62. Marvin v. United States, 114 Fed. 225.

63. State v. Estorge (La.) 34 So. 643.

64. Under Code, c. 106, § 3767, the money so received not being money collected under "process"—Parks v. Bryant, 132 Ala. 224.

65. City of Whitesboro v. Diamond (Tex. Civ. App.) 75 S. W. 540.

66. State v. Harrison (Mo. App.) 72 S. W. 469.

67. Northern Pac. Ry. Co. v. Owens, 86 Minn. 188.

68. Code, §§ 72, 1883—Smith v. Patton, 131 N. C. 396.

69. An account in a bank opened by him in his name as clerk and which he afterward remitted to the state treasurer in payment of license fees collected, sufficiently shows that the funds belonged to the state so as to render him liable for interest on the deposits. Code, arts. 14 and 17. He may deposit the fees, but they constitute an emolument beyond the sum prescribed by the Constitution for his salary—Vansant v. State, 96 Md. 110.

70. The sureties have at most a right of contribution merely—Johnson v. Bobbitt (Miss.) 33 So. 73.

71. Vansant v. State, 96 Md. 110.

his duty within its conditions, and he is liable thereon for appropriation to his own use of money deposited with him by a private suitor in a pending cause with the sanction of the court. A private suitor may sue thereon for his own benefit in the name of the United States without express statutory authority.[72]

COLLEGES AND ACADEMIES.

Nature, establishment and organization.—A manual and polytechnic school established by private donation is not a public school.[73] Where the curriculum of study is the same, it is not important that an institution created as a university is termed a polytechnic school.[74] A selection of a site for a normal school, after the expiration of the time fixed by statute for the selection, is unauthorized and void.[75]

Powers of officers.—Laws prescribing the powers and duties of trustees of a college are not unconstitutional as conferring corporate powers, as the board is not a corporation.[76] Directors of an endowed institution may make rules and regulations which do not interfere with the rights of the public, and the courts will not interfere with their discretion in this respect.[77] Laws allowing college trustees to convey trust property to a city in the execution of their trust do not deprive the trustees of power under the original donation.[78]

Endowments, properties and fiscal affairs.—The course of legislation in Indiana shows a purpose to make the university a part of the public school system, and hence its endowment fund is entitled to all the protection accorded to the general public school fund.[79] Only the interest on proceeds of sales of a government land grant for normal schools may be expended for buildings and maintenance.[80] Directors may refuse a proposed donation for maintenance if deemed unacceptable, but where accepted, it must be accepted on the terms offered.[81] On failure of a college to establish a schoolarship and chair under an agreement for their immediate establishment on payment of a certain sum, an amount to be paid at donor's death cannot be collected from his estate.[82] A university formed by the consolidation of two existing institutions may sell a portion of their property, notwithstanding the agreement of consolidation makes a removal of the university work a reversion of property to the constituent colleges.[83] An act making an annual appropriation to support a state institution does not impliedly repeal another act providing for an annual appropriation, where no reference is made to the earlier act; the later act will be construed as an additional appropriation.[84] An act by the city requiring the city board of education on application of the board of directors of a college, giving instruction to pupils, to levy a tax, does not violate the bill of rights, since the help given by taxation aids public instruction.[85]

Endowment fund mortgages under Indiana law.—In Indiana a university permanent endowment fund mortgage may be foreclosed by public advertisement.[86] Publication for nine successive weeks satisfies the requirement of sixty days' no-

72. Bond required by Rev. St. U. S. § 795, as amended by Act Feb. 22, 1875—Howard v. United States, 184 U. S. 676.
73. State v. Schauss, 23 Ohio Circ. R. 283.
74. State v. Toledo, 23 Ohio Circ. R. 327.
75. Board of Education v. Territory (Okl.) 70 Pac. 792.
76. Rev. St. §§ 4099, 4105—State v. Toledo, 23 Ohio Circ. R. 327.
77. State v. Schauss, 23 Ohio Circ. R. 283.
78. State v. Toledo, 23 Ohio Circ. R. 327.
79. Fisher v. Brower, 159 Ind. 139.
80. State v. Maynard (Wash.) 71 Pac. 775.
81. State v. Schauss, 23 Ohio Circ. R. 283.
82. U. S. Grant University v. Fruit's Estate (Wis.) 94 N. W. 42.
83. Board of Trustees v. Board of Curators, 24 Ky. L. R. 476, 68 S. W. 660.
84. Agricultural & M. College v. Lacy, 130 N. C. 364.
85. State v. Toledo, 23 Ohio Circ. R. 327.
86. Burns' Rev. St. 1901, § 7164—Fisher v. Brower, 159 Ind. 139. The act authorizing the state auditor to foreclose by advertisement and sale, does not confer judicial power on the auditor—McElwain-Richards Co. v. Gifford (Ind.) 65 N. E. 576.

tice.[87] The legislature has power to make permanent endowment fund mortgages prior to all other mortgages or conveyances of the property.[88] Purchasers at such foreclosure take title free from all claim of the holder of a junior mortgage.[89] There may be no redemption by the mortgagor or junior incumbrancer.[90] Since the act of 1901, the purchaser's deed is to be recorded in the auditor's office and not with the secretary of state.[91]

Courses of study; instruction; teachers.—Trustees are proper parties to suits to enjoin instruction beyond that limited by the deed of the donor establishing the institution.[92]

Instructors.—A lady teacher in a private academy may not be discharged for disobeying regulations as to times for receiving gentlemen callers, where her conduct in that respect is ladylike and does not interfere with her duties,[93] nor for failure to keep order, where the disorder is due to the fact that she is a young lady and many of the pupils are young men or large boys who could not be restrained by her.[94]

Discipline.—A student may be expelled for bearing false witness against a fellow student.[95] In California the local board of trustees of a normal school may not dismiss a student passing all classes except that of practice teaching, without giving him an opportunity to complete his study of that subject,[96] and the joint board of normal school trustees, though made a board of arbitration in matters concerning the management of normal schools, is without appellate jurisdiction to pass on the complaint of a student dismissed from school.[97]

Issuance of diplomas.—An action solely against the trustees of a university, to compel the issuance of a diploma, is improper where diplomas may not be issued except on request of the faculty.[98]

COMBINATIONS AND MONOPOLIES.[99]

§ 1. *Combinations violative of the federal anti-trust act.*—Under the federal anti-trust act July 2, 1890, if the effect of a combination or contract is to restrain interstate commerce, it will be dissolved,[1] no matter what its form may be,[2] and

87. Burns' Rev. St. 1901, § 6109—Fisher v. Brower, 159 Ind. 139.

88. Burns' Rev. St. 1901, § 6100—Fisher v. Brower, 159 Ind. 139.

89, 90. McElwain-Richards Co. v. Gifford (Ind.) 65 N. E. 576.

91. Burns' Rev. St. 1901, § 7651—Fisher v. Brower, 159 Ind. 139.

92. State v. Toledo, 23 Ohio Circ. R. 327.

93. Hall-Moody Inst. v. Copass, 108 Tenn. 582.

94. Hall-Moody Inst. v. Copass, 108 Tenn. 582. An instruction that the board could dismiss a teacher if she was keeping late hours with young men or going with them to questionable places so as to cause her reputation as a lady to be called in question does not tend to lead the jury to think that her character for morality or chastity was in question, where there was evidence tending to show that she was indiscreet in visiting a minstrel show, going to a cafe and receiving gentlemen callers at a late hour in the evening and in other respects—Id.

95. Goldstein v. New York University, 76 App. Div. (N. Y.) 80.

96. Miller v. Dailey, 136 Cal. 212, 68 Pac. 1029.

97. There was a sufficient finding on the question of mental capacity, where the court in mandamus proceedings found that there had been no failure in the subject of practice teaching, which was the only subject in which he was claimed to have been deficient, and that it was not true that he could not attain a degree of proficiency sufficient to warrant a recommendation for a diploma—Miller v. Dailey, 136 Cal. 212, 68 Pac. 1029. On the question whether there had been an attendance for the time allowed by law, a finding is sufficient that the dismissed student was not permitted to complete the practice teaching course and there was no showing that any definite time had been fixed by law for attendance at the normal school—Id.

98. Steinhauer v. Arkins (Colo. App.) 69 Pac. 1075.

99. Illegality of contracts as violating public policy, etc., see Contracts.

1. A contract between coal producers of a district controlling and limiting the output and fixing a uniform price therefor, etc., the contract being for "Western shipment" and to "enlarge the Western market," is invalid as restraining interstate commerce—Chesapeake & O. Fuel Co. v United States (C. C. A.) 115 Fed. 610. An agreement between dealers in a certain community and producers generally in the United States binding the former not to buy from producers not members and not to sell to others than members at less than list price, the latter

though it has not operated injuriously on the public, but has been beneficial.[3] The act applies to interstate carriers of passengers or freight.[4]

Property rights and the right to protect same by action are not lost because the holder is a member of a combination in violation of the act.[5] That a contract is violative of the act is a matter of defense,[6] but unlawful combination cannot be made a defense in collateral way.[7] The treble damages given for a violation of the act can be recovered only in a direct action.[8]

§ 2. *Combinations violative of state anti-trust acts and of the common law.* —Acts regulating combinations, known generally as anti-trust laws, to be valid, must not discriminate in favor of any particular class of persons or products,[9] but they are not invalid in that they abridge the right to acquire property by con-

not to sell at all to dealers not members, etc., is within the act and void—Montague v. Lowry (C. C. A.) 115 Fed. 27. A combination between dealers to compel other dealers to sell at a fixed price and on failure to conform to prevent sale of goods to him is within the act—Brown v. Jacobs' Pharmacy Co., 115 Ga. 429, 57 L. R. A. 547. A contract between a board of trade and telegraph company not to furnish market quotations to bucket shops is not within the act—Board of Trade v. Christie Grain Co., 121 Fed. 608. A contract by a patentee giving an exclusive license to manufacture and sell the patent at a fixed price is not within the act though it also provides that the licensee shall not manufacture or sell other like goods without the improvement—Bement v. National Harrow Co., 186 U. S. 70, 46 U. S. Lawy. Ed. 1058; but a contract between the licensee and dealers not to sell the article below a fixed price will not be enforced—National Phonograph Co. v. Schlegel, 117 Fed. 624.

2. The formation of a corporation to obtain control of the majority of the stock of competing interstate railroad companies, to hold and vote the same; to receive the dividends and divide same between the stockholders of the companies pro rata, though the railroads conducted their business through their own officers destroys competition between the railroads within the Sherman Act—United States v. Northern Securities Co., 120 Fed. 721. Combination to control production and price of shingles made only in the state but sold principally without the state is violative of the act—Gibbs v. McNeeley (C. C. A.) 118 Fed. 120, 60 L. R. A. 152.

3. Chesapeake & O. Fuel Co. v. United States (C. C. A.) 115 Fed. 610.

4. A contract or combination which deprives a carrier of the right to fix its own rates independent of a competing carrier no matter whether the combination rates are reasonable or unreasonable is void—United States v. Northern Securities Co., 120 Fed. 721.

5. The fact does not give third persons the right to infringe patents held by him—General Elec. Co. v. Wise, 119 Fed. 922. A combination in violation of the act is not precluded from recovering on collateral contracts for goods sold—Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 46 U. S. Lawy. Ed. 679.

6. Bement v. National Harrow Co., 186 U. S. 70, 46 U. S. Lawy. Ed. 1058.

7. Harrison v. Glucose Sugar Ref. Co. (C. C. A.) 116 Fed. 304; Kinner v. Lake Shore & M. S. R. Co., 23 Ohio Circ. R. 294. That complainant in equity is a member of an unlawful railroad transportation company is not ground for refusing it relief against dealing in its tickets by third persons—Id.

8. They cannot be set off in an action by the trust or combination particularly in a state where unliquidated damages cannot be set off in an action on a contract—Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 46 U. S. Lawy. Ed. 679.

9. The Ill. Act June 20, 1893, exempting from its operation agricultural products and live stock is repugnant to U. S. Const. amend. art. 14, and is invalid in its entirety—Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 46 U. S. Lawy. Ed. 679. So also the Georgia Act, Dec. 23, 1896 (Brown v. Jacobs' Pharmacy Co., 115 Ga. 429, 57 L. R. A. 547); and Texas Act, March 30, 1899 (State v. Waters-Pierce Oil Co. [Tex. Civ. App.] 67 S. W. 1057); but the Texas Act 1895 (Rev. St. 1895, arts. 5313, 5314) is not repugnant to such constitutional provision because it provides for a forfeiture of the charter of domestic corporations and a revocation of licenses to foreign companies for violation of its provisions—State v. Shippers' Compress & Warehouse Co. (Tex.) 69 S. W. 58; National Cotton Oil Co. v. State (Tex. Civ. App.) 72 S. W. 615. Neb. Com. St. 1901, c. 91a, excepting labor unions from its operation is not invalid as a grant of a special privilege—Cleland v. Anderson (Neb.) 92 N. W. 306. Ill. Act June 10, 1897, excepting combinations for the purpose of maintaining wages from the act renders it invalid, but it did not invalidate the act of 1891—People v. Butler St. Foundry Co., 201 Ill. 236. Excepting building and loan associations from the operation of the act does not render it invalid. Such corporations are not for pecuniary profit—People v. Butler St. Foundry Co., 201 Ill. 236. Ill. Act 1891, amend. 1893, §§ 7a, 7b, providing that corporations under penalty answer under oath inquiries from the secretary of the state as to whether they are violating the act is valid, though this is only required of corporations; nor is it an assumption of judicial power by the legislature—Id. Tex. Anti-trust Act 1899, c. 146, by section fourteen does not incorporate as a part of it the unconstitutional part of act 1895, c. 83, exempting certain parties from its operation—State v. Laredo Ice Co. (Tex.) 73 S. W. 951.

tract.[10] Statutes designed to prevent combinations have been construed as shown below.[11] Contracts or combinations controlling the price of and tending to stifle competition in commodities are generally void,[12] as against public policy.[13] If the effect of the combination is to restrain trade, it is invalid,[14] though there is not a complete monopoly of the article, and though the public is not injuriously affected,[15] but a monopoly is not created merely because a certain business is placed at some disadvantage.[16]

A combination, though illegal at common law, is not precluded from recovering on contracts made in the course of business.[17] Forfeiture of a corporate charter does not necessarily follow because it entered into a combine, but it will be fined after abandonment of the combine.[18] Any individual injuriously affected by the combination has a cause of action therefor,[19] or he may obtain an injunction to dissolve it,[20] against the individuals composing the combination.[21] Where it is an incorporation for monopolistic purposes, the remedy would be by quo warranto.[22] If the statute permits a recovery back of money paid to a company unlawfully transacting business as a trust, such provision is in the nature of a penalty.[23]

10. Kan. Laws 1897, c. 265—State v. Smiley, 65 Kan. 240, 69 Pac. 199.

11. Miss. Code 1892, c. 140, § 4437. The words "and is inimical to public welfare, unlawful, and a criminal conspiracy" were not intended as an element—Barataria Canning Co. v. Joulian, 80 Miss. 555. Illinois Act June 11, 1891, preventing trusts was not expressly or by implication repealed by Act June 20, 1893, defining trusts—People v. Butler St. Foundry Co., 201 Ill. 236.

12. An agreement to sell all oysters dug to one party excepting a portion which the producer was not to sell at less than a fixed price is void under Miss. Code 1892, c. 140, §§ 4437, 4438—Barataria Canning Co. v. Joulian, 80 Miss. 555. Agreement between plumbers' association and dealers and manufacturers of supplies not to sell to others than members is within Mo. Rev. St. 1899, c. 143, art. 2, § 8978 and void—Walsh v. Master Plumbers' Ass'n, 97 Mo. App. 280. A combination of retail lumber dealers, prescribing a qualification for membership, to prevent sales direct to consumers or retailers not eligible to membership by wholesale dealers is void under Neb. Comp. St. c. 91a, § 1—Cleland v. Anderson (Neb.) 92 N. W. 306. Agreement between brewers not to sell beer to one indebted to one of the parties for beer sold is in violation of Mo. Rev. St. 1899—Ferd Heim Brew. Co. v. Belinder, 97 Mo. App. 64. The proportion of retail dealers, in a combine to prevent sales to non-members, that the number bears to the whole number of dealers is not material—Cleland v. Anderson (Neb.) 92 N. W. 306. The mere incorporation for the purpose of purchasing and maintaining cotton compresses does not show of itself an intention to create a monopoly. The price of compressing being uniform and fixed by the railroad commission—State v. Shippers' Compress & Warehouse Co. (Tex.) 69 S. W. 58.

Manufacturers and dealers do not create a monopoly by fixing a uniform jobbing price and agreeing to sell only to retailers who would exact the regular retail list price, provided any dealer is allowed to buy on such terms—John D. Park & Sons Co. v. National Druggists' Ass'n, 175 N. Y. 1.

Evidence held insufficient to show a contract to stifle competition under Iowa Code, § 5060—Willson v. Morse, 117 Iowa, 581.

13. An agreement limiting the amount of purchase of grain is within Kan. Laws 1897—State v. Smiley, 65 Kan. 240, 69 Pac. 199.

14. If the effect of the association of a certain branch of labor is to control it to the exclusion from employment persons not members, courts will not recognize it by compelling its continuance or by reinstating expelled members—O'Brien v. Musical Mut. Protective Union (N. J. Ch.) 54 Atl. 150; Froelich v. Musicians Mut. Benefit Ass'n, 93 Mo. App. 383.

15. Evidence held sufficient to show combination to fix prices—State v. Armour Packing Co. (Mo.) 73 S. W. 645.

16. State v. New Orleans Warehouse Co., 109 La. 64.

17. Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 46 U. S. Lawy. Ed. 679. Under Mo. Rev. St. 1899, §§ 8966, 8970, that plaintiff was a member of a combine may be set up as a defense to an action on a contract made with it—Ferd Heim Brew. Co. v. Belinder, 97 Mo. App. 64.

18. Mo. Rev. St. 1899, § 8971—State v. Armour Packing Co. (Mo.) 73 S. W. 645.

19. Laws N. Y. 1899, c. 690—Rourke v. Elk Drug Co., 75 App. Div. (N. Y.) 145. Under Neb. Comp. St. 1901, c. 91a, § 11 the action may be brought against a member or members of the association personally—Cleland v. Anderson (Neb.) 92 N. W. 306.

Allegations of a conspiracy to control prices held to be conclusions of law not admitted by demurrer—John D. Park & Sons Co. v. National Druggists' Ass'n, 175 N. Y. 1.

20. Rev. St. 1899, c. 143, art. 2, §§ 8978, 8979, do not affect remedies previously existing—Walsh v. Master Plumbers' Ass'n, 97 Mo. App. 280.

21. Brown v. Jacobs' Pharmacy Co., 115 Ga. 429, 57 L. R. A. 547.

22. Where the monopoly was created by an exercise of the charter powers, as where it was allowed to purchase stock in other corporations, a contract of purchase will not be enjoined—Dittman v. Distilling Co. (N. J. Ch.) 54 Atl. 570.

23. And on termination of the company the right of action dies—Mason v. Adoue (Tex. Civ. App.) 70 S. W. 347.

All parties to the conspiracy should be named in the information, though they need not be jointly charged.[24] That the cause of the breach of a contract was the entering into an unlawful combination is not ground for enhancing the damages.[25]

§ 3. *Grants of privileges by statute, ordinance and contracts with municipalities tending to create monopolies.*—The power of a municipality to create a monopoly cannot be implied from its charter.[26] Ordinances or statutes which in effect grant privileges to some and refuse them to others on equal terms tend to create a monopoly and are invalid.[27]

COMMERCE.

§ 1. **Public Regulation.**—Federal and State Powers; Peddlers; Foreign Corporations; Telegraphs and Telephones; Railroads; Offenses; Intoxicants; Adulterations; Quarantine; State Taxation of Foreign Commerce.

§ 2. **Domestic and Interstate or Foreign.**—Original Packages; Sales on Agents' Orders; Lottery Tickets; Domestic Terminals Connected by Foreign Lines.

§ 1. *Public regulation in general. Meaning of term and general limitations of federal and state powers.*—The term commerce as used in law books includes all the initiatory and intervening acts that directly bring about the sale or exchange of goods.[28]

The purpose of the commerce clause of the constitution is to prevent discrimination in favor of local products.[29] A state cannot give a corporation organized under its laws power to do acts which would operate to restrain interstate commerce,[30] and the government may not interfere with commerce strictly within the state.[31] A state cannot regulate except for public health, the bringing into the state from another of an article of commerce, but may regulate its sale after the article is brought into the state.[32]

A license imposed on nonresidents carrying on a local business is not regulation of commerce.[33]

Hawkers' and peddlers' licenses.—Laws taxing peddlers are not on their face objectionable as authorizing a tax on interstate commerce.[34] The fact that a peddler deals with a foreign merchant, who requires payment for goods as a condition to delivery, will not make the license a burden on commerce.[35]

24. State v. Dreany, 65 Kan. 292, 69 Pac. 182.

25. Crystal Ice Co. v. Wylie, 65 Kan. 104, 68 Pac. 1086.

26. Town of Kirkwood v. Meramec Highlands Co., 94 Mo. App. 637.

27. Ordinance construed and held not to authorize the city marshal to discriminate and give exclusive rights to stand cabs at railroad depots—City of Danville v. Noone, 103 Ill. App. 290. A statute authorizing a residence park association to maintain stores, etc., to furnish visitors and lessees with necessaries held not tending to create a monopoly—Thousand Island Park Ass'n v. Tucker, 173 N. Y. 203. Authorizing the use of certain text books in schools for a term of years does not tend to create a monopoly—Rand, McNally & Co. v. Hartranft, 29 Wash. 591, 70 Pac. 77. A contract with an individual giving him the exclusive right to collect ashes and other harmless substances is invalid (Iler v. Ross [Neb.] 90 N. W. 869, 57 L. R. A. 985) but a contract to furnish lights for streets and for individual use for a definite period does not tend to create a monopoly—Denver v. Hubbard (Colo. App.) 68 Pac. 993. A grant to an individual an exclusive right to use city streets to erect and maintain a system of telephone poles is a grant of an exclusive privilege—Chicago Tel. Co. v. Northwestern Tel. Co., 100 Ill. App. 57.

In Alabama an exclusive water franchise may be revoked (Const. art. 1, § 23) though loss may befall the franchise holders. Const. art. 14, § 10, restricting revocation of charters to such as that no injustice befalls the corporators does not apply—Bienville Water Supply Co. v. Mobile, 186 U. S. 212, 46 U. S. Lawy. Ed. 1132.

28. United States v. Swift & Co., 122 Fed. 529.

29. Kehrer v. Stewart (Ga.) 44 S. E. 854.

30. United States v. Northern Securities Co., 120 Fed. 721.

31. State v. Hammond Packing Co. (La.) 34 So. 368.

32. Commonwealth v. Phosphate Co., 23 Ky. L. R. 2284, 67 S. W. 45.

33. State v. Hammond Packing Co. (La.) 34 So. 368.

34. In re Lipschitz (N. D.) 95 N. W. 157. Ga. Pen. Code, § 600—Stone v. State (Ga.) 43 S. E. 740.

35. In re Pringle (Kan.) 72 Pac. 864.

Regulation of foreign corporations in general.—A foreign corporation engaged in interstate business may be required to comply with reasonable regulations as a condition to doing business within a state.[36] A state law requiring foreign corporations to file a copy of their charter may not be avoided on the ground that the contemplated traffic might extend beyond the state limits.[37] A foreign corporation sending goods to retail dealers on orders obtained from traveling men is not within local laws requiring foreign corporations engaged in business in the state to designate places of business within the state and the name of one on whom process may be served.[38]

Regulation of telegraph and telephone companies.—A telegraph company, though engaged in interstate commerce, may be required to pay a reasonable license fee by a municipality;[39] and it is not material that a larger amount is realized than is actually necessary to reimburse the city for the costs of supervision and inspection.[40] An occupation tax cannot be levied on the interstate business or business of the government transacted by telegraph.[41] The fact that telegrams are sent beyond the state will not work an exemption from taxation where valuation is determined by regarding the part within the state as part of a system operated in other states,[42] nor will acceptance of the benefits of Act of Congress, allowing operation over military and post roads and organization under the laws of another state be conclusive on the question.[43] A state may compel payment of a license fee on each telephone in use, though the companies do interstate business, where the act applies only to instruments used solely in business within the state.[44] Neither a state nor an Indian nation may grant to telephone companies the exclusive right to maintain lines in the territory.[45]

Regulation of railroads and other carriers.—The state may not fix the rates to be received by carriers engaged in interstate commerce,[46] nor compel railroad companies to transfer cars containing live stock to connecting roads within the state, where the shipment comes from another state,[47] nor impose a penalty for shipping freight from another state by a road different from that designated by the shipper.[48]

A city may not require a license fee from an express company doing both a local and interstate business.[49] Laws requiring payment of an occupation tax must distinguish between the local and the interstate business.[50] The state may regulate the local business of carriers, where interstate commerce is not interfered with.[51] The commerce clause is not violated by state laws imposing a penalty on

36. State v. American Book Co., 65 Kan. 847, 69 Pac. 563; Commonwealth v. Phosphate Co., 23 Ky. L. R. 2284, 67 S. W. 45. The franchise tax laws of Michigan, requiring foreign corporations to pay a franchise fee, and providing that contracts made by non-complying companies shall be wholly void, are within the power of the state. The real purpose of the statute is to impose a tax as a condition to carrying on business in this state—Oakland Sugar Mill Co. v. Fred W. Wolf Co. (C. C. A.) 118 Fed. 239.

37. Diamond Glue Co. v. United States Glue Co., 187 U. S. 611.

38. Commonwealth v. Hogan, McMorrow & Tieke Co., 25 Ky. L. R. 41, 74 S. W. 737.

39. Borough of Taylor v. Cable Co., 202 Pa. 583; Atlantic & P. Telegraph Co. v. Philadelphia, 190 U. S. 160. It may be based on the poles and length of conduits in city—Postal Tel. Cable Co. v. Norfolk (Va.) 43 S. E. 207.

40. Western Union Tel. Co. v. New Hope, 187 U. S. 419.

41. Western Union Tel. Co. v. Wakefield (Neb.) 95 N. W. 659.

42, 43. Western Union Tel. Co. v. Missouri, 190 U. S. 412.

44. State v. Rocky Mountain Bell Tel. Co., 27 Mont. 394, 71 Pac. 311.

45. Muskogee Nat. Tel. Co. v. Hall (C. C. A.) 118 Fed. 382. The act of congress governing the matter of franchises for telephone lines in Indian Territory annulled grants previously made by Indian nations conflicting therewith—Muskogee Nat. Tel. Co. v. Hall (C. C. A.) 118 Fed. 382.

46. Southern Exp. Co. v. Goldberg (Va.) 44 S. E. 893.

47. Central Stock Yards Co. v. Railroad Co. (C. C. A.) 118 Fed. 113.

48. Lowe v. Railway Co., 63 S. C. 248.

49. Southern Exp. Co. v. Ensley, 116 Fed. 756.

50. Pol. Code, § 4074—State v. Express Co., 27 Mont. 419, 71 Pac. 404.

51. A privilege tax—Nashville, C. & St. L.

carriers for failure to pay damages on freight in a specified time,[52] nor by laws making weights in bills of lading conclusive,[53] nor by a requirement that the delivering carrier trace and locate the carrier causing injury to goods in transit,[54] nor by laws prohibiting unjust discrimination by an express company against another company engaged in the same business.[55]

Railroads engaged in interstate commerce are subject to local laws governing signals at crossings,[56] and speed of trains.[57] The state may require incorporation of foreign railway corporations under its laws.[58]

Discrimination in rates under interstate commerce act.—There must be a shipment to constitute a violation of the Interstate Commerce Act; mere making of offer of a discriminating rate is not sufficient.[59] A carrier cannot adopt unreasonable rates for the purpose of building up a seaport on its own line at the expense of one on a rival road.[60] The charging of unjust and unreasonable rates or the making of undue discrimination on a portion of a railroad system is not justified by the fact that such portion fails to pay expenses.[61] A lesser rate to a more distant and competitive point is not an unjust discrimination or an undue preference with regard to the nearer noncompetitive point.[62] In determining the reasonableness of rates, a city which, by reason of competition, has received unusually low rates, should not be made the sole basis of comparison.[63] Weight should be given the opinions of expert witnesses as to the effect of the rates charged on the growth and prosperity of the city, the cost of transportation as compared with the rates charged, and the rates in force at numerous other cities where the circumstances are as nearly as possible similar.[64] The fact that a point becomes noncompetitive, by reason of the purchase by one road of the competing road, does not affect the justice of discrimination in favor of a competing point, where it is affirmatively shown that the rates to the noncompetitive point have not been increased.[65] Where a through rate is made by two roads jointly, each may be liable for a violation of the interstate commerce act without regard to the proportion it receives for its own services.[66] On appeal from a decree of the interstate commerce commission, the supreme court will not independently investigate the facts to make new findings to sustain the order of the commission, even though the record is such as to allow such investigation.[67] There is a presumption that conclusions of an interstate commerce commission are well founded, and in a suit to enforce the order, the burden rests upon the company to show any errors.[68] Copies of confidential telegrams sent or received by the commission need not be filed with the claims for telegraph tolls.[69]

Ry. Co. v. Alabama City, 134 Ala. 414; Pullman Co. v. Adams, 189 U. S. 420.

52. Porter v. Railway Co., 63 S. C. 169.

53. Missouri, K. & T. Ry. Co. v. Simonson, 64 Kan. 802.

54. Central of Georgia Ry. Co. v. Murphey (Ga.) 43 S. E. 265.

55. Acts 1901, p. 149 (Burns' Rev. Sts. 1901, § 3312)—Adams Exp. Co. v. State (Ind.) 67 N. E. 1033.

56. Willfong v. Railroad Co., 116 Iowa, 548.

57. Chicago & A. R. Co. v. Carlinville, 200 Ill. 314.

58. Davis' Adm'r v. Railroad Co., 24 Ky. L. R. 1125, 70 S. W. 857.

59. Lehigh Valley R. Co. v. Rainey, 112 Fed. 487. Proceedings for damages for discrimination in freight rates, under the inter-state commerce act, are governed as to limitations by the statutes of the state where brought—Ratican v. Terminal R. Ass'n, 114 Fed. 666; Kinnavey v. Same, Id.

60. Interstate Commerce Commission v. Railroad Co., 118 Fed. 613.

61. Separate road operated as a part of a large railway system—Interstate Commerce Commission v. Railroad Co., 118 Fed. 613. Evidence of shipments on a certain division of a road held to be unjust, unreasonable and discriminating—Id.

62, 63, 64, 65. Interstate Commerce Commission v. Railway Co., 117 Fed. 741.

66. Interstate Commerce Commission v. Railroad Co., 118 Fed. 613.

67. Interstate Commerce Commission v. Railroad Co., 186 U. S. 320, 46 U. S. Lawy. Ed. 1182.

68. Interstate Commerce Commission v. Railroad Co., 118 Fed. 613.

69. United States v. Moseley, 187 U. S. 322.

Offenses against regulatory acts.—The officers are individually liable to indictment along with the carrier for violation of the interstate commerce act.[70] An indictment under the Federal act, making it unlawful for a common carrier to transport game killed in violation of the laws of the state where the game was killed, must aver the fact that it was so killed and delivered to the carrier.[71] A motion to quash information, charging violation of interstate commerce act, should show that the business of defendant was interstate commerce,[72] and the interstate commerce commission may properly examine into an increased rate made pending the hearing.[73]

Regulation of traffic in intoxicating liquors.—The Wilson act, making liquors on their arrival in the state subject to the operation of the police powers of the state, gives the state jurisdiction only after the liquors have been delivered[74] or stored within the state to await the consignee's orders.[75] The act did not give the state power to interfere with interstate commerce by laws only effectual without the state.[76] Since the Wilson act, the question whether a local statute imposing a tax on liquor imported into the state violates the constitution of the United States, prohibiting the laying of imposts or the commerce clause can no longer arise.[77]

Beer sent by a foreign brewery into a state for storage and sale by an agent is subject to taxation under the state laws.[78] State inspection laws are inoperative as to liquors passing through a state or stored therein for distribution to points without the state.[79] There is not a discrimination against foreign brewers by a provision releasing local brewers from payment of inspection fees on export beers.[80] The fact that inspection fees exceed the cost of inspection will not invalidate a law valid under the Wilson act.[81] A state law providing a certain tax for wholesale liquor dealers and a less tax on manufacturers does not discriminate where manufacturers establishing warehouses or places of sale elsewhere than at the brewery must pay the tax.[82] The commerce clause is violated by the state law prohibiting the sale of intoxicating liquors without a license and excepting sales of domestic wines or ciders.[83]

Adulteration of articles of food and drink.—The states have power to enact laws to prevent adulteration of food stuffs, and such laws are not regarded as a violation of the commerce clause of the constitution, though the articles or ingredients are brought from other states or intended for sale in such states.[84]

Quarantine laws.—A state health law against healthy persons entering infected districts does not interfere with commerce, though the persons come from another state.[85] The state has power to impose as a condition to the admission of cattle from an infected district that they remain in a district free from such conditions for a certain time or submit to inspection by the state authorities,[86] and such a

70. In re Pooling Freights, 115 Fed. 588.

71. United States v. Smith, 115 Fed. 423. The term "evasion" in an act imposing a fine for an evasion of its provisions means acts done, and not those in mere contemplation of the party—Id.

72. State ex rel. Pettigrew v. Hall, 109 La. 290.

73. Interstate Commerce Commission v. Railroad Co., 118 Fed. 613.

74. In re Bergen, 115 Fed. 339.

75. State v. Intoxicating Liquors, 96 Me. 415.

76. And therefore did not have the effect of re-enacting a prior law having that effect—Corbin v. McConnell, 71 N. H. 350.

77. State v. Bengsch, 170 Mo. 81.

78. People v. Voorhis (Mich.) 91 N. W. 624.

79, 80, 81. Act Mo. May 4, 1899 (Sess. Laws 1899, p. 228)—Pabst Brew. Co. v. Crenshaw, 120 Fed. 144.

82. People v. Voorhis (Mich.) 91 N. W. 624.

83. Rev. Laws, c. 100, § 1—Commonwealth v. Petranich (Mass.) 66 N. E. 807.

84. Arbuckle v. Blackburn (C. C. A.) 113 Fed. 616; Crossman v. Lurman, 171 N. Y. 329. Vinegar (Laws 1893, c. 338, §§ 50-53)—People v. Fruit Co., 75 App. Div. (N. Y.) 11. Butter—Hathaway v. McDonald, 27 Wash. 659, 68 Pac. 376.

85. It was not the intention of the Federal laws to overthrow the existing quarantine system—Compagnie Francaise De Navigation A Vapeur v. Board of Health, 186 U. S. 380, 46 U. S. Lawy. Ed. 1209.

86. Reid v. People, 187 U. S. 137.

law is not objectionable as the regulation of interstate commerce,[87] nor as laying an impost or a duty on imports or exports.[88] The quarantine laws may not be used to give a monopoly of public grazing grounds to inhabitants of the state.[89]

State burdens on foreign commerce.—The state may not tax imported goods in original unbroken packages on which United States duties have been paid.[90] A license tax on the business of buying products for export is in fact a duty on exports.[91] A state law giving a lien on vessels for repairs or supplies furnished on credit is not objectionable as imposing a burden on foreign commerce, though applicable to vessels engaged in foreign commerce; its effect is to facilitate commerce by enabling vessel owners to obtain the things necessary to complete a voyage.[92]

§ 2. *Domestic and interstate or foreign commerce.*—A car in a train made up in one state and destined to a point in another state is engaged in interstate commerce.[93] Where a shipment is to a point without the state, the shipment is interstate commerce without regard to the form of the bill of lading.[94] The interstate commerce act is not concerned with the question of contracts limiting liability for negligence on shipments passing through different states.[95] A shipment is not made domestic by the fact that title was acquired from the shipper by a resident of the state.[96]

Original packages.—Packages of cigarettes containing ten cigarettes each and given loose to an express company for transportation to another state are not original packages so as to prevent the operation of the state laws.[97]

A law requiring emigrant agents to obtain a license does not violate the commerce clause of the constitution, as that business is not an article of commerce.[98]

The assembling of articles within a state at a distributing point will make such articles generally amenable to state laws, though a portion is shipped beyond the state.[99]

A corporation owning elevators and trackage thereto but no rolling stock is not engaged in interstate commerce, though its entire business consists in handling grain in course of interstate transportation.[1]

Laws requiring certification of engineers do not impose burdens on commerce when applied to engineers on scows engaged in blasting in a navigable river.[2]

A flock of sheep driven across the state by a direct route is exempt from local taxation, though the sheep while in transit are permitted to support themselves by grazing on the land traversed.[3]

87, 88. Reid v. People, 29 Colo. 333, 68 Pac. 228.

89. Equitable relief by injunction may be invoked by a cattle owner prevented from bringing his stock into a state by a proclamation of the governor against the importation of such stock on the ground of an existence of an infectious disease in an adjoining state, where it is shown that the cattle in question were free from such disease and that there was no such disease on the ranges where they were or had been, and it was shown that the purpose of the proclamation was to secure for the inhabitants of the state a monopoly on the grazing grounds, and the effect of the proclamation would work irreparable injury to the complaining parties—Smith v. Lowe (C. C. A.) 121 Fed. 753.

90. Appeal of Doane & Co., 197 Ill. 376.

91. State v. Allgeyer & Co. (La.) 34 So. 798.

92. The Robert Dollar, 115 Fed. 218.

93. Within Act of March 2, 1893, § 4 (U. S. Comp. St. 1901, p. 3174) requiring interstate carriers to furnish cars with grab irons and hand holds—Malott v. Hood, 201 Ill. 202; and may not be attached—Wall v. Norfolk & W. R. Co. (W. Va.) 44 S. E. 294.

94. State v. International & G. N. R. Co. (Tex. Civ. App.) 71 S. W. 994; Gulf, C. & S. F. Ry. Co. v. Ft. Grain Co. (Tex. Civ. App.) 72 S. W. 419.

95. Hughes v. Pennsylvania R. Co., 202 Pa. 222.

96. Gulf, C. & S. F. Ry. Co. v. Ft. Grain Co. (Tex. Civ. App.) 72 S. W. 419.

97. Cook v. Marshall County (Iowa) 93 N. W. 372.

98. State v. Napier, 63 S. C. 60.

99. Logs—Diamond Match Co. v. Ontonagon, 188 U. S. 82. Coal—Pioneer Fuel Co. v. Molloy (Mich.) 91 N. W. 750. Hardware products—American Steel & Wire Co. v. Speed (Tenn.) 75 S. W. 1037.

1. People v. Miller, 116 N. Y. St. Rep. 582.

2. People v. Prillen, 73 App. Div. (N. Y.) 207.

3. Kelley v. Rhoads, 188 U. S. 1, rev. 9. Wyo. 352, 63 Pac. 935; L. Wyo. 1895, c. 61, authorizing taxation of stock brought into the state for grazing purposes.

Whether business is interstate business within the constitution is a question of fact.[4]

Sales by orders taken by agent of nonresident.—An agent taking orders for the sale of goods for a nonresident principal, the orders to be subject to approval or rejection by his principal and the goods to be shipped directly to the purchasers, is engaged in interstate commerce,[5] and its character as interstate commerce is not affected by fact of shipment direct to the agent for distribution.[6] The term does not apply to orders from samples filled from goods not in the original packages but sent to the agent in bulk from the other state,[7] nor to shipments from another state to the owner's place of business to be stored and offered for sale by his agent.[8]

The business of transporting lottery tickets from one state to another is interstate commerce and may be made an offense under the United States laws.[9] Policy slips delivered to an agent to be forwarded to headquarters in another state are not within the act making it an offense to transport lottery tickets.[10]

Effect of use of lines without the state to connect points within the state.—There may be interstate commerce between two points in the same state where a large portion of the connecting railroad is outside the state.[11] In Virginia the rule is differently applied to telegraph messages and a telegraphic message is there considered a domestic message, where the initial and terminal points are both in the same state, though the line passes in part through another state and the company has a relay office in such other state.[12]

COMMON LAW.

In general.[13]—Constitutional provisions control where there is a conflict between the constitution and the common law.[14]

Statutes in derogation of the common law are to be strictly construed.[15]

Construction of statutes enacting common law.—Statutes making the common law of England the rule of decision in cases not governed by the constitution or statutes so far applicable do not require adherence to the decisions of English common law courts before the Revolution, in cases where subsequent decisions either English or American contain better expositions of its principles.[16] Courts should hesitate to declare established common law doctrines inapplicable to a state, unless the inapplicability is general, extending to the whole or a greater part of the state or to a portion incapable of exact ascertainment.[17] The common law adopted by Illinois does not prohibit ordinary labor on Sunday.[18]

4. Commonwealth v. Read Phosphate Co., 23 Ky. L. R. 2284, 67 S. W. 45.

5. State v. Hanaphy, 117 Iowa, 15; In re Bergen, 115 Fed. 339; State v. Hickox, 64 Kan. 650, 68 Pac. 35; Ex parte Green, 114 Fed. 959; Stockard v. Morgan, 185 U. S. 27, 46 U. S. Lawy. Ed. 785.

6. Stone v. State (Ga.) 43 S. E. 740; Caldwell v. North Carolina, 187 U. S. 622; Kehrer v. Stewart (Ga.) 44 S. E. 854. Likewise one selling stoves shipped from another state in different parcels to be set up by an employe of the manufacturer—Harkins v. State (Tex. Cr. App.) 75 S. W. 26. A license can be required from one receiving goods from a nonresident shipper in the original packages and delivered to the purchasers by such solicitor—Collier v. Burgin, 130 N. C. 632.

7. In re Pringle (Kan.) 72 Pac. 864.

8. Kehrer v. Stewart (Ga.) 44 S. E. 854.

9. Champion v. Ames, 188 U. S. 321.

10. Francis v. United States, 188 U. S. 375.

11. Hanley v. Arkansas City So. Ry. Co., 187 U. S. 617.

12. Western Union Tel. Co. v. Reynolds (Va.) 41 S. E. 856.

13. Common law marriage. See "Marriage." Forms of action at common law. See "Forms of Action."

14. Chicago & E. R. Co. v. Keith, 67 Ohio St. 279.

15. The rule has no application to a revision of the Kentucky statutes which are to be liberally construed with the purpose of promoting the object in view—Dillehay v. Hickey, 24 Ky. L. R. 1220, 71 S. W. 1.

16. Williams v. Miles (Neb.) 94 N. W. 705.

17. Meng v. Coffey (Neb.) 93 N. W. 713.

18. McCurdy v. Commercial Co., 102 Ill. App. 120.

Presumption of prevalence of common law in a sister state.—In the absence of evidence, there is a presumption that the common law prevails in a sister state,[19] and that it is the same in all the states.[20] Statutory modifications must be proved.[21]

Reference to common law for purposes of definition.—Though common law crimes do not exist, yet in seeking a definition of an act forbidden by statute but not defined, reference may be had to the common law.[22]

COMMON AND PUBLIC SCHOOLS.[23]

§ 1. **Right, Privilege and Duty of Attendance.**—Compulsory Laws; Separation of Races; Vaccination; Furnishing Facilities and Conveyances.

§ 2. **School Districts and Sites.**—Formation and Alteration; Independent Districts; High Schools; Use of Buildings.

§ 3. **Officers and School Meetings.**—Boards of Education; Elections; Qualifications of Officers; Duties and Liabilities of Officers; Tenure of Office; Quo Warranto; School Meetings.

§ 4. **Property and Contracts.**—Lands; Contracts; Proposals; Attorneys; Text-books; Ratification of Contracts; Contract of Officer or of District; Contractor's Bonds; Actions.

§ 5. **Fiscal Affairs of District.**—Investments; Tuition and Fees; Debt Limit; Levy, etc., of Taxes; Bonds; Orders and Warrants; Apportionment of Funds; Support of Libraries.

§ 6. **Teachers and Instruction.**—Certificates; Contracts; Employment of Relatives; Dismissal, Suspension and Reassignment; Breach of Contract; Payment of Salary; Pensions; Teacher's Liability; Religious Instruction.

§ 7. **Control and Discipline.**

§ 8. **Decisions and Orders and Review Thereof.**

§ 1. *Right, privilege and duty of attendance.*—A regulation as to admission to public schools can be questioned only by parents whose children are affected thereby.[24] Where there is a clear right to admission, there is no loss of the right by failure of a parent to make affidavit of the facts showing the right.[25] Admission of a pupil denied school privileges under illegal requirements may be compelled by mandamus.[26]

Compulsory school laws.—Compulsory education laws are within constitutional provisions allowing the enactment of wholesome and reasonable laws for the welfare of the state,[27] and do not interfere with the right of parental control of children.[28] Such laws do not require attendance where injurious to health,[29] and do not prevent occasional absence.[30]

Separate schools for races.—Where the advantages are equal, the states may provide separate schools for children of different races.[31] The Kansas law does not violate the provision of the constitution of the United States guaranteeing equal protection of the laws, nor does it invalidate the statutory rule against plurality of subjects.[32]

Vaccination of pupils.—In some states municipalities through their health departments may require vaccination as a condition to admission to public schools.[33]

19. Gaylord v. Duryea, 95 Mo. App. 574; Rush v. Landers, 107 La. 549, 57 L. R. A. 353. 32 Hen. VIII, entitling the assignee of a reversion to the rents, is a part of the common law of Illinois, and in the absence of evidence will be presumed to be the law of Iowa—David Bradley & Co. v. Coal Co., 99 Ill. App. 427.

20. Engstrand v. Kleffman, 86 Minn. 403.

21. Rush v. Landers, 107 La. 549, 57 L. R. A. 353.

22. State v. DeWolfe (Neb.) 93 N. W. 746.

23. See Colleges and Academies, for institutions of higher learning.

24. Board of Public Education v. Felder, 116 Ga. 788.

25. State ex rel. Biggs v. Penter, 96 Mo. App. 416.

26. Board of Education v. Felder, 116 Ga. 788; State ex rel. Biggs v. Penter, 96 Mo. App. 416.

27, 28, 29. State v. Jackson, 71 N. H. 552. On the question of excuse from attendance, under a compulsory attendance law, evidence that a child was in feeble health and was kept from school on the belief that attendance would affect her health, and that the board was so informed, is admissible—Id.

30. State v. Jackson, 71 N. H. 552.

31. **White and colored children.**—Reynolds v. Board of Education (Kan.) 72 Pac. 274; Hooker v. Greenville, 130 N. C. 472. **Mongolians.**—Wong Him v. Callahan, 119 Fed. 381.

32. Laws 1879, p. 163, c. 81—Reynolds v. Board of Education (Kan.) 72 Pac. 274.

33. State ex rel. Freeman v. Zimmerman, 86 Minn. 353.

In other states boards of education have this power only when smallpox is prevalent,[34] and in such states boards of health have no greater powers.[35]

Duty to furnish school facilities.—A town having provided sufficient school facilities on the mainland is not compelled to build a school house on an island adjacent thereto for the accommodation of a few children, where the authority to do so is questionable.[36]

Public conveyances for children attending school.—An appropriation for transporting scholars from an island off the coast to a district on the mainland will not be compelled, where the access is difficult and at times impossible.[37]

§ 2. *School districts and sites.*—Laws requiring a certain number of children of school age as a condition of newly formed cities or incorporated towns becoming school districts are constitutional.[38] Such laws will not affect a borough at its formation a part of the school district and not situated in the township, so as to cause it to become a part of the township school district.[39]

Formation, alteration, consolidation and dissolution of districts.—A legislature may create a school district from lands comprising other districts and give the new district the school property within its limits.[40] In the formation of districts, care must be taken that the boundary lines do not encroach on other districts.[41] Laws making a town liable for school property taken in by annexation do not apply to the original incorporation of a town, as this act does not amount to annexation,[42] and the property becomes the property of the town, notwithstanding an indebtedness thereon.[43] A school board is without power to alter a district under an act authorizing alteration, but providing no method of procedure.[44] A failure to comply with the statute as to the mode of procedure of changing school districts amounts to a jurisdictional defect invalidating action.[45] Where the officers acting on the petition for consolidation have proceeded, after being satisfied that the petition was regularly signed and the district has erected buildings, chosen school officers and maintained the school, objections on the ground of irregularity in obtaining consent of taxpayers will not be considered.[46] Jurisdiction to establish a school district on petition of a majority of the resident freeholders of the district is not lost by the fact that at the time of the hearing the number of freeholders had increased so that there was no longer a majority signed to the peti-

34, 35. Osborn v. Russell, 64 Kan. 507, 68 Pac. 60.

36, 37. Newcomb v. Inhabitants of Rockport, 183 Mass. 74.

38. State v. Board of Education (N. J. Law) 53 Atl. 398. Supplemental School Law N. J. March 22, 1895.

39. State v. Board of Education (N. J. Law) 53 Atl. 398.

40. Attorney General ex rel. Kies v. Lowrey (Mich.) 92 N. W. 289.

41. Rev. St. 1899, § 9742—State ex rel. School Dist. No. 1 v. Denny, 94 Mo. App. 559. In determining the location of a line separating districts and laid out by the officers of the two districts, the rules applicable to ordinary surveys will not be followed and a line acquiesced in for twenty years will be held the true boundary line—Castleman v. Trustees, 24 Ky. L. R. 88, 68 S. W. 17. Sufficiency of evidence as to the location of disputed boundary in mandamus proceedings to compel the extension of a levy—State v. Beale, 90 Mo. App. 341.

42. Maumee School Tp. v. School Town, 159 Ind. 423.

43. Maumee School Tp. v. School Town, 159 Ind. 423.

44. School Dist. No. 110 v. Palmer, 41 Or. 485, 69 Pac. 453.

45. Huyser v. Township Boards (Mich.) 91 N. W. 1020. In determining whether the action of Louisiana school directors in dividing parishes into districts is sufficiently formal, regard must be had as to whether the question is raised in connection with the distribution of the school fund or with reference to the exercise of the taxing power, as a greater degree of formality is required in the latter case—Burnham v. Police Jury, 107 La. 513. A statutory requirement that arbitrators, to pass upon the disputed boundary, shall be disinterested resident taxpayers of the county, is not complied with by a certificate reciting the appointment of certain voters of the county—State ex rel. Smart v. Wilson (Mo. App.) 74 S. W. 404. The alteration of a petition for the establishment of a graded school district, after its approval by the trustee of one of the districts interested as to the location of the site, entirely invalidates subsequent proceedings—Waring v. Bertram (Ky.) 75 S. W. 222.

46. Howell v. Shannon (Mich.) 90 N. W. 410.

tion.[47] Proof of posting of notices for an election to change school districts is insufficient, unless it shows that the place of posting was actually a public place.[48] The notice should describe the territory to be affected.[49] The directors may not open the polls at the hour fixed by the statute for closing.[50] There may be no action by voters on a petition presented more than a year before, where, in the meantime, adverse action has been had by voters on a petition for consolidation of a larger area.[51] A majority of the members of a joint convention to establish a district from other territory constitutes a quorum, and their vote is sufficient for the provisional establishment of the district.[52] Under the Missouri law, it is a prerequisite to the appointment of arbitrators to pass upon the necessity for a division of a school district that voters of the district to be affected authorize the action.[53] The board of arbitrators need not keep a record of their proceedings.[54] Their proceedings are void where it does not appear that they ever met and considered the matter or found a necessity for the change.[55] After several years' acquiescence in the result of an election creating a graded school district, the action of the electors will not be invalidated by the fact that a slight excess of territory was included.[56] School districts are not parties having real interest allowing them to attack an act detaching territory, on the ground that taxes will be increased in the district and thus impair the security in the district's creditors.[57] An act attaching territory to a district by number is not invalid on the ground that the territory had never been legally designated by that number, where, as a matter of fact, it has long been known by that number and had been so designated in the tax list.[58] Holdings as to validity of statutes relating to the subject will be found in the notes.[59]

Independent school districts.—An independent school district has no vested right preventing detachment of territory to establish another independent school district.[60] In Iowa an independent school district will not lose its corporate existence, though reduced by detachment of territory to less than four sections, not-

47. Gerber v. Board of Com'rs (Minn.) 94 N. W. 886.

48. Notices were posted near certain residences without indicating that these were public places—Huyser v. Township Board (Mich.) 91 N. W. 1020.

49. School Dist. No. 4 v. Smith, 90 Mo. App. 215.

50. 1 Ball. Ann. Codes & Sts. § 2420—Peth v. Martin (Wash.) 71 Pac. 549.

51. Peth v. Martin (Wash.) 71 Pac. 549.

52. Board of Education of Van Buren Tp. v. Board of Education, 67 Ohio St. 326.

53. Rev. St. 1899, § 9742—School Dist. No. 4 v. Smith, 90 Mo. App. 215.

54. Rev. St. 1899, § 9742—State ex rel. School Dist. No. 1 v. Denny, 94 Mo. App. 559.

55. State ex rel. School Dist. No. 1 v. Denny, 94 Mo. App. 559.

56. Collins v. Masden, 25 Ky. L. R. 81, 74 S. W. 720. The election is not invalidated by the failure of the judge to sign the returns, where they are signed by the clerk—Id. Where the clerk of a school election board fails to act, the judge in Kentucky, with the consent of the voters present, may appoint another to act as clerk—Id.

57. Board of Education of Union Free School Dist. No. 6 v. Board of Education, 76 App. Div. (N. Y.) 355.

58. School Dist. No. 76 v. Ryker, 64 Kan. 612, 68 Pac. 34.

59. There is no plurality of subjects in the Kansas act allowing dissolution of districts and attachment of the same territory to another district for the purpose of forming a graded school—Ash v. Thorp, 65 Kan. 60, 68 Pac. 1067. School districts are municipal corporations within a constitution exempting municipal corporations from a provision against creating corporations by special act—Board of Education of Union Free School Dist. No. 6 v. Board of Education, 76 App. Div. (N. Y.) 355. Sufficiency of titles of acts incorporating school districts—Attorney General ex rel. Kies v. Lowrey (Mich.) 92 N. W. 289. Laws creating special school districts in certain townships violate the constitutional provision that laws of general nature shall have uniform operation—State v. Spellmire, 67 Ohio St. 77. Laws allowing a school district co-terminous with the city to elect as to the laws governing it are not objectionable as special or local legislation—Commonwealth ex rel. Martin v. Guthrie, 203 Pa. 209. In Michigan a school district may be created by a local act from a portion of the territory embraced in other districts, and authorizes the inspectors to attach lands not disposed of to other districts. Such laws are not generally open to the objection of impairing the obligation of contracts, or as depriving the people of local self-government, and the law otherwise valid is not entirely invalidated by the fact that it fixes the site of a school building—Attorney General ex rel. Kies v. Lowrey (Mich.) 92 N. W. 289.

60. Rural Independent School Dist. No. 10 v. New Independent School Dist. (Iowa) 94 N. W. 284.

withstanding a statutory provision requiring such districts to contain four sections.[61] The creation of an adjunct school district in Nebraska requires the concerted action of all the common school districts embraced therein, and the question must be submitted to a vote in all of such districts.[62]

Establishment of high schools.—In Louisiana parish boards of school directors may, with the approval of the state board, establish necessary high schools when suitable buildings and sites have been furnished, and draw for their support upon the general school fund before apportionment to the school districts.[63] The board of education can only perform the official acts, where there is a quorum thereof assembled after due notice.[64] A meeting of two members of a board of education at a time and place of which no notice had been given to other members is an illegal meeting.[65]

Use of building for other purposes.—In Louisiana public school buildings may not be used for theatrical performances.[66]

§ 3. *Officers and school meetings. Municipal boards of education.*—A city board of education is generally a municipal agency and not a body corporate,[67] and hence may not call an election to vote on a tax proposition without authorization of the city council,[68] nor is it a necessary party to an action to enjoin action on a text book contract.[69] The New York city board of education is made a distinct corporation by the charter, and may be sued as such for a teacher's salary.[70]

Selection of officers.—In Texas the trustees of a district comprising a town or village seeking incorporation are to be elected at the same time that the question of incorporation is voted on.[71] Laws making incorporated cities municipal school districts, with power to elect trustees at a meeting in a specified month, do not destroy the old board of trustees in cities afterwards incorporated, as such laws refer to existing cities, and it is the policy of the law to retain experienced school officers if possible,[72] and a city council acting under such laws in attempting to fill a vacancy must designate the vacancy intended to be filled.[73] In Kentucky the members of the board of education of cities of the fourth class must be elected by viva voce vote.[74] Under the laws of Wisconsin the office of county superintendent is a legislative one, and the legislature may fix the qualifications and prohibit the placing of the name of an ineligible candidate on the ballot.[75]

Qualification of officers.—Laws requiring a director to be a resident taxpayer and qualified voter do not intend that he must be a resident taxpayer of the district in which he is elected.[76]

Duties and liabilities of officers.—It is a duty to furnish certified copies of school records where the statute imposes a penalty on the district officer for failure to furnish the same,[77] and a school officer may not excuse his refusal to furnish same on the ground that the statute declares the copy admissible

61. Rural Independent School Dist. No. 10 v. New Independent School Dist. (Iowa) 94 N. W. 284.

62. State ex rel. Davis v. Board of Com'rs (Neb.) 95 N. W. 6.

63. Andrus v Parish Board, 108 La. 386.

64, 65. Cunningham v. Board of Education (W. Va.) 44 S. E. 129.

66. Sugar v. Monroe, 108 La. 677, 59 L. R. A. 723.

67, 68. Ocorr & Rugg Co. v. Little Falls, 77 App. Div. (N. Y.) 592.

69. Madden v. Kinney (Wis.) 93 N. W. 535.

70. Gunnison v. Board of Education, 80 App. Div. (N. Y.) 480.

71. Hillebrandt v. Devine (Tex. Civ. App.) 72 S. W. 266.

72. Burns' Rev. St. 1901, §§ 3467, 5914, 5915—State v. Ogan, 159 Ind. 119. The course of constitutional and statutory enactment indicates a purpose to make the school system a centralized and not a localized one—Id. The entire obliteration of the existing district school organization, is not shown by the fact that the succeeding corporation is called a school city—Id.

73. State v. Ogan, 159 Ind. 119.

74. Elliott v. Burke, 24 Ky. L. R. 292, 68 S. W. 445.

75. Fordyce v. State, 115 Wis. 608.

76. State v. Fasse (Mo. App.) 71 S. W. 745.

77, 78. Musback v. Schaefer, 115 Wis. 357.

as evidence.[78] School directors are personally liable for the funds lost to the school district through their misconduct,[79] and suit therefor may be brought by a resident patron for the use of himself and other patrons, and for the school district.[80] In Nebraska, in counties of less than two thousand school population, the number of days which a superintendent may be employed in the discharge of his official duties is left to his own sound discretion.[81] A county superintendent with power to order a census to be retaken, where he believes the census officer has not reported a correct list of school children, may not correct the list himself.[82] A New Hampshire moderator refusing to poll the voters in accordance with law is liable to a penalty.[83] Action of boards in matters within their jurisdiction may not be controlled by injunction.[84] A board of trustees may not use funds to erect a building at a particular site after the county board has decided on a different site.[85]

The treasurer may deposit funds in a solvent bank to his credit as treasurer.[86]

Tenure of office.—In Kentucky a city of the fourth class is without power to fill vacancies in the board of education, and the members hold over until their successors have been validly elected.[87] An act creating a school district, otherwise valid, is not invalidated by the fact that it appoints the first trustees and fixes their terms.[88] The constitutional requirement of uniformity in the public school system is violated by an act appointing designated persons as trustees of public schools in a certain town for a term of 20 years with power not given trustees of other common schools.[89] The action of a superintendent in changing boundaries will not oust trustees living in the districts so formed.[90] A statute allowing a trustee to hold office until the appointment of his successor does not apply to one removed from office.[91]

Quo warranto to test right to hold office.—Trustees of public schools are officers within the statutes allowing quo warranto against persons unlawfully holding an office.[92]

School meetings.—Laws requiring notice of the annual school meeting to specify the propositions to be submitted to the voters, and requiring the posting of the notice by the secretary, are mandatory and not directory, and require notice as to any special propositions.[93] In Arkansas the electors at a school district meeting may vote to dispense with the school for the year, and apply the proceeds to the building of a school house.[94] In Nebraska the site of a school house can only be changed at the annual school meeting.[95] A divorced woman denied the custody of children cannot vote under a law conferring school suffrage on widows and spinsters having custody of children.[96] In Arkansas the county judge sitting alone and not the quorum court opens the returns on a text book election.[97] A committee of a

79. Shannon's Code, § 1426—Finney v. Garner (Tenn.) 71 S. W. 592.

80. Finney v. Garner (Tenn.) 71 S. W. 592.

81. Chase County v. Kelley (Neb.) 95 N. W. 865.

82. State v. Wedge (Nev.) 72 Pac. 817.

83. Of $30—State v. Waterhouse, 71 N. H. 488.

84. Board of Education v. Holt, 51 W. Va. 435.

85. Sligh v. Bowers, 62 S. C. 409.

86. And is not guilty of embezzlement by depositing school funds in a bank within an act making it embezzlement for a school officer to loan school funds without authority, as the deposit is not a loan—Hunt v. Hopley (Iowa) 95 N. W. 205.

87. Elliott v. Burke, 24 Ky. L. R. 292, 68 S. W. 445. An appointment to a vacancy in a school board cannot be made prior to the time the office is vacated—Shepherd v. Gambill (Ky.) 75 S. W. 223.

88. Attorney General v. Lowrey (Mich.) 92 N. W. 289.

89. Ellis v. Greaves (Miss.) 34 So. 81.

90. Farley v. Gilbert, 24 Ky. L. R. 2109, 72 S. W. 1098.

91. Shepherd v. Gambill (Ky.) 75 S. W. 223.

92. Ellis v. Greaves (Miss.) 34 So. 81.

93. Code 1897, § 2746—Goerdt v. Trumm (Iowa) 91 N. W. 1067.

94. Hale v. Brown, 70 Ark. 471.

95. School Dist. No. 34 v. Stairs (Neb.) 95 N. W. 492.

96. Ball v. Cawood, 23 Ky. L. R. 2315, 67 S. W. 37.

97. Acts 1899, p. 147, § 3—Firestone v. White (Ark.) 71 S. W. 250.

school district, meeting to investigate the financial affairs, are not school officers within the laws allowing school officers their expenses in suits against them growing out of the performance of their official duties.[98]

§ 4. *Property and contracts.*[99] *School lands.*—Portions of the public domain held for school or educational endowment are treated as public lands.[1] Boards charged with the investment of a permanent school fund have power to assign mortgages to secure loans of such funds, though the power to assign is not expressly given by the laws.[2] In Texas school trustees may not convey lands belonging to school districts, unless authorized by an order of the commissioners' court.[3] A statute granting a right of way to railroads over lands belonging to the state does not embrace public school lands of the state.[4] In Washington school lands are liable to assessment for drainage purposes;[5] otherwise in North Dakota.[6] Under laws requiring trustees to take a fee simple title to lands in use for school sites, a tax may not be levied to pay for repairs on a building owned jointly by the district and other parties with a reversionary interest in favor of their grantor.[7]

Validity of contracts in general.—In some states school townships may contract for school supplies, though there is no contingent fund on hand at the time.[8] Where all the members of a school board are present, a contract by the school township may not be attacked on the ground that no notice of a special meeting was given.[9] The Nebraska laws allow a director with the consent of a moderator to contract for repairs during vacation,[10] and it is not necessary that the contract be entered into at the regular meeting of the school board.[11]

Under laws invalidating contracts in which school officers are pecuniarily interested, a district is not liable on a warrant in favor of trustees for repairs.[12]

Laws allowing districts to extend temporary aid to impoverished school children do not authorize a school corporation to contract a debt on behalf of the county with a third person for furnishing supplies to destitute scholars.[13]

The acceptance of a void warrant by the assignee of one furnishing school supplies will not deprive him of his right to insist on the original contract.[14]

A text book bond, conditioned that they should be sold at the lowest retail price fixed by the publishers anywhere in the United States, is not violated by sales at a less price in another state, where the publishers had not sold them at a price below that made to the complaining state.[15]

Proposals.—Unless the statutes require school boards to advertise for proposals and award the contract to the lowest bidder, the board is not restricted to that method.[16] A school board may delegate to a committee the duty of preparing specifications for contracts, and authorize it to conduct the negotiations.[17]

98. Consol. School Laws, § 264—People v. Skinner, 74 App. Div. (N. Y.) 58.

99. Teachers' Contracts, see post, § 6. Exemption of school property from taxation, see "Taxes."

1. See "Public Lands."

2. Lawrey v. Sterling, 41 Or. 518, 69 Pac. 460.

3. Crouch v. Posey (Tex. Civ. App.) 69 S. W. 1001.

4. Texas Cent. R. Co. v. Bowman (Tex. Civ. App.) 75 S. W. 556.

5. State v. Henry, 28 Wash. 38, 68 Pac. 368.

6. Erickson v. Cass County, 11 N. D. 494.

7. Ky. St. 1899, § 4437—Dawson v. Trustees Common School Dist. No. 40, 24 Ky. L. R. 2027, 72 S. W. 806.

8. Johnson v. School Corp. of Cedar, 117 Iowa, 319.

9. Hanna v. Wright, 116 Iowa, 275. In Missouri an action of the school board at a meeting thereof whether in obedience to notice or by accident is valid, though there is a failure to preserve the minutes of the proceedings—Decker v. School Dist. No. 2 (Mo. App.) 74 S. W. 390.

10, 11. Leonard v. State (Neb.) 93 N. W. 988.

12. Miller v. Sullivan (Wash.) 72 Pac. 1022.

13. Acts 1899, p. 550, § 6—Board of County Com'rs v. Falk, 29 Ind. App. 683.

14. Johnson v. School Corp. of Cedar, 117 Iowa, 319.

15. Mills v. Myers, 24 Ky. L. R. 971, 70 S. W. 412.

16. Kraft v. Board of Education, 67 N. J. Law, 512. They may not be required to let

Employment of attorneys.—School districts may employ attorneys to prosecute suits for the district, and an allowance for such service is proper.[18] Under a charter provision requiring a city attorney to defend suits against the board of education, such board may not employ a private attorney.[19] Nor is the board authorized to employ, under a provision giving them power to hire teachers, janitors and other employes.[20]

Contracts for text books.—A law authorizing a state board to contract for text books for a term of years is not objectionable as creating a monopoly.[21] In Wisconsin a city board of education may select text books without regard to the city council,[22] and there is a sufficient adoption within a law prohibiting a change within five years, by the passage of a resolution for the purchase and use of certain text books.[23] Laws requiring uniformity of text books refer only to the same grade and do not require that all text books on the same subject used in the different grades should be prepared by the same author.[24] The laws governing the reception of bids for furnishing school books in Utah are directory only, and a failure to literally comply with its terms is not important.[25] Laws providing that a school township may purchase books and shall levy a contingent fund therefor do not require contingent funds on hand as a condition to the purchase of such books.[26]

Ratification of action of officers.—There may be no recovery of moneys expended on a contract irregularly entered into where it has been fully performed by both parties and there is no claim of corrupt or fraudulent action by the officers, and the amount paid was not excessive.[27] The defeat of a motion not to accept the articles bought amounts to an approval.[28]

Whether contract that of the district or the members of board.—A district will not be liable on contracts made by the trustees in their individual capacity with reference to repairs on the school house.[29] A contract for supplies is valid, where signed by a majority of the board, the contract providing that a majority should sign, and is not an individual contract of the signers.[30] There is a con-

the contract to union labor though advertisement so specifies—Id.

17. Kraft v. Board of Education, 67 N. J. Law, 512.

18. State v. Aven, 70 Ark. 291.

19. Denman v. Webster (Cal.) 70 Pac. 1063. A refusal of the attorney to defend will not authorize the employment of a private attorney where the charter authorizes the mayor to suspend an official refusing to discharge the duties of his office—Id.

20. Denman v. Webster (Cal.) 70 Pac 1063.

21. Rand, McNally & Co. v. Hartranft, 29 Wash. 591, 70 Pac. 77. The laws of Washington authorize the state board to contract for furnishing text books for a term of years; a later law organizing a county board, authorized such board to enter into a text book contract for a term of five years. Held not an impairment of the contract by the state board within the constitution against the laws impairing the obligation of contracts—Id.

22. Madden v. Kinney (Wis.) 93 N. W. 535.

23. Attorney General v. Board of Education (Mich.) 95 N. W. 746. The time is computed from the date of the resolution of adoption, and not from the time the text books are in use by the school—Id.

24. Attorney General v. Board of Education (Mich.) 95 N. W. 746.

25. Rev. St. § 1856—Tanner v. Nelson, 25 Utah, 226, 70 Pac. 984. There is a substantial compliance with laws requiring a convention to meet and publicly open proposals for furnishing text books by a public opening and the reading of introductory portions of the bids and accompanying communications, and their reference to committees, where the bids are voluminous and containing large catalogues and price lists—Id. Where a convention for the adoption of uniform text books bases a bond on the amount required for furnishing a certain class of text books, it is no objection that they fail to fix the amount of bonds for furnishing other books; the same method will apply—Id.

26. Code, § 2783—Hanna v. Wright, 116 Iowa, 275.

27. Kagy v. Independent Dist. of West Des Moines, 117 Iowa, 694; Johnson v. School Corp. of Cedar, 117 Iowa, 319.

28. Johnson v. School Corp. of Cedar, 117 Iowa, 319. There is a ratification of an unauthorized contract for school supplies, where the goods were accepted and used without objection and payment made thereon, and no objection was made to the contract when brought before a subsequent annual meeting—Haney School Furniture Co. v. School Dist. No. 1 (Mich.) 94 N. W. 726.

29. Moore v. Leonard Independent School Dist. (Tex. Civ. App.) 74 S. W. 324.

30. Johnson v. School Corp. of Cedar, 117 Iowa, 319.

tract with the school district by its directors and not with directors as individuals, where the contract recites that the directors were parties of the second part and the parties in an action on the contract stipulated that the directors had made the contract, and the building on its completion was accepted by such board.[31]

Contractor's bonds.—Sureties on a contractor's bond payable to the directors, and not to the school district are not relieved from liability by that fact, as the school directors acted in their representative capacity,[32] nor by an unauthorized attempt to cancel the bond so that the contractor might receive the insurance on a building destroyed while in course of construction.[33] Subcontractors are not included in a statute requiring contractors for the erection of public buildings to give bonds to secure amounts due mechanics and laborers.[34]

Actions on contracts.—There is no joint liability authorizing a joinder as defendants of a town and a school district, on the ground that the town is the successor of the school district on its dissolution.[35] A board of education sued for breach of a contract may not defend on the ground that public funds could not be used to pay damages,[36] and has the burden of establishing a defense of ultra vires in an action for breach of contract.[37]

§ 5. *Fiscal affairs of district. Investment of school funds.*—Under the constitution of Nebraska authorizing the investment of the school fund in bonds or state securities, bonds of other states running not less than thirty nor more than forty years with three per cent. interest may be purchased.[38]

Tuition and incidental fees.—In South Carolina the trustees of graded schools may not charge incidental fees.[39] New Hampshire towns not being authorized to maintain high schools and having no school boards are not liable under a law requiring towns not maintaining high schools to pay the tuition of children therein attending schools in another town or city.[40] Laws allowing children living within one-half mile of the city limits to attend the nearest city school free of tuition do not violate the constitutional provision against depriving one of property without due process of law.[41] In an action on a tuition note given by a parent, it is proper to submit the question whether the note was given as a compromise of a doubtful claim.[42]

Debt limit.—A contract in excess of the debt limit is valid to the extent of the limit.[43] For the purpose of determining whether a debt limit has been exceeded, a contract is considered to have been created on the day the contract was made.[44] Prior to action by the state board of equalization, an assessment is not complete, so that the question whether the debt limit has been exceeded must be determined by the tax roll of the preceding year.[45] An unexpended balance on hand will not sustain a debt in excess of the limit unless such balance to the extent of the excess is appropriated for payment of the debt.[46] Where the district indebtedness exceeds the constitutional limit the levy to pay the debt

31. Wabash R. Co. v. People, 202 Ill. 9.

32, 33. Finney v. Garner (Tenn.) 71 S. W. 592.

34. Comp. St. 1901, c. 54, art. 2, § 1—Fidelity & Deposit Co. v. Parkinson (Neb.) 94 N. W. 120.

35. Cunningham v. Town of Orange, 74 Vt. 115.

36, 37. Morgan v. Board of Education, 136 Cal. 245, 68 Pac. 703.

38. State v. Stuefer (Neb.) 92 N. W. 646.

39. Young v. Trustees of Fountain Inn Graded School, 64 S. C. 131.

40. Union School Dist. v. Dist. No. 20, 71 N. H. 269. The term "town" is held to include school districts—Id.

41. Edmondson v. Board of Education, 108 Tenn. 557.

42. School Dist. of Barnard v. Matherly, 90 Mo. App. 403.

43. Wabash R. Co. v. People, 202 Ill. 9.

44. Wabash R. Co. v. People, 202 Ill. 9. The acceptance of a bid to construct school buildings will not amount to an increase of the district's indebtedness, it being understood at the time that a formal contract should be afterwards signed and the contractor furnish a bond—Baltimore & O. S. W. R. Co. v. People, 195 Ill. 423.

45, 46. Wabash R. Co. v. People, 202 Ill. 9.

may be defeated.[47] A tax for payment of the valid portion of a building contract is not rendered invalid by the subsequent issue of bonds to pay the invalid portion of such contract.[48]

Levy and collection of taxes.—A tax refused at an annual meeting may be levied at a later special meeting called for that purpose.[49] A levy is not invalid because of the failure of the school board to submit the proposed rate to the meeting.[50] A levy will be defeated for unwarranted interference in the election by the school officers.[51] Councilmen approving school tax levies made by a board of education act as ex officio members of the board and not as municipal officers.[52] A school board may levy an annual tax for the interest of bonds and sinking fund without the consent of a school meeting.[53] On division of a school district, a county board in Nebraska may levy the whole amount necessary for both districts within the statutory limit, but having failed to do so by levying on the basis of a district certificate, each district is entitled only to the amount levied in its favor and no more.[54]

An election as to a levy to establish a graded school is not rendered invalid by a variance in the order as to the term at which the petition was filed, where the record is correct and the recital in the order a mistake,[55] and the certificate of commissioners comparing the vote at such election need not show that notice was given, as it is a part of the record.[56] An objection on this score will be disregarded, where the school has been carried on for several years without any objection.[57]

A school tax may be levied on a statement reciting that the purpose of the tax is to meet current and running expenses.[58] Where the levy designates the amount necessary for building and educational purposes, a separation of the amount for building and for sites and a specification of items under the amount intended for educational purposes is not necessary.[59] The failure of the district clerk to deliver to selectmen an attested copy of the vote of the district to raise money will not invalidate the levy, as the statutory provision is directory and not mandatory as to the time.[60]

A general act limiting a levy for school purposes does not apply to an independent school district.[61] The Nebraska Act limiting a levy and requiring certification of the tax to the county clerk has reference to taxes levied by the electors and does not apply to taxes certified to county authorities by the county superintendent on the creation of a new school district.[62] Levies to pay interest and principal of bonds are not within laws limiting levies for educational and building purposes.[63]

In New York the school tax list and warrant and renewal thereof requires the joint action of the entire board of trustees.[64]

47. Baltimore & O. S. W. R. Co. v. People, 195 Ill. 423.

48. Wabash R. Co. v. People, 202 Ill. 9.

49. Stanton v. Board of Education (N. J. Law) 53 Atl. 236.

50. Benton v. Scott, 168 Mo. 378.

51. Officers suggested amount to be voted —Bennett v. Staples (La.) 34 So. 801.

52. School Dist. No. 76 v. Ryker, 64 Kan. 612, 68 Pac. 34.

53. Rev. St. 1899, §§ 9757, 9758—Benton v. Scott, 168 Mo. 378. The laws of Missouri authorizing a levy to pay interest on school bonds and to create a sinking fund are not limited to bonds issued prior to the constitution of 1875 or issued to refund an indebtedness existing at that time.

54. School Dist. No. 1 v. McCormick (Neb.) 93 N. W. 956.

55, 56, 57. Trustees of Fordsville Graded School Dist. No. 96 v. McCarty, 24 Ky. L. R. 164, 68 S. W. 147.

58. Stanton v. Board of Education (N. J. Law) 53 Atl. 236.

59. Koelling v. People, 196 Ill. 353.

60. Pub. St. c. 90, § 18—Smith v. Swain, 71 N. H. 277.

61. State v. Babcock, 87 Minn. 234.

62. School Dist. No. 1 v. McCormick (Neb.) 93 N. W. 956.

63. Hurd's Rev. St. 1899, c. 122, § 202—Baltimore & O. S. W. R. Co. v. People, 195 Ill. 423.

64. Beck v. Kerr, 75 App. Div. (N. Y.) 173.

On proceedings to enforce a school district tax, the certificate may be amended by changing the date in a certificate to conform to that of the board meeting,[65] and an omitted signature may be supplied.[66] An objection that the levy is to pay an unconstitutional debt may be raised in such proceedings.[67] Taxes having once been paid, the court may not disallow them in a proceeding for a judgment on the levy of other taxes.[68] Residents of a school district objecting to a tax, on the ground that the boundaries are so fixed as to make an attendance of the school children difficult, must show that their own children are incommoded or their taxes are increased by the manner in which the boundaries have been fixed.[69] Under the laws authorizing the acceptance of school warrants for taxes, the warrant must conform to the law governing the issuance of such warrants, and does not authorize the acceptance of a warrant payable in the future.[70] In mandamus proceedings to compel the payment of taxes on disputed territory to the district, the court is without power to compel payment by a collector, unless the taxes were levied by such district.[71]

School bonds.—In South Carolina a town may issue bonds for the erection of a school house within the municipality, though the school be controlled by school authorities.[72] Bonds will not be invalidated for confusion between a number and a name applied to the district issuing the bonds, where both terms have been indiscriminately applied.[73] A school district in Wisconsin is authorized to borrow money to pay school orders issued in compromise of suit against it only where there is an unusual exigency.[74] Under laws requiring the notice of the sale of bonds to give the amount of the bonds to be sold, time to run, where payable, the nature of the option to redeem, etc., a notice naming the rate of interest the bonds were to draw is not void, though it does not ask the bidders to name the rate at which they would accept such bonds.[75] Bonds issued for the payment of orders, void for want of power in the directors to settle claims or issue the orders, are not refunding bonds within an act providing that no tax is required to be levied as a condition to issuance of refunding bonds.[76] Where it is made a condition to the issuance of bonds that a levy of a tax for the payment of bonds and interest be first made, it will not be presumed that the levy of the tax was voted at a previous special meeting, where there was merely a levy for the payment of the annual interest, at the meeting called to ratify acts of directors in issuing the bonds.[77]

Where school district bonds are issued in excess of the debt limit, a court may not reduce them to an amount within the limit, as the bonds are entirely invalid,[78] and it is not important that the money obtained from the sale of the bonds has been used in the construction of school buildings.[79] The laws of Texas do not require that bonds for the erection of school buildings should be paid out of the levy for the maintenance of schools.[80]

65, 66. Indiana, D. & W. Ry. Co. v. People, 201 Ill. 351.

67, 68. Baltimore & O. S. W. R. Co. v. People, 195 Ill. 423.

69. Burnham v. Police Jury, 107 La. 513.

70. Coler v. Sterling, 15 S. D. 415.

71. State v. Beale, 90 Mo. App. 341.

72. Allen v. Adams, 66 S. C. 344. A constitutional provision against the enactment of special laws, where general laws could be made to apply, will not invalidate an act authorizing the issuance of bonds to erect a school building in a specified school district—State v. Brock, 66 S. C. 357.

73. State v. Brock, 66 S. C. 357.

74. Sanb. & B. Ann. St. §§ 474, 475, 476A—Montpelier Sav. Bank & Trust Co. v. School Dist. No. 5, 115 Wis. 622.

75. Parkinson v. Seattle School Dist. No. 1, 28 Wash. 335, 68 Pac. 875.

76, 77. Montpelier Sav. Bank & Trust Co. v. School Dist. No. 5, 115 Wis. 622.

78. Thornburgh v. School Dist. No. 3 (Mo.) 75 S. W. 81. And there is no estoppel in favor of bona fide purchasers before maturity—Id.

79. Thornburgh v. School Dist. No. 3 (Mo.) 75 S. W. 81.

80. Kennedy v. Birch (Tex. Civ. App.) 74 S. W. 593.

Orders and warrants for payment of claims.—Warrants should be countersigned by the secretary of the board and drawn by the president[81] on the authorization of the rest of the school board.[82] There is a presumption, in the absence of evidence to the contrary, that an order against the contingent fund of a school district was within the amount allowed by law to be drawn.[83] Mandamus lies to compel the issuance of an order for payment of a bill where the bill has been audited and taxes therefor collected,[84] and to compel a school district treasurer to register and pay properly drawn orders.[85] The fact that a claim against a school district has been reduced to judgment does not have the effect of changing the character of the claim as to the fund from which it should be paid.[86] Generally an anticipation of revenue is not allowed.[87] In Iowa it is no longer a condition to appropriations against the contingent fund that there should be unappropriated money on hand.[88]

Apportionment of funds.[89]—A school district receiving less than its proportion of the school fund may be reimbursed at the next division of the fund.[90] A new district in which no teacher had been employed is not entitled to a share of the primary school fund, where participation in apportionment depends on whether school had been taught for a certain period.[91] Under an act directing an equal division of property between districts due up to a certain period, a new district is not entitled to funds afterwards apportioned.[92] The term independent school districts in the apportionment laws of Texas refers to schools in incorporated towns and cities and not districts created by the commissioners' court.[93] In Texas commissioners' courts have no power to apportion the county school fund.[94] A railroad school tax collected for a graded school must be apportioned between the graded school and colored school district within the territory occupied by the graded school,[95] and the right thereto is not defeated by the fact that no tax was levied on the property of the colored people in the district.[96] Where the colored district is larger than the boundaries of the white district, the apportionment of a railroad school tax must be made on the basis

81. Andrus v. Parish Board of Directors, 108 La. 386.

82. Johnson v. School Corp. of Cedar, 117 Iowa, 319.

83. Farmers' & M. State Bank v. School Tp. of Rock Creek (Iowa) 92 N. W. 676.

84. People v. Anderson, 109 N. Y. St. Rep. 240.

85. Leonard v. State (Neb.) 93 N. W. 988.

86. State v. Cusenberry (Mo. App.) 71 S. W. 701.

87. Andrus v. Parish Board of Directors, 108 La. 386.

88. Farmers' & M. State Bank v. School Tp. of Rock Creek (Iowa) 92 N. W. 676.

89. Right of orphan asylum schools to share in the school fund see, "Charitable and Correctional Institutions."

90. Andrus v. Parish Board of Directors, 108 La. 386.

91. Deckerville High School Dist. v. School Dist. No. 3 (Mich.) 90 N. W. 1064.

92. Deckerville High School Dist. v. School Dist. No. 3 (Mich.) 90 N. W. 1064. Under the California law requiring the apportionment of school moneys on hand after apportioning to the districts in proportion to the average attendance in each district during the preceding year will not permit the distribution of the surplus to a new district formed during the school year. Pol. Code. § 1858, subds. 3 and 4. The rule is not changed by the fact that section 1859 provides that no school district except one newly formed is entitled to receive any apportionment of state or county school moneys which has not maintained a public school for at least six months during the next preceding year—Sunol School Dist. v. Chipman, 138 Cal. 251, 71 Pac. 340. A tax voted before, but collected after, the formation of a new district from another district, but going to the treasurer of the old district, is a credit within an act governing the apportionment of credits. A tax voted by a school district before, but warrants for the collection of which need not go to the treasurer until after, the formation of a new district from the old territory, is not property within an act for the apportionment of property—School Dist. No. 9 v. School Dist. No. 5 (Wis.) 95 N. W. 148.

93. Wester v. Oge (Tex. Civ. App.) 68 S. W. 1005. Law of Texas authorizing the apportionment of school funds by the county superintendent to the districts including independent school districts, is constitutional—Id.

94. Wester v. Oge (Tex. Civ. App.) 68 S. W. 1005.

95. Sp. Act March 29, 1878, Ky. St. §§ 4423, 4101—Board of Trustees v. Morris, 24 Ky. L. R. 1420, 71 S. W. 654.

96. Ky. St. § 4101—Board of Trustees v. Morris, 24 Ky. L. R. 1420, 71 S. W. 654.

of the white and colored children of school age living in the territory of the white district.[97]

Support of public libraries from school funds.—Taxes collected for school purposes may not be used to maintain a public library not under control of the board of education.[98]

§ 6. *Teachers and instruction. Issuance of certificates.*—A county superintendent may not refuse to issue a certificate where a majority of the examiners certify that the teacher has passed the required examination.[99] In New York it is the duty of the superintendent to enter names of teachers passing examination on lists to be kept in his office.[1] A school certificate issued after examination on request of the board of education is valid until revoked, though the section of the law under which the request for the examination was made had been repealed prior to the issuance of the certificate.[2]

A teacher's license is the subject of forgery within the criminal code.[3]

Contracts of employment.—The employment of a teacher for a year intends a school year.[4] Under laws requiring a contract of employment to specify the amount of his compensation, there may not be an enforcement of a contract providing that teachers should teach for the public money to be apportioned according to an agreement yet to be made.[5] There is a presumption that school authorities employ legally qualified teachers.[6] A law requiring the possession of a certificate as a condition to employment intends that the teacher should have the certificate at the time of commencing to teach and not at the time of employment,[7] and contract is not forfeited by failure to receive certificate until the day after the opening of the school, where the teacher was entitled thereto on the opening day.[8] A condition in a contract requiring an examination before a district superintendent may not be enforced where there is no such officer.[9] A teacher not allowed to teach under her contract is not required to file her teacher's certificate with the clerk as a condition to recovery for breach of the contract.[10] The contract of employment of a teacher is void where entered into by a portion of the trustees without notice to other trustees.[11] In some states a vote or resolution at a board meeting is required.[12] In an action for breach of a teacher's

97. Board of Trustees v. Morris, 24 Ky. L. R. 1420, 71 S. W. 654. In Maryland, the comptroller having apportioned the school funds for colored schools according to the colored population will not be compelled to make a distribution according to the white population under another section of the statute governing the matter—Shriver v. Hering (Md.) 54 Atl. 651.

98. Board of Education v. Board of Trustees, 24 Ky. L. R. 98, 68 S. W. 10.

99. Northington v. Sublette, 24 Ky. L. R. 835, 69 S. W. 1076. Mandamus to compel issuance will lie—Id.

1. People v. Maxwell, 114 N. Y. St. Rep. 726. The board having power to make a rule requiring separate lists for each grade the holder of license may not compel the making of a single list for both male and female licensed teachers of such grade—Id; Brooklyn Teachers' Ass'n v. Board of Education, 83 N. Y. Supp. 1.

2. Snell v. Glasgow (Minn.) 95 N. W. 881.

3. Arnold v. State (Ark.) 74 S. W. 513; Brooks v. State (Tex. Civ. App.) 75 S. W. 507.

4. Williams v. Bagnelle, 138 Cal. 699, 72 Pac. 408; Crabb v. School Dist. No. 1, 93 Mo. App. 254.

5. Mingo v. Trustees of Colored Common School Dist., 24 Ky. L. R. 288, 68 S. W. 483.

6. Hughes v. School Dist. No. 37, 66 S. C. 259.

7. Crabb v. School Dist. No. 1, 93 Mo. App. 254; Hughes v. School Dist. No. 37, 66 S. C. 259.

8. Crabb v. School Dist. No. 1, 93 Mo. App. 254. Question may not be raised where board employed a teacher in place of the plaintiff several days before the commencement of the school term—Id.

9, 10. Crabb v. School Dist. No. 1, 93 Mo. App. 254.

11. Scott v. Pendley, 24 Ky. L. R. 1431, 71 S. W. 647. Failure to notify one is not excused on the ground that the trustee had expressed his opinion adverse to the employment of such teacher—Id.

12. Comp. Laws, § 4671—Cowley v. School Dist. No. 3 (Mich.) 90 N. W. 680. Under laws allowing teachers' contracts to be made by a district board and reserving to the school district meeting power to decide as to sex of the teacher to be employed the district at its next meeting after the contract with the teacher may terminate the same by deciding to employ a teacher of a different sex. (Rev. St. Wis. 1898, § 428)—Hemingway v. Joint School Dist. No. 1 (Wis.) 95 N. W. 116.

contract, evidence as to the conduct of the teacher at a previous term is irrelevant.[13]

Employment of relatives.—Under laws invalidating contracts entered into with relatives of school officers, a contract with the wife of a school director to teach the school is void.[14] A second cousin of a school director or his wife may not be employed without petition under a law prohibiting employment of relatives within the fourth degree of consanguinity.[15]

Dismissal, suspension and reassignment.—In Pennsylvania teachers may be suspended for a refusal to comply with the regulation requiring vaccination.[16] In New York City competent teachers as well as superintendents and other officials are protected from removal during good behavior,[17] and cannot be reassigned to a lower grade at a reduced salary except after trial on charges.[18] Assignment to a lower grade with a reduction of salary amounts to a removal and not an assignment, and can only be brought about for cause.[19] The evening schools in New York City are a part of the common school system,[20] and a principal of an evening high school will not lose his grade by accepting employment as principal of an evening elementary school.[21] A principal of an evening school discharged because his services are unnecessary, may not have mandamus to compel reinstatement where the laws authorize the abolition of unnecessary positions.[22] The New York charter allows preference to be extended to teachers displaced by consolidation or discontinuance of schools.[23] The charter allows removal only on charges preferred and after trial, and supersedes the law making marriage of a teacher a vacation of her position.[24] A board of education having the power for good and sufficient reasons to reduce the number of classes in the public schools may determine the teachers to be retired.[25] Where directors have no power to dismiss a teacher employed under contract, an attempt to dismiss is without effect, hence the effect of a teacher leaving school under such dismissal is an abandonment of her contract.[26]

Persons liable for breach of contract.—The district and not the trustees is liable for the violation of a teacher's contract where the laws make the trustees a body politic and corporate.[27]

Payment of salary.—A teacher is an employe and not a city official and may not recover for deduction of salary for absence where the board refuses to excuse her for such absence.[28] A teacher may contract for a salary for the entire term of her employment, and it is not necessary that the contract should provide for monthly payments of salary thereunder, and it is not necessary that the payments should be made monthly.[29] The fact that a school teacher has no control over the action of the trustees will not cause a strict enforcement of a requirement that orders specify the amount of the salary due and the month for which due, as a

13. Hughes v. School Dist. No. 37, 66 S. C. 259.

14. Nuckols v. Lyle (Idaho) 70 Pac. 401.

15. Holt v. Watson (Ark.) 71 S. W. 262.

16. Lyndall v. High School Committee, 19 Pa. Super. Ct. 232.

17, 18, 19. Greater N. Y. Charter, § 1117, as amended and re-enacted by Laws 1901, p. 479, c. 466, § 1101—People v. Board of Education, 174 N. Y. 169.

20. Cusack v. Board of Education, 78 App. Div. (N. Y.) 470.

21. O'Leary v. Board of Education, 78 App. Div. (N. Y.) 475.

22. Cusack v. Board of Education, 174 N. Y. 136.

23. Cusack v. Board of Education, 78 App. Div. (N. Y.) 470.

24. In re Murphy, 39 Misc. (N. Y.) 166.

25. The school board is amply justified in reducing the number of teachers in a high school, where another high school in the same city employs the same number of teachers to instruct double the number of pupils—Bates v. Board of Education (Cal.) 72 Pac. 907.

26. Oakes v. Simrell (Mo. App.) 71 S. W. 1060.

27. Ky. St. § 4437—Mingo v. Trustees of Colored Common School Dist., 24 Ky. L. R. 288, 68 S. W. 483.

28. Murphy v. Board of Education, 38 Misc. (N. Y.) 706.

29, 30. Williams v. Bagnelle, 138 Cal. 699, 72 Pac. 408.

condition to the issuance of the requisition for their payment.[30] In a controversy between rival teachers as to which is entitled to an allowance for teaching the school, neither will be paid, where the one who taught did so without a valid contract, and the one legally entitled to teach had not taught.[31]

Teachers' pensions.—Pension funds for teachers may not be created by retention of a percentage from teachers' salaries.[32] The Ohio act is a taking of private property for the use of another without the consent of the owner and violates the constitutional requirements of uniformity of taxation and is not uniform in its operation when applied to only one city.[33]

Liability of teacher.—A principal of a public school is not liable to a merchant for damages by loss of business sustained by reason of a rule requiring pupils to go to their homes immediately at the close of school.[34]

Religious instruction.—Pupils in a public school cannot be required either to attend religious services or to take part in them.[35] The laws do not forbid the use of the Bible in the public schools, and courts have no power to declare its use unlawful, because it is possible or probable that there will be an abuse of the privilege in the interest of particular theological sects.[36] The point where courts may rightfully interfere to prevent its use is where legitimate use has degenerated into abuse.[37]

§ 7. *Control and discipline of scholars and regulation of attendance.*—During school hours the teacher's requests to his pupils amount practically to demands.[38]

There may be no recovery for an expulsion after hearing on account of a refusal to require other pupils to testify as to difficulty with the teacher, for which the pupil was expelled, unless it is shown that the refusal was based on bad faith.[39] In such an action there may be no recovery for board or tuition at a private school, unless payment for such board or tuition is shown.[40] There may be no recovery for an injury to a pupil's feelings or his loss of standing in the community caused by expulsion.[41]

The board may delegate to a committee the investigation of charges against the pupil.[42]

Corporal punishment.—Reasonable punishment of pupils is excepted from the penal code of Texas defining and punishing assault and battery.[43] Severe punishment of a pupil will not justify an assault by the parent on the teacher the following day.[44]

§ 8. *Decisions, rulings and orders of school officers and review of same.*—Findings of a superintendent in forming a school district embraced in other districts do not require the formality of legal judgments.[45] A change of the time of hearing is not material where it involves merely the change of one day and is made on the day the order is issued.[46] There is a presumption that officers in changing school boundaries have sufficient reason for their acts.[47] Certiorari is a proper remedy to review the action of officers in establishing

31. Shepherd v. Gambill (Ky.) 75 S. W. 223.
32. State v. Rogers, 87 Minn. 130.
33. Hibbard v. State, 65 Ohio St. 574.
34. Jones v. Cody (Mich.) 92 N. W. 495.
35. State v. Scheve (Neb.) 93 N. W. 169, 59 L. R. A. 927.
36. State v. Scheve (Neb.) 93 N. W. 169, 59 L. R. A. 927. The school authorities have the right to pass upon the question whether it is prudent or politic to permit Bible reading in the public schools; whether the practice takes the form of sectarian instruction is a question for the courts.—Id.
37. State v. Scheve (Neb.) 93 N. W. 169, 59 L. R. A. 927.
38. Judgment (1902) 91 N. W. 846, affirmed on rehearing—State v. Scheve (Neb.) 93 N. W. 169, 59 L. R. A. 927.
39, 40, 41. Rev. Laws, c. 44, § 7—Morrison v. City of Lawrence, 181 Mass. 127.
42. Miller v. Clement (Pa.) 55 Atl. 32.
43. Pen. Code, art. 593—Stephens v. State (Tex. Cr. App.) 68 S. W. 281.
44. Walkley v. State, 133 Ala. 183.
45, 46. Blart v. Myers (Neb.) 91 N. W. 573.
47. Farley v. Gilbert, 24 Ky. L. R. 2109, 72 S. W. 1098.

a school district.[48] In New York the superintendent of public instruction has jurisdiction of an appeal by an aggrieved person against an allowance for the expense of defending a libel suit defended by one of the committees of the school meeting.[49]

COMPOSITION WITH CREDITORS.

A composition operates as an accord and satisfaction.[50] The giving of a fraudulent preference, though it avoid the composition as to other creditors, does not as to the preferred creditor, and the sums received by him cannot be recovered back, but in bankruptcy proceedings against the debtor, they must be surrendered before the creditor can prove another claim.[51] A debtor is not released by a composition by his co-debtor in which he did not join.[52] A binding new promise to pay in full may be made by one member of the debtor firm.[53]

CONCEALING BIRTH OR DEATH.

Indictment.—An averment as to the manner of concealment may be rejected as surplusage.[1-38]

CONFESSION OF JUDGMENT.

§ 1. *The warrant or cognovit.*—A warrant or cognovit is always necessary to entry of the judgment; it must be exact as to the parties confessing,[39] and must be strictly construed.[40] A warrant in a note though it will not support a judgment under the New Jersey law will give validity to a judgment in a foreign state.[41] The warrant in a note does not require a War Revenue stamp.[42]

§ 2. *The confession of judgment; requisites and validity.*—A confession of judgment compelled by a creditor, without notice of a scheme of the debtor to defraud his creditors and before it is completed, is valid.[43] Purchasers from a defendant against whom judgment by confession has been entered, cannot object that the debt on which suit was brought was not due.[44] The original authority to accept a confession of judgment by one of two joint debtors is immaterial if the creditors with full knowledge attempt to enforce it.[45] The judgment will be presumed regular as to term of rendition, process, time of appearance, trial and rendition, where its recitals as to the cause are full in all particulars; it will be valid though there is no affidavit by plaintiff if it recites waiver of service.[46]

§ 3. *Opening or vacating the judgment.*—Motions to vacate judgments by confession may be entertained by courts of law,[47] but a judgment will not be vacated except on a clear showing that defendant does not owe its amount.[48] An

48. Huyser v. Township Boards of School Inspectors (Mich.) 91 N. W. 1020.

49. People v. Skinner, 74 App. Div. (N. Y.) 58. The law giving an aggrieved person a right to appeal from a decision of the school district meeting, intends only persons attending such meeting—Id.

50. See "Accord and Satisfaction," ante, pp. 8, 10, note 60.

51. In re Chaplin, 115 Fed. 162.

52. N. Y. Code Civ. Proc. § 1942—Farmers' & Mechanics' Bank v. Hawn, 79 App. Div. (N. Y.) 640.

53. The compromise expressed that the firm desired to resume business—Taylor v. Hotchkiss, 81 App. Div. (N. Y.) 470.

1-38. Wright v. United States (Ind. T.) 69 S. W. 819.

39. Cognovit or warrant by A. Bernstein & Co. will justify confession against A. Bernstein—Bernstein v. Curran, 99 Ill. App. 179.

40. A warrant to confess judgment in favor of the holder of a note is a special authority and cannot be extended to one not a holder—National Exch. Bank v. Wiley (Neb.) 92 N. W. 582.

41. Construing 1 Gen. St. p. 172—Shelmerdine v. Lippincott (N. J. Sup.) 54 Atl. 237.

42. War Revenue Act, June 13, 1898—Treat v. Tolman (C. C. A.) 113 Fed. 892.

43. That the same attorneys who aided in the scheme were employed by the creditor will not affect the judgment if he had no notice of it—Barker v. Franklin, 37 Misc. (N. Y.) 292.

44. Under Code Civ. Proc. § 1274, subd. 2, and § 1277—St. John Wood-Working Co. v. Smith, 82 App. Div. (N. Y.) 348.

45. Tootle, Hosea & Co. v. Otis (Neb.) 95 N. W. 681.

46. Smith v. Ridley (Tex. Civ. App.) 70 S. W. 235.

47. Baragwanath v. Lasher, 203 Ill. 247.

48. In vacating such judgments a court

application to open a judgment by confession is addressed to the equitable as well as the legal powers of the court, and they will be exercised on application of any defendant without regard to joinder or non-joinder of co-defendants.[49] A judgment confessed under a power in a note will not be set aside because the face of the note shows a change in the place of contract where the alteration could not affect the right to enter judgment within the state.[50] Failure to comply with the terms of a warrant in a lease as an agreement for an amicable action of ejectment will justify opening the judgment.[51] That a note on which judgment was entered was secured by undue influence and duress may be cause, in the discretion of the court, for opening the judgment.[52]

Procedure and evidence.—Delay of one year before application to open a judgment on a note alleged to be forged will not be fatal if the note was, in fact, forged; such delay may be excused where it results from advice of counsel. Terms on the opening requiring that the note shall stand as a prima facie case for plaintiff on trial may be stricken out on due notice after trial and new trial granted. The question of forgery of a note containing a warrant cannot be determined merely from comparison of the signature with another shown to be genuine; and plaintiff has the burden of establishing the validity of the instrument. If the judgment is opened generally, plaintiff must prove his case as though no judgment had been entered.[53]

CONFLICT OF LAWS.

§ 1. **Contracts in General.**
§ 2. **Effect of Status or Domicile.**
§ 3. **Matters Relating to Personal Property.**
§ 4. **Effect of Public Policy.**
§ 5. **Protection of Citizens in State of the Forum.**
§ 6. **Matters Affecting Morality.**
§ 7. **Contracts Relating to Realty.**
§ 8. **Application of Remedies.**—Action for Wrongful Death; Limitations; Adopted Statutes; Presumptions and Judicial Notice of Foreign Laws.
§ 9. **Torts.**
§ 10. **Crimes and Misdemeanors.**

§ 1. *Contracts in general.*—The validity of a contract[54] as to form and the solemnities to be followed therein,[55] as, for instance, application of the statute of frauds,[56] or of the statutes governing the sale of intoxicating liquors,[57]

of law acts with purely equitable jurisdiction—Pearce v. Miller, 99 Ill. App. 424; Whalen v. Billings, 104 Ill. App. 281. Judgment against a surety on a bond will be vacated where it appears that he did not sign, unless it also appears that some one duly authorized signed for him—Charles D. Kaier Co. v. O'Brien, 202 Pa. 153. Where a member of a building association had made considerable payments for which she received no credit and excessive fines had been imposed upon her, a judgment entered against her on warrant will be opened—Provident Bldg. & Loan Ass'n v. Cresswell, 204 Pa. 105. Sufficiency of evidence to warrant opening of judgment—Shannon v. Castner, 21 Pa. Super. Ct. 294.

49. Custer v. Harmon, 105 Ill. App. 76.

50. Krantz v. Kazenstein, 22 Pa. Super. Ct. 275.

51. Weaver v. McDevitt, 21 Pa. Super. Ct. 597.

52. Note secured by son from parents through fear and a mingled desire to give him a preferred claim and provide for him—McMahon v. McMahon, 203 Pa. 16.

53. Shannon v. Castner, 21 Pa. Super. Ct. 294.

54. Emerson Co. v. Proctor, 97 Me. 360. The legality of stock sales made by broker's correspondents in New York depends on the laws of that state—Gaylord v. Duryea, 95 Mo. App. 574. A contract of shipment made in Missouri between a resident corporation and a carrier having an office and doing business there is governed by the laws of that state—Herf & Frerichs Chemical Co. v. Lackawanna Line (Mo. App.) 73 S. W. 346. A contract made in New York, relating to construction of a railroad for a company afterward consolidated with one organized under the laws of Pennsylvania, will be enforced in the latter state though void there, where it is valid as between the parties in New York—Rumsey v. New York & P. R. Co., 203 Pa. 579. Matters concerning the validity of a contract of insurance issued to an applicant resident in Mexico on an application there executed will be settled by the laws of Mexico—DeSonora v. Banker's Mut. Casualty Co. (Iowa) 95 N. W. 232.

55. Roubicek v. Haddad, 67 N. J. Law, 522.

56. Contract of agency to sell lands—Goldstein v. Scott, 76 App. Div. (N. Y.) 78.

57. The validity of a sale of intoxicating liquor depends upon the law where sold—P. Schoenhofen Brewing Co. v. Whipple (Neb.) 89 N. W. 751. Sufficiency of sale of liquors in New York to persons without license to sell in Connecticut to prevent violation of liquor laws of the latter state; Gen. Laws Conn. § 3078—J. & J. Eager Co. v. Burke, 74 Conn. 534. A sale of liquor by

or as to usury,[58] will be controlled by the laws of the state where made. Insurance policies will be governed by the laws of the state where the policy is delivered and the premiums paid,[59] unless the policy stipulates otherwise and as to the rule in such contingency the authorities differ.[60] Contracts are generally construed according to the law of the state where made,[61] unless, however, by their terms they are to be performed elsewhere, in which case they are governed

a Georgia dealer on orders obtained by a traveling salesman in Alabama is governed by the laws of Alabama; Act of Congress, "Wilson Act" construed—Bluthenthal v. McWhorter, 131 Ala. 642.

58. **Contracts in general.** The rule applies to usury—Clarke v. Taylor, 69 Ark. 612. Interest to be paid by guarantor of mortgage not secured on property in another state—Taylor v. Simpkins, 38 Misc. (N. Y.) 246. The contract may be enforced in another state though usurious there and though secured by mortgage on lands in another state—Crebbin v. Delony, 70 Ark. 493. A contract to pay interest on advances on property in Nevada, made by a Colorado corporation with one of its directors, will be enforced in Pennsylvania, though the rate was not legal under the laws of Pennsylvania, where it was legal under the laws of both Nevada and Colorado—Kroegher v. Calivada Colonization Co. (C. C. A.) 119 Fed. 641; Calivada Colonization Co. v. Kroegher, Id.

Building and loan contracts. American Bldg., Loan & Tontine Ass'n v. McClellan (Ark.) 70 S. W. 463. Loans made in Mississippi by building and loan association—National Mut. Bldg. & L. Ass'n v. Hulet (Miss.) 33 So. 3; Same v. Hart, Id.; Same v. Hoskins, Id. Subscription and loan contract governed by laws of state where dated and made payable—Alexander v. Building & Loan Ass'n, 120 Fed. 963. A loan to a stockholder by a building and loan association organized under the laws of Alabama and payable in that state at the home office is governed by its usury laws—Gale v. Building & Loan Ass'n, 117 Fed. 732. Loan by borrowing stockholder in building and loan association depends as to legal rate of interest on the laws of the state where made and payable, though the security may be situated elsewhere—Interstate Bldg. & L. Ass'n v. Edgefield Hotel Co., 120 Fed. 422. Loans made by resident agents of a foreign association and secured on property in the state where made, and on which payments are there made, depend as to usury on the laws of that state though in terms payable at the home office—Hicinbothem v. Savings & Loan Ass'n, 40 Or. 511, 69 Pac. 1018; Georgia State Bldg. & L. Ass'n v. Shannon, 80 Miss. 642. Such loans by a foreign association are usurious if the rate is above the legal rate in the state where made, though the contracts for loans, being separate from those for subscription, were similar to those used in the state of organization and the place of performance was there fixed by the by-laws—Georgia State Bldg. & L. Ass'n v. Brown (Miss.) 31 So. 911.

59. Thompson v. Insurance Co., 169 Mo. 12. Property in Kentucky insured by New York company—Carrollton Furniture Mfg. Co. v. Indemnity Co. (C. C. A.) 115 Fed. 77. A life insurance policy executed in Missouri, the premiums and losses on which are payable in that state, is governed by its laws—Franklin Life Ins. Co. v. Galligan (Ark.) 73 S. W. 102. A life insurance policy issued by a company authorized to do business in Massachusetts, on an application made in writing to its agent in that state where the applicant resided, and there delivered by its agent, who there received the first premium, will be governed by the laws of that state—Albro v. Insurance Co., 119 Fed. 629.

60. An insurance policy will be construed under the laws of Missouri where delivered in that state at the residence of the insured though it stipulates that it is to be construed according to the laws of New York—Pietri v. Seguenot, 96 Mo. App. 258. A life insurance policy written in Washington by a New York company, on an application providing that the contract should be governed by the New York laws and made a part of the policy, is governed by such laws as to forfeiture for nonpayment of premiums, though the contract was delivered and the premiums paid in Washington. Laws N. Y. 1877, c. 321, § 1—Mutual Life Ins. Co. v. Hill (C. C. A.) 118 Fed. 708.

61. See Building & Loan Associations, p. 394, note 78, concerning loans. Where the writings for a loan stipulate no place of payment by a borrowing stockholder of a foreign building and loan association, but the application for membership designates the local treasurer as the officer to whom payment is to be made and payments are actually made to him, the rights of the member under an assignment of the debt to a stranger without recourse will be determined by the law of the member's domicile—Spinney v. Chapman (Iowa) 95 N. W. 230.

An action in one state on a policy of insurance on property in another state given by a company of a third state is governed as to the contract by the law of the state where the property was situated and the contract was made—Thompson v. Insurance Co., 169 Mo. 12. Policy of insurance by United States company on property in Mexico—De Sonora v. Banker's Mut. Casualty Co. (Iowa) 95 N. W. 222.

Negotiable Instruments. Note indorsed in blank in Vermont construed under the laws of that state in the New Hampshire courts—Limerick Nat. Bank v. Howard, 71 N. H. 13. An indorsement in New York of a note executed in another state is governed by the New York laws—Spies v. Bank, 174 N. Y. 222. A note and mortgage on Maryland realty, dated and executed in that state, will be presumed payable at place of date in absence of other evidence, and will be construed under the laws of that state—New York Security & Trust Co. v. Davis, 96 Md. 81. The Indiana law will govern a note dated in Wisconsin but actually negotiated, executed, and made payable in Indiana, as to days of grace and notice to indorsers, though the nature and sufficiency of evidence to show notice will be governed by the laws of Wisconsin—Second Nat. Bank v. Smith (Wis.) 94 N. W. 664.

Contracts of married women. Robison v. Pease, 28 Ind. App. 610; Baer Bros. v. Terry, 108 La. 597. Note of married woman living with her husband in Tennessee, executed, de-

by the laws of the place of performance;[62] citizens of the United States shipping as horsemen on English vessels carrying live stock from New Orleans to South Africa under contract requiring free return passage to an American port were subject to English law on the voyage over but on the return trip their rights were governed by United States laws.[63] Where certificates of stock in a foreign building association, having no office or general agent in a certain state but merely special agents who solicit subscriptions, provide that payments shall be made at the principal office, unless proper notice is given of another place of payment which was given fixing a place within the state for payment, the contract as to usury was governed by the laws of that state.[64] A loan secured by a mortgage on land in Alabama by a citizen of that state from a Minnesota building and loan association declared in the note and mortgage to be payable in Minnesota and to be made with reference to its laws, is governed by the usury laws of Minnesota.[65]

§ 2. *Effect of status or domicile.*[66]—The validity of a will covering personal property depends on the law of the testator's domicile though the property is situate elsewhere,[67] likewise the rights of an heir in a distributable surplus.[68] While the effect and validity of a will are determined by the laws of the testator's domicile, a beneficiary given power of "entire disposal" of certain personal property may do so by an instrument conforming to the laws of his own domicile.[69] The estate of an infant deceased will be administered according to the law of the state of its domicile.[70] The eligibility of beneficiaries of a benefit association will be determined by the laws of the state where the association was organized.[71] The liability of a stockholder will be determined by the laws of the domicile of the corporation regardless of his domicile or the law of the forum.[72]

livered, and payable in Ohio, is governed by the laws of Ohio—First Nat. Bank v. Shaw (Tenn.) 70 S. W. 807.

62. Negotiable Instruments. Notes executed in Indian Territory, where the laws of Arkansas govern, and made payable in the latter state, are governed by its laws as to negotiability—Clark v. Porter, 90 Mo. App. 143. A note sent by the maker in Nebraska to the payee in Oklahoma is not governed by the Nebraska laws—Hewitt v. Bank (Neb.) 90 N. W. 250; see, also, Id. (Neb.) 92 N. W. 741. The negotiability of a note payable in another state depends upon its laws—Barger v. Farnham (Mich.) 90 N. W. 281.

63. The European, 120 Fed. 776.

64. National Mut. Bldg. & L. Ass'n v. Farnham (Miss.) 33 So. 2.

65. United States Sav. & L. Co. v. Beckley (Ala.) 33 So. 934.

Rule against perpetuities.—If a disposition of personalty, by will or otherwise, is not against the rule in the state or country of the owner's domicile, it will be upheld, though the personalty is in another state and the disposition could not there be sustained under its laws—Knox v. Jones, 47 N. Y. 389, Cross v. United States Trust Co., 131 N. Y. 330, Whitney v. Dodge, 105 Cal. 196. But though a will or other transfer of realty is not in violation of the rule in force in the state or country where made or of the maker's domicile, it must be declared void, if against the rule in the place where the realty is situated, since the disposition of realty must always be determined by the law of the state or country of which it is a part—White v. Howard, 46 N. Y. 144, Ford v. Ford, 70 Wis. 19, Hobson v. Hale, 95 N. Y. 588, Knox v. Jones, 47 N. Y. 389. And sometimes it has been held that when funds are directed to be invested in another state in trusts allowable by its laws, but in violation of the law of the testator's domicile, that such directions must be disregarded as against the rule in force at his domicile—Wood v. Wood, 5 Paige (N. Y.) 596. But since the property to be acquired is to be held in another state, the courts or authorities of the state whence the funds came are not generally concerned with the question whether the direction violates the rule against perpetuities or not—Vansant v. Roberts, 3 Md. 119, Chamberlain v. Chamberlain, 43 N. Y. 424. Where a testator orders his estate to be invested in lands in another state or country, he must be presumed to have intended to submit to the jurisdiction and laws of that state. Whether the trusts created by his will are in violation of the statutes of that state or country, is a question for the jurisdiction of its courts and not for the courts of the testator's domicile—Ford v. Ford, 80 Mich. 55, Ford v. Ford, 72 Wis. 621. See more fully 49 Am. St. Rep. 124.

66. Sufficiency of acquisition of domicile in Texas by husband who removed so that property acquired elsewhere will be governed as to marital rights by the laws of Texas—Blethen v. Bonner (Tex. Civ. App.) 71 S. W. 290.

67. Garvey v. Horgan, 38 Misc. (N. Y.) 164.

68. Champallion v. Corbin, 71 N. H. 78.

69. Ward v. Stanard, 115 N. Y. St. Rep. 906.

70. In re Kiernan, 38 Misc. (N. Y.) 394.

71. Grimme v. Grimme, 198 Ill. 265.

72. McClure v. Iron Co., 90 Mo. App. 567;

The nature of a debt contracted, as to liability of husband and wife, depends on the law of the place where the transaction took place.[73] Lands purchased in Texas by a husband after moving there with money earned while a citizen in another state under the laws of which it was separate property, is not community property.[74] The laws of the state will apply to determine whether land on which a husband made a homestead entry during the life of his wife was community property when he did not get a patent or make final proof before her death.[75] Laws regulating privileges and disabilities of married women in Louisiana do not operate for benefit of such persons domiciled elsewhere.[76] The contract of a married woman is valid everywhere if valid where it is made and to be performed unless she is domiciled where she cannot legally make a contract.[77]

Liability for negligence resulting in personal injuries is determined by the laws of the state where the injuries were received.[78] The laws of the state where an injury to a passenger occurred govern as to the degree of care required of the carrier.[79]

§ 3. *Matters relating to personal property.*—The validity of a pledge must be determined by the laws of the state where the property is situated.[80] The validity of trusts in personalty will generally be settled by the law of the state where they are to be administered.[81] A contract to deliver goods then in warehouse or to pay commissions from their sale must be governed by the law of the place where it is to be performed.[82]

§ 4. *Effect of public policy.*—A contract made in one state will not be enforced in another state wherein it is against public policy or morals,[83] nor will

Love v. Pusey & Jones Co. (Del. Super.) 52 Atl. 542. Statute regulating proceedings by creditors to enforce statutory liability of stockholders—Pfaff v. Gruen (Mo. App.) 69 S. W. 405.

73. In Washington a debt for a building for husband and wife in another state will be held a community debt—Clark v. Eltinge, 29 Wash. 215.

74. Blethen v. Bonner (Tex. Civ. App.) 71 S. W. 290.

75. It will be determined community property under the state laws—Ahern v. Ahern (Wash.) 71 Pac. 1023.

76. Marks v. Germania Sav. Bank (La.) 34 So. 725.

77. Young v. Hart (Va.) 44 S. E. 703.

78. The laws of Texas will determine liability of a railroad company for injuries there received because of negligent loading of a car, though the car was loaded in New Mexico—El Paso & N. W. Ry. Co. v. McComas (Tex. Civ. App.) 72 S. W. 629.

79. Louisville & N. R. Co. v. Harmon, 23 Ky. L. R. 871, 64 S. W. 640.

Laws Determining Age of Majority.—The capacity, state and condition of persons according to law of their domicile, will generally be regarded, as to acts done, rights acquired and contracts made in place of their domicile, touching property situated therein, and if these acts, rights or contracts are valid there, they will be held equally valid everywhere; if they are invalid there, they will be invalid everywhere. As to acts done, rights acquired and contracts made in other countries, touching property therein, the law of the country where the acts are done, rights are acquired or contracts are made, will generally govern in respect to capacity, state and condition of persons. Hence, it may be deduced as a corollary, that, in regard to the question of minority or majority and other personal qualities and disabilities, the law of the domicile of birth, or the law of any other acquired and fixed domicile, is not generally to govern, but the law of the place where the contract is made or the act done, and a person who is a minor until he is of the age of 25 by the law of his domicile and incapable of making a valid contract there, may nevertheless in another country where he would be of age at 21 generally make a valid contract, even a contract of marriage—Story on Conflict of Laws, §§ 101, 102, 103. approved in Pearl v. Hansborough, 9 Humph. 426, and generally in the courts of all the states—Saul v. His Creditors, 16 Am. Dec. 212; Andrews v. His Creditors, 11 La. 464; Baldwin v. Gray, 16 Am. Dec. 169; Pickering v. Fisk, 6 Vt. 102; Hiestand v. Kuns (Ind.) 8 Blackf. 345. The rule is applied in Louisiana that the law of the domicile of origin governs the state and condition of the minor into whatever country he removes—Barrera v. Alpuente (La.) 6 Martin (N. S.) 69, 17 Am. Dec. 179. See also more fully on this point 17 Am. Dec. 179, and note.

80. In re St. Paul & K. C. Grain Co. (Minn.) 94 N. W. 218.

81. Trust in personalty in foreign state given by will of domestic testatrix—Mount v. Tuttle, 116 N. Y. St. Rep. 655. The liability of income from a trust founded in Rhode Island, of bonds and securities in New York, to be subjected to a judgment rendered against the beneficiary in New York, will be settled, in comity, by the laws of the latter state—Keeney v. Morse, 71 App. Div. (N. Y.) 104.

82. Farmer v. Etheridge, 24 Ky. L. R. 649, 69 S. W. 761.

83. Parker v. Moore (C. C. A.) 115 Fed. 799. The principle of state comity will not apply—Palmer v. Palmer (Utah) 72 Pac. 3. The laws of a state where a gambling device is to be delivered will determine the

the parties be allowed to abrogate the public policy of a state by conditions in a contract adopting the laws of another state.[84]

§ 5. *Protection of citizens in state of forum.*—Exemption laws of another state have no extraterritorial force.[85] Foreign voluntary assignments for benefit of creditors cannot be enforced if they conflict with the statutes or public policy of the state where they are sought to be enforced,[86] but they will be held valid if the controversy is wholly between nonresident creditors.[87]

§ 6. *Matters affecting morality.*—The court will not necessarily refuse to recognize divorces granted in another state for causes arising before the marital domicile was established merely because it will not grant a divorce on such grounds.[88] A statutory prohibition as to remarriage within a certain period after divorce has no force beyond the state.[89]

validity of a contract for its sale—Price v. Burns, 101 Ill. App. 418. An assignment of a negotiable certificate of deposit in payment of a loss at gambling, valid at the common law in hands of a purchaser in the state where made, will not be declared void in Colorado as against statute, where the law of the state of execution is not so offensive as to shock the moral sense—Sullivan v. Bank (Colo. App.) 70 Pac. 162.

84. Insurance policy—Albro v. Insurance Co., 119 Fed. 629. A condition in a contract made without the state for carriage of stock to a point within the state, limiting liability for injury due to negligence, will not be enforced where the injury occurs within the state, it being against the policy of the state—Hughes v. Railroad Co., 202 Pa. 222. A provision in a steamship ticket issued in England that the English law shall govern the contract will not validate a limitation of liability for negligent injury to baggage which is against the public policy of the United States—The New England, 110 Fed. 415.

Limitation of liability of carrier by contract.—Generally, contracts with regard to limitation of liability of carriers are determined as to conflict of laws by the rules applicable to other contracts and if the contract is allowed to be performed within one state, its laws will govern, though the contract is brought into question in the courts of other states—Knowlton v. Erie Ry. Co., 19 Ohio St. 260. If a contract is made in one country or state between citizens and residents thereof and its performance begins there, it will be governed by the laws of that country or state, unless the parties on entering the contract clearly manifest a mutual intention that it shall be governed by the law of some other country—Michigan Cent. R. Co. v. Boyd, 91 Ill. 268, Liverpool, etc., Steam Co. v. Phoenix Ins. Co., 129 U. S. 397, Merchants' Dispatch Transportation Co. v. Furthman, 149 Ill. 66, Brockway v. American Ex. Co., 168 Mass. 257, Pacific Exp. Co. v. Foley, 46 Kan. 457, 26 Pac. 665, Hudson v. N. P. R. Co., 92 Iowa, 231, Davis v. Chicago, etc., R. Co., 93 Wis. 470, Eckles v. Missouri Pacific R. Co., 72 Mo. App. 296, The Henry B. Hyde, 82 Fed. 682. The courts are in conflict on the question as to whether a contract exempting a carrier from liability for negligence, if valid where made, will be enforced in a jurisdiction where it is void. In Pennsylvania, such contracts will be enforced where valid in another state though void there—Forepaugh v. Delaware & Lackawanna R. Co., 128 Pa. St. 217, and in Iowa, limitations of liability valid elsewhere have been upheld though forbidden by statute within the state to limit the common law liability—Hazel v. Chicago, etc., R. Co., 82 Iowa, 477, and in Kentucky, contracts of this sort valid elsewhere have been upheld though forbidden by the constitution of the state—Tecumseh Mills v. Louisville & Nashville R. Co., 22 Ky. L. Rep. 264, 57 S. W. 9. In Nebraska, no such limitation will be enforced, no matter what the law of the place of contract may be—Chicago, etc., R. Co. v. Gardiner, 51 Neb. 70, and the federal courts will not seek to enforce such contracts in the jurisdiction where they have been declared illegal as against the public policy of the state—Schulz-Berge v. The Guild Hall, 58 Fed. 796. Stipulations in a contract exempting a carrier from liability for negligence will generally be held void in another state, since the policy of the law will not allow a party to accomplish indirectly what it will not allow him to do directly—Lewisohn v. National Steamship Co., 56 Fed. 602, Compagnie De Navigacion v. Brauer, 168 U. S. 104. See more fully 88 Am. St. Rep. 125.

85. Pennsylvania R. Co. v. Rogers, 52 W. Va. 450. A personal property exemption cannot be set up by a resident of North Carolina, in an action against him in New York, in which a debt due from an insurance company of New York for a loss in North Carolina was attached. The exemption laws have no extra-territorial effect—Sexton v. Insurance Co., 132 N. C. 1.

86. Bloomingdale v. Weil, 29 Wash. 611; Same v. Trust Co., Id.

87. Memphis Sav. Bank v. Houchens (C. C. A.) 115 Fed. 96.

88. Succession of Benton, 106 La. 494.

89. Civ. Code, Cal. §§ 61, 91—In re Wood's Estate, 137 Cal. 129; Appeal of Wood. Id.

Laws Governing Validity of Marriage.—It is almost universally recognized that statutes prohibiting the guilty party after divorce from marrying again either for a certain period or during the life of the other party to the former marriage, are in no sense extraterritorial and are without effect outside the limits of the state which pass them, even though they may be in terms special.—Moore v. Hegeman, 92 N. Y. 521; Van Voorhis v. Brintnall, 86 N. Y. 18; Wilson v. Holt, 83 Ala. 528; Succession v. Hernandez, 46 La. Ann. 962; Phillips v. Madrid, 83 Me. 205. But a state, however, may provide by statute that marriages entered into by persons domiciled within the state and who leave it to marry elsewhere in evasion of its laws, with the intention to return and live within the state, are invalid. The general rule is, as established by the great weight of authority, that a marriage

§ 7. *Contracts relating to realty.*—Conveyances and contracts concerning lands are an exception to the general rule in that they must conform to the law of the state where the land lies.[90] A loan made by a building and loan association and secured by a mortgage on lands in another state will be governed by the laws of the latter state with respect to usury though by the contract payment was to be made at the domicile of the association.[91] A loan by a Maryland building and loan association secured by a mortgage on land in the District of Columbia under a stipulation that the law of Maryland should govern may be so governed where it appears that the rule in Maryland produces the same result on accounting as that of the District.[92]

§ 8. *Application of remedies.*—Remedies are applied according to the law of the forum.[93] The penalty provided for usury by the laws of the state where a contract was made will not be applied on an attempt to enforce the contract elsewhere.[94] An action for breach of a contract for sale of goods will not lie in Texas though the contract is valid there, where not enforceable under the laws of Arkansas, the state of performance, on account of non-compliance with the statute of frauds.[95] Delay in transmission of a telegram in another state wherein such action will not lie, will not prevent an action for mental anguish for failure

valid by the laws of the state or country where it is entered into is valid in every other state or country, though it appears that the party went into such other state or country to contract the marriage with the express view to evade the laws of their own country; however, this does not extend to incestuous or polygamous marriages or to any marriage prohibited by the terms of the general and universal law of the nations, the contract being governed, even as regards the competency of the contracting parties, by the law of the place of contract.—Van Storch v. Griffin, 71 Pa. St. 240; Hutman v. Hutman, 8 Pick. (Mass.) 433; Ross v. Ross, 129 Mass. 243. A marriage in Tennessee between a nephew and his uncle's widow must be held valid in Kentucky, if not prohibited by the laws of Tennessee, though void if celebrated in Kentucky and though the parties left the state to evade its laws and returned to live there after the marriage.—Stevenson v. Gray (Ky.) 17 B. Mon. 193. However, it was held in Tennessee under the statute that a marriage between a guilty husband or wife after divorce for adultery and the person with whom the crime was committed, is prohibited during the life of the innocent party under the former marriage, and that, if such contracting parties, being citizens and residents of the state, withdraw temporarily to another state for the purpose of evading its laws by marriage and then return to live within the state, in the interest of public morals, peace and good order of society, the marriage will be declared void in Tennessee, though valid in the state where celebrated.—Pennegar v. State, 87 Tenn. 244. The rule has also been applied often in Southern states with the result that marriages between white persons and negroes, entered into in states where they are not so prohibited, have been held void in states where they were against the statute and to which the parties returned to live after marriage—State v. Ross, 76 N. Car. 242; State v. Kennedy, 76 N. C. 251; Kinney v. Commonwealth, 30 Grat. 858; State v. Tutty, 41 Fed. Rep. 753; Dupree v. Boulad, 10 La. Ann. 411. It seems that a marriage celebrated on the high seas for the purpose of evading the laws of the state and then to return to that state to live, is a fraudulent evasion of the laws of the state to which the citizen owes obedience and will not be held valid—Holmes v. Holmes, 1 Abb. (U. S.) 546. In such a case there is no local law which can be applicable to the contract of marriage, and the same rule applies to a marriage celebrated on land, not within the jurisdiction of any particular sovereignty; hence the law of the domicile of the parties will probably control the marriage and it cannot be regarded as valid if not sustained by such law—Davis v. Davis, 1 Abb. N. C. 140. See further on validity of marriages, 60 Am. St. Rep. 941; 79 Am. St. Rep. 364.

90. Jurisdiction over the land is local; construction of deed with regard to covenants—Dalton v. Taliaferro, 101 Ill. App. 592. Deed of married woman executed in South Carolina conveying land in North Carolina must conform in its execution to Code N. C., § 1256—Smith v. Ingram, 130 N. C. 100. A conveyance of immovables in Louisiana as between husband and wife is governed by the laws of that state—Rush v. Landers, 107 La. 549, 57 L. R. A. 353. Loan by building and loan association secured on property in another state from the domicile of the association—Hoskins v. Savings & Loan Ass'n (Mich.) 95 N. W. 566.

91. Georgia State Bldg. & L. Ass'n v. Shannon, 80 Miss. 642; Hicinbothem v. Savings & Loan Ass'n, 40 Or. 511, 69 Pac. 1018. However, see Interstate Bldg. & L. Ass'n v. Edgefield Hotel Co., 120 Fed. 422.

92. Middle States Loan, Bldg. & Const. Co. v. Baker, 19 App. D. C. 1.

93. Contract—Young v. Hart (Va.) 44 S. E. 703. Action on insurance policy—Thompson v. Traders' Ins. Co., 169 Mo. 12. Whether there was equity in a complaint to foreclose a mortgage by a building and loan association will be determined by the law of the forum though the association was organized elsewhere—Interstate Sav. & Loan Ass'n v. Badgley, 115 Fed. 390.

94. Crebbin v. Deloney, 70 Ark. 493.

95. Jones v. National Cotton Oil Co. (Tex. Civ. App.) 72 S. W. 248.

of delivery in a state where such action will lie.[96] That mental anguish is not recognized as an element of damages for failure to deliver a telegram in the state where it was received will not prevent recovery in the state of delivery where an action will lie for such cause.[97]

Recovery for wrongful death.—The right of action for wrongful death, if existing in another state, may be enforced by any appropriate remedy; it is the remedy which must follow the law of the forum.[98] The right of recovery for wrongful death, especially as pertaining to the wife and daughters of deceased, under the laws of Mexico is so unlike that given by the laws of Texas, and so hard to enforce properly under the statutory or common law procedure in Texas, so as to protect the rights of defendant, that the United States circuit court will refuse to take jurisdiction. That negligent acts render defendant liable because under the laws of Mexico they constitute crimes however will not prevent maintenance of the action in Texas; the Mexican law not being contrary to the public policy of Texas, to natural justice or good morals.[99]

Statutes of limitation.—Statutory limitations of the forum will generally be applied to actions brought on causes arising elsewhere,[1] especially if the remedy is statutory and is governed by the general statute of limitations only;[2] if the statute of another state is applied the action must be maintainable in that state,[3] and must have accrued there.[4] In an action for personal injuries the limitation laws of the state where the injury occurred have been held to apply.[5] The Illinois statute of limitation providing that a cause of action arising in a foreign state cannot be sued on in Illinois if barred in the state of its origin does not apply to a cause not barred in the state of its origin because defendant was a nonresident and could not be sued because without the state.[6]

96. The tort was done in the latter state —Western Union Tel. Co. v. Cooper (Tex. Civ. App.) 69 S. W. 427.

97. Western Union Tel. Co. v. Blake (Tex. Civ. App.) 68 S. W. 526.

Control of ward's estate as to investment of funds by guardian.—Where the law of the place of his appointment and of the domicile of his ward is different, the law of the ward's domicile will control, especially when he actually resides there, but the form of accounting, so far as concerns the remedy only, will be according to the law of the court in which relief is sought; the application of general rules by which the guardian is to be held responsible for the investment of the property will be governed by the law of the ward's domicile—Lamar v. Micon, 112 U. S. 452. See 89 Am. St. Rep. 297.

98. It is not contrary to public policy to enforce in Arkansas a cause of action for wrongful death which accrued in Louisiana (Civ. Code La. art. 2315 & Sand. & H. Dig. Ark. §§ 5908, 5911, 5912 construed)—St. Louis, I. M. & S. Ry. Co. v. Haist (Ark.) 72 S. W. 893. In an action brought in Michigan for death of a servant occurring in Canada from the employer's negligence, a Canadian statute which prevents application of the rule as to immunity from liability for negligence of fellow servants will be applied though contrary to the law of Michigan—Rick v. Saginaw Bay Towing Co. (Mich.) 93 N. W. 632. The English common law does not obtain in Hawaii as to right to sue for wrongful death, but by the action of the supreme court a widow may sue for the death of her husband—Schooner Robert Lewers Co. v. Kekauoha (C. C. A.) 114 Fed. 849. The question as to who may sue is of right and not of remedy (Rev. St. Wyo. §§ 3448, 3449) and must be followed—Thorpe v. Union Pac. Coal Co., 24 Utah, 475, 68 Pac. 145. An action for wrongful death brought in Indiana, when the death occurred in Ohio, will be governed as to parties by the laws of Ohio where the right of action arose and the father of deceased cannot sue—Fabel v. Cleveland, C., C. & St. L. Ry. Co. (Ind. App.) 65 N. E. 929. An action by next of kin for wrongful death given by statute in one state where the death occurred may be enforced in another state where a like statute exists differing only in that no recovery is allowed for pain and suffering of decedent—Boyle v. Southern Ry. Co., 36 Misc. (N. Y.) 289.

99. Mexican Nat. R. Co. v. Slater (C. C. A.) 115 Fed. 593.

1. Limitation of an action by a nonresident creditor of a New York firm on a note made and payable in that state will be governed by the laws of New York where the creditor brings his action in that state—Hixson v. Rodbourn, 67 App. Div. (N. Y.) 424. The statute of limitations of the state of a bankrupt's residence governs as to bar of claims of creditors against his estate—Hargadine-McKittrick Dry Goods Co. v. Hudson (C. C. A.) 122 Fed. 232. As to limitations, actions for recovery of damages for discrimination in freight rates will be governed by the laws of the state where brought, since the interstate commerce act contains no provisions as to the time of bringing action—Ratican v. Terminal R. Ass'n, 114 Fed. 666.

2. Enforcing statutory liability of stockholder without the state of organization of the corporation—Pulsifer v. Greene, 96 Me. 438.

3. O'Donnell v. Lewis, 104 Ill. App. 198.

4. Janeway v. Burton, 201 Ill. 78.

5. Southern Ry. Co. v. Mayes (C. C. A.) 113 Fed. 84.

6. Martin v Wilson (C. C. A.) 120 Fed. 202.

Construction of statutes adopted from other states.—A statute adopted or copied verbatim from statutes of another state will generally be construed as already construed by the highest court of the state of its origin;[7] in any jurisdiction the construction given in the state of origin is always of persuasive aid.[8]

Presumptions and judicial notice regarding foreign laws.—The contrary not being shown, the common law is presumed to be the same in the different states,[9] and the law on any particular subject though statutory will be presumed to be the same elsewhere as in the state of the forum,[10] and the rule applies to laws of foreign countries,[11] but it has been held that the presumption as to the common law will not apply to countries where English institutions have not been established.[12] In absence of other evidence it will be presumed that the statutes of another state are the same as those in the state of the forum; if it is claimed that they are different such fact must be alleged and proved.[13] Courts of one state will take judicial notice of the prevalence of the common law in another state but statutory modifications thereof must be proved.[14] The United States courts will not take judicial notice of the Cherokee statutes,[15] nor of the laws of an Indian nation.[16]

§ 9. *Torts.*—No action will lie in one state for a tort committed in another state, in which no such right of action exists, even though an action would lie if the tort had been committed in the state where the action is brought.[17]

§ 10. *Crimes and misdemeanors.*—Bringing into the state property stolen elsewhere is not larceny.[18] The question of larceny as to goods stolen elsewhere and brought into Oklahoma is to be determined by the laws of Oklahoma and not the laws of the place where the property was stolen.[19]

CONSPIRACY.

§ 1. *Civil liability.*—No express agreement is necessary.[20]

Particular conspiracies.—Refusal of manufacturers to sell to dealers who will not maintain a uniform price is not an actionable boycott.[21] The legality of various acts of labor unions is treated in the note.[22]

7. Goldman v. Sotelo (Ariz.) 68 Pac. 558. Construction of Comp. Laws, § 5803—Yankton Sav. Bank v. Gutterson, 15 S. D. 486.

8. Stephan v. Metzger, 95 Mo. App. 609.

9. Engstrand v. Kleffman, 86 Minn. 403; Gaylord v. Duryea, 95 Mo. App. 574. Common law as to presumptions—Baltimore & O. S. W. R. Co. v. Adams, 159 Ind. 688.

10. Right of assignee of reversion to rents (David Bradley & Co. v. Peabody Coal Co., 99 Ill. App. 427); assumption of risk by employe (Haworth v. Kansas City Southern R. Co., 94 Mo. App. 215); limitations (Keagy v. Wellington Nat. Bank [Okl.] 69 Pac. 811); lien for logging supplies (Hyde v. German Nat. Bank, 115 Wis. 170; Angle v. Manchester [Neb.] 91 N. W. 501). It will be presumed that the rate of interest on a note was lawful where it was executed if lawful where it is sought to be enforced, no evidence appearing to the contrary—Clark v. Eltinge, 29 Wash. 215, 69 Pac. 736.

11. Laws authorizing sale of corporate stock under execution—Daniel v. Gold Hill Min. Co., 28 Wash. 411, 68 Pac. 884. The law of Italy governing a stipulation in a contract for exclusive jurisdiction of the courts of Italy will be presumed the same as that of Massachusetts—Mittenthal v. Mascagni (Mass.) 66 N. E. 425.

12. Mexico—De Sonora v. Bankers' Mut. Casualty Co. (Iowa) 95 N. W. 232.

13. Barringer v. Ryder (Iowa) 93 N. W. 56.

14. Rush v. Landers, 107 La. 549; Cameron v. Orleans & J. Ry. Co., 108 La. 83; Bank v. Carr, 130 N. C. 479.

15. Kelly v. Churchill (Ind. T.) 69 S. W. 817.

16. Sass v. Thomas (Ind. T.) 69 S. W. 893.

17. Baltimore & O. S. W. R. Co. v. Reed, 158 Ind. 25. The liability for negligence resulting in personal injury depends on the law of the state where the injury occurred —El Paso & N. W. Ry. Co. v. McComas (Tex. Civ. App.) 72 S. W. 629; Louisville & N. R. Co. v. Harmon, 23 Ky. L. R. 871, 64 S. W. 640.

18. Van Buren v. State (Neb.) 91 N. W. 201.

19. The act is held larceny in Oklahoma—Barclay v. United States, 11 Okl. 503, 69 Pac. 798.

20. Patnode v. Westenhaver, 114 Wis. 460.

21. John D. Park & Sons Co. v. National Wholesale Druggists Ass'n, 175 N. Y. 1.

22. Employes may combine to quit their employment—Union Pac. R. Co. v. Ruef, 120 Fed. 102; Wabash R. Co. v. Hannahan, 121 Fed. 563. Though their grievance is the refusal to discharge nonunion employes—National Protective Ass'n v. Cumming, 170 N. Y. 315. But a resort to intimidation to secure the co-operation of other employes is unlawful—United States v. Haggerty, 116 Fed. 510; Frank v. Herold, 63 N. J. Eq. 443; Wabash R. Co. v. Hannahan, 121 Fed. 563; Beaton v. Tarrant, 102 Ill. App. 124; Jersey

Actions.—All conspirators need not be joined.[23] The declarations of conspirators in pursuance of the conspiracy are admissible against each other.[24] Holdings as to sufficiency of pleadings[25] and evidence[26] are found in the note.

§ 2. *Criminal liability. Indictable conspiracies.*—The fact that the details of the overt act alleged in indictment were not known at the time of the conspiracy is immaterial.[27] A conspiracy to depreciate the value of a corporate stock,[28] to defraud one of money, though the conspirators might have recovered it from him by action,[29] and though neither the object nor the means are criminal,[30] or to fraudulently obtain a patent to government lands,[31] is indictable. Conspiracy to defraud an individual by use of the mails is not an "offense against the United States," within U. S. Rev. St. § 5440.[32]

Defenses.[33]—The statute of limitations runs from the last overt act.[34] It is

City Printing Co. v. Cassidy, 63 N. J. Eq. 759.

An organization of the employes of a receiver with intent to call a sympathetic strike is illegal in its object—United States v. Weber, 114 Fed. 950. Boycotts are generally considered illegal—Beattie v. Callanan, 82 App. Div. (N. Y.) 7; Rourke v. Elk Drug Co., 75 App. Div. (N. Y.) 145. See, however, Marx & H. Jeans Clothing Co. v. Watson, 168 Mo. 133, in which an injunction against a boycott was said to impair the right of free speech.

BOYCOTT. (NOTE.) A boycott is a combination of many to cause loss to one person by coercing others against their will to withhold from him their beneficial business intercourse through threats, that unless those others do so, the many will cause similar loss to them. Unlawful boycotts include those that are threatening in their nature and intended and naturally calculated to overcome by fear of loss, the will of others—Beck v. Railway Teamsters' Union, 118 Mich. 497, 74 Am. St. Rep. 421. Injunction may issue against circulation of boycotting notices—Id. Cases collected in note to Marx & H. Jeans Clothing Co. v. Watson, 168 Mo. 133, 90 Am. St. Rep. 440, 451.

Picketing is not unlawful unless accompanied by violence—Union Pac. R. Co. v. Ruef, 120 Fed. 102; Foster v. Retail Clerks' Protective Ass'n, 39 Misc. (N. Y.) 48. But in case of intimidation of employes an injunction will lie—Jersey City Printing Co. v. Cassidy, 63 N. J. Eq. 759; Beaton v. Tarrant, 102 Ill. App. 124; Herzog v. Fitzgerald, 74 App. Div. (N. Y.) 110. And union officers are not relieved from liability by instructions to the pickets to refrain from violence—Union Pac. R. Co. v. Ruef, 120 Fed. 102.

23. Rourke v. Elk Drug Co., 75 App. Div. (N. Y.) 145.

24. Boyer v. Weimer, 204 Pa. 295; Cohn v. Saidel, 71 N. H. 558; Cleland v. Anderson (Neb.) 92 N. W. 306; Mosby v. McKee, Z. & W. Commission Co., 91 Mo. App. 500; Connecticut Mut. Life Ins. Co. v. Hillmon, 188 U. S. 208; Avard v. Carpenter, 72 App. Div. (N. Y.) 258; Thompson v. Rosenstein (Tex. Civ. App.) 67 S. W. 439.

25. Complaint alleging various overt acts states but one cause of action—Rourke v. Elk Drug Co., 75 App. Div. (N. Y.) 145. Complaint for conspiracy to boycott held to state cause of action—Id. Where the action is for the overt act, failure of proof of allegations of conspiracy is not fatal—Young v. Gormley (Iowa) 93 N. W. 565. And e converso it is held that in an action for deceit conspiracy may be shown though not alleged—Butler v. Duke, 39 Misc. (N. Y.) 235.

26. Evidence of conspiracy to obtain property by fraudulent promise of marriage held sufficient—Patnode v. Westenhaver, 114 Wis. 460.

27. Conspiracy to procure the casting of certain illegal votes. The names of the voters to be procured as charged in the indictment were unknown when the conspiracy was formed—Commonwealth v. Rogers, 181 Mass. 184.

28. People v. Goslin, 171 N. Y. 627.

29, 30. State v. Gannon (Conn.) 52 Atl. 727.

31. United States v. Peuschel, 116 Fed. 642.

32. United States v. Clark, 121 Fed. 190.

[NOTE.]—Indictable Conspiracies. A leading case in Maryland, exhaustively reviewed the early English cases, and concluded that an indictment would lie in the following cases:

1. For a conspiracy to do any act that is criminal per se.

2. For a conspiracy to do an act not illegal, nor punishable, if done by an individual, but immoral only.

3. For a conspiracy to do an act neither illegal nor immoral in an individual, but to effect a purpose which has a tendency to prejudice the public.

4. For a conspiracy to extort money from another, or to injure his reputation, by means not indictable if practiced by an individual.

5. For a conspiracy to cheat and defraud a third person, accomplished by means of an act which would not in law amount to an indictable cheat, if effected by an individual.

6. For a malicious conspiracy to impoverish or ruin a third person in his trade or profession.

7. For a conspiracy to defraud a third person by means of an act not per se unlawful, and though no person be injured thereby.

8. For a bare conspiracy to cheat and defraud a third person, though the means of effecting it may not be determined on at the time. State v. Buchanan, 5 Har. & J. (Md.) 317, 9 Am. Dec. 534.

33. It is no defense to an indictment for conspiracy to cast illegal votes at a primary

no defense that defendant's co-conspirator is immune from prosecution by reason of having testified.[35]

Under Ky. Cr. Code, § 262, conspiracy to commit a felony does not merge in the completed felony.[36]

Who liable.—Each conspirator is liable for the acts of all within the purview of the conspiracy.[37]

Indictments passed on are collected in the note.[38] An indictment for conspiracy to "commit a crime against the United States" need not fully describe the proposed crime.[39]

Evidence.—Conspiracy may be shown by circumstantial evidence,[40] and evidence of individual acts tending to a common purpose is sufficient.[41] Knowledge and participation by defendant must be shown.[42] Overt acts in another county may be shown.[43] Acts and declarations of a conspirator in furtherance of the common object are admissible against his co-conspirators,[44] but not acts and declarations after such object has been accomplished,[45] nor narration of past occurrences.[46] There must be preliminary proof of the fact of conspiracy,[47] though the order of proof is discretionary.[48]

that the arrangements at the polling place did not conform to law or that the warden was illegally elected—Commonwealth v. Rogers, 181 Mass. 184.

34. United States v. Greene, 115 Fed. 343.

35. Weber v. Commonwealth, 24 Ky. L. R. 1726, 72 S. W. 30.

36. Wait v. Commonwealth, 24 Ky. L. R. 604, 69 S. W. 697.

37. Handley v. State, 115 Ga. 584.

38. Indictment to procure casting of illegal votes need not state the particular disqualification of the voters, and may without duplicity allege conspiracy to procure votes illegal under several statutes—Commonwealth v. Rogers, 181 Mass. 184. Sufficiency of indictment to defraud United States by making false entries on public lands (United States v. Peuschel, 116 Fed. 642); by overcharges on public contract—United States v. Greene, 115 Fed. 343. An indictment for "contriving propagating and spreading" rumors tending to depress stocks is sufficient though the statutory term is "circulates"—People v. Goslin, 171 N. Y. 627. A count for conspiracy to commit an offense may be joined with one for aiding and abetting in the commission thereof without an averment that the offenses were the same—Commonwealth v. Rogers, 181 Mass. 184. Indictment for conspiracy to procure violation of Rev. St. § 5425, relating to issue of false certificates of naturalization—United States v. Melfi, 118 Fed. 899. An indictment may without duplicity allege the commission of the offense which was the object of the conspiracy—State v. Gannon (Conn.) 52 Atl. 727.

[NOTE].—The indictment must be clear and specific, and the English practice which sustains indictments for conspiracy in general terms is disapproved (United States v. Cruikshank, 92 U. S. 542). The overt act need not be alleged (People v. Arnold, 46 Mich. 268), nor need the means agreed on be stated if the act which is the object of the conspiracy, be unlawful (State v. Crowley, 41 Wis. 271; State v. Ripley, 31 Me. 386), and where the conspiracy is to commit a crime having a specific name, it may be described by that name in the indictment (Hazen v. Commonwealth, 23 Pa. St. 353). Where the object of the conspiracy has been accomplished, greater particularity is required in the indictment (State v. Noyes, 25 Vt. 415; Commonwealth v. Hunt, 4 Metc. 111). It has been held in a leading case that an indictment for conspiracy may be found against one conspirator separately (People v. Richards, 67 Cal. 412). Cases collected in note, 3 Am. St. Rep. 413.

39. Ching v. United States (C. C. A.) 118 Fed. 538.

40. Dixon v. State, 116 Ga. 186.

41. State v. Gannon (Conn.) 52 Atl. 727.

42. State v. Dreany, 65 Kan. 292, 69 Pac. 182. Evidence held sufficient to show participation in conspiracy to procure illegal voting—Commonwealth v. Rogers, 181 Mass. 184. To show participation in conspiracy to depress stocks by circulating false reports—People v. Goslin, 171 N. Y. 627.

43. State v. Soper, 118 Iowa, 1.

44. Crittenden v. State, 134 Ala. 145; State v. Dunn, 116 Iowa, 219; Commonwealth v. Rogers, 181 Mass. 184; Nelson v. State (Tex. Cr. App.) 67 S. W. 320; Barber v. State (Tex. Cr. App.) 69 S. W. 515.

45. State v. Soper, 118 Iowa, 1; Commonwealth v. Rogers, 181 Mass. 184; State v. Aiken, 41 Or. 294, 69 Pac. 683; Steed v. State (Tex. Cr. App.) 67 S. W. 328. Where the act though subsequent to the crime was pursuant to the conspiracy it is admissible—Powers v. Commonwealth, 24 Ky. L. R. 1007, 70 S. W. 644.

46. People v. Gonzales, 136 Cal. 666, 69 Pac. 487.

47. Young v. State (Tex. Cr. App.) 69 S. W. 153. Admissibility and sufficiency of such proof—State v. Dunn, 116 Iowa, 219; Commonwealth v. Rogers, 181 Mass. 184; Young v. State (Tex. Cr. App.) 69 S. W. 153; Freese v. State, 159 Ind. 597; Chadwell v. Commonwealth, 24 Ky. L. R. 818, 69 S. W. 1082; Powers v. Commonwealth, 24 Ky. L. R. 1007, 1186, 70 S. W. 644, 1050; State v. Prater, 52 W. Va. 132.

48. State v. Bolden, 109 La. 484; State v. Prater, 52 W. Va. 132.

CURRENT LAW.

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CONSTITUTIONAL LAW.

§ 1. Adoption and Amendment.
§ 2. Operative Force and Effect.
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§ 1. *Adoption and amendment of constitutions.*—A constitution acknowledged by the officers administering government, accepted by the people of the state, and enforced throughout the state, there being no government in existence under a former constitution denying its validity, will be regarded as the existing constitution, without regard to whether the convention had power to promulgate the same without submission to the people.[49]

It is not generally necessary that a proposed amendment should have a title, though there is no reason why a title should not be given for purposes of identification and verification.[50] The word "read" in a constitutional provision, requiring a proposed amendment to be read in full three times on three separate days in both legislative houses, is interpreted according to its received meaning by legislative bodies, and not in its popular sense.[51] In voting on a constitutional amendment, the voters exercise a legislative function and are for that purpose a part of the legislative branch in the state government.[52] The amendment and not the section as amended should be submitted to the voters.[53] Where one object is sought by an amendment, separate submission is not required by the fact that several changes are proposed to accomplish it.[54] A petition for the submission of the constitutional amendment not being required in Louisiana, the validity of an amendment when

49. Taylor v. Commonwealth (Va.) 44 S. E. 754.

50, 51. Saunders v. Board of Liquidation (La.) 34 So. 457.

52. And courts are without power to interfere with submission on the ground that the amendment will be invalid if adopted—People v. Mills, 30 Colo. 262, 70 Pac. 322.

53. Where submitted in the latter form the matter will be regarded as surplusage not affecting the result—Gabbert v. Chicago, R. I. & P. Ry. Co., 171 Mo. 84.

54. An amendment allowing rendition of a verdict by two-thirds of a jury in courts not of record and by three-fourths of a jury in courts of record, does not require separate submissions, the one purpose of the amendment being to abolish unanimity of verdicts—Gabbert v. Chicago, R. I. & P. Ry. Co., 171 Mo. 84; Hubbard v. St. Louis R. Co. (Mo.) 72 S. W. 1073.

adopted will not be made to depend upon the petition asking for its submission.[55] The ratification of a statute by a constitutional amendment does not necessarily make the statute a part of the constitution; its effect is merely to validate the act, and where the amendment as ratified and approved allows the legislature to amend in certain particulars, the statute becomes a part of the constitution with this reservation.[56]

§ 2. *Operative force and effect.*—Constitutional restrictions based on public policy are as valid as other provisions, and the legislature is without power to enact laws in opposition thereto.[57]

Constitutions operate prospectively,[58] and are generally without effect on suits pending at the time of their adoption.[59] An amendment is not operative before a canvass of the vote on its adoption.[60]

Acts in force at the time of the adoption of the constitution and not inconsistent therewith continue in force until repealed by the legislature.[61] Inconsistent provisions are impliedly repealed.[62]

Congress having complete authority over Indians, an act of congress will supersede a provision in the constitution of an Indian nation.[63]

Self-executing provisions.—A provision in the constitution giving the supreme court power to issue writs of mandamus is self-executing;[64] likewise a provision making directors and trustees of corporations joint and severally liable to creditors of stockholders for misappropriated funds.[65] A provision fixing the rate of interest on trust funds held by the state, and requiring semi-annual distribution of such interest, is not self-executing so as to authorize a state auditor to pay interest to state institutions without an appropriation.[66] A constitutional provision of self-executing character becomes a part of laws enacted thereunder, and controls wherein there is a difference, so that the statute will not be rendered invalid, but will be construed as though the constitutional language had been inserted in the act.[67]

§ 3. *Interpretation and exposition. A. When called for.*[68]—Courts will generally refuse to pass upon the constitutionality of a statute, unless absolutely necessary to a decision of the case.[69] The constitutionality of an act may not be tested

55. Brennan v. Sewerage & Water Board, 108 La. 569. A tax adopted into a constitution in accordance with a vote on a petition authorizing the tax which requested a constitutional amendment to carry out the tax scheme is subject to the conditions of the petition for the election—State v. Kohnke, 109 La. 838.

56. State v. Kohnke, 109 La. 838.

57. Hannah v. People, 198 Ill. 77.

58. Adams v. Dendy (Miss.) 33 So. 843. Where at the time of an execution of a mortgage, the constitution required record, a subsequent change in the constitution dispensing with this requirement, would not affect a mortgage previously executed—Blouin v. Ledet, 109 La. 709. A constitutional provision prescribing the method of waiving a homestead has application only to homesteads set off after the adoption of the constitution—Ex parte Jeter, 64 S. C. 405.

59. Conyers v. Commissioners of Roads, 116 Ga. 101. Amendment as to qualifications of jurors (Nov., 1902) is not retroactive—Cubine v. State (Tex. Cr. App.) 73 S. W. 396.

60. Girdner v. Bryan, 94 Mo. App. 27.

61. State v. O'Neil Lumber Co., 170 Mo. 7.

62. Chicago & E. R. Co. v. Keith, 67 Ohio St. 279, 60 L. R. A. 525.

63. Ansley v. Ainsworth (Ind. T.) 69 S. W. 884.

64. Keady v. Owers (Colo.) 69 Pac. 509.

65. Rice v. Howard (Cal.) 69 Pac. 77.

66. State v. Cole (Miss.) 32 So. 314.

67. Shively v. Lankford (Mo.) 74 S. W. 835.

68. Enactment and validity of statutes as dependent upon constitutional provisions governing their consideration and enactment by the legislature, see the topic "Statutes."

69. State v. King (Mont.) 72 Pac. 657; Joralman v. McPhee (Colo.) 71 Pac. 419; Gladwin Tp. v. Bourret Tp. (Mich.) 91 N. W. 618; State v. Hardelein, 169 Mo. 579; State v. Courtney, 27 Mont. 378, 71 Pac. 308; State v. Curler, 26 Nev. 347, 67 Pac. 1075; Hart v. Smith, 159 Ind. 182; Summerson v. Schilling, 94 Md. 582; Morse v. Omaha (Neb.) 93 N. W. 734. The constitutionality of an act creating a court will not be decided where it is not necessary to the disposition of the case, and the members of the court are not parties—Platte Land Co. v. Hubbard (Colo.) 69 Pac. 514. Under the rule that courts will refuse to consider constitutional questions unless necessary to a determination of the case, the court will not determine the constitutionality of an act allowing suits against the United States government where the only purpose of such actions is to furnish Congress with information, and such judgments are merely reported to Congress

without a showing that the party was injured by its application.[70] The particular defect must be pointed out, and objection to the statute as a whole is not sufficient.[71]

Generally, a constitutional question cannot be raised for the first time on appeal.[72] It may be determined in an application for writ of habeas corpus.[73]

A constitutional objection is not waived by the fact that the objecting party had acted under the presumption that it was valid,[74] but where he institutes proceedings under an act, he may not question its constitutionality.[75] Under a law authorizing the revocation of a liquor license on failure of licensee to file a verified answer denying violations of the law, licensee is not estopped to question the constitutionality of the act by reason of the court accepting an unverified answer from him.[76]

B. General rules of interpretation.—Words will be given their ordinary meaning unless the context makes it plain that they have been used in a technical sense.[77] Where a word or term is used in the constitution in a plain and manifest sense, it will be accorded the same interpretation when used in other parts, unless the context indicates a different meaning.[78] A proviso should be confined to the antecedent next preceding it, unless the contrary intention clearly appears.[79] The rule that where a statute is re-enacted in the same words, the interpretation placed upon it must be considered as adopted along with it, applies to the construction of the constitution.[80]

The proceedings of the convention may be consulted in determining the meaning of doubtful provisions.[81] Due effect will be given to long continued and unquestioned interpretation by the legislature, and officers whose duty it is to carry the provisions into effect.[82]

Enactments against the spirit of the constitution may be declared void, though not expressly prohibited by the instrument.[83]

to take action on as it should deem fit and are in no sense operative against the government prior to the Congressional consideration—United States v. McCrory (C. C. A.) 119 Fed. 861.

70. Turpin v. Lemon, 187 U. S. 51; Turnquist v. Cass County Drain Com'rs, 11 N. D. 514; Ely v. Rosholt, 11 N. D. 559; State v. Smiley, 65 Kan. 240, 69 Pac. 199; Donaldson v. State (Ind.) 67 N. E. 1029; Lufkin v. Lufkin, 182 Mass. 476. Where the constitution fixes the time for action, the party may not object that the statute conflicts therewith where the constitutional time had expired—Globe Lumber Co. v. Griffeth, 107 La. 621. A dram shop keeper prosecuted for selling liquor on which the tax had not been paid, may assail the constitutionality of the act imposing the tax on the manufacturer—State v. Bengsch, 170 Mo. 81. A non-resident property owner who does not appear after notice to protest cannot obtain a review of the constitutionality of the laws limiting the right to protest to resident owners—Field v. Barber Asphalt Pav. Co., 117 Fed. 925.

71. Dawson v. Waldheim, 91 Mo. App. 117.

72. Cauble v. Craig, 94 Mo. App. 675; Keller v. Home Life Ins. Co., 95 Mo. App. 627; In re Klpp. 70 App. Div. 567, 10 N. Y. Ann. Cas. 456; State v. Smith (Mo.) 75 S. W. 468. Constitutionality of an ordinance is not raised in the lower court by an objection to its introduction in evidence as null and void—Id. The fact that a contestant in an election contest did not specify his ground of demurrer to jurisdiction of contest board, that the act creating the board was not constitutional, will not prevent him from relying on that ground on appeal—Davison v. Johnson, 24 Ky. L. R. 27, 67 S. W. 996.

73. In re Jarvis (Kan.) 71 Pac. 576.

74. O'Brien v. Wheelock, 184 U. S. 450, 46 U. S. Lawy. Ed. 636.

75. Comesky v. Village of Suffern, 115 N. Y. St. Rep. 1049; Moore v. Napier, 64 S. C. 564. One who has appeared and contested, cannot question the constitutionality of an act on the ground that it fails to provide for notice—Quin v. State (Miss.) 33 So. 839.

76. In re Cullinan, 115 N. Y. St. Rep. 567.

77. Hamilton Nat. Bank v. American Loan & Trust Co. (Neb.) 92 N. W. 189; Epping v. Columbus (Ga.) 43 S. E. 803. A village is included in the term "town" under the constitutional provision giving legislature power to provide for the organization of cities and towns—Brown v. Village of Grangeville (Idaho) 71 Pac. 151. The word "business" in the Utah constitution providing that all civil and criminal business arising in such county must be tried in such county, means "actions"—White v. Rio Grande Western Ry. Co., 25 Utah, 346, 71 Pac. 593.

78. Epping v. Columbus (Ga.) 43 S. E. 803.

79. State v. Quayle (Utah) 71 Pac. 1060.

80. Globe Lumber Co. v. Clement (La.) 34 So. 595.

81, 82. Epping v. Columbus (Ga.) 43 S. E. 803.

83. Cain v. Smith (Ga.) 44 S. E. 5; Lex-

Presumptions favor the constitutionality of statutes,[84] but not where a portion of the act has been held unconstitutional and the validity of the remainder is challenged.[85] Where one of two interpretations of a statute will bring the act within the constitution, and the other will conflict therewith, the former will be adopted.[86] The conflict must be shown beyond all reasonable doubt,[87] and must be manifest.[88]

Courts will not inquire into the motives of the legislature,[89] nor the wisdom of their enactments.[90] A statute satisfying the requirements of the constitution will not be declared unconstitutional on the ground that it is opposed to public policy.[91]

An act is not rendered entirely invalid by the fact that it contains an unconstitutional provision, if what remains is complete and enforceable,[92] but though an act be valid under one provision, it may be declared void where expressly prohibited by another provision.[93] A penal act cannot be sustained as within the constitutional power, where it is broader than the constitutional provision, and the language covers acts without as well as within the constitutional limitation.[94]

§ 4. *Executive, legislative and judicial functions. Executive functions.*—A governor may act administratively as a member of a levee board without transcending his functions.[95]

Following the majority,[96] Missouri holds that the legislature may not take from the executive the appointment of administrative officers;[97] Maryland holds that this is also a nonjudicial function;[98] New Jersey, on the contrary, holds that their appointment is not solely for the executive, but may, under legislative sanction, be exercised by a court, since the appointive power is not strictly referable to either

ington v. Thompson, 24 Ky. L. R. 384, 68 S. W. 477, 57 L. R. A. 775; State v. Kohnke, 109 La. 838.

84. Ross v. Board of Chosen Free Holders (N. J. Law) 55 Atl. 310; Commonwealth v. Mintz, 19 Pa. Super. Ct. 283.

85. Western Union Tel. Co. v. Austin (Kan.) 72 Pac. 850.

86. Grinage v. Times Democrat Pub. Co., 107 La. 121; Cass County v. Sarpy County (Neb.) 92 N. W. 635; Sugden v. Partridge, 174 N. Y. 87; State v. Lewis (Utah) 72 Pac. 388; People v. Rose (Ill.) 67 N. E. 746. The constitutionality of a statute will be sustained if possible, and in cases of doubtful terms or meaning that construction will be applied which upholds the act if it can be done without doing violence to the manifest legislative purpose—Commonwealth v. Barney, 24 Ky. L. R. 2352, 74 S. W. 181; Beasley v. Ridout, 94 Md. 641. Where there is doubt as to whether the constitution confers power on municipality to regulate street railway charges, that doubt will be resolved in favor of the power—Chicago Union Traction Co. v. Chicago, 199 Ill. 484, 59 L. R. A. 631.

87. Bon Homme County v. Berndt, 15 S. D. 494; State v. Sonier, 107 La. 794.

88. Rosenbloom v. State (Neb.) 89 N. W. 1053, 57 L. R. A. 922; People v. Warden of Sing Sing Prison, 39 Misc. (N. Y.) 113; Grinage v. Times Democrat Pub. Co., 107 La. 121.

89. Dobbins v. Los Angeles (Cal.) 72 Pac. 970. Whether duress and coercion caused the adoption of a congressional law by Indian tribes will not be considered—Ansley v. Ainsworth (Ind. T.) 69 S. W. 884.

90. State v. Lewis (Utah) 72 Pac. 388; Point Roberts Fishing Co. v. George & Barker Co., 28 Wash. 200, 68 Pac. 438.

91. Julien v. Model Bldg., Loan & Inv. Co. (Wis.) 92 N. W. 561.

92. Northwestern Mut. Life Ins. Co. v. Lewis & C. County (Mont.) 72 Pac. 982; White v. Gove (Mass.) 67 N. E. 359; In re Philadelphia, M. & S. St. Ry. Co., 203 Pa. 354; Logan County v. Carnahan (Neb.) 95 N. W. 812. If the valid and invalid parts of a statute are severable and it is apparent that the latter was not an inducement to the adoption of the former, the law will be enforced to the extent that it is in harmony with the constitution—Union Pac. R. Co. v. Sprague (Neb.) 95 N. W. 46.

93. State v. Froehlich, 115 Wis. 32.

94. Karem v. United States (C. C. A.) 121 Fed. 250.

95. Dehon v. Lafourche Basin Levee Board (La.) 34 So. 770.

96. 6 Am. & Eng. Enc. Law, 1010.

97. There is a legislative encroachment on the executive by the creation of a bipartisan board of election commissioners to be chosen from persons named by political committees. The power of the legislature as to the appointment of officers "not otherwise" provided for is confined to the "manner" of making such appointments. The fact that the committees "name" and the executive "appoints" is unsubstantial because the executive has no choice—State v. Washburn, 167 Mo. 680, reviewing many cases.

98. Appointment of jail visitors and custodians—Beasley v. Ridout, 94 Md. 641.

department.[99] The courts may by mandamus compel action, but cannot direct it,[1] and may hear appeals from the actions of official boards.[2]

The pardoning power of the governor is not invaded by a provision in a game law giving the informer one-half the fines imposed, as this power does not extend to the remission of vested interests of private persons in fines and penalties,[3] nor by a law allowing the imposition of an indeterminate sentence on one convicted of a crime for the first time,[4] nor by an act allowing the resubmission of the question of the sale of intoxicating liquors, as the second submission, though in favor of the sale, will not absolve from offenses previously committed.[5]

Legislative functions.—A legislature is without power to limit the powers of a subsequent legislature in matters strictly governmental,[6] and cannot give a municipality the power to vacate, suspend or repeal a general law of the state.[7] A legislature having power to delegate to local authorities the control of public rights in streets may at any time resume such authority.[8] The legislature alone has power to suspend the laws.[9]

Legislative power is delegated by an act giving the people of the state the power to declare in favor of a salary law, and making the same void if rejected by the voters,[10] by an act allowing the county courts of certain counties to appropriate such amounts as they shall deem just and equitable within a certain sum as judges' salaries,[11] and by an act requiring a license from steam engineers and making the examiner the sole judge of the competency of the applicant.[12]

There is no delegation of legislative power within the constitution by laws authorizing the subdivision of cities and townships by committees,[13] or permitting appointments without concurrence of the senate,[14] or by the creation of a park board with a power of initiative over a city council,[15] or by the creation of a board of fish commissioners, with power to appoint a fish warden,[16] or by acts allowing munici-

99. Ross v. Board of Chosen Free Holders (N. J. Law) 55 Atl. 310, upholding act giving power to name park commissioners and overruling Schwarz v. Dover, 68 N. J. Law, 576, which denied validity of Laws N. J. 1901, c. 107, p. 239 authorizing the court to appoint excise officers.

1. State v. Savage (Neb.) 90 N. W. 898. Executive discretion in acting can not be so controlled. See Mandamus.

2. Though in determining the illegality of a refusal by the commissioners of the license or their abuse of discretion, the court must decide question of suitability and in a limited sense have a trial de novo, yet it is not required to decide whether it would have rejected the license itself and in that sense exercise administrative powers—Appeal of Moynihan, 75 Conn. 358.

3. Hurd's Rev. St. 1899, p. 925—Meul v. People, 198 Ill. 258.

4. Penal Code, § 687A—People v. Warden of Sing Sing Prison, 39 Misc. (N. Y.) 113. Indeterminate sentence law is valid though clemency is in a sense to be exercised by the court—Dreyer v. Illinois, 187 U. S. 71.

Reduction of sentence at a subsequent term of court infringes on the pardoning power—State v. Dalton (Tenn.) 72 S. W. 456.

5. Lloyd v. Dollisin, 23 Ohio Circ. R. 571.

6. Laws N. Y. 1897, c. 378, §§ 351-357, creating a police pension fund, could not prevent a subsequent legislature from abolishing the office of one about to become a pensioner—People v. Coler, 173 N. Y. 103.

7. Arroyo v. State (Tex. Cr. App.) 69 S. W. 503.

8. New England Telephone & Telegraph Co. v. Boston Terminal Co., 182 Mass. 397.

9. This principle is not violated by the act allowing resubmission of the question of local option in cities after two years from the former determination—Lloyd v. Dollisin, 23 Ohio Circ. R. 571. An act allowing removal of a county seat and appointing commissioners therefor with power to solicit subscriptions and ascertain the amount likely to be realized from old county buildings, providing the act should not take effect until such commissioners had ascertained that the removal would not require increase of tax rate, does not violate constitutional provision limiting power of suspending laws to the general assembly—Hand v. Stapleton, 135 Ala. 156.

10. State v. Garver, 66 Ohio St. 555.

11. The judges are state, not county officers and their salaries shall be "ascertained by law"—Colbert v. Bond (Tenn.) 75 S. W. 1061.

12. The legislature should fix a standard of proficiency—Harmon v. State, 66 Ohio St. 249.

13. Kennedy v. Mayor of Pawtucket, 24 R. I. 461; Allison v. Corker, 67 N. J. Law, 596.

14. Sess. Laws 1899, p. 345 (The Medical Law)—In re Inman (Idaho) 69 Pac. 121.

15. Kansas City v. Mastin, 169 Mo. 80.

16. Sess. Laws 1901, p. 328—Reed v. Dunbar, 41 Or. 509, 69 Pac. 451.

pal corporations to amend their charters,[17] or by an act authorizing voters of street lighting districts to appropriate funds raised by taxation and expended within the district.[18] The state may delegate to a municipal corporation its powers to regulate the rates of local common carriers.[19]

There is not an unwarranted delegation of legislative power by laws giving departmental officers the power to make rules and regulations.[20] But the violation of such rules cannot be declared a crime,[21] subject to the proviso that a subdivision of government or a branch of such subdivision may be authorized to legislate upon matters of local concern.[22]

There is not a delegation of congressional legislative power by a recognition in the bankruptcy act of local laws giving exemptions, dower, etc.,[23] nor by an act ratifying an agreement with an Indian tribe.[24]

There is not an invasion of legislative power by a court's authorizing a statutory action against the railroad commission to determine the reasonableness of rates made by the commission,[25] nor by an act authorizing a township to pass an ordinance directing application to a court to compel railroad companies to erect gates at crossings.[26] Modes of procedure are for legislative regulation.[27] Courts cannot be given the initiative in the acquisition or construction of permanent accommodations for themselves.[28] It is proper for the judiciary to be authorized to call a court into session when the judge who shall sit is otherwise designated.[29]

Matters within the legislative discretion are not the subject of judicial review, unless there has been an abuse of power.[30] The passage and approval of ordinances may not be controlled by injunction.[31]

Judicial functions.—The protection of existing tribunals and of their jurisdictions and procedure is the subject of later portions of this article.[32] Courts are given the power to determine all judicial questions whenever or however they may arise.[33]

17. Yazoo City v. Lightcap (Miss.) 33 So. 949.

18. Allison v. Corker, 67 N. J. Law, 596.

19. Chicago Union Traction Co. v. Chicago, 199 Ill. 484, 59 L. R. A. 631.

20. Act of Congress approved, June 4th, 1897 (30 Stat. 35)—United States v. Dastervignes, 118 Fed. 199.

21. Federal act making it an offense to violate rules made by a cabinet officer delegates legislative powers to an administrative officer—United States v. Blasingame, 116 Fed. 654; Dastervignes v. United States (C. C. A.) 122 Fed. 30; Dent v. United States (Ariz.) 71 Pac. 920.

22. Act making violation of rules and regulations of a board of park commissioners, breaches of the peace, does not amount to a delegation of legislative power—Brodbine v. Inhabitants of Revere, 182 Mass. 598.

23. Hanover Nat. Bank v. Moyses, 186 U. S. 181, 46 U. S. Lawy. Ed. 1113.

24. Ansley v. Ainsworth (Ind. T.) 69 S. W. 884.

25. Railroad Commission v. Weld & Neville (Tex.) 73 S. W. 529.

26. Palmyra Tp. v. Pennsylvania R. Co., 63 N. J. Eq. 799.

27. In re Probate Blanks, 71 N. H. 621.

28. Moreau v. Board of Chosen Freeholders, 68 N. J. Law, 480.

29. Commonwealth Roofing Co. v. Palmer Leather Co., 67 N. J. Law, 566.

30. May not review the discretion of the legislature in redistricting a state—People v. Rose (Ill.) 67 N. E. 746; People v. Carlock, 198 Ill. 150. Nor whether property is benefited by the construction of a sewer—Prior v. Buehler & C. Const. Co., 170 Mo. 439. Nor the reasonableness of a license tax—Woodall v. City of Lynchburg, 4 Va. Sup. Ct. R. 166, 40 S. E. 915.

31. Wright v. People (Colo.) 73 Pac. 869.

32. Establishment and abolition of constitutional courts or of their jurisdiction is subject to restriction by various provisions not dependent on the distribution of powers. See post, § 22; "Organization and Frame of Government; Officers." See also sections treating of "Jury Trials" and the like.

33. State v. Savage (Neb.) 90 N. W. 898. The question whether an act violates a constitutional provision prohibiting special legislation, is for the judiciary—State v. Hammond (S. C.) 44 S. E. 797; Rambo v. Larrabee (Kan.) 73 Pac. 915.

The provision against the passage of a special act where a general law can be made applicable, is addressed to the legislature alone; it is a legislative question whether a general law can meet the occasion—Sanitary Dist. of Chicago v. Ray, 199 Ill. 63.

In passing on the constitutionality of a statute, courts must bear in mind that except in the particular wherein it is restrained by the constitution of the United States, the legislative department may exercise all legislative power which is not forbidden expressly or by implication by provision of the statute of the state, and if there be doubt as to the validity of the law, it is due to the co-ordinate branch of the government that its action should be upheld and

The legislature cannot declare the meaning and intent of the pre-existing law,[34] but in legislating may define its own meaning.[35]

The legislature is without power to abridge the court's power to punish for contempt.[36] An act making specifications of weights in bills of lading conclusive evidence of the fact deprives courts of the power to determine the weight and sufficiency of evidence.[37] An attempt by the legislature to exercise control over court records and extend the time for filing bills of exceptions in cases pending on appeal in appellate courts violates the rule requiring separation of the three departments of the government.[38]

Judicial functions are not conferred on nonjudicial officers by the provision of the anti-trust law, imposing a penalty on a corporation for failure to answer under oath inquiries from a secretary of state as to violation of provisions of the act,[39] nor by a law giving a state board of irrigation power to determine the priority in amount of past appropriations and allowing further appropriations, when there is unappropriated water in the stream,[40] nor by an act allowing the board of managers of a reformatory to transfer convicts to the penitentiary, where the convicts are shown to be more than twenty-one years of age.[41] Congress may invest officers with power to determine fact of citizenship as means of excluding aliens, such being an inquiry of a political rather than a judicial fact.[42] There is an invasion of judicial power by an act creating a board of auditors with the power to determine the validity of claims against a county which has been divided, and to apportion the amount on the property of the taxpayers of two counties.[43]

Nonjudicial functions are not imposed on a court under a highway law allowing the supreme court, on the presentation of a petition, to determine the necessity and line of construction of a road between different points and direct a notice of a hearing before commissioners,[44] nor by an act making it the duty of a court to count names on a petition for submission of the question of sale of intoxicating liquors, and determining whether the names are the names of persons voting at a preceding election.[45] An act giving control of a jail to a board of visitors appointed by judges of the circuit court confers the nonjudicial power of appointment on the judges.[46] Local legislative bodies and not the judiciary must determine the necessity for, and initiate the action of, the public, in providing permanent accommodations for the courts.[47]

Courts are without power to regulate the procedure.[48] For a court to request pursuant to statute the holding of a constitutional court is not a judicial appointment of a judge of that court, when viewed in the light of a statute which designates which judge shall sit.[49] The constitution of New Jersey does not prevent legis-

accepted by judicial powers—Brown v. Galveston (Tex.) 75 S. W. 488.

34. Kern v. Supreme Council, A. L. of H., 167 Mo. 471.

35. The provision in a franchise tax act that the act shall not be considered to apply to any corporation which has not or may not exercise a municipal franchise, is not an invasion of judicial functions by the legislature, but limits the scope of the act itself —State Board of Assessors v. Plainfield Water Supply Co., 67 N. J. Law, 357.

36. State v. Shepherd (Mo.) 76 S. W. 79.

37. Missouri, K. & T. Ry. Co. v. Simonson, 64 Kan. 802, 68 Pac. 653, 57 L. R. A. 765.

38. Johnson v. Gebhauer, 159 Ind. 271.

39. Hurd's Rev. St. 1899, pp. 616, 617—People v. Butler St. Foundry & Iron Co., 201 Ill. 236.

40. Laws 1895, c. 69—Crawford Co. v. Hathaway (Neb.) 93 N. W. 781.

41. People v. Mallary, 195 Ill. 582.

42. United States v. Lee Huen, 118 Fed. 442.

43. Fitch v. Board of Auditors of Claims (Mich.) 94 N. W. 952.

44. Laws 1892, c. 493—Citizens' Sav. Bank v. Town of Greenburgh, 173 N. Y. 215.

45. Board of Sup'rs of Election v. Todd (Md.) 54 Atl. 963.

46. Beasley v. Ridout, 94 Md. 641.

47. Moreau v. Board of Chosen Freeholders, 68 N. J. Law, 480.

48. The supreme court of New Hampshire is without power to approve or disapprove forms and rules of practice and procedure in probate courts (Laws 1901, c. 45)—In re Probate Blanks, 71 N. H. 621.

49. New Jersey Act 1900 provides that a judge of the Court of Common Pleas on request of the Justices of the Supreme Court shall hold the Circuit Court, Act of 1901 pro-

lation affecting powers lodged in several justices of the supreme court, as distinguished from the court itself, and the legislature may abolish such powers without invading jurisdiction of the supreme court.[50]

§ 5. *Relative powers of federal and state or other subordinate governments.*—Under the provisions conferring exclusive powers over certain subjects, the questions which arise are such as require a construction of the act averred to be obnoxious. For this reason titles like "Bankruptcy" and "Commerce" should be consulted. The state may not invest a state corporation with power to restrain interstate commerce.[51] In a preceding article, "Commerce," is treated the question what are regulations of commerce and what commerce is interstate or foreign as distinguished from domestic. The federal inhibition against the passage of laws impairing the obligation of contracts is a limitation on the powers of states and not of congress.[52] A patent is the property right granted by the constitution and laws of the United States, and a state may not enact laws that notes in the ordinary form shall not be given or accepted for an assignment thereof,[53] but it may adopt police regulations respecting such articles.[54] A state is without power to tax the compensation allowed federal officers.[55]

Where there is a conflict between the national bankruptcy and the state insolvency laws, the state laws must yield.[56] A federal bankruptcy act excepting a corporation seeking benefit of the act as voluntary bankrupt does not suspend state insolvency laws in that respect.[57] The constitutional provision giving congress the power to establish uniform bankruptcy laws does not affect proceedings commenced under state insolvency laws enacted before the passage of the national act.[58] Tribal constitutions of Indian nations yield to acts of congress.[59]

§ 6. *Police power in general.*—This section is designed to treat of the general doctrine of police power. Police regulations considered as offending some one or more of the constitutional guaranties will be considered in succeeding sections.

The legislature may not, under its police powers, arbitrarily invade private property or personal rights.[60] The power may be delegated to municipalities.[61] There can be no estoppel of the public from making and enforcing proper police regulations.[62] The fact that an article is protected by the federal patent laws does not prevent its coming within the operation of the police powers of the state.[63] The state may not, within its police power, confine the use of artesian wells by its owner to the amount reasonably necessary for his own use,[64] nor prevent a riparian owner from bathing in the waters of a lake because a city draws its

viding that the law judge of the court of Common Pleas should ipso facto be appointed to hold the Circuit Court. Held, that the judge of the court of common pleas derives his authority to hold the Circuit Court, from his appointment as judge of the Court of Common Pleas, and not from request of the Justices of the Supreme Court—Commonwealth Roofing Co. v. Palmer Leather Co., 67 N. J. Law, 566.

50. State v. Taylor, 68 N. J. Law, 276.

51. United States v. Northern Securities Co., 120 Fed. 721.

52. Ansley v. Ainsworth (Ind. T.) 69 S. W. 884.

53. Pegram v. American Alkali Co., 122 Fed. 1000.

54. Arbuckle v. Blackburn (C. C. A.) 113 Fed. 616.

55. Purnell v. Page (N. C.) 45 S. E. 534.

56. Rosenfeld v. Siegfried, 91 Mo. App. 169.

57. Keystone Driller Co. v. San Francisco Superior Ct., 138 Cal. 738, 72 Pac. 398.

58. Old Town Bank v. McCormick, 96 Md. 341; Hood v. Blair State Bank (Neb.) 91 N. W. 701, 706; Osborn v. Fender (Minn.) 92 N. W. 1114.

59. Ansley v. Ainsworth (Ind. T.) 69 S. W. 884.

60. Iler v. Ross (Neb.) 90 N. W. 869, 57 L. R. A. 895.

61. City of Danville v. Hatcher (Va.) 44 S. E. 723; Ward v. County Ct., 51 W. Va. 102.

62. Dobbins v. Los Angeles (Cal.) 72 Pac. 970.

63. Arbuckle v. Blackburn (C. C. A.) 113 Fed. 616.

64. Laws 1901, p. 502, c. 354, provides that where there are two or more artesian wells in a neighborhood, one or more of which are operated, the owner of such well shall use due care to prevent waste, and see that the well discharges no more than is reasonably necessary for his own use—Huber v. Merkel (Wis.) 94 N. W. 354.

water supply from a lower point on the lake,[65] nor compel free transportation of policemen on street cars,[66] nor limit the hours of labor on public works unless against the public welfare or public policy.[67] The state may, within its police powers, allow the erection of a fence by a landowner along a railroad, where the company refuses to build the fence, and authorize the recovery of an attorney's fees in an action for reimbursement.[68] Other instances of valid exercise of police powers are grouped in the notes.[69]

§ 7. *Liberty of contract and right of property.*—Legislation is not invalid because it may result in deprivation of property, or liberty of contract if public welfare is sought.[70] Liberty of contract is also a property right,[71] which is not offended by laws against dealing in options and futures.[72] Laws against combination to raise the price of articles of commerce and fix prices are valid,[73] but it is unreasonable to require persons contracting for erection of buildings to secure their contracts by bonds, which shall inure to the benefit of persons furnishing materials.[74]

Laws limiting the hours of employment have been sustained,[75] though the Ohio courts decide that such are invalid as applied to public works, unless it appears that longer hours are unlawful or impolitic.[76] A law compelling weekly payments of wages by corporations violates the right of private contract,[77] but agreements relieving employer from the payment of wages each week may be forbidden, as well as assignments of wages[78] or payment of seamen in advance.[79] The

65. People v. Hulburt (Mich.) 91 N. W. 211.

66. Laws 1895, c. 417—Wilson v. United Traction Co., 72 App. Div. (N. Y.) 233.

67. Cleveland v. Clements Bros. Const. Co., 67 Ohio St. 197, 59 L. R. A. 775.

68. Terre Haute & L. Ry. Co. v. Salmon (Ind.) 67 N. E. 918.

69. Hours of employment of females (Act March 31, 1899)—Wenham v. State (Neb.) 91 N. W. 421. Sunday laws—State v. Nichols, 28 Wash. 628, 69 Pac. 372. Forbidding sale of oleomargarine and imitation butter—People v. Rotter (Mich.) 91 N. W. 167. License acts for physicians excepting nonresidents, opticians—Parks v. State, 159 Ind. 211. Licensing of barbers (Laws 1901, p. 349, c. 172)—State v. Sharpless (Wash.) 71 Pac. 737. Police powers of cities, see Municipal Corporations. Compulsory vaccination (Rev. Laws, c. 75, § 137)—Commonwealth v. Pear (Mass.) 66 N. E. 719. License of dentists—State v. Chapman (N. J. Law) 55 Atl. 94. Law making specification of weights in bills of lading conclusive on railroad companies (Kan. Laws 1893, c. 100)—Missouri, K. & T. Ry. Co. v. Simonson, 64 Kan. 802, 68 Pac. 653, 57 L. R. A. 765. It is proper to compel abutters to make sewer connections when a sewer is laid—Van Wagoner v. City of Paterson, 67 N. J. Law, 455.

70. A law is reasonable which requires gas flow from a well to be controlled within two days—Given v. State (Ind.) 66 N. E. 750. Restrictions on the hours of stated kinds of labor if for the public good do not invade liberty of occupation—People v. Lochner, 73 App. Div. (N. Y.) 120; State v. Buchanan, 29 Wash. 602, 70 Pac. 52, 59 L. R. A. 342. Laws against the use of trading stamps are not reasonable—People v. Dycker, 72 App. Div. (N. Y.) 308.

The subjects of this section are also protected against deprivation without due process of law, which see, post.

Property: Alimony decree—Gundry v. Gundry, 11 Okl. 423, 68 Pac. 509; Livingston v. Livingston, 173 N. Y. 377. Liquor license—In re Cullinan, 115 N. Y. St. Rep. 567.

Not property: Labor—Mathews v. People, 202 Ill. 389; Street v. Varney Elect. Co. (Ind.) 66 N. E. 895. Existing proportion between classes of stock issues and bond issues may be changed by majority under enabling acts of incorporation—Dickinson v. Consolidated Traction Co., 114 Fed. 232; Venner Co. v. United States Steel Corp., 116 Fed. 1012. Expectancy of a pension—People v. Coler, 71 App. Div. (N. Y.) 584. Levy which attached no lien—McFaddin v. Evans-Snyder-Buel Co., 185 U. S. 505, 46 Law. Ed. 1012. Objections to land entry—Emblen v. Lincoln Land Co., 184 U. S. 660, 46 Law. Ed. 736. Immature franchise—Underground R. of N. Y. v. City of New York, 116 Fed. 952. Gambling devices—Garland Novelty Co. v. State (Ark.) 71 S. W. 257.

71. Mathews v. People, 202 Ill. 389.

72. Booth v. Illinois, 184 U. S. 425, 46 U. S. Lawy. Ed. 623. Though legitimate contracts may be affected—Otis v. Parker, 187 U. S. 606.

73. State v. Smiley, 65 Kan. 240, 69 Pac. 199.

74. San Francisco Lumber Co. v. Bibb (Cal.) 72 Pac. 964. Cal. Code Civ. Proc. § 1203—Shaughnessy v. American Surety Co., 138 Cal. 543, 69 Pac. 250, 71 Pac. 701.

75. In re Ten Hour Law for St. Ry. Corp. (R. I.) 54 Atl. 602. Pen. Code, § 384h—People v. Orange County Road Const. Co., 73 App. Div. (N. Y.) 580.

76. Act April 16, 1900—Cleveland v. Clements Bros. Const. Co., 67 Ohio St. 197, 59 L. R. A. 775.

77. Ind. Laws 1899, p. 193, c. 124—Republic Iron & Steel Co. v. State (Ind.) 66 N. E. 1005.

78. Acts 1899, p. 193, § 4—International

right to discharge an employe for membership in a labor union[80] and to employ laborers to take the place of strikers is protected.[81]

The liberty of contract is limited by the commerce clause in the federal constitution, and congress may prohibit private contracts in restraint of interstate commerce.[82]

Right of property is not infringed by a requirement that persons offering real property for sale shall have written authority,[83] nor by laws allowing the prosecution of one in possession of premises on which liquor is sold in violation of the law, though it allows such person to be punished each time liquor is sold, without regard to whether he makes the sale,[84] nor by laws making it an offense to buy or sell certain species of game,[85] nor by laws making spite fences a nuisance,[86] nor by laws allowing the public destruction of liquors illegally offered for sale.[87]

Private property may not be taken for private purposes.[88]

§ 8. *Freedom of speech and the press.*—Speeches and writings in aid of a boycott of a business may not be enjoined,[89] nor may a judge in a murder trial prohibit the publication of the evidence, where there is no question of obscenity in testimony,[90] but publications of articles scandalizing courts have no protection,[91] nor articles inciting to revolution and murder and suggesting the murder of certain persons.[92]

§ 9. *Personal and religious liberty.*—Public school pupils cannot be required to attend religious services or join in them,[93] but may be compelled to attend school.[94] Applications of the guaranty of personal liberty are shown below.[95]

"Imprisonment for debt" does not include imprisonment to enforce payment of a license tax, or a fine,[96] or alimony, as a money decree for alimony, is not a debt;[97] nor is it such imprisonment when made in punishment of the offense of selling property on which a lien exists without consent of lienee.[98]

Text-Book Co. v. Weissinger (Ind.) 65 N. E. 521.

79. Patterson v. Bark Eudora, 190 U. S. 169.

80. State v. Kreutzberg, 114 Wis. 530.

81. Mathews v. People, 202 Ill. 389.

82. United States v. Northern Securities Co., 120 Fed. 721.

83. In certain cities only—Whiteley v. Terry, 83 App. Div. (N. Y.) 197.

84. City of Campbellsville v. Odewalt, 24 Ky. L. R. 1717, 72 S. W. 314.

85. Pen. Code, § 626k—Ex parte Kenneke, 136 Cal. 527, 69 Pac. 261.

86. Horan v. Byrnes (N. H.) 54 Atl. 945.

87. Gen. St. Kan. 1901, § 2493—State v. McManus, 65 Kan. 720, 70 Pac. 700.

88. An act requiring the railroad company to keep its right of way clear of inflammable material and imposing a penalty for violation of the act, does not amount to a taking of private property for private use—McFarland v. Mississippi River & B. T. Ry. Co. (Mo.) 75 S. W. 152. An act authorizing the condemnation of land for "so-called" private roads, does not authorize the taking of private property for private use, as a private road is open to the public—Madera County v. Raymond Granite Co. (Cal.) 72 Pac. 915. An act for the establishment of drainage districts and the election by the residents of the districts of a board to manage the business, does not create a private corporation for the improvement of private property and force individuals to become members of the corporation against their will against the constitutional inhibition (Rev. St. 1899, § 8251)—Mound City Land & Stock Co. v. Miller, 170 Mo. 240, 60 L. R. A. 190.

89. Marx & H. Jeans Clothing Co. v. Watson, 168 Mo. 133, 56 L. R. A. 951.

90. Ex parte Foster (Tex. Cr. App.) 71 S. W. 593.

91. State v. Shepherd (Mo.) 76 S. W. 79.

92. People v. Most, 171 N. Y. 423.

93. The point where courts may interfere with the use of the bible in public schools, is where the use amounts to an abuse and the teacher employed to give secular instruction inculcates sectarian views—State v. Scheve (Neb.) 93 N. W. 169, 59 L. R. A. 927.

94. Laws requiring compulsory attendance of children at school are not unconstitutional as authorizing an interference with parental dominion or personal liberty—State v. Jackson, 71 N. H. 552.

95. Law against loitering in bar rooms is valid—In re Stegenga (Mich.) 94 N. W. 385. To require license from transcient merchants is valid—Levy v. State (Ind.) 68 N. E. 172.

Missouri bill of rights does not allow an injunction to restrain boycotting unless the privilege is abused, as this would amount to a deprivation of personal liberty—Marx & H. J. Clothing Co. v. Watson, 168 Mo. 133, 56 L. R. A. 951.

96. Rosenbloom v. State (Neb.) 89 N. W. 1053, 57 L. R. A. 922; Sothman v. State (Neb.) 92 N. W. 303.

97. State v. Cook, 66 Ohio St. 566.

98. Cr. Code, § 277—State v. Barden, 64 S. C. 206.

Right to choose employment.—Laws requiring registration and examination as a condition to following a profession are not unconstitutional, as operating to prevent persons from following these occupations.[99] An ordinance requiring public printing to bear a union label deprives those not using the label of the right to pursue their vocations as far as public printing is concerned.[1] There is not an unconstitutional restraint to personal liberty in an act prohibiting the operation of a barber shop on Sunday.[2] An act making it unlawful to exhibit games of chance in rooms made difficult of access to the police is not invalid as unreasonable or oppressive interference with ordinary personal rights.[3] Business of operating street railways is not an ordinary avocation, within the constitutional provision securing individuals the right to choose their occupation and to pursue any ordinary calling or trade so as to prevent legislative regulation.[4]

§ 10. *Equal protection of laws.*—The discrimination contemplated by the clause guaranteeing equal protection of the law is a discrimination between persons coming within the same class,[5] and must be in some measure unjust and oppressive.[6] An act allowing the city to contract for the construction of an underground street railroad does not deprive companies desiring to construct a road on the same line of the equal protection of the laws.[7]

Discrimination against races is not wrought by separating them in schools.[8] A negro on trial for crime is denied equal protection if his own race is excluded from the jury because of race.[9]

There is not a violation of the clause guaranteeing equal protection of the laws by an act exempting a portion of a county from the operation of the general stock law,[10] nor by a law requiring the licensing and regulation of barbers, and exempting from its provisions barbers in cities of a specified class, as the barbers in the different towns and cities are treated alike.[11] The proclamation of the governor of a state against the importation of cattle for dairy and breeding purposes from a certain district, but allowing the importation of cattle for slaughter from the same district creates an illegal discrimination within the constitutional provision.[12] An act giving commissioners under the general stock law the power to exclude all undesirable persons from the exempt territory gives such commissioners arbitrary powers and is unconstitutional.[13]

99. State v. Wilcox, 64 Kan. 789, 68 Pac. 634.

1. Marshall & Bruce Co. v. Nashville (Tenn.) 71 S. W. 815.

2. State v. Sopher, 25 Utah, 318, 71 Pac. 482, 60 L. R. A. 468.

3. In re Ah Cheung, 136 Cal. 678, 69 Pac. 492.

4. Goddard v. Chicago & N. W. Ry. Co., 202 Ill. 362.

5. City of Carthage v. Carlton, 99 Ill. App. 338. Violated by laws treating some persons within the state differently from others in respect to the enjoyment of public waters—Rossmiller v. State, 114 Wis. 169.

6. Does not apply to requirement that one consumer pay for his gas by meter rate while others pay by the flat rate—Indiana Natural & Illuminating Gas Co. v. State, 158 Ind. 516, 57 L. R. A. 761. The allowance of exemptions according to state laws, in force at the time of filing of petition in bankruptcy, does not render the national bankruptcy act open to the objection that it is ithout uniform application throughout the United States—Hanover Nat. Bank v. Moyses, 186 U. S. 181, 46 U. S. Lawy. Ed. 1113.

7. Underground R. of New York v. New York, 116 Fed. 952.

8. Reynolds v. Board of Education (Kan.) 72 Pac. 274. Mongolians (Pol. Code, Cal. § 1662)—Wong Him v. Callahan, 119 Fed. 381. Apportionment of school funds—Hooker v. Town of Greenville, 130 N. C. 472.

9. There is not sufficient evidence to show a discrimination against the colored race in formation of a jury for the trial of a member of the race, where it is shown that only a small percentage of the negroes in the county could read or write, and there were but few negroes in the county and the jury commissioners stated that they were instructed not to discriminate, and that they did not in fact discriminate against the race —Hubbard v. State (Tex. Cr. App.) 67 S. W. 413.

10. Goodale v. Sowell, 62 S. C. 516.

11. State v. Sharpless (Wash.) 71 Pac. 737.

12. Pierce v. Dillingham, 203 Ill. 148.

13. Goodale v. Sowell, 62 S. C. 516.

Laws prohibiting the sale of liquors are not open to the objection that they violate the constitutional guaranty of equal protection of the laws.[14] A local option law allowing the use of liquors on prescription, and limiting the right to write prescriptions only to physicians who follow the profession of medicine as their principal and usual calling, denies the equal protection of the laws to a physician engaged in the practice but whose principal business is that of a postmaster.[15] A charter provision against saloons keeping wine-rooms into which women are permitted to enter and be supplied with liquor is not a discrimination against women on account of sex.[16]

Inspection fees and licenses.—An act exacting an inspection fee from manufacturers of beer for sale in the state, which brewers for export need not pay, denies a brewer for domestic use the equal protection of the laws.[17]

Laws requiring a license as a condition to the transaction of business are not generally objectionable as denying equal protection,[18] unless they discriminate, as where a law requiring peddler's licenses exempts business men of the town,[19] and honorably discharged soldiers of the civil war,[20] or deny right thereto to nonresidents.[21] An act exempting from examination steam engineers who have operated engines for three years or held a license under a city ordinance violates the equality clause, in that it confers a license on engineers without reference to their competency.[22]

Taxation.—The constitutional guaranty of equal protection of the laws does not require the levy of taxes by a uniform method upon every class of property, but leaves to the legislative discretion the manner with respect to each class.[23] The clause is not violated by the inheritance tax laws of New York and Illinois.[24] There is a denial by the Wisconsin inheritance tax law, exempting inheritances of less than $10,000 in value, and taxing those exceeding that amount without regard to the size of the bequests.[25] There is not a denial of the equal protection of the laws by an act taxing railroad stock and exempting the stock in domestic railroads and others that list substantially all their property for taxation.[26]

14. An act allowing an election on the question of prohibition in a lesser area in the county, after a defeat of the proposition by the county as a whole and prohibiting an election in such lesser area, where prohibition has been carried by the county as a whole previous to a defeat of the question by the entire county—Rippy v. State (Tex. Cr. App.) 68 S. W. 687. Sales to students—Peacock v. Limburger (Tex. Civ. App.) 67 S. W. 518. Laws forbidding sales within a certain distance of an institution of learning and excepting from its operation manufacturers selling wholesale packages or quantities—Webster v. State (Tenn.) 75 S. W. 1020.

15. Busch v. Webb, 122 Fed. 655. A legislature is not given power to prohibit the giving of prescription for intoxicants in local option territory by a constitutional provision requiring the legislature to enact local option laws—Stephens v. State (Tex. Cr. App.) 73 S. W. 1056.

16. Denver City Charter, § 20, subd. 12—Adams v. Cronin, 29 Colo. 488, 69 Pac. 590.

17. Rev. St. 1899, c. 117, art. 4, §§ 7691, 7696—State v. Eby, 170 Mo. 497.

18. Transient merchants—Levy v. State (Ind.) 68 N. E. 172. Dairy permits—St. Louis v. Fischer, 167 Mo. 654. Evidence held sufficient to show discrimination against colored race in formation of jury for trial of defendant—Smith v. State (Tex. Cr. App.) 69 S. W. 151. Agents of banking houses doing business within the state—Stewart v. Kehrer, 115 Ga. 184. Stage drivers—Borough of Belmar v. Barkalow, 67 N. J. Law, 504. Merchants according to a division into classes on the basis of sales made by such merchants—Clark v. Titusville, 184 U. S. 329, 46 U. S. Lawy. Ed. 569. Foreign corporations—State v. Hammond Packing Co. (La.) 34 So. 368. Acts of Ark. 1901, p. 113—Ft. Smith v. Scruggs, 70 Ark. 549. Physicians (Burns' Rev. St. 1901, §§ 7318-7323[a])—Parks v. State, 159 Ind. 211. There is not an arbitrary and unjust discrimination in an act exempting from the physician's registration act a physician called from another state to treat a particular case (Act 1895, c. 170)—State v. Bohemier, 96 Me. 257.

19. Pub. Laws 1901, c. 277—State v. Mitchell, 97 Me. 66.

20. State v. Shedroi (Vt.) 54 Atl. 1081.

21. Michigan barber law—Templar v. Michigan State Board of Examiners (Mich.) 90 N. W. 1058.

22. Harmon v. State, 66 Ohio St. 249.

23. Peacock v. Pratt (C. C. A.) 121 Fed. 772.

24. Blackstone v. Miller, 188 U. S. 189; Billings v. Illinois, 188 U. S. 97.

25. Laws 1899, c. 355—Black v. State, 113 Wis. 205.

26. Kidd v. Alabama, 188 U. S. 730.

nor by provisions assessing the stock of nonresident stockholders in a domestic corporation at its market value, without deduction of amount of realty held by the corporation, though such deduction is allowed to resident stockholders.[27] Savings banks are not charitable corporations within a tax exemption, so as to be subjected to an inequality by reason of being subjected to a franchise tax.[28] There is a denial of equal protection of laws to the citizens of the United States and of the particular states, by a law imposing taxes on articles manufactured for sale within the state, but exempting therefrom taxes on articles manufactured for export.[29]

Local improvements.—Equal protection is not denied by an act making the abutting property, in proportion to its frontage, pay three-fourths of the cost of paving a street,[30] nor by a water district allowing condemnation of the property of a water company by commissioners, though the value of other property is determined by a jury.[31]

Regulation of business trades and professions.—There is not a denial of equal protection by a provision avoiding margin contracts because it strikes at some and not all objects of possible speculation.[32] Laws requiring affidavits as to the ingredients used by a foreign brewer do not discriminate against the foreign brewer, though exempting the local brewer, as the state cannot inspect manufactories without the state.[33] There is no denial of the equal protection of laws by an act making the directors of a corporation liable for the misappropriation of funds,[34] nor by an act allowing building and loan associations to exact a rate of interest in excess of that allowed to be demanded by other persons,[35] nor is the clause infringed by laws requiring foreign corporations to file certificates as a condition to doing business in the state and using the state courts.[36] An act relating to foreign insurance companies and defining the term agent to include acknowledged agents, brokers or persons aiding in a transaction of the business of the company, does not deny the insurance companies the equal protection of the laws.[37] Acts requiring the Sunday closing of stores and excepting therefrom drug stores, livery stables and hotels, except as to sale of liquor,[38] prohibiting wine-rooms in connection with saloons,[39] and forbidding the manufacture and sale of imitation butter and oleomargarine, do not violate the guaranty.[40] The equality clause is violated by provisions in anti-trust acts exempting agricultural products or live stock in the possession of the producer or raiser,[41] and combinations for the purpose of raising or maintaining wages formed by those doing business in the production of articles, the cost of which is mainly made up of wages.[42] It is not violated by a provision in an anti-trust act requiring a corporation to answer under oath inquiries from secretary of state, as to violation of the act, as corporations do business by virtue of their charters from the state and may be required to answer inquiries, though individuals are not subjected to like provisions.[43] The Texas anti-

27. Pub. Acts, Conn. 1897, c. 153, § 2—Travellers' Ins. Co. v. Connecticut, 185 U. S. 364, 46 U. S. Lawy. Ed. 949.
28. People v. Miller, 116 N. Y. St. Rep. 621.
29. State v. Bengsch, 170 Mo. 81.
30. Chadwick v. Kelley, 187 U. S. 540.
31. Kennebec Water Dist. v. City of Waterville, 96 Me. 234.
32. Otis v. Parker, 187 U. S. 606.
33. Act of Mo. March 4, 1899, § 5—Pabst Brew. Co. v. Crenshaw, 120 Fed. 144.
34. Rice v. Howard (Cal.) 69 Pac. 77.
35. Brandon v. Miller, 118 Fed. 361.
36. Keystone Driller Co. v. San Francisco Superior Ct., 138 Cal. 738, 72 Pac. 398.
37. Pollock v. German Fire Ins. Co. (Mich.) 93 N. W. 436.
38. State v. Nichols, 28 Wash. 628, 69 Pac. 372.
39. Adams v. Cronin, 29 Colo. 488, 69 Pac. 590.
40. People v. Rotter (Mich.) 91 N. W. 167.
41. Brown v. Jacobs' Pharmacy Co., 115 Ga. 429, 57 L. R. A. 547; Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 46 U. S. Lawy. Ed. 679.
42. People v. Butler St. Foundry & Iron Co., 201 Ill. 236.
43. Hurd's Rev. St. 1899, pp. 616, 617—People v. Butler St. Foundry & Iron Co., 201 Ill. 236. The exemption of building and

trust act, authorizing a forfeiture of a corporation's charter, does not deny the equal protection of the law as authorizing the state to forfeit the charter of a domestic corporation and revoke the license of a foreign corporation.[44]

There is no violation of the equal protection of the laws clause, by an act limiting the hours of employment in a specified occupation,[45] though exempting cases of existing written contracts.[46] A law governing hours of labor on state and municipal contracts creates a distinction between persons contracting with the state and other employers within the equality clause.[47] There is a denial of the equal protection by an act creating free employment officers, but prohibiting the officers thereof to furnish lists to employers whose employes are on a strike.[48] There is not a denial of equality by the acts against the employment of women in the sale of intoxicating liquors.[49] The Kansas Medical Examiners' law is not open to the objection of an unlawful discrimination, by providing that nothing in the act shall interfere with religious beliefs in the treatment of diseases.[50]

Operation of railroads.—There is a denial of equal protection by regulations establishing rates unjustly and unreasonably low.[51] There is not a denial of equal protection by a provision that no right of way shall be appropriated by any private corporation until full compensation is first made and paid into court,[52] nor by an act authorizing condemnation of right of way of railroad company for telephone purposes, in that it allows the proceeding for numerous counties to take place in one county, nor because it fails to provide for jury inspection,[53] nor by an act allowing the assignment of claims against railroad companies for injuries to property, where the claim is assignable irrespective of the statute,[54] nor by an order of railroad commissioners requiring a street railroad to pay one-half the expense of constructing and maintaining safety appliances at a grade crossing of a railroad built after the construction of the street railroad.[55] There is no unconstitutional discrimination against a railroad company in a levee act, making the costs as to lands in general a charge against realty, while in the case of railroad companies the charge is against the owner.[56] An act making railroad corporations liable for injuries to employes engaged in the operation of the road by the negligence of any other agent or servant does not deny equality, where construed as including all servants necessary to the running of trains.[57]

Creation and discharge of liabilities.—The abrogation of the fellow-servant doctrine in its application to corporations but not to individuals denies to corporations the equal protection of the laws.[58] There is not a denial of the equal

loan associations from the operation of the act does not render it invalid—People v. Butler St. Foundry & Iron Co., 201 Ill. 236.

44. State v. Shippers' Compress & Warehouse Co., 95 Tex. 603.

45. People v. Lochner, 73 App. Div. (N. Y.) 120.

46. Pub. Laws, c. 1004—In re Ten Hour Law for St. Ry. Corp. (R. I.) 54 Atl. 602.

47. People v. Orange County Road Const. Co., 175 N. Y. 84.

48. Laws 1899, p. 268—Mathews v. People, 202 Ill. 389.

49. City of Hoboken v. Goodman (N. J. Law) 51 Atl. 1092.

50. State v. Wilcox, 64 Kan. 789, 68 Pac. 634.

51. Wallace v. Arkansas Cent. R. Co. (C. C. A.) 118 Fed. 422.

52. Steinhart v. Superior Ct., 137 Cal. 575, 70 Pac. 629, 59 L. R. A. 404; Beveridge v. Lewis, 137 Cal. 619, 67 Pac. 1040, 70 Pac. 1083, 59 L. R. A. 581. The constitutional provision is a mere limitation on the power of the legislature, negative in its character, and does not authorize any taking by any one else on more favorable terms, on which corporations, other than municipal, may take—Beveridge v. Lewis, 137 Cal. 619, 67 Pac. 1040, 70 Pac. 1083, 59 L. R. A. 581.

53. South Carolina & G. R. Co. v. American Telephone & Telegraph Co., 65 S. C. 459.

54. Louisville & N. R. Co. v. Landers, 135 Ala. 504.

55. Detroit, Ft. W. & B. I. Ry. Co. v. Osborn, 189 U. S. 383.

56. Missouri, K. & T. Ry. Co. v. Cambern (Kan.) 71 Pac. 809.

57. Rev. St. 1899, § 2873—Callahan v. St. Louis Merchants' Bridge Terminal R. Co., 170 Mo. 473, 60 L. R. A. 249.

58. Ballard v. Mississippi Cotton Oil Co. (Miss.) 34 So. 533. But see Cincinnati, H. & D. R. Co. v. Thiebaud (C. C. A.) 114 Fed. 918, decided on the strength of Tullis v. Lake Erie & W. R. Co., 175 U. S. 348.

protection of the laws by an act making the expenses for caring for an insane patient a charge against his estate, though the property had been taxed to help support the insane asylum,[59] nor by laws giving mortgages of building and loan associations priority over other liens on the premises filed subsequent to the recording thereof.[60] An act providing that persons furnishing material or labor to a contractor on a public improvement shall have a lien on the money due the contractor, providing notice of the claim is given to the officer whose duty it is to pay the contractor, does not discriminate, as the contractor and the subcontractor are not in the same position.[61]

Imposing penalties.—There is not a denial of equal protection by laws authorizing the recovery of damages and attorney's fees for failure of insurance companies to pay losses,[62] nor by an act allowing the recovery of attorney's fees from railroad companies for failure to keep the right of way clear from inflammable material,[63] nor by an act imposing a penalty on carriers for failure or refusal to pay damages within a certain time,[64] nor by a compulsory vaccination law excepting minors and persons under guardianship from the payment of the penalty for its violation,[65] nor by laws authorizing the recovery of ten times the amount of damages caused by a sheep-killing dog.[66] The clause is violated by an act authorizing the recovery of costs including an attorney's fee, from the mortgagee failing to release a mortgage after its satisfaction.[67]

Criminal laws and procedure.—Equal protection is not denied by acts prohibiting the sale of certain species of game,[68] or allowing the confiscation and sale of game illegally killed,[69] or making it a misdemeanor to work as barber on Sunday,[70] or by local option laws prescribing a penalty for sales in prohibition districts,[71] or by limitations on the allowance by the county to justices for services on criminal cases,[72] or by laws specially punishing officers for embezzlement of bank funds.[73] There is no denial of equal protection of the laws by an act authorizing the secretary of the interior to prescribe rules and regulations for the preservation of forests, and making the violation of such rules a misdemeanor, as the rules operate alike on all persons and property similarly situated.[74] There is not a discrimination within the equal protection clause, by a law providing that one who records a wager and does not transfer a memorandum thereof shall not be punished criminally if he makes the record on a certain racecourse authorized by the act.[75] An act prohibit-

59. Bon Homme County v. Berndt, 15 S. D. 494.

60. Rev. St. 1898, §§ 2014, 2015—Julien v. Model Bldg., Loan & Inv. Co. (Wis.) 92 N. W. 561.

61. 2 Starr & C. Ann. St. 1896, p. 2572, § 24—West Chicago Park Com'rs v. Western Granite Co., 200 Ill. 527.

62. Iowa Life Ins. Co. v. Lewis, 187 U. S. 335. Rev. St. Tex. art. 3071—Sun Life Ins. Co. v. Phillips (Tex. Civ. App.) 70 S. W. 603. There is not a denial of the protection by a law authorizing the allowance of a reasonable attorney's fee to plaintiff in case of the unsuccessful defense by an insurance company of a suit on a policy covering property totally destroyed by clause insured against—Farmers' & M. Ins. Co. v. Dobney, 189 U. S. 301. But see contra, Civ. Code Ga. § 2140—Phoenix Ins. Co. v. Schwartz, 115 Ga. 113, 57 L. R. A. 752.

63. Cleveland, C., C. & St. L. Ry. Co. v. Hamilton, 200 Ill. 633.

64. Porter v. Charleston & S. Ry. Co., 63 S. C. 169.

65. Rev. Laws, c. 75, § 137—Commonwealth v. Pear (Mass.) 66 N. E. 719.

66. Act 1886, No. 111, § 6—Rausch v. Barrere, 109 La. 563.

67. Rev. St. § 2006—Openshaw v. Halfin, 24 Utah, 426, 68 Pac. 138.

68. Ex parte Kenneke, 136 Cal. 527, 69 Pac. 261.

69. Title of game is in the state—Hurd's Rev. St. 1899, p. 928—Meul v. People, 198 Ill. 258.

70. Ex parte Northrup, 41 Or. 489, 69 Pac. 445.

71. Rev. St. 1895, tit. 69, arts. 3384-3399; Pen. Code, art. 402—Rippey v. State (Tex. Cr. App.) 73 S. W. 15.

72. Herbert v. Baltimore County Com'rs (Md.) 55 Atl. 376. The act being general in its operation on all the justices within the class fixed by the act—Id.

73. Ky. St. § 1202—Commonwealth v. Porter, 24 Ky. L. R. 364, 68 S. W. 621.

74. Dastervignes v. United States (C. C. A.) 122 Fed. 30.

75. People v. Bennett, 113 Fed. 515.

ing unjust discrimination by express companies against each other and imposing a penalty therefor is not an act punishing a crime by a special act, as the recovery is by means of a civil action.[76] An action for a penalty is not a criminal proceeding, within a constitutional provision denying the state the right to appeal in criminal cases.[77]

Civil remedies and proceedings.—There is not a denial of equal protection of laws by a law authorizing special juries in cities of a specified population, and requiring the deposit of a jury fee,[78] nor by laws requiring joinder in challenges to jurors by joint parties,[79] nor by laws authorizing recovery against telegraph companies for mental anguish,[80] nor by acts exempting plaintiff in a personal injury case from the burden of proving want of contributory negligence,[81] nor by the practice of state courts allowing proof of waiver of the terms of an insurance policy, without alleging waiver in the complaint.[82]

§ 11. *Privileges and immunities of citizens.*—The right to deal in alcoholic stimulants is not an immunity or privilege secured to citizens by the 14th amendment.[83] Acts are valid which punish the selling of liquor to an Indian having allotment or patent of lands, which the United States holds in trust for him.[84] A nonresident has a right to engage in business in another state, and by so doing, does not waive his right to object to the constitutionality of a statute of that state subjecting nonresidents engaged in business therein to judgments without personal service of process.[85] No privileges or immunities of citizens of New York are denied beneficiaries under a foreign will by the tax imposed under the New York Inheritance Tax Law on the transfer under the will of debts due decedent by the citizens of that state.[86]

The states may, under this clause, exact licenses if nonresidents be not discriminated against,[87] and may require possession of license as condition to pursuing an occupation.[88] It may compel foreign insurance companies to file statements with the secretary of state, and obtain a license as a condition for the transaction of business in the state.[89] Permits may be required for dairy stables within city limits,[90] or cattle quarantine laws enforced,[91] as well as those forbidding nonresidents to permit stock to run at large.[92] The hours of employment of bakers may be limited.[93] Landowners killing game on their own land may be punished for having it in possession.[94] A practice act allowing service on the manager or agent or per-

76. Adams Exp. Co. v. State (Ind.) 67 N. E. 1033.

77. State v. Waters-Pierce Oil Co. (Tex. Civ. App.) 67 S. W. 1057.

78. Eckrich v. St. Louis Transit Co. (Mo.) 75 S. W. 755.

79. Code Civ. Proc. Cal. § 601—Muller v. Hale, 138 Cal. 163, 71 Pac. 81.

80. Simmons v. Western Union Tel. Co., 63 S. C. 425, 57 L. R. A. 607.

81. Acts 1899, p. 58—Citizens' St. R. Co. v. Jolly (Ind.) 67 N. E. 935.

82. Andrus v. Fidelity Mut. Life Ins. Ass'n, 168 Mo. 151.

83. Busch v. Webb, 122 Fed. 655; City of Danville v. Hatcher (Va.) 44 S. E. 723; Rippey v. State (Tex. Cr. App.) 73 S. W. 15; City of Hoboken v. Goodman, 68 N. J. Law, 217.

84. No privilege of the Indian as a citizen is destroyed—Mulligan v. United States (C. C. A.) 120 Fed. 98.

85. Moredock v. Kirby, 118 Fed. 180.

86. Blackstone v. Miller, 188 U. S. 189.

87. Transient merchants—Levy v. State (Ind.) 68 N. E. 172. Immigrant agents (22 Stat. p. 812)—State v. Napier, 63 S. C. 60. A vehicle tax ordinance dividing vehicles and teams into different classes, and imposing occupation tax on the different classes, is not void as exacting a tax for the privilege of using vehicles and thereby abridges the right of citizens to use the streets (Kansas City Charter, 1889, art. 3, § 1)—Kansas City v. Richardson, 90 Mo. App. 450. The clause is violated by license acts operative only on non-residents of the state—In re Jarvis (Kan.) 71 Pac. 576.

88. Medicine—Parks v. State, 159 Ind. 211.

89. Vt. St. § 4181—Cook v. Howland, 74 Vt. 393.

90. St. Louis v. Fischer, 167 Mo. 654.

91. Sess. Laws Colo. 1885, p. 335—Reid v. Colorado, 187 U. S. 137.

92. State v. Smith (Ark.) 75 S. W. 1081.

93. Laws 1897, c. 415, art. 8, § 110—People v. Lochner, 73 App. Div. (N. Y.) 120.

94. People v. Van Pelt (Mich.) 90 N. W. 424.

son having charge of the business of a nonresident is offensive to this clause,[95] but laws requiring the appointment of a resident assignee for the benefit of creditors are not.[96] One who has a right to protect must make objection; hence an ordinance confining labor on public works to citizens is not available as a defense to a suit to enforce the payment of a lien on abutting property for its proportion of the costs of improvement.[97]

§ 12. *Grants of special privileges and immunities; class legislation.*—The rules for interpretation of statutes to determine if they do or do not tend to the violation of this provision are treated in a later article.[98] The constitutional provision against grants of special privileges and immunities is violated by an act creating an election commission to be appointed from persons named by political committees,[99] and by an act prohibiting the sale of nontransferable passes, and impliedly giving the railroad power to make the sale lawful by not expressing a nontransferable condition.[1] The clause is not violated by medical registration acts,[2] by exception of labor unions from the operation of trust acts,[3] by acts allowing members of the bar to nominate jury commissioners,[4] or acts allowing the appointment of civil service commissioners by the president of a county board without consent and advice of the board.[5] Laws allowing liquor manufacturers to sell at wholesale to outside dealers within a municipality which has prohibited sale of liquor, are valid.[6] The objection on this ground is not tenable if the act has uniform application.[7] A "corporation" within this clause does not embrace a municipality.[8] In the note are collected decisions passing on numerous acts objected to as class legislation.[9]

95. Civ. Code Pr. Ky. § 51, subs. 6—Moredock v. Kirby, 118 Fed. 180.

96. Duryea v. Guthrie (Wis.) 94 N. W. 365.

97. Suit to enforce lien on abutting property—Chadwick v. Kelley, 187 U. S. 540.

98. Statutes.

99. State v. Washburn, 167 Mo. 680.

1. Ill. Act, June 10, 1897—Allardt v. People, 197 Ill. 501.

2. Act Idaho, March 3, 1899—In re Inman (Idaho) 69 Pac. 120.

3. Comp. St. Neb. 1901, c. 91 A—Cleland v. Anderson (Neb.) 92 N. W. 306.

4. Sess. Laws 1901, p. 204—State v. Vance, 29 Wash. 435, 70 Pac. 34.

5. 1 Starr & C. Ann. St. (2nd Ed. p. 1102) —Morrison v. People, 196 Ill. 454.

6. Lloyd v. Dollisin, 23 Ohio Circ. R. 571.

7. An Act authorizing the construction of side walks by a city on refusal of the property owner and exempting the city from liability for injuries on such sidewalks does not grant an immunity not allowed to other municipal corporations, where the provision exists in the charter of the municipality—Dallas v. Lentz (Tex. Civ. App.) 69 S. W. 166. 2 Burns' Rev. St. Ind. 1901, §§ 54, 58c, authorizes cities of over 100,000 to grant to existing street railway corporations a franchise not exceeding 34 years, the company to surrender all franchises or right to use the street. The act further provides that if no extension is granted between the enactment of the statute and nine months of the expiration of the franchise the company may remove its tracks, and the board of public works shall open the right to occupy the streets to free competition and authorizes the successful bidder to condemn the property of the former occupant of the street. Another section provides that the contractual rights of the board of public works with reference to the use of streets are not taken away by statute except by a contract under it. Another section requires the companies operating under the statute, to charge fixed rates which are in excess of those fixed by an earlier statute. No provision of the statute gives the board of public works of the city of Indianapolis power to grant franchise to street railroads for such terms and on such conditions as it sees fit. Held, that the act did not grant a right to an existing Indianapolis street railway company, denied to others, by which it could charge a higher fare than other companies, in violation of the constitutional provision against the granting of special privileges or immunities, since the benefits are not confined to existing corporations—Smith v. Indianapolis St. Ry. Co., 158 Ind. 425.

8. Pub. Laws N. J. p. 73—State Board of Health v. Diamond Mills Paper Co., 63 N. J. Eq. 111.

9. **Laws infringing rule:** The minimum wage law affecting only employment of unskilled laborers on public works (Burns' Rev. St. 1901, §§ 7055a, b)—Street v. Varney Electrical Supply Co. (Ind.) 66 N. E. 895. An order of a city council singling out particular switch tracks and ordering their removal "as the same are a nuisance," as the city council could only have this power by the enactment of a general ordinance applicable to all switch tracks—People v. Blocki (Ill.) 67 N. E. 809. Prohibiting merchants from taking the assignment of miners' wages in consideration of checks or devices redeemable in merchandise, as it is limited to merchants on one hand and coal operators on the other (Burns' Rev. St. 1901. § 7448 A)—Dixon v. Poe, 169 Ind. 492, 60 L. R. A. 308.

Laws not objectionable as class legislation:

§ 13. *Laws impairing the obligations of contracts.*—This inhibition does not lie upon the United States.[10] It binds a state constitution, hence it cannot so retroact on a prior mortgagee as to impair his rights of priority.[11]

What is a contract.—There must be an enforceable obligation.[12] It must have been complete before the offensive law passed.[13] Hence an act may be valid if it only operates upon unformed obligations arising on an existing contract.[14] A lessee holding over under an executed lease will not have his rights cut down by a law passed after the law implied the new obligation.[15]

Judgments[16] and laws governing the alienation of the public domains are not contracts within the limitations.[17] If a mortgage be foreclosed, the obligation passes into decree, and in this view is noncontractual.[18] Ordinances having reference to contracts for water supply[19] are laws of the state. The purchaser of invalid railroad bonds has no contract right protected by the constitution against impairment, because the purchase was made on the faith of the former decision tending to show validity of the bond.[20] An act making it unlawful to sell adulterated goods will not act obnoxiously on contracts for sale of such goods.[21]

Extending time for filing petition for damages caused by change of railroad grade and excepting terminal companies—Dunbar v. Boston & P. R. Corp., 181 Mass. 383. Medical registration laws (Act Idaho, March 3, 1899) —In re Inman (Idaho) 69 Pac. 120. Allowing recovery of attorney's fees in actions against railroad companies for taking land without compensation (Gen. St. 1894, § 2661)—Pfaender v. Chicago & N. W. Ry. Co., 86 Minn. 218. Against gambling, punishing the proprietors of the game and excepting from punishment the patrons—State v. Woodman, 26 Mont. 348, 67 Pac. 1118. Limiting hours of labor of women employees is not, where it has uniform application to all women employment in the establishments described (Act March 31, 1899) —Wenham v. State (Neb.) 91 N. W. 421. Making it a misdemeanor to work as a barber on Sunday (Sess. Laws 1901, p. 17)—Ex parte Northrup, 41 Or. 489, 69 Pac. 495. Allowing recovery against telegraph companies for mental anguish [Act Feb. 20, 1901 (23 Stat. p. 748)]—Simmons v. Western Union Tel. Co., 63 S. C. 425, 57 L. R. A. 607. Allowing children within a certain distance of the city limits to attend the nearest city school free of tuition (Acts 1899, c. 59)—Edmondson v. Board of Education, 108 Tenn. 557. Prohibiting sale of liquors in local option district—State v. Johnson, 86 Minn. 121; Rippey v. State (Tex. Cr. App.) 73 S. W. 15. Forbidding liquor sales within a certain distance of an institution of learning, though it excepts wholesalers—Webster v. State (Tenn.) 75 S. W. 1020. Making it a misdemeanor to purchase material on credit under representations that it is to be used in a certain building whereas it is used in another building without the consent of the seller (Rev. St. 1899, § 4226)—State v. Gregory, 170 Mo. 598. Making a jury law apply only to counties of a certain population (Acts 1901, c. 124)—Turner v. State (Tenn.) 69 S. W. 774. Making a sale of goods in bulk fraudulent unless the parties take an inventory five days before the sale, and the purchaser makes inquiries as to the creditors of the seller and gives five days notice of the sale stating cost price and the price to be paid (Acts 1901, c. 133)—Neas v. Borches (Tenn.) 71 S. W. 50. Making fraudulent a sale of a stock of goods in bulk without demanding and receiving from the vendor verified list of all credits with the amount of his indebtedness (Pierce's Code, § 5346)—McDaniels v. J. J. Connelly Shoe Co., 30 Wash. 549, 71 Pac. 37. Authorizing the making of a proper assessment on failure of a prior assessment for defects therein (Rev. St. Wis. 1898, § 1210, as amended by laws 1901, 1902, c. 9)—Schintgen v. La Crosse (Wis.) 94 N. W. 84. Allowing the secretary of the interior to prescribe rules for the preservation of forests and making the violation of such rules a misdemeanor—Dastervignes v. United States (C. C. A.) 122 Fed. 30. Making it a misdemeanor to buy or sell species of game—Ex parte Kenneke, 136 Cal. 527, 69 Pac. 261. An act giving the county superintendent a specified mileage allowance in one class of counties, and a greater allowance in another class of counties—Henry v. Thurston County (Wash.) 72 Pac. 488.

10. Ansley v. Ainsworth (Ind. T.) 69 S. W. 884.

11. Later one dispensed with registration of a homestead—Blouin v. Ledet, 109 La. 709.

12. Void contracts not protected—Cameron's Ex'rs v. State (Tex. Civ. App.) 67 S. W. 348.

13. Blackstone v. Miller, 188 U. S. 189. Law need only have been enacted but not operative when contract is made (Rev. St. Wis. 1898, § 1770)—Diamond Glue Co. v. United States Glue Co., 187 U. S. 611.

14. Act providing that notes and mortgages by associations shall be negotiable only on the order of court or judge (Burns' Rev. St. 1901, § 4463e)—Bowlby v. Kline, 28 Ind. App. 659.

15. Caley v. Thornquist (Minn.) 94 N. W. 1084.

16. Changing rate of interest on judgments—Stanford v. Coram (Mont.) 72 Pac. 655.

17. Waggoner v. Flack, 188 U. S. 595; Wilson v. Standefer, 184 U. S. 399, 46 U. S. Lawy. Ed. 612.

18. Limitation law upon certificate of purchase—Bradley v. Lightcap, 201 Ill. 511.

19. American Waterworks & Guarantee Co. v. Home Water Co., 115 Fed. 171.

The legislature, being empowered to alter school districts by taking territory from one and adding it to another, impairs no obligation of contract in so doing, of which one of the districts may complain.[22] On consolidation of districts into one which assumes their debts, it does not matter that a part of one is not taken in.[23] The state may abolish an office, though the incumbent will in consequence not share in a pension fund to which he has contributed.[24]

State or municipal contracts are as much protected as one made between individual citizens.[25] A city warrant drawn on an appropriation is protected against repeal of the appropriation ordinance.[26] An act organizing a county board of education, with power to determine the course of study and enter into contracts for text books for a term of years, is not objectionable as authorizing an impairment of contracts of the state board with like powers as to the state.[27] There is no violation of the obligation of a contract by a change in the municipal charter requiring the presentation of claims to the city council for allowance as a condition to suit thereon.[28]

Corporate charters and franchises.—The power of a state reserved in its constitution to change general laws governing corporations is to be construed in connection with federal constitution against laws impairing the obligation of contracts, and rights honestly acquired by corporations and lawfully exercised cannot be arbitrarily destroyed by state legislature.[29]

Where the general incorporation law reserves such power, this right becomes part of the contract of every stockholder, and amendatory acts do not impair the obligation,[30] except as to charters already granted.[31] The legislature may not authorize a municipality to so bind it as not to exercise its retained powers of supervision over corporations.[32] But the charter or the constitution must reserve this power of alteration.[33] Where the validity of a corporation is questionable, there is no impairment by legislation authorizing the corporation to become a corporation de jure.[34]

Under this power of amendment the legislature may legislate as to rates charged by public service corporations.[35] An ordinance giving a street railroad the right to

20. Zane v. Hamilton County, 189 U. S. 370.

21. Hecht v. Wright (Colo.) 72 Pac. 48.

22. Laws 1898, c. 576—Board of Education of Union Free School Dist. No. 6 v. Board of Education of Union Free School Dist. No. 7, 76 App. Div. (N. Y.) 355.

23. Local Acts 1901, No. 315—Attorney General v. Lowrey (Mich.) 92 N. W. 289.

24. Vested rights if any in the fund are protected—People v. Coler, 173 N. Y. 103.

25. Shinn v. Cunningham (Iowa) 94 N. W. 941. Contract by county—Id.

26. Moores v. State (Neb.) 93 N. W. 733.

27. Rand, McNally & Co. v. Hartranft, 29 Wash. 591, 70 Pac. 77.

28. Oshkosh Waterworks Co. v. Oshkosh, 187 U. S. 437.

29. San Joaquin & K. R. Canal & Irr. Co. v. Stanislaus County, 113 Fed. 930.

30. C. H. Venner Co. v. United States Steel Corp., 116 Fed. 1012. An act fixing the rate of taxation on the gross receipts of the railroad company, will not violate the obligation of the charter under such a law, exempting from taxation—Northern Cent. Ry. Co. v. Maryland, 187 U. S. 258.

31. Making railroad insurer against fires communicated from engines—MacDonald v. New York, N. H. & H. R. R. Co., 23 R. I. 558.

32. City of Tampa v. Tampa Water Works Co. (Fla.) 34 So. 631.

33. Changing tax exemption—State v. Alabama Bible Soc. 134 Ala. 632.

34. Deitch v. Staub (C. C. A.) 115 Fed. 309.

35. Water rates—City of Tampa v. Tampa Water Works Co. (Fla.) 34 So. 631. A water company cannot complain of an impairment of its contract rights by an ordinance reducing rates, where the company was incorporated under an act giving the company the right to charge such rates as might be agreed upon with consumers, as this proviso expressly recognized the power in the municipality to regulate—Knoxville Water Co. v. Knoxville, 189 U. S. 434. Gas—People's Gaslight & Coke Co. v. Chicago, 114 Fed. 384. The Canal Act of 1862, makes it the duty of county boards in fixing water rates to base same on the amount of capital actually invested. Act of 1885, allowed the board to estimate the value on the property actually used. Held, that a fixing of the rates on a basis other than the capital actually invested, when applied to corporations organized under Act 1862, would amount to an impairment of the obligation of their charter contracts—San Joaquin & K. R. Canal & Irr. Co. v. Stanislaus County, 113 Fed. 930.

charge a maximum fare gives the company a contract right to charge that rate, which cannot be reduced under pretense of regulation without the company's consent;[36] but such a contract rate may be lost by leasing to an operating company which is subject to regulation.[37]

A charter authorizing the issuance of common stock, preferred stock and bonds, and giving the corporation the right to increase the bond issue for necessary objects and to decrease its capital stock by purchasing shares for retirement, does not create a contract entitling the stockholder to insist that the relative proportions of the different classes remain the same.[38] An act relating to the rights of withdrawing shareholders of a building association, if retroactive, is, to the extent that it impairs the obligation of contract implied in a pre-existing membership in the association, unconstitutional.[39] An act making it a felony for building association officers to accept dues after knowledge of insolvency does not impair the contract to pay dues.[40]

Public service franchises are contracts within this clause.[41] Where a street railroad company, incorporated under general statutes, has not obtained the consent of the city authorities, it may not object that there is an impairment of obligation of contract by the construction by the city of a railroad on streets selected for its lines.[42] There is no impairment by acts requiring railroads to construct[43] and maintain grade crossings.[44] A street railway grant to use streets may not be arbitrarily impaired or rejected, though it is subject to conditions imposed by statute and to the proper exercise of the police power of the municipality.[45] It may be compelled to clean between its tracks,[46] or to pave them.[47]

Tax and assessment laws.—An act imposing a specific tax on certain business occupations, not to become operative until a certain time after its passage, does not

36. Detroit v. Detroit Citizens' St. Ry. Co., 184 U. S. 368, 46 U. S. Lawy. Ed. 592.

37. Chicago Union Traction Co. v. Chicago, 199 Ill. 484, 59 L. R. A. 631.

38. C. H. Venner Co. v. United States Steel Corp., 116 Fed. 1012.

39. Intiso v. Metropolitan Sav. & Loan Ass'n, 68 N. J. Law, 588.

40. Act May 17, 1899 (Acts 1899, p. 121)—State v. Missouri Guarantee Sav. & Bldg. Ass'n, 167 Mo. 489.

41. There is an impairment of a contract by an ordinance for the erection of electric or water works in competition with a company operating under a prior ordinance granting a franchise for a term of years (Southwest Missouri Light Co. v. City of Joplin, 113 Fed. 817; Potter County Water Co. v. Borough of Austin (Pa.) 55 Atl. 991; if the franchise be accepted and used—Capital City Light & Fuel Co. v. Tallahassee, 168 U. S. 401, 46 U. S. Lawy. Ed. 1219; Underground R. of New York v. City of New York, 116 Fed. 952. An unexercised option to buy such works is not impaired by constructing new works—Newburyport Water Co. v. City of Newburyport, 113 Fed. 677. Where a telephone company uses a street under permission of the city under a grant and has established a plant, it may not be required thereafter to pay for the use of the street as an additional condition—Sunset Telephone & Telegraph Co. v. City of Medford, 115 Fed. 202. An electric franchise accepted by a corporation on which large sums of money had been expended in making improvements amounts to a contract which cannot be changed without the consent of the company and will prevent a demand for compensation for use of ground occupied by poles—Hot Springs Elec. Light Co. v. Hot Springs, 70 Ark. 300.

42. Underground R. of New York v. City of New York, 116 Fed. 952.

43. Code 1892, § 3555—Illinois Cent. R. Co. v. Copiah County (Miss.) 33 So. 502. Pub. Laws 1898, p. 110—Palmyra Tp. v. Pennsylvania R. Co., 63 N. J. Eq. 799. An act allowing the making of contracts with railroads for the relief of city from obstruction of railroad crossings and grade, under a plan adopted or to be adopted by commissioners to be appointed, giving commissioners power to adopt a general plan and change the same as to any detail, but denying them a right to adopt a general plan extending beyond the one heretofore adopted, or from extending the general plan adopted by them, does not amount to an impairment of the obligation of the contract—Lehigh Valley Ry. Co. v. Adam, 70 App. Div. (N. Y.) 427.

44. Vt. St. §§ 3844-3846—Town of Clarendon v. Rutland R. Co. (Vt.) 52 Atl. 1057.

45. Town of Mason v. Railroad Co., 51 W. Va. 183; City of Springfield v. Springfield St. Ry. Co., 182 Mass. 41; City of Worcester v. Worcester Consol. St. Ry. Co., 182 Mass. 49.

46. Chicago v. Chicago Union Traction Co., 199 Ill. 259, 59 L. R. A. 666.

47. Asphalt instead of stone as prescribed by charter—Binninger v. City of New York, 80 App. Div. (N. Y.) 438.

impair the obligation of a contract.[48] The New York franchise tax act, authorizing valuation for general taxes of all special franchises by state boards appointed by the governor, does not impair the obligation of a contract, as it does not change any part of the corporate grants and exacts nothing from the owners that is not exacted from property owners of the state.[49]

Regulation of remedies.—Remedial rights may be abridged if a reasonable time be allowed to pursue remedies existing.[50] The remedy to enforce a contract is not a part of the contract so as to prevent control thereof by the legislature.[51] There is no impairment of the obligation of a contract by an act allowing a surety to set up any defense of which his principal might have availed himself,[52] nor by the provision of the bankruptcy act dissolving an attachment, where the attachment was secured long after the act took effect,[53] nor by an act relating to the enforcement of mortgages after notes secured are barred by limitation, and declaring that no suit shall be had to foreclose any mortgage previously executed to secure any such obligation after two years from the passage of the act.[54] A carrier's contract, limiting liability, is not impaired by a law requiring it to locate the connecting carrier to which loss is attributable.[55] Recording acts making period of lien depend upon the time of recording are valid.[56] A lien for labor may be made prior to a mortgage later in time but earlier recorded.[57] A statutory attorney's fee cannot be impressed on a contract by subsequent law.[58]

§ 14. *Retroactive legislation; vested rights.*[59]—Many state constitutions put the ban on all retrospective laws.[60] Otherwise the state may pass retrospective laws,[61] so long as other limitations of its power are not transgressed.[62] A citizen can have

48. Kehrer v. Stewart (Ga.) 44 S. E. 854. Exemption from taxes is a contract—Bancroft v. Wicomico County Com'rs, 121 Fed. 874; State v. Alabama Bible Soc., 134 Ala. 632. And see Northern Cent. Ry. Co. v. Maryland, 187 U. S. 258.

49. People v. State Board of Tax Com'rs, 174 N. Y. 417.

50. Act providing that ground rents should be presumed released after 21 years, is valid if postponed for reasonable time in taking effect—Wilson v. Iseminger, 185 U. S. 55, 46 U. S. Lawy. Ed. 804. Laws impairing priorities are not merely remedial—Blouin v. Ledet, 109 La. 709.

51. Kendall v. Fader, 99 Ill. App. 104; Devalinger v. Maxwell (Del.) 54 Atl. 684. Where the obligations of a railroad corporation to the state have been fixed by statute, a later act is unconstitutional which attempts to increase these obligations but not where the effect is merely to provide a remedy for enforcement of liabilities created by the earlier statute—Terre Haute & I. R. Co. v. State, 159 Ind. 438. An act raising the amount of exemption from forced execution, applies to the remedy and does not effect contractual relation of the parties contracted before the passage of the act, and hence does not impair the obligation of contracts—Folsom v. Asper, 25 Utah, 299, 71 Pac. 315. Objection untenable where urged against a repealing act reinstating parties in their former rights (Rev. St. 1879)—Knights Templars', etc., Indem. Co. v. Jarman, 187 U. S. 197. Rev. St. c. 77, § 30, p. 625 limiting life of a certificate of purchase upheld—Bradley v. Lightcap, 201 Ill. 511.

52. Flagg v. Locke, 74 Vt. 320.

53. Wood v. Carr, 24 Ky. L. R. 2144, 73 S. W. 762.

54. Rev. St. Mo. 1899, § 4277—Kreyling v. O'Reilly, 97 Mo. App. 384.

55. Civ. Code, Ga. §§ 2317, 2318—Central of Georgia Ry. Co. v. Murphey, 116 Ga. 863.

56. Knights of Maccabees v. Nitsch (Neb.) 95 N. W. 626.

57. Sutton v. Consolidated Apex Min. Co., 15 S. D. 410.

58. Kendall v. Fader, 99 Ill. App. 104.

59. The forthcoming article on Statutes should be consulted as to the rules for interpreting statutes with respect to their operation.

60. An Act making findings, maps and surveys of a canal commission evidence held invalid—State v. Cincinnati Tin & Japan Co., 66 Ohio St. 182. An act open to the construction that it will allow the court to annul or vary final judgments entered before its passage, is objectionable as retrospective legislation within the constitutional inhibition. Laws N. Y. 1900, c. 742, allow a court on application of either party to an action of divorce at any time after final judgment whether heretofore or hereafter rendered to annul, vary or modify a direction in the judgment requiring defendant to provide for the support of plaintiff and for the education and maintenance of the children of the parties—Livingston v. Livingston, 173 N. Y. 377.

61. Kiskaddon v. Dodds, 21 Pa. Super. Ct. 351; League v. Texas, 184 U. S. 156, 46 U. S. Lawy. Ed. 478.

62. In Montana the only limitation as to retrospective legislation, is that prohibiting ex post facto laws and laws impairing the obligation of contracts—Bullard v. Smith (Mont.) 72 Pac. 761.

no vested right in general law which can preclude its amendment or repeal, and there is no implied promise on the part of the state to protect its citizens from incidental injury occasioned by changes in law.[63] There is no disturbance of vested rights by an act amounting only to a declaration of rights of the state under a grant to a city.[64] A public corporation cannot acquire vested contract rights as to the time of maturity of bonds held by it against another public corporation.[65] There is no impairment of a vested right by a law regulating the practice of dentistry and requiring a license as a condition to practice, though applied to one engaged in the practice before the enactment of the law.[66]

Offices may be abolished or incumbency changed,[67] but accrued salaries may not be.[68]

Interests in realty.—Homestead laws are prospective in their operation and do not affect vested rights.[69] The right of a husband in his wife's realty is a vested right.[70]

Taxes and public rights.—A taxpayer has no vested rights in an existing mode of collecting taxes.[71] The New York Transfer Tax Act of 1899 is unconstitutional, as diminishing value of vested assets wherein it taxes remainders and reversions which had vested before 1885, on their coming into actual possession or enjoyment.[72] An act retrospectively making delinquents pay interest from the time of the delinquency is not objectionable to the federal constitution.[73] A law is retrospective which imposes an additional liability for accrued taxes.[74]

Laws affecting corporations.—A statutory right given in the charter of a corporation is not vested until taken possession of.[75] By reorganizing, a corporation becomes subject to existing laws which were junior to its original existence.[76] Permission given a foreign corporation to do business on its complying with the con-

63. Stanford v. Coram (Mont.) 72 Pac. 655. An act made marriages valid between parties against one of whom an impediment existed of which such person was ignorant from the time of the removal of the impediment. A later act made this statute applicable to impediments removed before its passage. Held, that where the marriage was performed before the passage of the act and the impediment was removed after its passage, the statute was not retrospective as no vested rights had attached (St. 1895, c. 4960, amended by act of 1896)—Lufkin v. Lufkin, 182 Mass. 476.

64. Mobile Transp. Co. v. Mobile, 187 U. S. 479.

65. Held in an action construing the laws 1887, c. 77, § 1, providing that all bonds issued by municipalities shall be redeemable at pleasure of municipal officers at any time after ten years—Little River Tp. v. Board of Com'rs. 65 Kan. 9, 68 Pac. 1105.

66. State v. Chapman (N. J. Law) 55 Atl. 94.

67. There is no vested right in an office created by the legislature, such as will prevent an act abolishing the office—Dallis v. Griffin (Ga.) 43 S. E. 758. An act appointing members to succeed an existing board does not deprive incumbents of vested rights—Sinclair v. Young (Va.) 40 S. E. 907. The power of the legislature to abolish the office of chief of police, does not affect the right of such officer to a pension and he may thereafter assert any vested rights which he may have in the pension in a proper proceeding therefor—People v. Coler, 173 N. Y. 103.

68. Term had expired—Young v. Rochester, 73 App. Div. (N. Y.) 81.

69. Brown v. Hughes (Minn.) 94 N. W. 438; Bell v. Whitehead, 115 Ga. 589. A husband under laws giving him the right to alienate the homestead without his wife's consent under certain conditions, acquires a vested right of which he may not be deprived by subsequent legislation and the fact that the husband had not exercised his right will not authorize an invasion of the right by the legislature—Gladney v. Sydnor, 172 Mo. 318.

70. Rev. St. 1899, § 4340, enabled her to sue for possession—Vanata v. Johnson, 170 Mo. 269.

71. League v. Texas, 184 U. S. 156, 46 U. S. Lawy. Ed. 478.

72. In re Pell's Estate, 171 N. Y. 48, 57 L. R. A. 540.

73. League v. Texas, 184 U. S. 156, 46 U. S. Lawy. Ed. 478.

74. An Act making railroads personally liable for special assessments for which they were not so liable originally (Local Acts. Mich. 1895, Act No. 443)—Grand Rapids v. Lake Shore & M. S. Ry. Co. (Mich.) 89 N. W. 932.

75. San Joaquin & K. R. Canal & Irr. Co. v. Stanislaus County, 113 Fed. 930.

76. The New York Mileage Book Act applied to a corporation thereafter reorganized, which succeeds a previous corporation, is constitutional notwithstanding the previous corporation had a right to charge a specified fare—Minor v. Erie R. Co., 171 N. Y. 566.

ditions does not become vested against other conditions in later laws.[77] A street railway company acquires no vested rights in a street preventing an alteration of the grade of such street, so as to justify disobedience of an order requiring tracks to be lowered to conform to the grade.[78] A preferred stockholder has no vested right to insist that the proportion of stock and bonds shall remain unchanged and thus prevent retirement of stock for bonds.[79]

Regulation of procedure.—No one can gain a vested right to any remedy which would preclude legislation taking away the right thus created.[80] This includes rules of evidence,[81] but by the operation of remedies or failure to avail of them, rights may become fixed; hence an act must not deprive one of rights acquired under a judgment obtained before its passage,[82] nor extend time for filing a bill of exceptions after it became too late to do so.[83] Liens and securities cannot be destroyed by repeal of a law giving them.[84] Reorganization not being essential to operation of a railroad by a purchaser at foreclosure, its limitation does not impair vested rights of the bondholders.[85] Curative acts may validate mere irregularities.[86]

Statutes of limitation may be amended if time be given to enforce existing causes of action.[87] An act removing the bar of limitation has been upheld where the original time was unnecessarily short.[88]

§ 15. *Deprivation without due process of law or contrary to law of the land.*—Due process of law requires notice and the right to be heard.[89] It need not take the form of a judicial determination by a court.[90] A law prescribing statutory arbitration and sale to enforce its award is sufficient;[91] otherwise where sale is had without judicial proceedings.[92] Proceedings of societies for the discipline of members may be due process, though its effect may be to forfeit property rights.[93]

Actual notice may supply the failure of a statute to provide for notice.[94]

Use and enjoyment of property.—There must be a valid subject of property rights,[95] and not a mere privilege.[96] The right must have matured to receive pro-

77. Adams Exp. Co. v. State (Ind.) 67 N. E. 1033.

78. Snouffer v. Cedar Rapids & M. City Ry. Co. (Iowa) 92 N. W. 79.

79. Act March 28, 1902—Berger v. United States Steel Corp., 63 N. J. Eq. 809.

80. Bullard v. Smith (Mont.) 72 Pac. 761. Gen. Laws Tex. 1901, p. 122, c. 54, authorizes dismissal of a cause from the docket of the trial court for reversal when the mandate is not taken out, and that in any cause which has been reversed or remanded the mandate shall be taken out within twelve months after the passage of the act. Before the act took effect judgment against plaintiff was on his appeal reversed and remanded with costs and a year after the act took effect plaintiff paid the costs and procured a remand whereupon the action was dismissed. Held that the statute deprived him of no vested right—Watson v. Boswell (Tex. Civ. App.) 73 S. W. 985. There is no constitutional obstacle to the enactment of a law allowing negotiable instruments to contain the provision for a reasonable attorney's fee, the act affecting remedy only—Bullard v. Smith (Mont.) 72 Pac. 761.

81. A statute making church and parish records of birth prima facie evidence in proceedings to determine the question of heirship does not impair vested rights (Rev. St. 1898, § 4160)—Sandberg v. State, 113 Wis. 578.

82. Village of New Holland v. Holland, 99 Ill. App. 251. Alimony decree—Goodsell v. Goodsell, 82 App. Div. (N. Y.) 65.

83. Johnson v. Gebhauer, 159 Ind. 271.

84. Preferred lien on the road bed of a railroad—State Trust Co. v. Kansas City, P. & G. R. Co., 115 Fed. 367.

85. Commissioner of Railroads v. Grand Rapids & I. Ry. Co. (Mich.) 89 N. W. 967.

86. Private sales of decedent's real property for payment of debts—Kiskaddon v. Dodds, 21 Pa. Super. Ct. 351.

87. On foreclosure of mortgages after notes barred—Rev. St. Mo. 1899, § 4277—Kreyling v. O'Reilly, 97 Mo. App. 384.

88. Dunbar v. Boston & P. R. Corp., 181 Mass. 383.

89. Stone v. Little Yellow Drainage Dist. (Wis.) 95 N. W. 405. Notice not prescribed in proceeding to construct ditch at expense of delinquent railroad (Rev. St. §§ 3343-3346) —Chicago & E. R. Co. v. Keith, 67 Ohio St. 279.

90. Action of medical board—Meffert v. State Board of Medical Registration & Examination (Kan.) 72 Pac. 247.

91. To fix damage by live stock—Randall v. Gross (Neb.) 93 N. W. 223.

92. Sale by pound-master (Laws of Ariz. 1893, p. 32)—Greer v. Downey (Ariz.) 71 Pac. 900.

93. Moore v. National Council of Knights & Ladies of Security, 65 Kan. 452, 70 Pac. 352.

94. Detroit, Ft. W. & B. I. Ry. v. Osborn, 189 U. S. 383.

95. Destruction of gambling devices under Sand. & H. Dig. § 1618 valid—Garland Novelty Co. v. State (Ark.) 71 S. W. 257.

tection,[97] a mere proceeding on a claim being insufficient.[98] An alimony decree is property,[99] and there is a deprivation by the law authorizing variance or modification of a decree which had already become absolute.[1] An incumbent public servant's expectation of a pension is not such a property right.[2] The regular action of a majority does not impair any property rights of dissenting minority stockholders.[3] Laws forbidding the collection of tolls, unless a turnpike road is kept up, do not take, but merely limit, a right.[4] Laws compelling the free transportation of policemen,[5] allowing killing of animals found to be unfit for use,[6] or giving materialmen and laborers a right to enforce payment in money from the owner, irrespective of the contract price,[7] must satisfy this clause. Laws requiring forfeiture of unclaimed witness fees to the school fund are held to simply impose the duty of claiming fees promptly.[8] Laws against fraud or adulteration in commodities,[9] or fraudulent conveyances, are upheld.[10] Railroad companies are not deprived of their property by laws for the opening of highways across their rights of way,[11] or compelling them to keep their rights of way clear.[12] Laws restricting the height of buildings to be erected on certain streets of a city and fixing liability on the municipality are valid, though the latter was not heard.[13] A city cannot, in the exercise of its governmental functions, refuse to perform a contract made in a quasi private or business capacity.[14] An act allowing children living without the suburbs of a city to attend its schools free of tuition is not objectionable as depriving the school organization of property without due process of the law.[15]

Regulations of business and occupations.—Labor is property in this sense.[16] The right to contract respecting labor is also protected,[17] and the right to choose an

96. Liquor tax certificate in New York under present law is property—In re Cullinan, 115 N. Y. St. Rep. 567.

97. Franchise for street railroad lacked confirmation by city—Underground Ry. of New York v. City of New York, 116 Fed. 952. Contestant of an entry of government lands has no property interest therein to be affected, by an act confirming the title of the original entryman enacted during the pendency of the contest—Emblen v. Lincoln Land Co., 184 U. S. 660, 46 Law. Ed. 736.

98. Attaching creditors with knowledge of prior mortgage, acquire no property rights —McFaddin v. Evans-Snider-Buel Co., 185 U. S. 505, 46 Law. Ed. 1012.

99. Gundry v. Gundry, 11 Okl. 423, 68 Pac. 509; Livingston v. Livingston, 173 N. Y. 377.

1. Livingston v. Livingston, 74 App. Div. (N. Y.) 261.

2. Office was abolished—People v. Coler, 71 App. Div. (N. Y.) 584.

3. Dickinson v. Consolidated Traction Co., 114 Fed. 232. To same affect C. H. Venner Co. v. United States Steel Corp., 116 Fed. 1012.

4. Back River Neck Turnpike Co. v. Homberg, 96 Md. 430.

5. Laws 1895, c. 417—Wilson v. United Traction Co., 72 App. Div. (N. Y.) 233.

6. Carter v. Colby, 71 N. H. 230.

7. Stimson Mill Co. v. Braun, 136 Cal. 122, 68 Pac. 481, 57 L. R. A. 726.

8. Douglas County v. Moores (Neb.) 92 N. W. 199.

9. "Imitation" butter, and "colored" oleomargarine (Public Acts 1901, No. 22)—People v. Rotter (Mich.) 91 N. W. 167.

10. Laws making sales of merchandise stocks in bulk otherwise than in the ordinary course of trade, fraudulent unless the parties make an inventory and the purchaser makes inquiry as to creditors—Neas v. Borches (Tenn.) 71 S. W. 50. The Washington act requires a purchaser to require a verified list of creditors and making the sale without it fraudulent, unless the purchaser applies the purchase money to the payment of bona fide debts—McDaniels v. J. J. Connelly Shoe Co., 30 Wash. 549, 71 Pac. 37.

11. Baltimore & O. S. W. R. Co. v. State, 159 Ind. 510. Code 1892, § 3555—Illinois Cent. R. Co. v. Copiah County (Miss.) 33 So. 502. Act authorizing the construction by a town or person entitled at the company's expense held valid (Vt. St. §§ 3844. 3846)—Town of Clarendon v. Rutland R. Co., 75 Vt. 6.

12. McFarland v. Mississippi River & B. T. Ry. Co. (Mo.) 75 S. W. 152.

13. State has power to make city liable—Williams v. Parker, 188 U. S. 491.

14. Riverside & A. Ry. Co. v. City of Riverside, 118 Fed. 736.

15. Edmondson v. Board of Education, 108 Tenn. 557.

16. Mathews v. People, 202 Ill. 389; Street v. Varney Electrical Supply Co. (Ind.) 66 N. E. 895.

17. Burns' Rev. St. 1901, §§ 7055a, 7055b fixing a minimum wage law on public works held invalid—Street v. Varney Electrical Supply Co. (Ind.) 66 N. E. 895. Weekly payment law held invalid (Republic Iron & Steel Co. v. State [Ind.] 66 N. E. 1005); but not laws declaring agreements relieving an employer from the operation of the weekly payment law—International Text Book Co. v. Weissinger (Ind.) 65 N. E. 521. Act creating a free employment bureau which was not to give names to employers whose men

occupation is a liberty subject to the police power.[18] There is a deprivation by laws and ordinances making rates chargeable by public corporations unreasonably low.[19] Laws against meter rents by gas companies are valid.[20] Inspection,[21] quarantine,[22] medical registration laws,[23] and license laws,[24] are valid; but the contrary was held of a law requiring a fee for sending a commodity out of the state.[25] Foreign corporations may be denied resort to courts for noncompliance with the laws.[26]

Sunday laws do not operate to deprive persons of life, liberty or property, without due process.[27]

Statutes creating a liability may be valid,[28] unless unreasonable or unconscionable.[29] Requiring a carrier to locate a connecting carrier, which is responsible for loss, does not take its property unduly.[30]

Eminent domain proceedings.[31]—A taking without giving compensation is a taking of property without due process of law.[32] Conferring on a telegraph company the right to condemn a way on a railroad right of way may be upheld.[33] A special tribunal to pass on necessity of the taking is not required.[34]

Local improvements.—Due process is satisfied by allowing assessment of lands benefited by a public improvement[35] on notice, giving the property owner an opportunity to be heard on the question of the amount apportioned to his property.[36] It

were striking is void—Mathews v. People, 202 Ill. 389.

18. Acts limiting hours of employment of workingmen sustained—People v. Lochner, 73 App. Div. (N. Y.) 120; State v. Buchanan, 29 Wash. 602, 70 Pac. 52, 59 L. R. A. 342.

Void acts: forbidding pensioners to hold office—People v. Woodbury, 38 Misc. (N. Y.) 189. Act regulating the appointment of branch pilots (Rev. St. 1895, art. 3796)—Olsen v. Smith (Tex. Civ. App.) 68 S. W. 320. Laws making it a misdemeanor to offer for sale without written authority—Grossman v. Caminez, 79 App. Div. (N. Y.) 15.

19. Water rates—Cedar Rapids Water Co. v. Cedar Rapids, 117 Iowa, 250. Carriers—Wallace v. Arkansas Cent. R. Co. (C. C. A.) 118 Fed. 422. Water company subject to reasonable regulation of rates—Tampa v. Tampa Water Works Co. (Fla.) 34 So. 631. A fixing of rates for carrying hard coal held not void—Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 257, 46 Law. Ed. 1151.

20. Buffalo v. Buffalo Gas Co., 81 App. Div. (N. Y.) 505.

21. Elevators—New Orleans v. Kee, 107 La. 762. Laundries—Id.

22. Compagnie Francaise De Navigation A Vapeur v. Louisiana State Board of Health, 186 U. S. 380, 46 Law. Ed. 1209.

23. Reetz v. Michigan, 188 U. S. 505. The due process provision is not violated by a failure of the medical registration act to provide in terms for review of proceedings on the question whether the applicant had been legally registered under a prior statute—Id.

24. Requiring sellers of meats in public markets to take license—Buffalo v. Hill, 79 App. Div. (N. Y.) 402.

25. Exacting a license and requiring payment of a certain amount a ton for ice taken from lakes owned by the state for shipment without the state—Rossmiller v. State, 114 Wis. 169.

26. Filing of certificates—Keystone Driller Co. v. Superior Ct., 138 Cal. 738, 72 Pac. 398.

27. Barbers—State v. Sopher, 25 Utah, 318, 71 Pac. 482, 60 L. R. A. 468. (Sess. Laws 1901, p. 17)—Ex parte Northrup, 41 Or. 489, 69 Pac. 445. Closing stores except drug stores and livery stables and hotels—State v. Nichols, 28 Wash. 628, 69 Pac. 372.

28. Penalty for failure to pay an insurance loss within a specified time—New York Life Ins. Co. v. English (Tex. Civ. App.) 70 S. W. 440. Making a married woman's property liable for family necessaries, after execution against husband (Comp. St. c. 53, § 1)—Noreen v. Hansen (Neb.) 90 N. W. 937. Acts making directors of corporations liable—Winchester v. Howard, 136 Cal. 432, 64 Pac. 692, 69 Pac. 77. Making a railroad company liable for injuries to a passenger, unless the injury arise from the criminal negligence of the injured party or by his violation of the carrier's rules brought to his notice—Chicago, R. I. & P. R. Co. v. Hambel (Neb.) 89 N. W. 643. Requiring street railways to pay one-half the expense of safety appliances at grade crossings of railroad which was built after street railway (Pub. Act Mich. 1893, No. 171, § 15)—Detroit, Ft. W. & B. I. Ry. v. Osborn, 189 U. S. 383.

29. Making purchaser liable to lien claimant for more than value of property (Rev. St. 1898, § 3336))—Rogers-Ruger Co. v. Murray, 115 Wis. 267, 59 L. R. A. 737.

30. Civ. Code, §§ 2317, 2318—Central of Georgia Ry. Co. v. Murphey, 116 Ga. 863.

31. See the following section as to the clause against taking without compensation.

32. Telegraph right of way—Phillips v. Postal Tel. Cable Co., 130 N. C. 513.

33. Savannah, F. & W. Ry. Co. v. Postal Tel. Cable Co., 115 Ga. 554; South Carolina & G. R. Co. v. American Telephone & Telegraph Co., 65 S. C. 459.

34. Savannah, F. & W. Ry. Co. v. Postal Tel. Cable Co., 115 Ga. 554.

35. Voigt v. Detroit City, 184 U. S. 115, 46 Law. Ed. 459.

36. Voigt v. Detroit City, 184 U. S. 115, 46 Law. Ed. 459; Kansas City v. Mastin, 169 Mo. 80. Irrigation laws are sufficient which

is not necessary to give opportunity also to be heard against issuance of bonds.[37] The exaction of an excessive assessment[38] or the requirement of written objections which shall be final[39] are offensive to this clause. The front foot rule of assessment does not deny due process.[40]

Drainage acts satisfy the requirement of due process, where the property owner is given a day in court before his property is taken into the district,[41] or the assessment for benefits become final,[42] nor is there a denial of due process by an act allowing a deficiency assessment without notice, where landowner had notice of the original assessment.[43] They are sufficient where omission as to procedure for confirmation is provided under another provision of the code.[44] Such laws do not deprive landowners of property without due process by the fact that they authorize the issuance of interest-bearing bonds to defray costs of the improvement and divide the same into as many parts as the bonds have years to run.[45]

Taxation.—Proceedings to levy and assess taxes do not require a notice and hearing like litigated proceedings.[46] Due process in sales of land for unpaid taxes does not require that the same should be matter of record.[47] In the note are various acts which have been upheld as affording due process in proceedings to sell for taxes.[48] It is lacking where foreign property is assessed.[49]

provide the means by which benefits received may be adjudicated—Pioneer Irr. Dist. v. Bradbury (Idaho) 68 Pac. 295. Objection of want of notice can only be made by parties whose property has been taken —Goodrich v. Detroit, 184 U. S. 432, 46 Law. Ed. 627.

37. German Sav. & Loan Soc. v. Ramish, 138 Cal. 120, 69 Pac. 89, 70 Pac. 1067.

38. Klein v. Nugent Gravel Co. (Ind. App.) 66 N. E. 486.

39. Barber Asphalt Pav. Co. v. Ridge, 169 Mo. 376.

40. Franklin v. Hancock, 204 Pa. 110; Schaefer v. Werling, 188 U. S. 516. There is a deprivation without due process by an act empowering a city to collect sums assessed against lots abutting on streets through which water pipes pass, and which makes no provision for fixing the amount of the assessment either as to cost or benefits to property owners, or for just apportionment of the cost among the interested land owners, or for notice to them giving them an opportunity to be heard on the question of the reasonableness or justness of the assessment—City Council of Augusta v. King, 115 Ga. 454.

41. Rev. St. 1899, § 8251—Mound City Land & Stock Co. v. Miller, 170 Mo. 240, 60 L. R. A. 190. There is due process where, before the rendition of a decree creating a drainage district, property owners all receive notice of the proceeding and have a trial of the question whether a public purpose would be subserved by the drainage and whether the property owner's land would be benefited thereby, and whether the benefits to the district in its entirety would exceed the cost and the proportion of cost which ought to fall on the landowner's property considered relatively to all other lands in the district, and an opportunity is given for appeal to the highest courts of the state—Stone v. Little Yellow Drainage Dist. (Wis.) 95 N. W. 405. A drainage law does not authorize taking without due process of law, by failure to provide for giving of notice of the assessment, where it provides for notice on the hearing determining the boundaries of the district—Oliver v. Monona County, 117 Iowa. 43.

42. Erickson v. Cass County, 11 N. D. 494.

43. Stone v. Little Yellow Drainage Dist. (Wis.) 95 N. W. 405.

44. State v. Henry, 28 Wash. 38, 68 Pac. 368.

45. Rev. Codes, § 1474—Erickson v. Cass County, 11 N. D. 494.

46. The due process provision of the federal constitution does not apply to tax proceeding cases—German Sav. & Loan Soc. v. Ramish, 138 Cal. 120, 69 Pac. 89, 70 Pac. 1067. Law requiring the assessment to the trustee, of personal property held in trust, and requiring the assessors to give public notice to taxpayers to return personal property lists, and on failure to make such return, giving the assessor power to estimate the value—Glidden v. Harrington, 189 U. S. 255. Special franchise act authorizing the assessment or valuation for general taxes of all special franchises by a state board of tax commissioners appointed by the governor—People v. State Board of Tax Com'rs, 174 N. Y. 417. Law making the valuation of corporate stock by a tax commissioner final, unless appealed from within a given time but failing to provide for the giving of notice to the owner, does not deprive the corporation of property without due process as the corporation represents the stockholders and has a right to appeal, if the valuation is unsatisfactory—Corry v. City Council of Baltimore, 96 Md. 310.

47. Turpin v. Lemon, 187 U. S. 51.

48. Provision against setting aside sales of property for taxes except in case of double assessments or previous payment of taxes, unless the proceeding is commenced within a limited time (Const. La. art. 233)—Ashley Co. v. Bradford, 109 La. 641. Act authorizing foreclosure of tax liens by proceedings in rem to which the land alone is a party, the owner being unknown, and providing that the sale shall cut off pre-existing rights or liens—Leigh v. Green (Neb.) 90 N. W. 255. A claimant of land sold for non-

Civil remedies and proceedings.—There is a deprivation by service on agents of nonresidents in actions in personam,[50] but debts may be attached against a nonresident where the garnishee debtor resides,[51] and service by publication on a nonresident defendant is sufficient in a suit to quiet title to personal property situated within the state.[52] Notice to insane persons cannot be dispensed with.[53] Short notice is sufficient if a right to open the decree is reserved.[54]

Statutes of limitation are not open to the objection that they deprive the owner of his property without due process of law.[55]

Amendments may be allowed by consent of counsel,[56] in proceedings changed during pendency of an action to make them conform to an amended statute.[57]

The clause may be violated by laws affixing conclusiveness to certain documents.[58] It is not permissible to make a license certificate revocable summarily unless the holder shall, in a revocation proceeding, deny all violations of the liquor law under oath.[59]

An act authorizing contribution, where one of two judgment debtors pays more than his share may be upheld though it does not provide for an adjudication of relative equities.[60] Attorney's fees may be allowed in an action for reimbursement for building fences required by law.[61]

The omission to provide in the bankruptcy act for personal service on creditors of notice of application for discharge in voluntary proceedings is not objectionable;[62] nor is the failure to provide for notice of the filing of petition in voluntary proceedings, as the act provides for ten days' notice of the first meeting of creditors and of each of the later steps of the administration, and for revocation of a discharge where procured by fraud.[63]

Due process is preserved in contempt proceedings where accused appears and trial is had.[64] The clause is violated by orders denying defenses and evidence for contempt of party.[65] An order to show cause cannot be served on attorney.[66] Laws

payment of taxes is not deprived of his property without due process by judicial proceedings to collect the delinquent taxes, under a statute subsequently enacted, though the expenses attending the proceeding are chargeable as costs contrary to the earlier statute—League v. Texas, 184 U. S. 156, 46 Law. Ed. 478. Washington irrigation laws making irrigation bonds a lien, and providing that lands may be taxed therefor and sold for non-payment, and authorizing the special proceeding to pass upon the validity of the bonds on publication of notice of the hearing of the petition, does not amount to taking of property without due process because authorizing taxation and sale without personal notice—Kinkade v. Witherop, 29 Wash. 10, 69 Pac. 399.

49. Assessment of an interstate bridge including franchises derived from a sister state —Louisville & J. Ferry Co. v. Kentucky, 188 U. S. 385.

50. Moredock v. Kirby, 118 Fed. 180. Laws Minn. 1901, c. 278—Cabanne v. Graf, 87 Minn. 510; Kemper-Thomas Paper Co. v. Shyer, 108 Tenn. 444.

51. Rothschild v. Knight, 184 U. S. 334, 46 Law. Ed. 573.

52. People's Nat. Bank v. Cleveland (Ga.) 44 S. E. 20.

53. Hunt v. Searcy, 167 Mo. 158.

54. Ten days notice of probate is enough where a party interested is given a year in which to attack it—In re Davis' Estate, 136 Cal. 590, 69 Pac. 412.

55. Linton v. Heye (Neb.) 95 N. W. 1040; St. Mary's Power Co. v. Chandler-Dunbar Water Power Co. (Mich.) 95 N. W. 554. An act making probate in common form conclusive after seven years except in case of minors who are given four years after reaching majority valid—Sutton v. Hancock (Ga.) 45 S. E. 504.

56. Rothschild v. Knight, 184 U. S. 334, 46 Law. Ed. 573.

57. O'Brien v. Flint, 74 Conn. 502.

58. Specification of weights in bills of lading (Laws 1893, c. 100)—Missouri, K. & T. Ry. Co. v. Simonson, 64 Kan. 802, 68 Pac. 653, 57 L. R. A. 765. Surveys and findings of canal commissioners evidence of ownership of state or canal lands—State v. Cincinnati Tin & Japan Co., 66 Ohio St. 182. Comp. Laws, § 10203, prescribing what shall be a prima facie case in creditors' suits, merely creates a rule of evidence and is not a taking of property without due process of law—Crane v. Waldron (Mich.) 94 N. W. 593.

59. In re Cullinan, 115 N. Y. St. Rep. 567.

60. Code Civ. Proc. § 480—City of Ft. Scott v. Kansas City, Ft. S. & M. R. Co. (Kan.) 72 Pac. 238.

61. Terre Haute & L. Ry. Co. v. Salmon (Ind.) 67 N. E. 918.

62, 63. Hanover Nat. Bank v. Moyses, 186 U. S. 181, 46 Law. Ed. 1113.

64. State v. Shepherd (Mo.) 76 S. W. 79.

65. Harley v. Montana Ore Purchasing Co., 27 Mont. 388, 71 Pac. 407; Sibley v. Sibley, 76 App. Div. 132, 12 N. Y. Ann. Cas. 135.

allowing a probate judge to let a contract for opening a ditch on failure of a railroad company to do the work, after notice by the landowner, amount to the taking of private property for private purposes without due course of law.[67]

Criminal offenses and procedure.—Penal laws which have been held valid are shown below.[68]

A commitment by an inferior court on evidence of probable guilt is not a deprivation of liberty without due process,[69] and a like construction applies to laws allowing a trial by a jury of five.[70] That a juror on the trial of one convicted of murder had himself been found guilty of a felony, though ground for a challenge is not a denial of due process.[71] The compulsory physical examination of one accused of a crime, to determine whether he is affected with a disease as testified to, violates the provision.[72] Representation of a prosecutor by other counsel on the trial with court's consent does not amount to a denial of due process.[73] There is no infringement of the due process clause by the refusal of the state court on motion for a new trial to review the question whether the officers in charge of the jury on a trial for felony have taken the statutory oath.[74]

The good faith of prosecuting witnesses cannot be determined in the trial of defendant for the purpose of fixing costs, unless there is an appeal given.[75]

The indeterminate sentence law is not open to the objection by the fact that it in a degree confers judicial powers on nonjudicial officers and invests them with some of the pardoning power belonging to the executive.[76]

§ 16. *Compensation for taking of property.*—The power of eminent domain may be delegated to municipalities[77] and private corporations.[78] The constitutional provision does not prevent a railroad from acquiring an easement in right of way by adverse possession.[79] The use must be public.[80] Particular laws are passed on by the cases shown below.[81]

Liability to make just compensation is not prevented by the fact that the land was taken by the United States in exercise of the power to improve navigation.[82]

66. Alimony proceeding—Goldie v. Goldie, 77 App. Div. 12, 12 N. Y. Ann. Cas. 175.

67. Chicago & E. R. Co. v. Keith, 67 Ohio St. 279, 60 L. R. A. 525.

68. An act making it a felony for building and loan associations to accept dues after knowledge of insolvency does not destroy the rights of others to insist that borrowers shall pay their loans—State v. Missouri Guarantee Sav. & Bldg. Ass'n, 167 Mo. 489. Act establishing a park and prohibiting hunting therein—Commonwealth v. Hazen, 20 Pa. Super. Ct. 487. Nor by laws making it an offense to sell intoxicating liquor in a prohibition district (Rev. St. 1895, tit. 69, arts. 3384, 3399; Pen. Code, art. 402)—Rippey v. State (Tex. Cr. App.) 73 S. W. 15.

69. Parks v. Nelms, 115 Ga. 242.

70. Welborne v. Donaldson, 115 Ga. 563.

71. Queenan v. Territory, 11 Okl. 261, 71 Pac. 218.

72. State v. Height, 117 Iowa, 650, 59 L. R. A. 437.

73. State v. Conly, 130 N. C. 683.

74. Dreyer v. Illinois, 187 U. S. 71.

75. Rickley v. State (Neb.) 91 N. W. 867.

76. Dreyer v. Illinois, 187 U. S. 71.

77. State v. District Ct., 87 Minn. 146.

78. Street railway companies—Adee v. Nassau Elec. R. Co., 72 App. Div. (N. Y.) 404. Under a constitution allowing the exercise of eminent domain only by domestic corporation, a foreign corporation complying with laws requiring the filing of copies of articles of incorporation, becomes a domestic corporation notwithstanding a provision in this act that process shall be served on such corporations in the same manner as process is served on agents of domestic corporations—Russell v. St. Louis S. W. Ry. Co. (Ark.) 75 S. W. 725.

79. Boyce v. Missouri Pac. R. Co., 168 Mo. 583.

80. Opening a private ditch is a private purpose—Chicago & E. R. Co. v. Keith, 67 Ohio St. 279, 60 L. R. A. 525.

81. Void acts: Act requiring residents of a portion of a county exempt from the general stock law, to build a fence along lines therein described—Goodale v. Sowell, 62 S. C. 516. Act pensioning school teachers—Hibbard v. State, 65 Ohio St. 574. Law requiring license to cut ice for shipment without the state and requiring a payment to the state for each ton so shipped—Rossmiller v. State, 114 Wis. 169.

Valid acts: Acts compelling the extension of street railway lines, the legislature having power to amend charters—Metropolitan R. Co. v. Macfarland, 20 App. D. C. 421. Act allowing the destruction of glandered animals is not a taking—Livingston v. Ellis County (Tex. Civ. App.) 68 S. W. 723. Requiring license from transients—Levy v. State (Ind.) 68 N. E. 172.

82. United States v. Lynah, 188 U. S. 445.

A city cannot escape liability for damages caused to property by the destruction of a public improvement, because it was built by the city in the exercise of its police power,[83] and this rule extends to a taking of a street by a railroad company in obedience to a statute enacted within the police power of the state.[84]

The provision making payment a condition to possession is violated by an act authorizing possession by a railroad company, pending condemnation on a court order.[85] The necessity of payment before taking applies to acquisition of right of way over the track of another railroad company.[86] Payment into court suffices.[87] This requirement as a rule has no application to appropriation for a purely public purpose.[88]

§ 17. *Right to justice and guaranty of remedies.*—The making of conditions precedent to suit does not deny a remedy[89] if reasonable,[90] nor do laws regulating costs.[91] The act allowing the court to refuse continuance, though facts expected to be proved be admitted, is constitutional.[92] A jury law allowing a jury commissioner to select a jury in cities of a specified population is not opposed to principles of justice, in that it gives an opportunity to a dishonest commissioner to "fix" the jury.[93]

The right to be heard in courts of last resort is satisfied where the right may be had by error or otherwise, though no remedy by appeal is provided.[94] Under a grant of power to regulate and limit appellate procedure, the right of review cannot be destroyed.[95] An act allowing removal of causes in cases in which it appears that plaintiff is entitled to some relief, but not in the court in which it is brought, is not unconstitutional, because no right of appeal is secured from the order of removal.[96]

§ 18. *Jury trials preserved.*—The right of trial by jury is that which existed at common law,[97] or prior to the adoption of the constitution.[98] It is not a matter of right in an equity case,[99] but where a cause is divested of its purely equitable features, a party is then entitled to a trial by jury, unless he waives the privilege.[1] Not-

83. Chicago v. LeMoyne (C. C. A.) 119 Fed. 662.

84. McKeon v. New York, N. H. & H. R. Co., 75 Conn. 343.

85. Code Civ. Proc. § 1254—Steinhart v. Superior Ct., 137 Cal. 575, 70 Pac. 629, 59 L. R. A. 404.

86. Civ. Code, Ga. 2167—Atlantic & B. R. Co. v. Seaboard Air Line Ry., 116 Ga. 412.

87. Code, Va. 1079—Southern Ry. Co. v. Gregg (Va.) 43 S. E. 570.

88. For school-site—Buckwalter v. School Dist. No. 42, 65 Kan. 603, 70 Pac. 605.

89. Law requiring the deposit of a jury fee—Eckrich v. St. Louis Transit Co. (Mo.) 75 S. W. 755. Postponing actions for malicious prosecutions which are still pending—Bonney v. King, 201 Ill. 47.

90. And acts requiring presentation of claims against municipalities where the injured person was unable to present his claim within the time (Laws 1894, c. 623)—Williams v. Village of Port Chester, 72 App. Div. (N. Y.) 505.

91. Grinage v. Times-Democratic Pub. Co., 107 La. 121.

92. Howard v. Commonwealth, 24 Ky. L. R. 950, 70 S. W. 295.

93. Eckrich v. St. Louis Transit Co. (Mo.) 75 S. W. 755.

94. Sothman v. State (Neb.) 92 N. W. 303. Gen. Laws 1901, c. 258—State v. Board of County Com'rs, 87 Minn. 325, 60 L. R. A. 161.

95. Finlen v. Heinze, 27 Mont. 107, 69 Pac. 829, 70 Pac. 517.

96. Acts Maryland, 1896, c. 229—Insurance Co. of North America v. Schall, 96 Md. 225.

97. Eckrich v. St. Louis Transit Co. (Mo.) 75 S. W. 755; Mound City Land & Stock Co. v. Miller, 170 Mo. 240, 60 L. R. A. 190; State v. Hamey, 168 Mo. 167, 57 L. R. A. 846. Not allowed in summary proceedings—Mahoney v. People, 98 Ill. App. 241; McLeod v. Lloyd (Or.) 71 Pac. 795.

98. State v. Shepherd (Mo.) 76 S. W. 79; Terry v. State, 24 Ohio Circ. R. 111; Hathorne v. Panama Park Co. (Fla.) 32 So. 812. Where at the time of the adoption of a constitution guaranteeing the right to a jury trial, there is no statutory provision for a trial by jury in certain species of actions, a later re-enactment of such statutes does not carry with it the right to a jury trial—Montana Ore Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co., 27 Mont. 288, 70 Pac. 1114.

99. Maggs v. Morgan, 30 Wash. 604, 71 Pac. 188; Porter v. International Bridge Co., 79 App. Div. (N. Y.) 358; Jones v. Wood, 24 Ky. L. R. 840, 70 S. W. 45; Culp v. Mulvane (Kan.) 71 Pac. 273. Provision for the enforcement of a mechanic's lien by bill in equity—Hathorne v. Panama Park Co. (Fla.) 32 So. 812. Action to quiet title to mining property is an equitable action—Montana Ore Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co., 27 Mont. 536, 71 Pac. 1005.

1. McNulty v. Mount Morris Elec. Light Co., 172 N. Y. 410; Kentucky Land & Immi-

withstanding the constitutional guaranty, the court may, in a case where authorized by statute, refer the case generally or specially.[2] Where an action at law is referred in part to state an account, either party is entitled to a jury trial as to the remaining issues joined.[3] The right is not denied by rule authorizing entry of judgment for plaintiff for want of an affidavit of defense.[4] Unanimity is a part of the system until constitutionally changed.[5]

There is no impairment of the right by the instruction of a verdict where there is no material conflict in the evidence,[6] or by the action of a court in setting aside an unjustifiable verdict.[7]

The right to a jury trial may be made to depend on the amount involved.[8]

Statutes denying an appeal in certain cases may operate as a deprivation of the right.[9]

An action on several of a series of notes, some due and some not matured except as they were matured by stipulation that all should become due on default of any one, is not a suit on an unconditional contract in writing, within a constitutional provision requiring verdict of a jury on such a contract.[10]

One against whom the case is dismissed on the ground of falsity of an affidavit of poverty may not raise the question that he is thereby deprived of the right of trial by jury; having invoked the provisions of a statute allowing this procedure, he is bound thereby.[11]

The provision of the constitution of the United States, guaranteeing the right of jury trial for crimes, applies to the territories.[12] Misdemeanors,[13] prosecutions for violation of municipal police regulations,[14] and the like, are not crimes of which jury trial is of right.

The jury contemplated by the federal constitution is the common-law jury of twelve persons.[15] A constitutional provision requiring an impartial jury from the county where the offense is committed does not make it necessary that the jury be selected from the particular municipality in the county,[16] and is not violated by a law requiring jury commissioners to place on the list, names of persons whom they believe to be qualified, nor by an act providing that if the panel for the term becomes exhausted, it may be completed from those on the list living within five miles of the court house.[17]

gration Co. v. Crabtree, 24 Ky. L. R. 743, 70 S. W. 31. Defendant in a purchase money mortgage foreclosure interposing as a counterclaim a claim of damages arising from a breach of covenant against incumbrancers is entitled to a jury trial on the issue so raised—Herb v. Metropolitan Hospital & Dispensary, 80 App. Div. (N. Y.) 145. In proceedings to review a judgment where defendant pleads facts amounting to payment and satisfaction of a judgment and plaintiff joins the issues a jury trial is a matter of right—Farak v. First Nat. Bank (Neb.) 93 N. W. 682.

2. Const. art. 2, § 28—Tinsley v. Kemery, 170 Mo. 310.

3. Tinsley v. Kemery, 170 Mo. 310.

4. Fidelity & Deposit Co. v. United States, 187 U. S. 315.

5. Girdner v. Bryan, 94 Mo. App. 27.

6. Henry v. Thomas (Tex. Civ. App.) 74 S. W. 599; Hintz v. Michigan Cent. R. Co. (Mich.) 93 N. W. 634.

7. Serwer v. Serwer, 71 App. Div. (N. Y.) 415.

8. Items may be cumulated to make the amount—Lee v. Dow, 71 N. H. 326.

9. An act denying an appeal from a commissioner's court in civil cases, where the amount of the judgment, exclusive of costs, does not exceed $20.00, violates the constitutional provision guaranteeing right of trial by jury in suits at common law, where the amount in controversy exceeds $20.00 (Act Congress, March 1, 1895)—Archard v. Farris (Ind. T.) 69 S. W. 821. There is a deprivation of the right of trial by jury by an act allowing cemetery associations to secure land, the value to be determined by specified commissioners and giving no right of appeal—King v. Greenwood Cemetery Ass'n, 67 Ohio St. 240.

10. Howard v. Wellham, 114 Ga. 934.

11. Woods v. Bailey, 122 Fed. 967.

12. Queenan v. Territory, 11 Okl. 261, 71 Pac. 218.

13. People v. Stein, 80 App. Div. (N. Y.) 357.

14. Delaney v. Police Court, 167 Mo. 667.

15. Queenan v. Territory, 11 Okl. 261, 71 Pac. 218.

16. Lloyd v. Dollisin, 23 Ohio Circ. R. 571; United States v. Peuschel, 116 Fed. 642.

17. State v. Bolln (Wyo.) 70 Pac. 1.

Special juries in cities of a specific population may be authorized and deposit a jury fee required,[18] and unless the manner of obtaining a jury is prescribed, an act creating city court is not unconstitutional, because it provides for summoning a panel of sixteen jurors from which twelve should be taken.[19]

§ 19. *Crimes, prosecutions, punishments and penalties.*—A provision against passing of local or special acts to regulate the punishment of crimes repeals a special act wherein it provides for the punishment for embezzlement by officers of a certain bank.[20] Under a constitutional provision declaring gambling a vice and giving the legislature power to pass laws for its suppression, the legislature have power to declare betting on races at a distance, in the turf exchange, gambling.[21]

Ex post facto laws include only those punishing crime.[22] One charged with a crime is entitled to the benefits of a law applicable thereto, enacted after his commitment and before his conviction and sentence, though the situation cannot be altered to his disadvantage by later legislation.[23] The place of executing a sentence may be changed ex post facto.[24] The statute against the practice of medicine by unregistered persons and creating boards of registration does not render the act ex post facto as to one licensed under a prior act, where the later act provides for registration of persons legally registered under the earlier act.[25]

The federal provision that no person shall be held to answer for an infamous crime, except on presentment or indictment of the grand jury, is a limitation on the congressional power and does not apply to the states.[26]

The nature and extent of the accusation may be known without averring the name of the purchaser in an indictment for selling liquors without a license.[27]

The right to speedy trial does not clash with a law declaring that no bar shall arise to further prosecution of one who is discharged for delay in coming to trial.[28] Accused cannot be discharged and the indictment afterwards reinstated.[29]

The right to compulsory process to compel attendance of witnesses in criminal prosecutions is not a guaranty of their attendance, nor of more than ordinary diligence in serving the subpoena.[30]

The confrontation of witnesses is given if accused has opportunity to be present when witnesses give evidence which is introduced in writing.[31]

One is compelled to be a witness against himself by a prosecution under an indictment founded on his own involuntary testimony.[32] The privilege against self-incriminating testimony precludes cross-examination of accused as to matters which

18. Eckrich v. St. Louis Transit Co. (Mo.) 75 S. W. 755.

19. Mattox v. State, 115 Ga. 212.

20. Commonwealth v. Porter, 24 Ky. L. R. 364, 68 S. W. 621.

21. City of Shreveport v. Maloney, 107 La. 193.

22. The revocation of a physician's certificate for gross immorality is not a criminal punishment within the ex post facto clause, though applied to one whose habits were grossly immoral before the passage of the law—Meffert v. State Board of Medical Registration & Examination (Kan.) 72 Pac. 247. Ex post facto law see State v. Callahan, 109 La. 946.

23. State v. Edwards, 109 La. 236.

24. Capital punishment at state prison instead of jail—State v. Rooney (N. D.) 95 N. W. 513.

25. Reetz v. Michigan, 188 U. S. 505.

26. State v. Jones, 168 Mo. 398; People v. Scannell, 37 Misc. (N. Y.) 345. An act establishing a criminal court for a city is not unconstitutional for failure to provide that one accused of a penal offense shall have right to demand trial by indictment—Welborne v. Donaldson, 115 Ga. 563.

27. Jones v. State, 136 Ala. 118.

28. In re Begerow, 136 Cal. 293, 68 Pac. 773, 56 L. R. A. 528.

29. Prosecuting attorney announced his unreadiness to proceed with trial, discharged witnesses and accused from his bond—Jones v. Commonwealth, 24 Ky. L. R. 1434, 71 S. W. 643.

30. Smith v. State (Ga.) 44 S. E. 817.

31. Written testimony before examining magistrate (Rev. St. Utah, 1898, § 4513, subd. 4)—State v. King, 24 Utah, 482, 68 Pac. 418. Depositions—State v. Kline, 109 La. 603. Right to confront witnesses not impaired by reading testimony of deceased witness—People v. Elliott, 172 N. Y. 146. Right to confront witnesses may be waived—Odell v. State (Tex. Cr. App.) 90 S. W. 964.

32. State v. Gardiner, 88 Minn. 130.

he did not develop in evidence.[33] Merely requiring one to be sworn before the grand jury does not abridge this privilege.[34] There must be compulsion.[35] The fourteenth federal amendment did not extend the fifth so as to make guaranty therein apply to states.[36] The presumption of guilt from silence of witnesses other than accused is not forbidden.[37]

In felony cases a jury cannot be waived by accused.[38]

An act allowing sentence to depend on the fact of a prior conviction does not provide for sentence uncertain or disproportionate to the offense.[39] Fines in cases made to abide the event of a like case are not "assessed by a jury," hence are void if they, with the fine in the test case, exceed what may be imposed by the court.[40] The inhibition of disproportionate penalties refers only to criminal ones.[41] A fine of twice the amount embezzled from the state is not double punishment.[42] It is not double punishment to penalize an act in addition to giving a civil recovery.[43] Excessive fines[44] and cruel and unusual punishment[45] are not imposed because separate fines will in the aggregate take many years to work out.[46]

There is no jeopardy to preclude a second trial if the case was brought to an end before the jury was sworn,[47] or even afterwards, if the proceedings were insufficient to support a conviction,[48] or the jury became disqualified or disagreed.[49] A trial of a special issue is not jeopardy,[50] nor is a former trial for an offense which, though perhaps arising out of the same acts, was not identical with the one charged at bar,[51] and accused cannot complain that a former trial jeopardized him, when at his own instance it has been set aside or reversed.[52]

An act allowing a person under an indeterminate sentence to be released by prison officers does not invade the governor's pardoning power,[53] or provide an uncertain sentence.[54]

A constitutional provision declaring that fines shall be for the benefit of the school fund will not prohibit the legislature from authorizing a judgment in a criminal action which will operate in favor of the party whose moneys have been embezzled.[55]

33. Rogers v. State (Tex. Cr. App.) 71 S. W. 18.

34. He cannot assert it till questioned—United States v. Kimball, 117 Fed. 156. But unless he then asserts it it is lost—Id.

35. United States v. Kimball, 117 Fed. 156.

36. People v. Wyatt, 39 Misc. (N. Y.) 456.

37. United States v. Kimball, 117 Fed. 156.

38. Starr & C. Ann. St. c. 38, § 168—Paulsen v. People, 195 Ill. 507.

39. People v. Fox, 77 App. Div. (N. Y.) 245.

40. Madden v. State (Tenn.) 67 S. W. 74.

41. Penalty for discrimination by one express company against another—Adams Exp. Co. v. State (Ind.) 67 N. E. 1033.

42. Crim. Code, Neb. § 124—Everson v. State (Neb.) 92 N. W. 137.

43. Penal statute making pool selling or book making a felony, except where another penalty is provided by law, of amounts lost in a civil action (Pen. Code of New York, § 351)—People v. Stedeker, 75 App. Div. (N. Y.) 449.

44. Fine of one thousand dollars for assault and battery on a young woman, not excessive—Doyle v. Commonwealth (Va.) 40 S. E. 925. Anti-trust law not invalid as laying excessive fines—State v. Laredo Ice Co. (Tex.) 73 S. W. 951.

45. Fine of $100 or imprisonment for ninety days for operating stage without license not a cruel and unusual punishment—Borough of Belmar v. Barkalow, 67 N. J. Law, 504.

46. Twenty convictions of selling liquor, twelve years to work out the fines—Ex parte Brady, 70 Ark. 376.

47. State v. Taylor, 171 Mo. 465; State v. Lewis (Wash.) 71 Pac. 778.

48. Defective indictment—State v. Holton, 88 Minn. 171; State v. Sherman (Ark.) 74 S. W. 293. Verdict on fatally defective indictment is no jeopardy—State v. Brown (La.) 34 So. 698.

49. Illness of juror and discharge of jury—People v. Smith, 172 N. Y. 210. Discharge on disagreement—Dreyer v. Illinois, 187 U. S. 71. Discharge on holiday legal—State v. Lewis (Wash.) 72 Pac. 121.

50. Issue of former conviction—State v. Ellsworth, 131 N. C. 773.

51. See Criminal Law where the cases are collected showing what are identical.

52. People v. McFarlane, 138 Cal. 481, 71 Pac. 568, 72 Pac. 48; State v. Morrison (Kan.) 72 Pac. 554.

53. People v. Warden of Sing Sing, 39 Misc. (N. Y.) 113.

54. Indeterminate sentence act not bad for uncertainty—People v. Warden of Sing Sing, 39 Misc. (N. Y.) 113. Indeterminate

§ 20. *Searches and seizures.*—The taking of incriminating property from a defendant under arrest, without his consent, for use in evidence, does not amount to an unreasonable search and seizure.[56]

§ 21. *Suffrage and elections.*—The right to vote at a purely state election is governed by the laws of the state. The fifteenth amendment does not confer an affirmative right to vote. Its office is to inhibit abridgment of the right on grounds of race, color or condition. It is not directed against individuals who may intimidate voters.[57] Under the constitutional provision that male citizens shall be eligible to vote for all elective offices to be elected by the people, the legislature may not create a board of five members with bi-partisan representation on such board, and limiting the right of a voter to vote for more than three of such officers.[58] A requirement that voters shall vote in the wards of their residence does not impose an additional qualification within a prohibition of additional qualifications.[59] Where the constitution of a state makes residence in a municipality for one year a condition to right to vote at the election, a city is without power to require a residence of one year prior to registration.[60] An act imposing a property qualification on persons voting on the question of the establishment of a water-work system does not conflict with the constitutional provision prohibiting property qualification, the legislature having elsewhere in the constitution been given the power to restrict the taxing power of municipalities so as to prevent abuse of assessment.[61]

A ballot law prohibiting the placing of the name of the candidate nominated by different parties under the different party emblems interferes with the right of parties to make nominations, and with the right of a candidate to demand that his name shall be placed on the ballot so as to inform voters that he is the nominee of the political parties.[62] The fact that the constitution makes all persons entitled to vote eligible to office does not prevent the legislature from enacting laws governing the form of a ballot and limiting the right of a candidate to have his name placed on such ballot.[63]

The Nebraska primary election law, being complete in itself, does not contravene a constitutional provision relating to amendments of laws, though one of the sections operates indirectly as an amendment of a section of the general election law.[64]

Under a constitutional provision authorizing a city to form a charter to be submitted at the "next election" thereafter, it is not necessary that it be submitted at a general election.[65] A drainage act is not unconstitutional by reason of the fact that it gives each owner of land one vote for each acre owned by him.[66]

§ 22. *Frame and organization of government; courts; officers.—The right of local self government* is not a guaranty to a city, against appointment of its governing body by the governor of the state; but it has reference solely to the people of the state and not to the people of any portion of it.[67]

sentence law valid—Shular v. State (Ind.) 66 N. E. 746.

55. Everson v. State (Neb.) 92 N. W. 137.

56. Russell v. State (Neb.) 92 N. W. 751.

57. Prosecution for conspiracy to intimidate voters under Rev. St. § 5508—Karem v. United States (C. C. A.) 121 Fed. 250.

58. Bowden v. Bedell, 68 N. J. Law, 451.

59, 60. State v. Kelly (Miss.) 32 So. 909.

61. Spitzer v. Village of Fulton, 172 N. Y. 285.

62. Pol. Code, § 797—Murphy v. Curry, 137 Cal. 479, 70 Pac. 461, 59 L. R. A. 97.

63. State v. Moore, 87 Minn. 308, 59 L. R. A. 447. There is no infringement of the constitutional provision making voters eligible to office by a provision prohibiting a candidate who has sought nomination from a political party and been successful from having his name printed on the official ballot as an independent candidate for the same office; the right of such a person is amply protected by the provision for a blank space for the writing of names of candidates—Id.

64. Laws 1899, c. 27—De France v. Harmer (Neb.) 92 N. W. 159.

65. State v. Kiewel, 86 Minn. 136.

66. Mound City Land & Stock Co. v. Miller, 170 Mo. 240, 60 L. R. A. 190.

No offices may be created except as specially authorized by the constitution.[67] A constitutional provision against creation of executive offices is not violated by an act imposing duties of commissioner of department on governor of the state, and providing for appointment of special deputy to assist in discharging such duties.[69]

Where the courts have been classified or the jurisdiction fixed by the constitution, the legislature is without power to alter either.[70] Grants of power to erect courts[71] or define jurisdiction[72] are limited to terms of the grant. Under a provision conferring appellate jurisdiction on the supreme court in all cases at law and in equity, under such limitations and regulations as the legislature may prescribe, the legislature cannot enlarge or diminish the jurisdiction or the right of appeal.[73] Where jurisdiction is fixed at a certain amount, a court has no jurisdiction of an offense where the maximum fine would exceed the jurisdictional amount.[74] The giving of a right which is litigable in chancery does not extend chancery powers.[75] Judges as distinguished from the courts may be deprived of powers.[76]

An act temporarily increasing the number of judges of the supreme court does not violate the constitutional provision that the supreme court shall consist of a stated number of judges, and that the legislature may increase the number thereof from time to time.[77] Provision may be made for a judge to serve during a vacancy in a constitutional court.[78]

67. Brown v. Galveston (Tex.) 75 S. W. 488. The appointment of the majority of a board of commissioners, to constitute the governing body of a city, is not prevented by the constitutional provision allowing the voters the right to vote for "mayor" and all other elective offices—Id. Local self government is not impaired by state officers assessing franchise taxes—People v. State Board of Tax Com'rs, 174 N. Y. 417.

68. Superintendent of sewers—Lowery v. Lexington, 25 Ky. L. R. 392, 75 S. W. 202. Legislature of Kentucky is without power under the constitution to create a board with judicial powers to try county election contests, as this in effect creates a new court—Davison v. Johnson, 24 Ky. L. R. 27, 67 S. W. 996. Laws authorizing the incorporation of a private police and detective agency with power to arrest and imprison on the officers giving bond and taking of an oath and requiring no public service when qualified except ability to read and write and putting no limit on the time the officers may discharge their powers, violates a constitutional provision against the creation of offices, appointment to which shall be for more than a term of years, and that no grant of exclusive privileges shall be made to any man except on consideration of public service, and requiring civil officers of the state at large to reside in the state, and all officers of the districts, counties and municipalities to reside therein—(Kentucky Act, March 3, 1884)—Swincher v. Commonwealth, 24 Ky. L. R. 1897, 72 S. W. 306. Under a constitution enumerating the legislative employes, there can be no payment from a contingent fund of a claim for services by an officer not included in the enumeration and this particularly where an act in force at the time provided that no other employes than those enumerated should be elected without joint action by the two houses—Walker v. Coulter, 24 Ky. L. R. 530, 68 S. W. 1108. Electoral boards are not constitutional officers—Sinclair v. Young (Va.) 40 S. E. 907.

69. State v. Eskew (Neb.) 90 N. W. 869; Merrill v. State (Neb.) 91 N. W. 418.

70. Jurisdiction of federal courts under the constitution of the United States, see Appeal, Jurisdiction—Love v. Liddle (Utah) 72 Pac. 185.

An act allowing a township to pass an ordinance directing application to courts to compel railroad companies to erect gates at crossings, does not confer on the court the power inherently belonging to the supreme court and exercisable by mandamus—Palmyra Tp. v. Pennsylvania R. Co., 63 N. J. Eq. 799.

71. Under a constitutional provision authorizing the establishment of inferior courts in territory constituting territorial division of the state, the legislature may not authorize election of magistrate in territory corresponding to a congressional district, as such districts are federal and not state subdivisions (Laws 1901, c. 466, § 1392)—People v. Dooley, 69 App. Div. (N. Y.) 512.

72. Power to confer additional jurisdiction on certain courts does not give the legislature power to confer jurisdiction beyond this limitation—Ex parte Cox (Fla.) 33 So. 509.

73. Finlen v. Heinze, 27 Mont. 107, 69 Pac. 829.

74. State v. Wiseman, 131 N. C. 795.

75. Fixing a penalty for violation of an act against discharging sewerage in streams from which municipalities receive water, and authorizing state board of health to enjoin the act by suit in a chancery court—State Board of Health v. Diamond Paper Mills Co. (N. J. Law) 53 Atl. 1125.

76. State v. Taylor, 68 N. J. Law, 276.

77. Laws of Wash. 1901, p. 345—State v. McBride, 29 Wash. 335, 70 Pac. 25.

78. Town of Grayson v. Bagby, 25 Ky. L. R. 44, 74 S. W. 659.

Under a constitutional provision authorizing the legislature to change supreme court districts at the session next preceding the election of the judges, the legislature, in changing the boundaries of one district at such time, may make such changes in other districts as are necessary.[79] A constitutional provision for requiring redistricting of a state for legislative purposes the year following a national census, and each ten years thereafter, does not require that the successive re-apportionment acts should be taken the year following the taking of the national census. It is sufficient if a census has been taken before the enactment of the act.[80]

Appointments, election, and removal of officers.—A provision that the senate shall advise and confirm all appointments to constitutional or legislative offices is limited by a following provision contemplating modes of appointment "otherwise provided," and the senatorial confirmation may be dispensed with by law.[81] Where the constitution makes it the duty of the legislature to provide for the election of county officers, the appointment of such officers may not be delegated to other county officers.[82] An act allowing the president of a county board to appoint a civil service commission, without consent and advice of the members of the board of commissioners, does not violate a constitutional provision for the management of affairs of such county by a board of such commissioners.[83]

A constitutional provision vesting electors and county or municipal authorities with the selection of officers whose appointments are not provided for by the constitution is violated by an act for the consolidation of numerous boards of commissioners into one board, and naming the commissioners for the first year,[84] and by an act allowing the appointment of city magistrates by the mayor for a term of years and authorizing the election of city magistrates in congressional districts included in such city, as the act does not require the election of magistrates by the entire city,[85] and by acts transferring the duties and privileges belonging to local officers to state officers.[86] It is not violated by an act allowing the appointment of commissioners of juries by justices of the supreme court, in counties having a certain population,[87] nor by an act terminating the office of commissioners in New York city and vesting their powers in a single commissioner who could be removed by the mayor or governor whenever the public interest requires, as the vesting of the power of removal in the governor was a particular qualification of the mayor's power of appointment.[88] The right to vote for all elective officers is impaired by an act allowing a vote for but three of a bi-partisan board of five.[89]

An act forfeiting an office, for failure of the elected candidate to file a verified statement of his election expenses, violates a constitutional provision by requiring an oath of office different from the one required therein, and the further provision that no other oaths, declarations or tests shall be required as a qualification for any office of public trust.[90]

Tenure of office.—Under a constitutional provision that county officers shall be elected at such times, in such numbers and for such periods not exceeding six years, as may be prescribed by law, the legislature may shorten the term of office of in-

79. People v. Rose (Ill.) 67 N. E. 746.
80. People v. Carlock, 198 Ill. 150.
81. Idaho Act, March 3, 1889—In re Inman (Idaho) 69 Pac. 120.
82. Appointment of county hospital physician by supervisors—People v. Wheeler, 136 Cal. 652, 69 Pac. 435.
83. 1 Starr & C. Ann. St. (2nd Ed.) p. 1102—Morrison v. People, 196 Ill. 454.
84. Village of Saratoga Springs v. Van Norder, 75 App. Div. (N. Y.) 204.
85. Laws 1901, c. 466, § 1392—People v. Dooley, 171 N. Y. 74.
86. People v. State Board of Tax Com'rs, 174 N. Y. 417.
87. In re Allison, 172 N. Y. 421. But compare In re Brenner, 170 N. Y. 185.
88. Laws 1901, c. 33—People v. Coler, 71 App. Div. (N. Y.) 584.
89. Bowden v. Bedell, 68 N. J. Law, 451.
90. Stryker v. Churchill, 39 Misc. (N. Y.) 573.

cumbents elected for a fixed term.[91] In some states the constitution prohibits enactment of laws extending the terms of public officers.[92] The constitutional provision that officers shall continue to perform the duties of their offices until the qualification of their successors is mandatory, and an officer continues in office until the appointment of his successor, notwithstanding the acceptance of his resignation.[93]

The office of state assessor in Mississippi is one held under the authority of the state, within a constitutional provision forbidding a person to hold office under authority of the state while holding an office of honor or profit under the United States.[94]

Under the constitution fixing the number of members of the legislature, officials receiving certificates of nomination are without power to refuse a certificate or prevent the name of the party certifying from appearing on the ballot, on the ground that the nomination calls for excess in membership, as the legislature is the proper body to pass upon the election and qualification of its members.[95]

Compensation.[96]—Additional compensation for services in the line of duty may not usually be made during incumbency, or when the compensation is fixed by the constitution, to an officer whose compensation is fixed by law.[97] A provision allowing the increase of salaries of judges does not authorize acts excepting judges presiding in circuits of a certain area and population.[98] Under a constitution providing that justices shall have such compensation "as have been heretofore or may hereafter be prescribed by law," the legislature has power to fix the amount to be paid by specified counties to justices, for services in criminal cases.[99] A constitutional provision requiring uniformity of system of town and county government is not violated by an act for salary of officer in counties containing a specified population, though such officers in other counties are paid by fees, where there is no change in the method of electing the officer, and a requirement for the execution of a bond is to protect the county in its title to fees which had formerly belonged to the officer.[1]

§ 23. *Taxation and fiscal affairs.*—The fact that the constitution does not expressly authorize the imposition of an inheritance tax will not defeat the right of the legislature to provide for such tax, where the constitution declares that the enumeration of certain rights therein shall not be construed to deny others retained by the people.[2] A county empowered to tax for county purposes may not be authorized to levy a tax to pay a state officer's salary.[3] Under a provision requiring that every person in the state or holding property therein should contribute to the

91. Brown v. Brooke, 95 Md. 738.

92. Violated by act postponing date of election of judges—People v. Knopf, 198 Ill. 340.

93. Keen v. Featherston (Tex. Civ. App.) 69 S. W. 983.

94. This constitutional provision does not prevent one in holding a state office, but who has pending a contest therefor, from accepting during the pendency of the contest, an office under the United States, and the contest will not be dismissed on motion showing the acceptance—State v. Kelly, 80 Miss. 803.

95. Mills v. Newell (Colo.) 70 Pac. 405.

96. A salary fixed by constitution is not taxable—In re Taxation of Judge's Salaries, 131 N. C. 692. An act limiting the amount to be paid justices in a specified county for attendance on criminal cases, being local but not special, does not violate the constitutional provision against the enactment of a special law respecting that for which provision has been made by a general law. The act is local but not special—Herbert v. Baltimore County Com'rs (Md.) 55 Atl. 376.

97. **Applied:** To officers acting ex officio in a second capacity—Warner v. Board of State Auditors, 128 Mich. 500. To officer performing unusual service—Humboldt County v. Stern, 136 Cal. 63, 68 Pac. 324. To officer claiming allowance for expenses—Coles County v. Messer, 195 Ill. 540.

98. Bennett v. State (S. D.) 93 N. W. 643.

99. Herbert v. Baltimore County Com'rs (Md.) 55 Atl. 376.

1. Laws 1895, c. 169—Verges v. Milwaukee County (Wis.) 93 N. W. 44.

2. State v. Clark, 30 Wash. 439, 71 Pac. 20.

3. Judges held state officers—Colbert v. Bond (Tenn.) 75 S. W. 1061.

public taxes, the taxes may be imposed on a domestic corporation owned by a nonresident.[4] A license fee is not necessarily an "occupation tax" within a limiting clause.[5]

Equality and uniformity.—The requirement of uniformity is satisfied where the taxes are uniform upon the same class within the territorial limits of the levying authority.[6] It is necessary that the tax should be for a public purpose and subserve the interests of the people.[7] The rule applies to municipal corporations.[8] It does not apply to licenses imposed under the police power,[9] nor to inheritance taxes which are not upon property.[10] Acts exempting property of charitable institutions from taxation are valid;[11] but the rule is violated by a town charter relieving property within the town from payment of county taxes.[12] A license tax on dealers in a commodity, but exempting those handling such of it as had already passed through a licensed dealer, is unreasonable in its exemption.[13] In determining whether the rule has been violated, property escaping taxation altogether cannot be taken into account.[14] A good will is not property within the constitutional requirement of equality and uniformity.[15] A constitutional amendment providing for assessment of property under general laws and by uniform rules, according to its true value, abrogates special laws exempting certain property, but not yet accepted so as to constitute a contract.[16] There is no unconstitutional discrimination in an income tax law, exempting from its operation insurance companies taxed under other laws on their premiums.[17] In the note are collected laws passed on in this connection.[18]

4. Corry v. City Council of Baltimore, 96 Md. 310.

5. Limit on occupation tax—Brown v. Galveston (Tex.) 75 S. W. 488.

6. Elting v. Hickman, 172 Mo. 237; Day v. Roberts (Va.) 43 S. E. 362; State v. Bengsch, 170 Mo. 81.

Inequality as taking property without due process, see ante, § 15; as denying equal protection of law, ante, § 10.

7. State v. Froehlich (Wis.) 94 N. W. 50.

8. Mayo v. Dover & Foxcroft Village Fire Co., 96 Me. 539; State v. Savage (Neb.) 91 N. W. 716. A constitutional provision requiring uniformity in equality of taxation and giving municipalities the power to levy taxes in such a manner as shall be prescribed by law, does not impliedly prohibit the legislature from granting a municipality the right to levy taxes to pay particular debts on the theory that the manner of levying could not thereby be prescribed, as the manner of levying taxes is fixed by general laws—State v. City of Bristol (Tenn.) 70 S. W. 1031.

9. State v. Hammond Packing Co. (La.) 34 So. 368. Vehicle taxes—Terre Haute v. Kersey, 159 Ind. 300; Ft. Smith v. Scruggs. 70 Ark. 549. Licenses must not be so high as to amount to a tax on the business—Seattle v. Bartol (Wash.) 71 Pac. 735.

10. Sess. Laws 1901, p. 68, § 2—State v. Clark, 30 Wash. 439, 71 Pac. 20. The Minnesota inheritance tax law making transfers as between collaterals taxable at their value when they exceed $5,000.00, and that as to lineal descendants the tax shall be imposed only on the excess over and above the fixed valuation of $5,000.00, violates the constitutional provision authorizing an inheritance tax, but requiring the tax above any exempted sum to be uniform (Laws Minn. 1901, c. 215)—State v. Bazille, 87 Minn. 500.

11. People v. Miller, 116 N. Y. St. Rep. 621; W. C. Peacock & Co. v. Pratt (C. C. A.) 121 Fed. 772.

12. Day v. Roberts (Va.) 43 S. E. 362.

13. No reasonable ground for classification—Standard Oil Co. v. City of Spartanburg (S. C.) 44 S. E. 377.

14. State v. Savage (Neb.) 91 N. W. 716.

15. Hart v. Smith, 159 Ind. 182.

16. Cooper Hospital v. City of Camden, 68 N. J. Law, 691.

17. W. C. Peacock & Co. v. Pratt (C. C. A.) 121 Fed. 772.

18. Unequal and not uniform: County tax to reimburse general fund for moneys paid to benefit township—Harper v. New Hanover County Com'rs (N. C.) 45 S. E. 526. The creation of a pension fund for school teachers out of teachers' salaries—Hibbard v. State, 65 Ohio St. 574. General tax of certain amount and in addition to the water rates on each lot having a building on it and abutting on a street having service mains—Village of Lemont v. Jenks, 197 Ill. 363.

Rule not violated: Act for licensing transient merchants and excepting therefrom sheriffs, assignees and other public officers—Levy v. State (Ind.) 68 N. E. 172. A local option law imposing a penalty different from that imposed by general dram shop act—Ex parte Handler (Mo.) 75 S. W. 920. Laws taxing gross premiums of insurance companies where imposed on foreign and domestic companies alike—Northwestern Mut. Life Ins. Co. v. Lewis & Clarke County (Mont.) 72 Pac. 982. An act exempting the owner of mortgaged property from taxation on the mortgage (Burns' Rev. St. 1901, § 8417A; Horner's Rev. St. 1901, § 6272A)—

The constitutional provision authorizing taxation of persons engaged in specific occupations, by the general law of uniform application as to classes taxed, does not prevent a classification of persons for that purpose.[19] The federal requirement of uniformity of duties and imposts does not apply to taxation by states or territories.[20]

Double taxation.—The prohibition of double taxation has no reference to taxation by the state and again by its governmental division,[21] or to taxation in another state,[22] but the same property cannot be taxed in two places for the same purpose.[23] A tax may be levied to restore and reimburse a fund raised by taxation.[24] An intent to impose it will not be presumed.[25] Corporate stocks are not taxable in addition to its property,[26] but taxation of shares to the holders and landed property to the corporation has been upheld.[27] A license tax on an insurance company and also its agents is valid,[28] as well as a license for street use by vehicles otherwise taxed.[29]

Complaint of violation of the rule may only be made by persons affected.[30]

Exemption clauses are strictly construed.[31] Under a constitutional provision reserving the right to exemption to the legislature, there is a valid exemption of an

State v. Smith, 158 Ind. 543. An act imposing a license tax on agents of packing houses doing business in the state—Stewart v. Kehrer, 115 Ga. 184. An act taxing sellers of cigarettes at a specified amount per annum, and inapplicable to jobbers doing an interstate business with customers outside the state—Cook v. Marshall County (Iowa) 93 N. W. 372. Occupation taxes levied under a charter allowing municipalities to divide the various occupations into different classes and imposing taxes on all such classes—Kansas City v. Richardson, 90 Mo. App. 450. Laws placing an officer on a salary instead of under fees as formerly, objected to on the theory that under the fee system such officer could waive his fees, but under the statute every citizen must pay the fee and consequently it was a tax—Verges v. Milwaukee County (Wis.) 93 N. W. 44. A road tax law exempting from its provision, property within municipalities where work on streets is done under laws relating to municipalities, on the ground that the said property was not equally taxed for road purposes in proportion to its value (Act, Cal. 1883, § 2)—Miller v. Kern County, 137 Cal. 516, 70 Pac. 549. An act providing that all personal property except certain classes shall be listed for taxation in the township in which the taxpayer resides, the residence of the corporation or partnership would be deemed to be in a township in which the particular office or place of business is situated, it not being the purpose of the constitution to restrict the legislature from prescribing regulations as to situs of personalty (Laws 1899, c. 15, § 14)—City of Winston v. City of Salem, 131 N. C. 404. A valuation of realty on which mine is situated, at the price that the mine would sell for at a fair, voluntary sale for cash, and other property at value at which it would be taken in payment of a just debt from a solvent debtor (1 Ballinger's Ann. Codes & St. § 1698—Eureka Dist. Gold Min. Co. v. Ferry County, 28 Wash. 250, 68 Pac. 727.

19. Rosenbloom v. State (Neb.) 89 N. W. 1053, 57 L. R. A. 922.

20. W. C. Peacock & Co. v. Pratt (C. C. A.) 121 Fed. 772.

21. The fact that a city charter allows the levy of a license tax on insurance companies, and a legislative act requires companies to pay a tax does not authorize double taxation, but merely different methods of taxation—City of Lamar v. Adams, 90 Mo. App. 35.

22. Griggs Ry. Const. Co. v. Freeman, 108 La. 435.

23. Township where the taxpayer resides, and also by another township—Stephens v. Smith, 30 Ind. App. 120.

24. County tax to pay expenses of patients in state insane hospital supported by state tax—Bon Homme County v. Berndt, 15 S. D. 494.

25. Wright v. Louisville & N. R. Co. (C. C. A.) 117 Fed. 1007.

26. Shares of stock held by resident in foreign corporation taxed, and property of the corporation is taxed in the state where located—Stroh v. Detroit (Mich.) 90 N. W. 1029.

27. Illinois Nat. Bank v. Kinsella, 201 Ill. 31.

28. City of Farmington v. Rutherford, 94 Mo. App. 328.

29. Ft. Smith v. Scruggs, 70 Ark. 549.

30. Corliss v. Village of Highland Park (Mich.) 93 N. W. 254.

31. Louisiana & N. W. R. Co. v. State Board of Appraisers, 108 La. 14. Exemption from taxation of property used exclusively for charitable purposes, a part of a building not used will not be exempt, though the rent therefrom is used for charitable purposes—State v. Board of Equalization (S. D.) 92 N. W. 16. Within the constitutional provision enumerating property exempt from taxation and declaring invalid all laws exempting other property, an inspection law, in effect a revenue law exempting certain kinds of liquors is unconstitutional—State v. Bengsch, 170 Mo. 81. An exemption is a contract within the constitution which may not be impaired by taxation—Bancroft v. Wicomico County Com'rs, 121 Fed. 874. A sugar refinery is regarded as a "manufacturer"—State v. American Sugar Refining Co., 108 La. 603. The term "produce of the state" in a constitutional provision, exempting articles manufactured from produce of the state, from taxation, includes logs grown on soil of the state lying at a mill to be cut up into lumber—Benedict v. Davidson County (Tenn.) 67 S. W. 806.

asylum from taxation in a charter granted thereto under such statute.[32] An exemption of property leased for revenue by a charitable institution and not embraced in its charter is repealed by a provision in the constitution afterwards adopted, exempting only property of charitable institutions not used or leased for purposes of private or corporate income.[33] Exemptions cannot be made by way of commuting taxes,[34] but an act exempting railroad company from payment of taxes for a term of years, in compromise of a claim of the railroad against the state, was sustained.[35] Under the constitutional provision that the salaries of judges shall not be diminished during their continuance in office, the salaries of the judges of the supreme court are exempt from taxation either direct or otherwise.[36]

Levy, assessment, collection, and equalization.[37]—The constitutional provision that the legislature shall provide for an annual tax sufficient to defray the estimated expenses of the state for each year limits the annual tax to an amount sufficient to defray such expenses.[38] A constitutional provision that the treasurer shall be the collector of taxes is violated by an act authorizing the assessor to collect taxes on personal property.[39] Taxes must ordinarily be based on valuation.[40] Ordinances imposing occupation taxes[41] and assessments for public improvements are not within the constitutional provision requiring taxation in proportion to value.[42] Laws providing for water frontage assessment do not violate either state or federal constitution.[43] Alfalfa will not be regarded as an "improvement" so as to require separate assessment.[44]

Public improvements.—Under a constitutional provision prohibiting the state from contracting any debt for works of internal improvement, the state is without power to appropriate money for the construction and strengthening of a levee system on navigable river, though the construction of a levee might incidentally avert possible peril to life.[45] The constitution of Ohio prohibits the raising of money directly or indirectly by assessment, to pay compensation, damages or costs for land appropriated by the public for public use.[46] An act amending an act incorporating a city is not rendered unconstitutional by reason of it requiring reimbursement of property owners for paving assessments by rebates from the road tax.[47] Constitutional prin-

32. St. Anna's Asylum v. Parker, 109 La. 592.

33. Female Orphan Soc. v. Board of Assessors, 109 La. 537.

34. An act levying a tax on gross premiums to be in full of state and local taxes —Raymond v. Hartford Fire Ins. Co., 196 Ill. 329.

35. State v. Colorado Bridge Co. (Tex. Civ. App.) 75 S. W. 818.

36. In re Taxation of Judge's Salaries, 131 N. C. 692.

37. There is no violation of a home rule constitutional provision in a law requiring franchise assessment by state officers—People v. State Board of Tax Com'rs, 174 N. Y. 417.

38. State v. Froehlich (Wis.) 94 N. W. 50.

39. Mutual Life Ins. Co. v. Martien, 27 Mont. 437, 71 Pac. 470.

An act authorizing a collector to assess personal property he finds unassessed by the assessor is constitutional—Powell v. McKee (Miss.) 32 Mo. 919, following State Revenue Agent v. Tonella, 70 Miss. 701 and line of decisions.

40. The beer inspection fees provided by the laws of Missouri are a tax and unconstitutional as not being levied on a cash valuation (Rev. St. Mo. 1899, c. 117, art. 4, § 7691)—State v. Eby, 170 Mo. 497. An inspection law providing for a state license tax on distilled liquors and exempting from its provisions, liquors intended for export and domestic wines, violates the constitutional provision that all property subject to taxation shall be taxed in proportion to its value—State v. Bengsch, 170 Mo. 81.

41. Kansas City v. Richardson, 90 Mo. App. 450.

42. Jones v. Holzapfel, 11 Okl. 405, 68 Pac. 511.

43. State v. Trustees of Macalester College, 87 Minn. 165; Minneapolis & St. L. R. Co. v. Lindquist (Iowa) 93 N. W. 103; Heman v. Gilliam, 171 Mo. 258. Benefits must be equal and uniform—Morse v. Omaha (Neb.) 93 N. W. 734.

44. Miller v. Kern County, 137 Cal. 516, 70 Pac. 549.

45. State v. Froehlich, 115 Wis. 32.

46. The constitution does not, however, affect or prohibit the raising of money by assessment to pay for the improvement of streets, etc., so long as the assessment does not exceed the special benefits—Dayton v. Bauman, 66 Ohio St. 379.

47. Pennsylvania Act, May 18, 1871—Franklin v. Hancock, 204 Pa. 110.

ciples applicable to taxation for public improvements are applicable to assessments for the construction of sewers.[48]

Debt limit.—The words "debt" or "indebtedness" refer to indebtedness created by contract,[49] and are used in their ordinary sense.[50] Current expenses for the year are not to be counted as an existing debt.[51] There is no increase by issue of bonds to be exchanged at par for a greater or equal amount of pre-existing legal bonds bearing a greater interest,[52] nor by exchange of bonds for warrants, where the change will diminish rather than increase indebtedness.[53] City bonds bearing interest and secured by mortgage on a water works erected with the proceeds are a debt of the city, though they are to be payable out of a special tax for that purpose in instalments.[54] A contract requiring the city to pay for a plant in the form of rental constitutes an indebtedness[55] from the day of the execution of the contract,[56] though payment of rentals at specified future times is not a "current expenditure,"[57] nor is a contract to pay annual rentals an indebtedness for the aggregate amount of the rentals.[58] Amount of debt is determined by adding to the principal of all outstanding debts the amount of accrued and overdue interest.[59] A percentage of "value" is the assessed value and not the actual value of taxed property.[60] Funds included among the cash resources of the city and set apart pursuant to statutory authority to meet a specific indebtedness should be deducted from the city's liabilities, and funds not so set apart should not be deducted.[61] Under a charter provision limiting indebtedness to a fixed sum and providing that for the purpose of acquiring and establishing a water works and sewerage system a further indebtedness may be incurred, indebtedness already incurred or to be incurred for such water works or sewerage system is not to be considered in the fixed limitation.[62]

Debts of superior or co-extensive but distinct public corporations are not reckoned.[63] The indebtedness of a water district, an integral part of a municipality, is not an indebtedness of the municipality.[64]

A city may not exceed the limit, though it has in its treasury a part of the

48. White v. Gove (Mass.) 67 N. E. 359. Statutes 1867, c. 106—Smith v. Worcester, 182 Mass. 232, 59 L. R. A. 728. An act allowing cities to build sewers is not made unconstitutional by a provision allowing a city when constructing a sewer to lay the necessary pipes for hose connections to the curb line of abutting lots and charge the cost thereof to the abutting premises—Van Wagoner v. City of Paterson, 67 N. J. Law, 455.

49. O'Bryan v. Owensboro, 24 Ky. L. R. 469, 68 S. W. 858.

50. Does not include unearned interest—Epping v. Columbus (Ga.) 43 S. E. 803. The term "indebtedness" in Montana constitution means what a city owes irrespective of demands which it might hold against others—Jordan v. Andrus, 27 Mont. 22, 69 Pac. 118.

51. O'Bryan v. Owensboro, 24 Ky. L. R. 469, 68 S. W. 858.

52. Hyde v. Ewert (S. D.) 91 N. W. 474.

53. Walling v. Lummis (S. D.) 92 N. W. 1063.

54. Swanson v. City of Ottumwa (Iowa) 91 N. W. 1048, 59 L. R. A. 620. But see contra, City of Ottumwa v. City Water Supply Co. (C. C. A.) 119 Fed. 315, 59 L. R. A. 604.

55, 56. Baltimore & O. S. W. R. Co. v. People, 200 Ill. 541.

57. City of Centerville v. Fidelity Trust & Guaranty Co. (C. C. A.) 118 Fed. 332.

58. Fidelity Trust & Guaranty Co. v. Fowler Water Co., 113 Fed. 560; Denver v. Hubbard (Colo. App.) 68 Pac. 993.

59. Epping v. Columbus (Ga.) 43 S. E. 803.

60. City Water Supply Co. v. City of Ottumwa, 120 Fed. 309.

61. Kronsbein v. Rochester, 76 App. Div. (N. Y.) 494.

62. Los Angeles v. Hance, 137 Cal. 490, 70 Pac. 475.

63. A constitutional limitation of the amount of indebtedness of municipality, does not require the inclusion of the state debt—Lancaster School Dist. v. Robinson-Humphrey Co., 64 S. C. 545.

School corporation having the same boundaries as the city—Hyde v. Ewert (S. D.) 91 N. W. 474. Interest bearing notes given by school trustees of a school city, to raise money for school purposes, are not to be included—Heinl v. Terre Haute (Ind.) 66 N. E. 450.

A library board is not included in a limitation enumerating counties, cities, towns, townships, boards of education and school districts—Robertson v. Board of Library Trustees, 136 Cal. 403, 69 Pac. 88.

64. Holroyd v. Town of Indian Lake, 40 Misc. (N. Y.) 75; Kennebec Water Dist. v. City of Waterville, 96 Me. 234.

funds necessary to discharge the obligation and may be able to collect the remainder by the time the obligation matures.[65]

An act allowing a court to direct the levy of a tax on a showing of its necessity does not authorize a levy in excess of the constitutional limit.[66]

Necessary expenditures are sometimes allowed for maintenance, though limit has been exceeded;[67] also to provide specified public improvements.[68] Where bonds have been issued in excess of the constitutional authority and all were created by the same ordinance and sold at the same time, each bond is valid to the extent of its proportionate share of the debt lawfully contracted.[69]

Submission of question of indebtedness.—The legislature may enact necessary legislation to make effective a constitutional provision allowing public assent to an increase.[70] It is not necessary to the validity of a special election to obtain consent of the taxpayers of a town to incur a debt, that the debt for each particular purpose should be specifically set out.[71] The majority intended by a constitution is a majority of the votes cast on that question at a general election, though the majority is not a majority of all electors voting at the election.[72] In Georgia the question may not be submitted to the voters in connection with other issues.[73] The order of a governmental body as to amount to be raised must be substantially followed.[74] A vote to exceed a limit is not required when the people have already voted for expenditures which with existing debts exceed the limit.[75]

A state is not prevented from establishing a dispensary and making the city liable for its maintenance, by a constitutional provision forbidding municipalities from incurring a new debt without the consent of two-thirds of the qualified voters of such municipality.[76]

Provision for payment of debts.—In many states it is required that provision for payment must precede creation of a debt.[77] A bonded debt is not "created" until the bonds are "issued," i. e., until they are sold.[78]

65. City Water Supply Co. v. City of Ottumwa, 120 Fed. 309. A city is not exempt from a constitutional debt limitation by the fact that it has sufficient property to pay for a public building, and it was the intent of the city to sell the property for that purpose, where there was no action on the part of the city council in accordance with the intent—Fourth Nat. Bank v. Dallas (Tex. Civ. App.) 73 S. W. 841.

66. State v. Wabash R. Co., 169 Mo. 563.

67. Expenses for guards to prevent destruction of property (Ky. St. § 1241A)—Hopkins County v. St. Bernard Coal Co., 24 Ky. L. R. 942, 70 S. W. 289. Labor, election expenses, guarding quarantine patients—Gladwin v. Ames, 30 Wash. 608, 71 Pac. 189. Light and water—Cain v. City of Wyoming, 104 Ill. App. 538. Salaries—Laws of New York, 1901, cc. 704-706—McGrath v. Grout, 171 N. Y. 7.

68. Under a constitution allowing citizens to increase debt to a certain per cent for providing water for irrigation and domestic purposes, the power to incur an additional per cent of indebtedness for water purposes is conferred regardless of existing indebtedness for other purposes—Wells v. Sioux Falls (S. D.) 94 N. W. 425.

69. Columbus v. Woonsocket Inst. of Savings (C. C. A.) 114 Fed. 162. Bonds issued by the municipality are valid only to the amount that a tax contemporaneously levied would pay the interest and create a sinking fund of the per cent prescribed, the same to be determined by the next preceding assessment—Id.

70. State v. Quayle (Utah) 71 Pac. 1060.

71. Gray v. Bourgeois, 107 La. 671.

72. Ballots reading "for the loan" and "against the loan," are sufficient without specifying the purpose and nature of a proposed loan—Tinkel v. Griffin, 26 Mont. 426, 68 Pac. 859.

73. Cain v. Smith (Ga.) 44 S. E. 5.

74. A resolution for reciting an indebtedness of about "$100,000," will not authorize the collection of a tax amounting to "$132,000"—Peoria & P. U. Ry. Co. v. People, 198 Ill. 318.

75. Under a constitutional provision that the debt of a city shall not exceed seven per cent of the assessed value of the taxable property, nor shall it incur any debt or increase its indebtedness to an amount exceeding two per cent of such assessed value without the consent of the electors construed—Keller v. Scranton, 202 Pa. 586.

76. Jacoby v. Dallis, 115 Ga. 272.

77. A contract by a municipality to purchase a water and electric light plant creates a debt under the provision that no debt shall be created without provision being made for a sinking fund, though the contract is a compromise of claims against the city in favor of another which may accrue in the future—City of Austin v. McCall, 95 Tex. 565. An act providing for the establishment of a dispensary and making the city liable for its maintenance, is not op-

Public aid donations and loans of credit.[79]—There is not an unconstitutional donation by an ordinance reimbursing an officer for expenses incurred in removing nuisance in highway,[80] nor by an ordinance appropriating money to reimburse property owners for the construction of a water pipe to connect with the city water supply.[81] An act allowing a school board to place on the retired list teachers retired prior to the passage of the act, on a pension, violates the constitutional provision forbidding a city to give money in aid of any individuals, it being on account of its retroactive operation a mere gratuity.[82] Laws making it the duty of school districts to transport scholars from remote parts of the district to attend school do not authorize diversion of public funds to private use.[83]

Diversion of taxes from other funds to a special road district newly created is not a grant in aid of individual associations or corporations.[84] There is no pledging of credit by a stipulation in a contract for local improvement, that the city shall not be liable to make certain payments before funds applicable thereto shall have been collected,[85] nor by insuring public property in a mutual insurance company.[86]

§ 24. *Schools and education; school funds.*—A constitutional provision making it the duty of the legislature to establish a uniform system of schools is violated by appointing certain persons as trustees of a specified district for twenty years.[87] Separate schools for white and colored children may be maintained under a constitutional provision requiring establishment of permanent system of public schools.[88]

Under a constitutional provision securing to the school fund lands under water belonging to the state, such lands may not be transferred to municipalities for a nominal consideration.[89] Under constitutional provision making right to participate in school funds dependent on the fact of maintenance of a school for three months in a year, a school district organized eight months before the time of distribution and six months after the apportionment is not entitled to share.[90]

The legislature is often denied power to divert any portion of the tax raised for school purposes,[91] but a drainage law is valid, though it makes public school lands, benefited, liable in apportioning cost of the improvement.[92]

§ 25. *Commerce.*—By the commerce clause the federal, to the exclusion of the state governments, is given the power to regulate commerce which passes the borders of a state. This clause does not deprive the states of their sovereign powers respecting persons and instrumentalities engaged in interstate and for-

posed to a constitutional provision declaring that municipal corporations shall not incur any debt until a provision therefor shall be made—Jacoby v. Dallis, 115 Ga. 272.

In Georgia the constitution does not require that provision for payment should be made before its creation—Epping v. Columbus (Ga.) 43 S. E. 803.

78. City of Austin v. Valle (Tex. Civ. App.) 71 S. W. 414.

79. Constitutional provision held not restrictive of the power of counties to subscribe for stock in any railroad company which had been duly incorporated and in which the citizens of the county as a body have a general interest because of supposed benefits to be derived therefrom—Board of Com'rs v. Coler (C. C. A.) 113 Fed. 705.

80. State v. St. Louis (Mo.) 73 S. W. 623.

81. State v. St. Louis, 169 Mo. 31.

82. Laws 1900, c. 725—Mahon v. Board of Education, 171 N. Y. 263.

83. School Dist. No. 3 v. Atzenweiler (Kan.) 73 Pac. 927.

84. Elting v. Hickman, 172 Mo. 237.

85. Kronsbein v. Rochester, 76 App. Div. (N. Y.) 494.

86. Nor by giving its premium notes for payment of assessments to meet losses incurred by the company—French v. City of Millville, 67 N. J. Law, 349.

87. Ellis v. Greaves (Miss.) 34 So. 81.

88. Laws 1879, p. 163, c. 81—Reynolds v. Board of Education (Kan.) 72 Pac. 274.

89. Henderson v. Atlantic City (N. J. Ch.) 54 Atl. 533.

90. Deckerville High School Dist. v. School Dist. No. 3 (Mich.) 90 N. W. 1064.

91. To support library—Board of Education v. Board of Trustees, 24 Ky. L. R. 98, 68 S. W. 10.

92. The money goes to benefit school property—State v. Henry, 28 Wash. 38, 68 Pac. 368.

eign commerce, but forbids regulation of the commerce itself, and it leaves to the states power over purely domestic commerce. In a preceding article[93] is discussed the question, what is a proper exercise of these powers. When a federal act regulating commerce is attacked as offending a provision of the bill of rights, it will be found treated under the appropriate section of this article.

§ 26. *Enactment of statutes* is in most of the states subject to restrictions against local or special laws, against repealing or amendatory acts which do not set out the law to be changed, against laws embracing more than one subject or not clearly expressing that subject in the title or enacting clause. Such provisions will be embraced in the article "Statutes," to be published in a future number.

§ 27. *Miscellaneous provisions other than foregoing. Right to bear arms.*—The constitutional privilege of keeping and bearing arms is not infringed by an act prohibiting private persons from carrying deadly weapons within the limits of municipalities within the state.[94]

Religious corporations.—The constitutional provision that no religious corporation can ever be established in the state is not violated by the granting of a charter to an institution of learning, the trustees of which are appointed by a religious organization.[95]

Right to require information by compulsion.—An act making it the duty of a carrier delivering damaged freight to a consignee to locate the connecting carrier liable for the injury, and furnish such information to the consignee, is not unconstitutional, in that it requires information by a statutory compulsion and inflicts a penalty for refusal to furnish the information which the company is entitled to withhold if it so desires.[96]

Usury laws.—A constitutional provision that all contracts for a greater than a specified rate of interest per annum should be deemed usurious has reference only to contracts, and does not limit the power of the legislature with regard to claims or rights that may be created otherwise than by contract.[97]

CONTEMPT.

§ 1. Nature of a Contempt.—A. Elements. B. Acts of Disobedience. C. Official Misconduct and Obstruction of Justice.
§ 2. Defense, Excuse, or Purgation.
§ 3. Power to Punish or Redress.
§ 4. Pleadings and Procedure Before Hearing.
§ 5. Hearing; Evidence; Trial.
§ 6. Findings and Judgment.
§ 7. Punishment; Fine and Commitment; Further Proceedings.
§ 8. Discharge or Pardon.
§ 9. Review.

§ 1. *Nature of a contempt and what constitutes one. A. Elements of contempt and nature of proceeding.*—Contempt must be willful and the failure to obey the direction of the court must not arise from mere inability,[98] or from the acts of others without one's knowledge and control,[99] and where the circumstances are such that it can fairly be inferred that a party acted with good intention and not in violation of his obligations to the court and other parties, he cannot be held

93. Commerce.
94. Legislature has undoubted power in the exercise of its police power to prohibit the carrying of concealed deadly weapons (Idaho Act, Feb. 4, 1889)—In re Brickey (Idaho) 70 Pac. 609.
95. State v. Board of Trustees (Mo.) 74 S. W. 990.
96. Central of Georgia Ry. Co. v. Murphey, 116 Ga. 863.
97. Galveston & W. Ry. Co. v. Galveston (Tex.) 74 S. W. 537.
98. The intent to defy the court must clearly appear—Kahlbon v. People, 101 Ill. App. 567. A mere failure to comply with a decree subjecting a party to a fine, cannot be declared contempt—Moseley v. People, 101 Ill. App. 564.
99. One restrained from diverting waters of a lake is not guilty of contempt because dams constructed for purpose of retaining the waters were removed by others without his knowledge—Stock v. Jefferson Tp. (Mich.) 92 N. W. 769.

guilty of contempt;[1] nor can there be contempt of an order not only not recorded but actually not made till a date following that of the alleged contempt; hence orders previously made cannot be modified by nunc pro tunc orders, nor can such orders take the place of orders intended to be made but which were not made, so as to justify proceedings for contempt.[2] The contemnor must have had notice or been served when the act was done.[3] It is not "willful" to withhold obedience of an order which is immediately appealed and superseded,[4] nor to hold property as against a receiver under a claim of right.[5] Where a stay of proceedings on a motion is granted until hearing and determination thereof, a party is not liable for contempt in proceeding after the motion was denied, because he did not await entry of a formal order on the decision.[6] It must appear that a right or remedy of a party in the cause has been destroyed or prejudiced.[7] One with actual knowledge of an injunction may be punished for contempt in violation, though not a party to the suit, or in privity with any party therein, or served with process in it;[8] but where an order for payment of money was modified and affirmed, but the modified order was not served on the party and no demand was made of him, he could not be held guilty of contempt for failure to pay.[9] The order must be in certain terms, else only a technical contempt is committed.[10] Invalidity of an order will not prevent punishment for a criminal contempt.[11] Disobedience of a void order ejecting plaintiff from land and forbidding his re-entry is not contempt.[12]

Civil or criminal.—Proceedings for contempt are criminal when conducted to preserve the dignity of the courts and punish disobedience of their order, and civil when instituted to enforce the rights of parties by compelling obedience to orders, judgments or decrees, and a proceeding against judges of a county court to compel compliance with mandamus directing them to levy a tax to pay a judgment against the county is a civil contempt.[13] A contempt is not criminal where defendant is required to pay a fine and costs to plaintiff, since in criminal contempt the fine belongs to the public and costs are not allowed.[14]

§ 1. *B. Acts in disobedience of court.*—A defendant in supplementary proceedings who violates an injunctive order by using money to his credit on deposit in a bank is in contempt.[15] Forcible prevention of use of a dock by other parties in violation of an injunction against obstruction of their use is contempt.[16] Entry on the mining claim of another, merely to post notices of a discovery of quartz lodes with an

1. Proceedings for contempt for failure to pay rent to a receiver on order of the the court—Moore v. Smith, 74 App. Div. (N. Y.) 629.

2. Gardner v. People, 100 Ill. App. 254.

3. Fletcher v. McKeon, 74 App. Div. (N. Y.) 231; Schultz v. Luft, 74 App. Div. (N. Y.) 628.

4. Failure to reinstate dismissed officer during two hours elapsing between service order appeal therefrom (Code Civ. Proc. § 8, subd. 2)—Croker v. Sturgis, 38 Misc. (N. Y.) 596.

5. State v. Denham, 30 Wash. 643, 71 Pac. 196.

6. Dady v. O'Rourke, 71 App. Div. (N. Y.) 557.

7. Application to punish purchaser in foreclosure for failure to complete his purchase—Dunlop v. Mulry, 40 Misc. (N. Y.) 131.

8. Ex parte Stone (Tex. Cr. App.) 72 S. W. 1000; Chisolm v. Caines, 121 Fed. 397. Rev. St. 1899, § 3643—In re Coggshall (Mo. App.) 75 S. W. 183. He may be required to restore the status at issuance of writ—Murphey v. Harker, 115 Ga. 77; Ex parte Richards, 117 Fed. 658. Injunction to stay prosecution of a divorce suit in another state—Kempson v. Kempson (N. J. Law) 52 Atl. 360, 625.

9. Code Civ. Proc. § 2268, requires both a service of the order requiring payment and a demand for the money—Flor v. Flor, 73 App. Div. (N. Y.) 262.

10. Rumney v. Donovan (Mont.) 72 Pac. 305.

11. Elmstedt v. People, 102 Ill. App. 231.

12. The rights of a party cannot be prejudiced in advance of the trial of the main issue—Forman v. Healey, 11 N. D. 563.

13. In re Nevitt (C. C. A.) 117 Fed. 448.

14. Code Civ. Proc. §§ 8, 9—Mutual Milk & Cream Co. v. Tietjen, 73 App. Div. (N. Y.) 532.

15. Harvey v. Arnold, 116 N. Y. St. Rep. 155.

16. Stolts v. Jackson, 82 App. Div. (N. Y.) 81.

intention to locate them, is not a violation of an order restraining the continuance and trespass by sinking shafts and other mining devices.[17] A corporation will be liable to a fine for contempt where through carelessness of its officers its employes violate an injunction against making or selling a patented article.[18] Contempt proceedings will not lie against the secretary and treasurer of a labor organization for refusing a transfer card to another division of the order not previously sought by the applicant, though, in mandamus proceedings, the particular division of the labor organization had been commanded to restore the relator to rights possessed before his expulsion.[19] Holding a meeting near mines in order to influence miners to strike by arguments and threats of violence in violation of an injunction restraining the assembling of defendants at or near the mines is a disobedience.[20] One restrained from selling liquor under a void license is not thereby placed in contempt by procuring a license under the law and selling under it.[21] Failure to pay alimony may be punishable as a contempt.[22] Ceasing to pay alimony after a reconciliation is not contempt.[23]

§ 1. *C. Official misconduct, and obstruction or perversion of justice.*—An attorney or officer of justice is guilty who advises or directs acts resulting in contempt,[24] or who imposes on or deceives the court,[25] unless it appears that he was acting in good faith and not with an intention to defy the court.[26] The trial judge does not contemn a mandate by allowing amendments to raise points not decided.[27] A police officer in attendance on the municipal court is guilty of contempt in informing the keeper of a gambling house of a warrant for his arrest so as to enable him to escape.[28]

Obstructing or embarrassing the administration of justice, as by abusively denouncing the official action of a federal judge,[29] constitutes contempt. A newspaper article published during progress of a trial, commenting upon the political complexion of the officers and others engaged in the trial, is not necessarily calcu-

17. Harley v. Montana Ore Purchasing Co., 27 Mont. 388, 71 Pac. 407.

18. Westinghouse Air Brake Co. v. Christensen Engineering Co., 121 Fed. 562.

19. People v. Millard Div. No. 104, 78 App. Div. (N. Y.) 581.

20. United States v. Haggerty, 116 Fed. 510.

21. Wray v. Harrison (Ga.) 42 S. E. 351.

22. Non-payment of notes sanctioned by decree is so—Bonney v. Bonney, 98 Ill. App. 129. It is not imprisonment for debt—State v. Cook, 66 Ohio St. 566; In re Cave, 26 Wash. 213, 66 Pac. 425; Baker v. Baker (Ga.) 43 S. E. 46; Welty v. Welty, 195 Ill. 335. See discussion in title Alimony, ante, p. 74.

23. Dillon v. Shiawassee Circuit Judge (Mich.) 91 N. W. 1029.

24. People v. District Ct., 29 Colo. 182, 68 Pac. 242. Leading client to violate an injunction against interference with property —Stolts v. Jackson, 82 App. Div. (N. Y.) 81. Attorney general advising state board of assessors to disregard an injunction restraining assessment cannot claim in defense that he was discharging official duties—People v. District Ct., 29 Colo. 182, 68 Pac. 242.

A judge of a territorial district court, who had appointed a receiver in a suit respecting mining claims, was guilty of contempt of the Circuit Court of Appeals in writing letters and giving instructions to the receiver which interfered with the execution of writs of supersedeas granted on appeal to the latter court. A district attorney, who refused to give up keys to safety deposit boxes in which gold dust was stored, which had been given him by the receiver, and an attorney who was a special examiner for the department of justice and who advised the marshal to obstruct execution of the writ and prevent the parties from securing the property from the receiver, commanded to surrender it, were also guilty of contempt of the same court; but otherwise as to the attorney for the receiver who advised the latter that the writ was void because not appealable, and that it did not require him to restore certain property in his hands, but who did not advise him as to his particular acts or that he should disobey the writ—In re Noyes (C. C. A.) 121 Fed. 209.

25. An attorney secured approval of a worthless bond (Code Civ. Proc. § 4, subds. 2, 8)—Nuccio v. Porto, 72 App. Div. (N. Y.) 88.

26. Advising a state court to compel surrender by receiver in bankruptcy, of property which was turned over to him by a state court's receiver without his consent—In re Watts, 190 U. S. 1.

27. May v. Ball, 24 Ky. L. R. 241, 67 S. W. 257, 68 S. W. 398.

28. State v. O'Brien, 87 Minn. 161.

29. During labor troubles—United States v. Gehr, 116 Fed. 520.

lated to embarrass or obstruct the court in administration of justice so as to constitute contempt.[30]

The federal courts have statutory power to punish as for contempt an assault on a court official still in office, returning from performance of duty in a past case, and such assault on a United States commissioner is contempt of the court to which he belongs, though no proceeding against the official was pending, and he was not at the time in performance of duty.[31]

Merely evasive and contemptuous conduct of a witness does not constitute contempt under the New York laws,[32] nor can an order be made finding him guilty of contempt for refusing to answer or answering falsely when it does not appear that the judge directed him to answer any specific question,[33] nor can a warrant in contempt issue on the mere statement that he was subpoenaed and failed to appear.[34] Tampering with evidence, such as the taking and concealment of an exhibit admitted to the jury, is contemptuous,[35] but it is not an interference with a witness to solicit the plaintiff to settlement for money in a divorce action.[36]

Suing or procuring process of the court to abuse it,[37] or fraudulently procuring process,[38] or acts in frustration of,[39] or interference with the legal custody of property,[40] or the retaining of property when such custody has ceased and surrender ordered,[41] is contemptuous. A bankrupt who fails to turn over to a receiver appointed all his books, papers and securities, and who leaves the state after a rule to show cause why he should not be held in contempt,[42] or who fails to turn over goods and abandons them so that they are stolen,[43] is guilty of contempt. Withholding property which one claims as his own does not contemn a receivership order.[44]

An executor who files the customary printed blank on being ordered to account, with "nothing" written in each of the schedules, and claiming to no longer

30. State v. Edwards, 15 S. D. 383.

31. Rev. St. § 725—Ex parte McLeod, 120 Fed. 130.

32. Code Civ. Proc. § 14, subd. 5, § 228, construed—Ryan v. Ryan, 73 App. Div. (N. Y.) 137.

33. East River Bank v. De Lacy, 37 Misc. (N. Y.) 765.

34. In re Haines, 67 N. J. Law, 442.

35. After it was laid on the table by the attorney (Code Civ. Proc. § 8, subd. 1)—In re Teitelbaum, 116 N. Y. St. Rep. 887.

36. Under Code Civ. Proc. § 14, subd. 4, making "unlawfully" preventing a witness, etc., a contempt—Herrmann v. Herrmann, 115 N. Y. St. Rep. 811.

37. Using writ of prohibition to cover disobedience of injunction—People v. District Ct., 29 Colo. 182, 68 Pac. 242.

38. Falsely justifying surety for order of arrest (Code Civ. Proc. § 14, subd. 4)—Nuccio v. Porto, 72 App. Div. (N. Y.) 88.

39. Suitors in a state court, on advice of attorney, to prevent a federal receiver from carrying out an order of the federal court to cease operation and sell the track materials and equipment of a mortgaged railroad, are guilty; the attorney is flagrantly guilty—Royal Trust Co. v. Washburn, B. & I. R. Ry. Co., 113 Fed. 531.

40. A purchaser at a tax sale with deed does not so interfere in taking possession after renting contracts made by the receiver's agent have expired and tenants have left, no one being in possession—Metcalfe v. Commonwealth Land & Lumber Co.'s Receiver, 24 Ky. L. R. 527, 68 S. W. 1100.

Suing to oust tenants of land in receiver's hands—Fletcher v. McKeon, 74 App. Div. (N. Y.) 231. A defendant lessee in mortgage foreclosure, after receiving service of an order appointing a receiver and enjoining the owner's interference with the property, is in contempt for collecting rent of a subtenant but not for suing to oust the subtenant after passage but before service of the order—Schultz v. Luft, 74 App. Div. (N. Y.) 628. But a tenant who has paid rent in advance is not guilty of contempt in refusing to pay rent for the same time to a receiver of the premises subsequently appointed—Krakower v. Lavelle, 37 Misc. (N. Y.) 423.

41. Order to return money after appointment of receiver was set aside (Code Civ. Proc. § 14, subd. 3, §§ 729, 2268, construed—Newell v. Hall, 74 App. Div. (N. Y.) 278. Receiver under advice refusing to surrender on appeal order of his appointment and stay is only technically guilty—Rumney v. Donovan (Mont.) 72 Pac. 305.

42. In re Wilson, 116 Fed. 419.

43. In re Levin, 113 Fed. 498.

44. He was not a party but had in his possession certain property, which he at first admitted belonged to the insolvent, but was informed by his attorney that the property did not belong to the insolvent and that he ought not to turn it over until ordered further to do so by the court—State v. Denham, 30 Wash. 643, 71 Pac. 196.

act as executor,[45] or who, being ruled to produce a certain chattel in court, fails to comply and responds merely that it has been lost without showing that he was blameless or the manner in which it was lost,[46] or who refuses to answer questions as to the taxable property of the estate at an appraisal to fix the transfer tax thereon,[47] is guilty of contempt. Disobedience by an executor of a surrogate's decree directing payment of legacies may be punished as a criminal contempt.[48]

§ 2. *Defense, excuse or purgation.*—Inability to perform the requirements of an order may be a defense.[49] Advice of counsel is not justification, but merely goes in mitigation,[50] where the party is a layman and not an officer charged with enforcement of the law,[51] and especially where the violation is willful and the effect of the order cannot be misunderstood.[52] That the order disobeyed is erroneous is no defense.[53] The improper issuance of an injunction is not a defense to contempt in its violation,[54] if the court has jurisdiction of the parties and the cause.[55] An assertion that money withheld by one cited for contempt for failure in its payment does not belong to the judgment debtor in supplementary proceedings constitutes no excuse for disobedience of the order.[56] It is criminal contempt to willfully disobey an injunction pendente lite against disturbing a tenant's possession, even though afterward the contemnor recovered possession of the premises in a lower court.[57] Error pertaining merely to description of lands in an opinion affirming a decree enjoining defendant from diverting a water course, cannot avail him in proceedings for contempt in violating the injunction.[58] Punishment for contempt in assaulting an officer of the court will not be meted out where no public good will result therefrom and the trouble between the parties has been amply adjusted.[59] Technical defenses will not be considered in contempt for decoying a witness from the state to prevent his appearance before a grand jury, where it appears that the witness and the defendants in the contempt believed the subpoena legal and the acts constituting the contempt were committed under that belief; but where no subpoena has been issued for appearance of the witness, one influencing him to leave the state to prevent testifying is not guilty of contempt.[60]

§ 3. *Power to punish or redress; contempt or other remedy.*—Constitutional definitions of jurisdiction do not limit the inherent powers of courts of original general jurisdiction to punish for contempt.[61] The federal courts have the consti-

45. In re People's Trust Co., 37 Misc. (N. Y.) 239.

46. Reed v. Reed, 24 Ky. L. R. 2438, 74 S. W. 207.

47. In re Bishop, 115 N. Y. St. Rep. 474. See, also, 115 N. Y. St. Rep. 252, 40 Misc. (N. Y.) 64.

48. Code Civ. Proc. § 2555—In re Holmes' Estate, 79 App. Div. (N. Y.) 267.

49. Alimony—Welty v. Welty, 195 Ill. 335; Wester v. Martin, 115 Ga. 776.

50. Violation of injunction—Stolts v. Jackson, 82 App. Div. (N. Y.) 81; Coffey v. Gamble, 117 Iowa, 545. Suing for property in custody of law—Fletcher v. McKeon, 74 App. Div. (N. Y.) 231.

51. Royal Trust Co. v. Washburn, B. & I. R. Ry. Co., 113 Fed. 531.

52. In re Granz, 78 App. Div. (N. Y.) 399, 38 Misc. 666.

53. Elmstedt v. People, 102 Ill. App. 231. Mandamus to treasurer to pay over fines, etc., is conclusive—Ball v. Wright, 115 Ga. 729.

54. People v. District Ct., 29 Colo. 182, 68 Pac. 242.

55. St. Louis, B. & S. Ry. Co. v. Gray, 100 Ill. App. 538.

56. In re Lewis (Kan.) 72 Pac. 788.

57. Code Civ. Proc. § 8, subd. 3—In re Granz, 38 Misc. (N. Y.) 666.

58. Defendant was sufficiently informed of the identity of the stream affected by the injunction and was not misled by the error—State v. Gray, 42 Or. 261, 70 Pac. 904, 71 Pac. 978.

59. Ex parte McLeod, 120 Fed. 130.

60. Shannon's Code, § 5918, subds. 3, 6—Scott v. State (Tenn.) 71 S. W. 824.

61. Circuit courts of Michigan are clothed with "exclusive" power over contempt whether specified by statute or not and the municipal court of Grand Rapids has the same power as a circuit court to punish for contempt in subornation of perjury in a criminal cause before it (Const. art. 6, § 8 construed; Const. 1835, art. 6, § 1, and the present Const. art. 6, §§ 1, 13, 18, and art. 3, § 2, construed in connection with Comp. L. §§ 630, 631, 1098)—Nichols v. Judge of Superior Ct. (Mich.) 89 N. W. 691.

tutional power to punish for contempt,[62] and upon contempt of a federal court the United States commissioner is authorized to arrest, imprison or admit to bail.[63] The offended court has exclusive jurisdiction wherefrom it alone has power to modify, mitigate or revoke its sentence, and no other court may bail or discharge the contemnor.[64] A bankruptcy court has no greater powers to punish for contempt than other federal courts and must proceed according to the established practice of those courts.[65] It may enforce an order requiring a debtor to turn over money to a trustee appointed by committing for contempt.[66] In Ohio a proceeding to enforce a decree for alimony rendered in the circuit court by attachment for contempt may be brought in the common pleas.[67]

The power of a court of record to punish neglect or violation of duty or misconduct, by which rights or remedies of parties may be defeated or prejudiced, may be applied to enforce any civil remedy.[68] One is not relieved from punishment for contempt for disobedience of an order in a case in which a statutory remedy of execution exists, if the remedy of enforcement by contempt proceedings exists also.[69] That an attempt to bribe a juror constitutes a crime does not prevent its punishment by the court as a contempt.[70]

§ 4. *Pleadings and other procedure before hearing.*[71]—A decree for alimony may be enforced by attachment for contempt after the term at which the decree was entered, on a hearing showing willful refusal to pay.[72] An application for attachment for contempt brought more than four years after knowledge of the facts is properly denied.[73] A contempt proceeding for violation of a previous injunction is not criminal so as to abate on defendant's death.[74] The application to punish for contempt must be made by an order to show cause,[75] on affidavit or proof in open court, and compulsory process should never be used unless it appears that ordinary methods would fail.[76] An oral motion and affidavit which make out a prima facie case are sufficient.[77] An affidavit which does not show that accused is one of the defendants in the suit, or an employe or agent of one of the defendants, will not authorize contempt proceedings against him for disobedience of an order restraining the defendants, their agents and employes.[78] The affidavit of arrest for disobedience of an injunctive order may be made by any one with knowledge of the facts, whether a party or not.[79] An affidavit in proceedings against a trial judge for refusing to obey a mandate of the court of appeals will be stricken from the files where it reflects upon the respondent and contains irrelevant and impertinent matter.[80] In a proceeding to compel payment of alimony, the order to show cause

62. Const. art. 3, § 1—In re Nevitt (C. C. A.) 117 Fed. 448.

63. Rev. St. § 1014, construed in connection with Act, May 28, 1896—Castner v. Pocahontas Collieries Co., 117 Fed. 184.

64. In re Nevitt (C. C. A.) 117 Fed. 448.

65. Bankr. Act, 1898, § 41—Boyd v. Glucklich (C. C. A.) 116 Fed. 131.

66. In re Wilson, 116 Fed. 419.

67. State v. Cook, 66 Ohio St. 566.

68. Code Civ. Proc. § 14—Rowley v. Feldman, 116 N. Y. St. Rep. 679.

69. Code Civ. Proc. § 779, contempt proceedings to enforce an order directing residue of money paid out of court on a judgment subsequently reversed on appeal—Rowley v. Feldman, 116 N. Y. St. Rep. 679.

70. Nichols v. Judge of Superior Ct. (Mich.) 89 N. W. 691.

71. Sufficiency of affidavit in proceedings for contempt against grand jurors for misconduct—State v. Rockwood, 159 Ind. 94.

72. 2 Starr & C. Ann. St. c. 40, § 18, c. 22, §§ 42, 47—Welty v. Welty, 195 Ill. 335.

73. Though the contempt may constitute an offense against the order of the court it is not bound to act after needless delay—Matheson v. Hanna-Schoellkopf Co., 122 Fed. 836.

74. Hannah v. People, 198 Ill. 77.

75. Notice of motion is insufficient—Dunlop v. Mulry, 40 Misc. (N. Y.) 131. Violation of order of court against publication of testimony in a criminal case—Ex parte Foster (Tex. Cr. App.) 71 S. W. 593.

76. In re Haines, 67 N. J. Law, 442; Ex parte Foster (Tex. Cr. App.) 71 S. W. 593.

77. Scott v. State (Tenn.) 71 S. W. 824.

78. Ballinger's Ann. Codes & St. § 5798, subd. 5, § 5801—State v. Peterson, 29 Wash. 571, 70 Pac. 71.

79. Castner v. Pocahontas Collieries Co., 117 Fed. 184.

80. May v. Ball, 24 Ky. L. R. 241, 67 S. W. 257, 68 S. W. 398.

must be served on the party and not his attorney, under the New York Code.[81] The complaint in attachment for contempt for failure to pay alimony need not allege ability to pay as it is imported by the decree.[82] One arrested in contempt proceedings, and who is in court with time to plead and to go on his own recognizance, may be ordered to be brought before the court without bail and without designating a return day in the warrant.[83]

§ 5. *Hearing; evidence; trial.*[84]—A bankrupt should not be punished for contempt in failing to comply with order of the court before giving him a hearing to show his inability to respond.[85] A husband prosecuted for contempt for failure to pay alimony cannot be attached without hearing after answer alleging poverty.[86] Summary punishment may follow a criminal contempt in the immediate presence of the court,[87] but failure to obey a subpoena to attend court as a witness is an indirect contempt and cannot be summarily punished.[88] Doubtful questions will not be decided against one charged with contempt in violating an injunction.[89] That the subpoena of a witness as shown by the record contains an error inserted by the clerk by mistake will not require dismissal of contempt proceedings on appeal for decoying a witness subpoenaed to appear before the grand jury to prevent his testimony, but a new trial will be ordered where the guilt of the parties otherwise seems clear.[90] The burden of proof is on plaintiff, in contempt to punish another for false qualification on a bond to release property from a lien, to show that defendant swore falsely as to his financial condition, and he must show falsehood beyond a reasonable doubt.[91] The relation of the persons charged with contempt to the suit, or the parties, and acts of misconduct beside those charged, may be proved in the contempt proceedings to show their motives.[92] Circumstantial evidence merely creating a strong impression that defendant has infringed a patent will not warrant a finding that he is guilty of contempt involving imprisonment, when he makes denial under oath.[93] Evidence that the court stated that the injunction order was dissolved, that no formal decree was necessary, and that defendant might proceed, may be admitted in mitigation in proceedings for contempt, as may also evidence that defendant acted on advice of counsel.[94] In proceedings against a police officer for informing a party accused of crime, so as to enable his escape, the failure of the officer to explain suspicious circumstances will raise an inference against him which the court may consider in drawing conclusions from his silence, and he cannot claim benefit of the absolute presumption of innocence given to persons accused of crime who decline to testify.[95] Defendant in a hearing for contempt cannot be compelled to testify as to his own guilt.[96]

81. Goldie v. Goldie, 77 App. Div. (N. Y.) 12.

82. State v. Cook, 66 Ohio St. 566.

83. State v. Peterson, 29 Wash. 571, 70 Pac. 71.

84. Sufficiency of evidence in proceedings for violation of a decree restraining obstruction of a water course—State v. Gray, 42 Or. 261, 70 Pac. 904, 71 Pac. 978. Of evidence in proceedings for false qualification on a bond to release property from a mechanic's lien—Johnson v. Austin, 76 App. Div. (N. Y.) 312. Of evidence of violation of injunction—Ex parte Richards, 117 Fed. 658. Of showing of disobedience of order restraining interference of complainant's business or employes during strike—George Jonas Glass Co. v. Glass Bottle Blowers' Ass'n (N. J. Ch.) 53 Atl. 138.

85. In re Hausman (C. C. A.) 121 Fed. 984.

86. Evidence to establish his plea of poverty must be heard—Wester v. Martin, 115 Ga. 776.

87. Code Civ. Proc. § 10—In re Teitelbaum, 116 N. Y. St. Rep. 887.

88. Laws 1901, c. 123—State v. Anders, 64 Kan. 742, 68 Pac. 668.

89. Against infringement of patent—Schlicht Heat, Light & Power Co. v. Aeolipyle Co., 121 Fed. 137.

90. Scott v. State (Tenn.) 71 S. W. 824.

91. Johnson v. Austin, 76 App. Div. (N. Y.) 312.

92. Interference with execution of writs of supersedeas—In re Noyes (C. C. A.) 121 Fed. 209.

93. Cimiotti Unhairing Co. v. Frolloehr, 121 Fed. 561.

94. Coffey v. Gamble, 117 Iowa, 545.

95. State v. O'Brien, 87 Minn. 161.

96. In re Haines, 67 N. J. Law, 442.

§ 6. *Findings and judgment.*—An adjudication of civil contempt for violation of an injunction should state definitely the facts constituting the violation and recite the acts of defendant calculated to defeat or prejudice plaintiff's rights.[97] A recital in an order adjudging one guilty of contempt for failure to pay a sum ordered by the court, that the court was satisfied that a demand for the amount had been made on the party, is insufficient where the code requires proof by affidavit.[98] Though formal accusation is not necessary for contempt in the presence of the court, the record must show that a contempt has been committed, and the record should contain the language alleged to be contemptuous and not merely a recital that such language was addressed by accused to the court. It must appear also that the contempt was committed in the presence of the court.[99] A written accusation of a direct contempt being unnecessary, a journal entry showing the proceedings may constitute the full record.[1] The order of the court on a motion for attachment in contempt should contain the action of the court on the motion and affidavit, in awarding or denying the attachment, together with the substance of the motion and of the charge, though not necessarily the evidence, and the substance of such order should appear in the writ if awarded.[2]

§ 7. *Punishment; fine and commitment; further proceedings.*—One guilty of contempt in violating an injunction may be sent to jail,[3] but violation of a preliminary injunction cannot be punished by instructing that testimony in behalf of defendant shall not be considered, any more than it would be proper to reward obedience to the injunction by instructing that he was entitled to a verdict.[4] The striking of defendant's answer in a suit for separation and support is an unconstitutional punishment for contempt if he is thereby prevented from presenting a defense.[5] Contempt in filing a scurrilous motion cannot be punished by forbidding the party to appear or file any other pleading or paper, and an order punishing a party for contempt by forbidding him to appear or file any pleadings until he first purges himself will not forbid filing of a motion to purge himself.[6] Disobedience of an order directing a son to support his mother is a civil, not a criminal contempt, so as to bring his punishment within the statutory limit of six months.[7] Statutes fixing the limit of a fine at a sum "and costs" have been held to mean only costs of the contempt proceeding.[8] The fine assessed against one guilty of a technical contempt only, because he acted in good faith under advice of counsel, should be nominal.[9] One who violates an injunction by preventing other parties from enjoyment of property rights may not only be fined but ruled to pay damages covering provable loss and expenses and imprisoned until he is ready to obey the writ.[10] In Michigan imprisonment of defendant found guilty of contempt in violating an injunction not exceeding 80 days in default of payment of a fine of $225 and $50 costs is not excessive, the proceeding being to enforce a civil remedy.[11] A defend-

97. Mutual Milk & Cream Co. v. Tietjen, 73 App. Div. (N. Y.) 532.

98. Code Civ. Proc. § 2268—Flor v. Flor, 73 App. Div. (N. Y.) 262.

99. Ogden v. State (Neb.) 93 N. W. 203.

1. Laws 1901, c. 123, § 1—State v. Anders, 64 Kan. 742, 68 Pac. 668.

2. Scott v. State (Tenn.) 71 S. W. 824.

3. 1 Gen. St. p. 392—Frank v. Harold (N. J. Law) 51 Atl. 774.

4. Lake v. Copeland (Tex. Civ. App.) 72 S. W. 99.

5. Fed. Const. Amend. 14—Sibley v. Sibley, 76 App. Div. (N. Y.) 132.

6. Kruegel v. Nash (Tex. Civ. App.) 70 S. W. 983.

7. Code Crim. Proc. § 915, construed in connection with Code Civ. Proc. § 2285—People v. O'Brien, 39 Misc. (N. Y.) 110.

8. Code Civ. Proc. § 2284—In re Husted's Estate, 37 Misc. (N. Y.) 237.

9. Rumney v. Donovan (Mont.) 72 Pac. 305. A witness should not be fined the limit for refusing under advice of counsel, to answer before a referee—In re Husted's Estate, 37 Misc. (N. Y.) 237.

10. Stolts v. Tuska, 82 App. Div. (N. Y.) 81.

11. Violation of an injunction to enforce a judgment of ouster against a foreign corporation—In re Osborn (Mich.) 90 N. W. 1029.

ant in alimony proceedings cannot be committed until the whole amount of alimony be paid, where the finding of the court does not show that he was able to pay the whole amount ordered.[12] An executor who became guilty of contempt by failing to obey an order of the court after he had paid into court money belonging to himself may be refused his motion for leave to withdraw the money.[13] An order adjudging defendant in contempt for failure to pay alimony, and committing him until it shall be paid, must name a definite term of imprisonment, if imprisonment is inflicted as punishment.[14] A justice may in Connecticut sentence to imprisonment for contempt without imposing a fine.[15]

§ 8. *Discharge or pardon.*—If the record shows that a trial for indirect contempt was summary, defendant must be discharged until formal proceedings are instituted.[16] A judge may discharge a receiver imprisoned for contempt in failing to pay over money on order of the court, on the ground that poverty prevents his payment, without determining the question whether by his imprisonment he has been sufficiently punished for the contempt.[17] An administrator imprisoned for failure to restore a wasted estate will not be discharged because adjudged a bankrupt, especially where his inability to pay is not clearly shown and he is guilty of fraud and perjury, and fled before entry of the decree requiring payment.[18]

The president of the United States cannot pardon one under imprisonment for a civil contempt of the United States courts.[19]

§ 9. *Review of proceedings.*—The state may take an appeal in proceedings for indirect contempt.[20] Certiorari is the proper method to review a proceeding adjudging a party guilty of criminal contempt.[21] An order punishing for contempt in violating an injunction is not appealable, though in addition to a fine, it directs restoration of the conditions when the injunction issued, and commits to imprisonment. If the order merely imposes a fine it is not appealable.[22] One adjudged guilty of contempt by a circuit court in Oregon may appeal as from a judgment in an action, though at common law such judgments were not reviewable.[23] The court of ultimate appeal cannot review a judgment imposing a penalty for a purely civil contempt unless an element is involved required by the statute to carry the case past a court of intermediate appeal.[24] One found in contempt may have a stay pending appeal.[25] Facts found by the judge in contempt may be reviewed on appeal only to determine their sufficiency to warrant the judgment.[26] If affidavits in contempt for failure to obey an order of court do not enable a court to determine with accuracy the existence of contempt, an order denying the motion will be reversed and a referee appointed to hear evidence as to defendant's guilt.[27] Subsequent modification on appeal of an order determining the liability of a purchaser at a judicial sale for failure to comply with the terms of his bid, and pay

12. Green v. Green, 130 N. C. 578.
13. Reed v. Reed, 24 Ky. L. R. 2438, 74 S. W. 207.
14. Kahlbon v. People, 101 Ill. App. 567.
15. Gen. St. 1902, § 506—Church v. Pearne, 75 Conn. 350.
16. State v. Anders, 64 Kan. 742, 68 Pac. 668.
17. Nisbet v. Tindall, 115 Ga. 374.
18. Under Code Civ. Proc. § 2286, providing for discharge—In re Collins, 39 Misc. (N. Y.) 753.
19. In re Nevitt (C. C. A.) 117 Fed. 448, as to power in criminal contempt see 7 Wheat. 38, 43.
20. Burns' Rev. St. 1901, § 1915—State v. Rockwood, 159 Ind. 94.
21. In re Teitelbaum, 84 App. Div. (N. Y.) 351.
22. Florida Cent. & P. R. Co. v. Williams (Fla.) 33 So. 991.
23. Under Del. & C. Ann. Codes & St. § 676—State v. Gray, 42 Or. 261, 70 Pac. 904, 71 Pac. 978.
24. Court of Appeals Act, 1891—Naturita Canal & Reservoir Co. v. People (Colo.) 70 Pac. 691.
25. 2 Ballinger's Ann. Codes & St. § 5811—State v. Superior Ct., 28 Wash. 590, 68 Pac. 1051.
26. Green v. Green, 130 N. C. 578.
27. Hogan v. Clarke, 72 App. Div. (N. Y.) 615.

a deficiency resulting after resale, cannot affect contempt proceedings against him.[28] An affidavit on which a motion is based on appeal from a conviction for contempt, if insufficient, may be amended on remand.[29] Where proceedings for contempt were reversed in the supreme court on certiorari and supplementary evidence was produced on rehearing in the district court, that court must consider the evidence received on both hearings.[30] Where, on habeas corpus proceedings and certiorari in aid to review an order committing in contempt, the evidence is certified on request of relator, defendant is entitled to expenses for transcribing the evidence into long hand on dismissal at costs of relator.[31] On dismissal at cost of relator of a writ of review to review an order in contempt, defendant is entitled to the fee paid by him for judgment and minute entries in his return and for the expense of making the transcript except such pages as consist merely of recitals by defendant.[32]

CONTINUANCE AND POSTPONEMENT.

§ 1. Definitions and Distinctions; Powers and Duties of Courts.
§ 2. Grounds.—A. In General. B. Absence or Disability. C. Inability to Procure Evidence. D. Surprise.
§ 3. Admission to Avoid Continuance.
§ 4. Application.
§ 5. Affidavits or Showing.
§ 6. Hearing and Order.
§ 7. Continuance By Operation of Law.

§ 1. *Definitions and distinctions; powers and duty of courts.*—In exact phraseology "continuance" means the revival of an abated cause, "adjournment" the putting over from day to day in the term, and "postponement" the putting over to another term.[33] But these uses have been confused and much relaxed and it is believed that except as the terms have been locally given a statutory meaning they cannot be distinguished.[34]

The grant of a continuance lies in the discretion of the court,[35] especially so if it is a second application.[36] The court may properly go to the residence of a party and take her testimony in his presence, without officers and attorneys, instead of granting an application for a continuance because of her physical inability to attend and testify.[37] An unwritten agreement by counsel to postpone hearing of a motion for new trial, or their acquiescence in an oral statement of postponement by the judge, will not keep the court open for hearing on the motion.[38] A justice cannot grant a continuance unless given authority by statute but he may postpone a trial after commencement on sufficient proof of the discovery of new evidence by the applicant.[39]

§ 2. *Grounds for continuance or postponement. A. In General.*—A continuance will not be granted defendant because of the short time granted him in which

28. Rowley v. Feldman, 84 App. Div. (N. Y.) 400.
29. Scott v. State (Tenn.) 71 S. W. 824.
30. McConkie v. District Ct., 117 Iowa, 334.
31. Code Civ. Proc. § 1860—In re Boyle, 26 Mont. 365, 68 Pac. 409, 471.
32. Code Civ. Proc. §§ 1860, 1866, 3472—State v. District Ct., 26 Mont. 224, 67 Pac. 114, 68 Pac. 470.
33. Cyc. Law Dict., "Postponement."
34. 4 Enc. Pl. & Pr. 824.
35. It is therefore not reviewable—Scott v. Boyd (Va.) 42 S. E. 918; Saastad v. Okeson (S. D.) 92 N. W. 1072; McMahan v. Norick (Okl.) 69 Pac. 1047 [on ground of rejection of evidence offered by defendant]—Supreme Lodge Knights of Pythias v. Robbins, 70 Ark. 364. For absence of material witness—Doll v. Stewart (Colo.) 70 Pac. 326. On application to be restored to mental capacity—In re Lovern's Estate, 137 Cal. 680, 70 Pac. 783.

A final decree will not be reversed for denial of a motion for continuance (United States v. Rio Grande Dam & Irr. Co., 184 U. S. 416); and the same is true of a judgment unless the action is clearly erroneous—Empire Coal & Coke Co. v. Hull Coal & Coke Co., 51 W. Va. 474.
36. Not properly verified—Gulf, C. & S. F. Ry. Co. v. Brown (Tex. Civ. App.) 75 S. W. 807.
37. Action to set aside a decree for a divorce—Humphrey v. Humphrey (Neb.) 91 N. W. 856.
38. Atlanta, K. & N. Ry. Co. v. Strickland, 114 Ga. 998.
39. Rev. Codes, 1899, § 6650—Lyman-Ellel Drug Co. v. Cooke (N. D.) 94 N. W. 1041.

to produce papers under an order of court, where it clearly appears that ample time was given for that purpose and no defense is shown to the suit.[40] Death of co-defendants and want of administration is not necessarily sufficient where the statutes and the nature of the case permit judgment to be taken without affecting their estates.[41] A statute providing that unless the declaration is filed ten days before the term of court, defendant may have a continuance, is not designed to allow plaintiff to keep defendant attending court from term to term, without giving him knowledge of the nature of the case against him.[42] A further continuance is properly denied where the former continuance was on a plea on which the parties introduced no evidence, and which constitutes the only plea which they were enabled to file.[43] A continuance will not be granted because of improper remarks by counsel in hearing of persons summoned as jurors, but the case will only be postponed until panels may be drawn from which to select the jury.[44]

(§ 2) *B. Absence or disability of party or counsel.*—A continuance should be granted for absence of a party, where it appears by affidavit that he was seriously sick and that he was a material witness and that his presence was necessary,[45] and that he was out of the state temporarily on business when taken sick did not require the other co-parties to take his deposition in order to show due diligence.[46] It should not be granted to a party who voluntarily leaves the district without asking a continuance or preparing his testimony,[47] nor on an affidavit merely showing that he was sick and unable to attend the trial but not showing that he was expected to testify or that his presence was otherwise necessary,[48] nor where it appears that his presence was not necessary and that he could not appear for some time, and that his deposition could have been taken, and it is admitted that if he were present he would testify as alleged in an affidavit for a continuance.[49] If no former continuance has been granted and the application on the ground of the absence of the defendant is perfectly regular, and it does not appear that the case should proceed against the other defendants without him, the continuance should be granted.[50]

A further continuance should be granted where it appears after a continuance granted because of an accident to defendant, that he was not physically able to be present or have his deposition taken and that his presence at the trial was necessary.[51]

A continuance because of absence of counsel will not be granted where the party is ably represented by other counsel,[52] nor because of absence of counsel on leave, where it appears from a motion for new trial that the leave was intended to apply to another case.[53] Unavoidable exhaustion of the attorneys of a party will not be cause for continuance if it appears that they can attend and properly conduct his defense.[54]

40. Sisk v. American Cent. Fire Ins. Co., 95 Mo. App. 695.

41. Action to set aside fraudulent release of legatee's share [Comp. Laws 1887, § 4884]—Ward v. Du Pree (S. D.) 94 N. W. 397.

42. Hurd's Rev. St. c. 110, § 18—Collier v. Grey, 105 Ill. App. 485.

43. Kinzie v. Riely's Ex'r (Va.) 42 S. E. 872.

44. Thompson v. O'Connor, 115 Ga. 120.

45. Affidavit of physician as to sickness and of attorney as to materiality of evidence—McMahan v. Norick (Okl.) 69 Pac. 1047. A personal affidavit was made by the party—Low, Hudson & Gray Water Co. v. Hickson (Tex. Civ. App.) 74 S. W. 781.

46. Low, Hudson & Gray Water Co. v. Hickson (Tex. Civ. App.) 74 S. W. 781.

47. Engelstad v. Dufresne (C. C. A.) 116 Fed. 582.

48. Hibbets v. Hibbets, 117 Iowa, 177.

49. Saastad v. Okeson (S. D.) 92 N. W. 1072.

50. Scott v. Whipple (Ga.) 42 S. E. 519.

51. Especially where it appears that he would probably soon be in a condition to attend—Morehouse v. Morehouse, 136 Cal. 332, 68 Pac. 976.

52. Douglass v. Douglass, 24 Ky. L. R. 2398, 74 S. W. 233.

53. Southern Ry. Co. v. Beach (Ga.) 43 S. E. 413.

54. Crabtree Coal Min. Co. v. Sample's Adm'r, 24 Ky. L. R. 1703, 72 S. W. 24.

(§ 2) *C. Inability to procure evidence or to examine witnesses.*[55]—A continuance because of absence of a witness should be allowed if it appears that a deposition could not be procured within a reasonable time granted on denial of the continuance;[56] and in an action against a corporation for injuries, because of the absence of the president, where it appears that he was in possession of peculiar material facts, and had been suddenly called to the bedside of his dying mother;[57] and trial in divorce should be postponed because of the absence of several witnesses without the county whose testimony was material, and whose attendance plaintiff could not procure though defendant had produced one of the witnesses.[58] A continuance should be granted in an action regarding the boundary line of lands where it appears that a survey will be necessary to determine the line and that one of the parties owing to inclement weather was unable to be present and cross-examine the other on the taking of their depositions;[59] or to allow plaintiff to procure testimony of great importance, discovered after the term opened, especially where his attorney who was preparing the case became disabled just before the term;[60] but not to allow plaintiff in damages for trespass, to produce evidence to complete its chain of title, where the evidence showed title only to land as to which the title was not undisputed;[61] nor for failure of defendant to produce a deposition after permission was properly denied plaintiff to take the deposition and after a continuance to the latter to supply the evidence, there being no proof that such evidence had ever been taken by defendant.[62] A continuance will not be granted because of absence of a witness whose evidence is purely cumulative;[63] nor where the evidence sought to be proved by him could not be admitted;[64] nor unless diligence of the party in securing material evidence is shown;[65] nor, as a matter of right, where the party relied upon the witness' promise to attend and did not subpoena him;[66] nor where it was not reasonably probable that his presence could be obtained, and where his deposition had been taken before the trial;[67] nor where the testimony of the witness is not shown to be material and it does not appear that it could not have been supplied by other witnesses;[68] nor where no order of court has been obtained authorizing service of a subpoena on a witness outside of the county of trial;[69] nor where it appears that part of the witnesses afterward testified to facts which were not disputed and the affidavit did not state what evidence was expected of other absent witnesses;[70] nor where it appears that a commission was taken for his deposition which was never placed in the hands of the officer for execution, and the witness had removed from the county and could not be located;[71] nor where the affidavit

55. Sufficiency of showing of diligence by party for whom a deposition was taken, but which was withheld by the commissioner because of nonpayment of fees, in order to entitle him to a continuance to secure testimony—Hurd's Rev. St. c. 110, § 42—Hall v. Hale's Estate, 202 Ill. 326.

56. Gatzmeyer v. Peterson (Neb.) 94 N. W. 974.

57. Langdon-Creasy Co. v. Rouse, 24 Ky. L. R. 2095, 72 S. W. 1113.

58. Church v. Church, 81 App. Div. (N. Y.) 349.

59. Chenault v. Spencer, 24 Ky. L. R. 141, 68 S. W. 128.

60. Kentucky Union Co. v. Patton, 24 Ky. L. R. 701, 69 S. W. 791.

61. Kentucky Land & Immigration Co. v. Crabtree, 24 Ky. L. R. 743, 70 S. W. 31.

62. Wetta v. New Orleans & C. R. Co., 107 La. 383.

63. Scott v. Boyd (Va.) 42 S. E. 918.

64. Wood v. Farmer's Life Ass'n (Iowa) 95 N. W. 226.

65. McDermott v. Manley (Neb.) 90 N. W. 1119; American Cent. Ins. Co. v. Heath (Tex. Civ. App.) 69 S. W. 235. Sufficiency of circumstances showing diligence under Code, § 3664—Hibbets v. Hibbets, 117 Iowa, 177.

66. Hughes v. Humphreys, 102 Ill. App. 194.

67. Board of Internal Imp. v. Moore's Adm'r, 25 Ky. L. R. 15, 74 S. W. 683.

68. Taylor v. Nevada-California-Oregon Ry., 26 Nev. 415, 69 Pac. 858; John S. Metcalf Co. v. Nystedt, 102 Ill. App. 71. The affidavit must show the materiality—Lomax v. Holbine (Neb.) 90 N. W. 1122.

69. Abby v. Dexter (Colo. App.) 72 Pac. 892.

70. Illinois Cent. R. Co. v. Taylor, 24 Ky. L. R. 1169, 70 S. W. 825.

71. Action for personal injuries—St. Louis & S. F. Ry. Co. v. Skaggs (Tex. Civ. App.) 74 S. W. 783.

does not show that he was the only witness who could testify to such facts, or that the facts were true, or that his attendance and deposition could be obtained at a later term, or why his deposition had not been taken during the preceding year in which the case was pending;[72] nor where the witness did not testify on a former trial and no effort was made to secure his testimony while he was within reach of process, and it does not appear from the affidavit that if the motion were granted his presence could be secured.[73] A continuance because of the absence of two witnesses is properly denied where the deposition of one of them, residing in another county, had not been taken, and the testimony of the other had not appeared material.[74] A continuance is properly refused near the close of a trial of an action to cancel a deed for fraud, for the purpose of taking a supplemental deposition of a party who was sick, where the court states that the proposed testimony would be valueless;[75] and for the absence of evidence, where it appears that the party asking the continuance refused to pay the charges for the taking of the deposition of the absent witnesses, and it is not shown that the amount was unreasonable or that she was unable to pay;[76] but a party for whom a deposition is taken is not bound to pay an illegal amount demanded by the commissioner in addition to the statutory fees, in order to secure the deposition and rely on a restitution of the excess by the court, in order to make a showing of diligence on applying for a continuance to procure testimony.[77] Where it appears from the application that an adjournment for 90 days cannot be allowed to enable a party to produce witnesses because 28 days have already elapsed since service of summons, and the materiality of the evidence and the diligence of the party in attempting to secure attendance of witnesses does not clearly appear, the granting of an adjournment is wholly within the discretion of the court.[78]

(§ 2) *D. Surprise in pleadings or evidence or change in theory of action.*—A continuance will not be granted as a matter of right because the issues are made up sooner than expected if they are made up regularly;[79] nor because an issue in the case had not been made up until the term for final submission of the cause, where that issue was expressly reserved by the court and continued until the succeeding term.[80] Where plaintiff in an action for personal injuries changed the theory of his proof as to negligence of defendant's servant, defendant should have been granted a continuance.[81] A continuance will not be granted because of the filing of an amended answer, substantially the same as the original, on the day of trial, where no affidavit was filed showing a reason for continuance;[82] nor because of amendment of the complaint, notice of which was properly served, where the trial was not held until the 8th day of the term and it did not appear that witnesses were absent;[83] nor because of amendment of a complaint at the close of the evidence to conform to the proof, where the amendment presented no new issue, and it does not appear from affidavits filed in support of a motion for new trial, that defendant could have produced other evidence.[84] Where it appears in a suit, which

72. John S. Metcalf Co. v. Nystedt, 203 Ill. 333.
73. Doll v. Stewart (Colo.) 70 Pac. 326.
74. Chicago, R. I. & T. Ry. Co. v. Long (Tex.) 75 S. W. 483.
75. Haynes v. Harriman (Wis.) 92 N. W. 1100.
76. Hall v. Muggeridge, 103 Ill. App. 593.
77. Hall v. Hale's Estate, 202 Ill. 326.
78. Consol. Laws 1882, c. 410, § 1364—Weston v. Proctor, 37 Misc. (N. Y.) 800.
79. Palmer v. Caywood (Neb.) 89 N. W. 1034.
80. Douglass v. Douglass, 24 Ky. L. R. 2398, 74 S. W. 233.
81. Choctaw, O. & G. R. Co. v. Donavan (Ark.) 72 S. W. 48.
82. Roach v. T. J. Moss Tie Co., 24 Ky. L. R. 1222, 71 S. W. 2.
83. J. I. Case Threshing Mach. Co. v. Eichinger (S. D.) 91 N. W. 82.
84. Montana Ore Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co., 27 Mont. 288, 70 Pac. 1114.

is the consolidation of two suits, that a party was surprised by collusion between the parties to the other suit and the abandonment by defendant therein of his defense, he should be granted a continuance.[85] Defendant in replevin need not be granted a continuance to procure testimony to meet the increase in values of the property, in the amendment by plaintiff of her petition, making their value greater than that alleged in her affidavit.[86] A continuance is properly refused on the ground of surprise, by reason of admission of papers in a suit on a book account, none of which were referred to in the statement of account;[87] or on the ground that defendant in trespass to try title was surprised in the testimony of the original trustee, who held property which was sold under the trust deed by a substitute trustee, that he was not disqualified and had not been requested to sell, since the evidence of the appointment of the substitute trustee would be made to sufficiently appear.[88] Defendant in a suit for personal injuries is not entitled to a continuance on the ground of surprise because of evidence of injury developed by a physical examination of plaintiff made at defendant's request;[89] nor can defendant in quo warranto ask for a continuance because of surprise in the execution of certain deeds of corporations, in that they were admitted in evidence in a similar proceeding against him, if the record does not show such fact and if the deeds were admitted their execution was not denied in the former suit.[90] A motion to discharge a jury and postpone the trial because of the misleading effect of the admission of testimony as to damages afterwards excluded is properly denied where no witnesses have been discharged nor documentary evidence in possession of counsel removed during the trial, and no offer was made to present further testimony.[91] Where, after two continuances by consent, a deed was filed by defendant in the cause and was finally temporarily withdrawn on notice for record, and refiled, and an affidavit of forgery was filed against the deed by one of the plaintiffs the day before trial, a continuance sought by such plaintiff is properly refused because of lack of diligence, where based on the ground that he discovered for the first time when he filed his affidavit, that defendants would rely upon the deed for title and wish to obtain evidence to prove its forgery.[92]

§ 3. *Admission or stipulation to avoid continuance or postponement.*—The application for a continuance because of absence of a witness may be denied where the other party admits that the facts recited in the application and desired to be proved by such witness are true,[93] but he must admit the truth of facts to which it is claimed the absent witness would testify and not merely that the witness would so testify.[94] The admission will not deprive plaintiff of the right to object to the relevancy, competency and materiality of the facts sought to be proved,[95] nor from objecting to conclusions of the witness as they appear in the affidavit in order to keep them from being read to the jury,[96] nor will the admission authorize the exclusion of other evidence to the same facts,[97] but it will operate as a waiver of his right to cross-examine the witness as to his knowledge of the facts on which he based his opinion.[98]

85. Vaught v. Murray, 24 Ky. L. R. 1587, 71 S. W. 924.
86. Chandler v. Parker, 65 Kan. 860, 70 Pac. 368.
87. E. Frank Coe Co. v. Eichenberg, 22 Pa. Super. Ct. 287.
88. Bemis v. Williams (Tex. Civ. App.) 74 S. W. 332.
89. Louisville & N. R. Co. v. Richmond, 23 Ky. L. R. 2394, 67 S. W. 25.
90. Lyons & E. P. Toll Road Co. v. People, 29 Colo. 434, 68 Pac. 275.
91. Fidelity & Deposit Co. v. L. Bucki & Son Lumber Co., 189 U. S. 135.
92. Collins v. Weiss (Tex. Civ. App.) 74 S. W. 46.
93. St. Louis S. W. Ry. Co. v. Campbell (Tex. Civ. App.) 75 S. W. 564.
94. Louisville & N. R. Co. v. Voss (Tenn.) 72 S. W. 983.
95. Code Civ. Proc. § 1039—Tague v. John Caplice Co. (Mont.) 72 Pac. 297.
96. Indiana Ry. Co. v. Maurer (Ind.) 66 N. E. 156.

§ 4. *The application.*—The continuance may be granted at any stage of the case and on such terms as may seem just.[99] Postponement is properly denied where defendant fails to object to the bill of particulars for three weeks after it is filed without giving reason for the delay.[1] An application verified by an attorney on information and belief is insufficient.[2] The application is properly denied where a rule of the court requires that it must be filed on or before the first day of the term and it appears that it was not filed until the trial was called, and it does not appear that the party had used reasonable diligence to procure counsel and the presence of witnesses.[3]

§ 5. *Affidavits or showing.*—An affidavit for a continuance because of absence of a witness is insufficient which simply avers that there is no other witness whose testimony can be so readily procured;[4] or where it does not set out facts as to which he will testify, or does not show that there are other witnesses available who will testify to the same facts.[5] Where the statements of an absent witness made in writing are admitted as his evidence on motion for a continuance because of his absence, they may be contradicted by an affidavit by the witness at another time and place, where it had been agreed between counsel that such contradiction might be made.[6] A continuance is properly granted in an action by a bank on the ground of the illness of the president and the necessity of his presence at the trial, though all the testimony which he is expected to give is not set out in the affidavit, if sufficient appears to show its materiality.[7]

§ 6. *Hearing and order.*—The affidavits of counsel, their admissions and their unsworn statements in open court, may be considered by the judge on a motion for a continuance.[8] A defendant in divorce, directed by the court to pay plaintiff a certain amount for counsel fees in order that she might prepare for trial and subpoena witnesses, is estopped by his failure to do so until time of the trial from opposing plaintiff's motion for a postponement.[9] Improper grant of a continuance by a justice, as against plaintiff, on the ground that defendant's attorney will be engaged in another court on the day of trial, will not affect a judgment for plaintiff.[10]

§ 7. *Continuance by operation of law.*—The general rule, usually enacted into the statutes, is that all undisposed of cases are continued to the next term without order.[11] If a motion for a new trial, set for a particular day by an order entered in term, is not heard or dismissed, it must be continued to a later day by express written order or it will go over to the next term, unless disposed of as provided by statute on notice in vacation.[12]

97. St. Louis S. W. Ry. Co. v. Campbell (Tex. Civ. App.) 75 S. W. 564.

98. American Hardwood Lumber Co. v. Nickey (Mo. App.) 73 S. W. 331.

99. Civ. Code, § 328—McMahan v. Norick (Okl.) 69 Pac. 1047.

1. Schram v. Rudnick, 37 Misc. (N. Y.) 821.

2. Rev. St. 1895, art. 1276—Gulf, C. & S. F. Ry. Co. v. Brown (Tex. Civ. App.) 75 S. W. 807.

3. Miles v. Ballantine (Neb.) 93 N. W. 708.

4. Abby v. Dexter (Colo. App.) 72 Pac. 892.

5. Diedrich v. Diedrich (Neb.) 94 N. W. 536.

6. Hutmacher v. Charleston Consol. Ry., Gas & Elec. Co., 63 S. C. 123.

7. Ida County Sav. Bank v. Seidensticker (Iowa) 92 N. W. 862.

8. Heyward v. Middleton, 65 S. C. 493.

9. Church v. Church, 81 App. Div. (N. Y.) 349.

10. Disque v. Herrington (Cal.) 72 Pac. 336.

11. 4 Enc. Pl. & Pr. 830 and cases cited. Motion to set aside a default was filed at the same term of entry of judgment, and was pending at the end of that term [1 Starr & C. Ann. St. 1896, p. 1160]—Donaldson v. Copeland, 201 Ill. 540.

12. Construction of Civ. Codes, §§ 4323, 4324—Atlanta, K. & N. Ry. Co. v. Strickland, 114 Ga. 998. See, also, Napier v. Heilker, 115 Ga. 168.

EDWIN C. CRAMPTON.

§ 1. Nature and Formal Requisites.—A. Formal Requisites. B. Offer and Acceptance. C. Reality of Consent.

§ 2. **Consideration.**—Necessity; Validity; Mutual Promises; Forbearance or Compromise; Legal Duty; Subscriptions; Change or Substitution of New Contract; Adequacy; Past Consideration; Expressing Consideration; Want or Failure.

§ 3. **Validity of Contract.**—A. General Principles. B. Subject-matter or Consideration. C. Mutuality. D. Unreasonableness. E. Public Policy in General. F. Limitations of Liability. G. Relating to Marriage or Divorce. H. Sunday Contracts. I. Relating to Property. J. Litigious Agreements. K. Compounding Offenses. L. Interfering with Public Service. M. Restraint of Trade. N. Effect of Invalidity.

§ 4. **Interpretation.**—A. General Rules. B. What Is Part of Contract. C. Character,—Joint or Several, etc. D. Language Used. E. Custom or Usage. F. As to Subject-matter. G. As to Parties. H. As to Place and Time. I. As to Compensation. J. As to Compromise or Arbitration. K. As to Performance. L. As to Acceptance of Performance. M. Elections and Options.

§ 5. **Conflict of Laws.**

§ 6. **Modification and Merger.**

§ 7. **Discharge by Performance or Breach.**—A. General Rules. B. Acceptance and Waiver. C. Excuses for Breach. D. Sufficiency of Performance. E. Rights after Default.

§ 8. **Damages for Breach.**

§ 9. **Rescission and Abandonment.**—A. What Contracts and Manner of Rescission. B. Causes. C. Waiver. D. Time. E. Conditions Precedent. F. Under Terms of Contract. G. By Agreement. H. Rights on Rescission. I. Actions for Rescission. J. Abandonment.

§ 10. **Remedies for Breach.**—A. Rights of Action in General. B. Form of Action. C. Accrual. D. Conditions Precedent. E. Defenses and Recoupment. F. Place of Trial. G. Parties. H. Pleading and Proof. I. Evidence. J. Questions of Law and Fact. K. Instructions. L. Verdict and Judgment.

§ 1. *Nature and formation of the contract.*—It is intended here to treat only of the general principles of contracts, leaving more extended and particular treatment of the various kinds of contracts to the particular articles devoted to them.[1]

(§ 1) *A. Formal requisites of contract.*[2]—Where negotiations have proceeded by correspondence, one party may object that the contract is not complete on refusal of the other to sign the written agreement;[3] but a contract may be final, if complete in terms, though the parties intend that it should be reduced to formal writing,[4] or if all substantial terms have been settled, unless it has been clearly understood that formal execution was necessary.[5] It is not always necessary that both parties should sign the contract,[6] but it must be executed as to both.[7] The contract may be formed by correspondence.[8] Parol contracts for life insurance are valid and enforceable.[9]

1. Bonds, Negotiable Instruments, Deeds, Mortgages, Gambling Contracts, Building and Construction Contracts, Public Contracts, and many other titles.

The reader who desires to consult a general treatise will find in Hammon on Contracts an analysis identical with this in many particulars.

2. Execution of contracts by particular kinds of parties, see Husband and Wife, Corporations, States, United States, Counties, Municipal Corporations.

Sufficiency of execution of written contract for employment of school teacher under St. § 4445—Mingo v. Trustees of Colored Common-School Dist. No. A, 24 Ky. L. R. 288, 68 S. W. 483. A written contract for the hiring of convict labor in Nebraska must be executed by the warden of the penitentiary and approved by the governor and the board of public lands and buildings. (Comp. St. c. 86, § 16)—State v. Mortensen (Neb.) 95 N. W. 831. A formal vote or written entry of assent by directors of a corporation is not necessary to validity of a contract if all are present and actually assent—Indiana Bermudez Asphalt Co. v. Robinson, 29 Ind. App. 59.

3. Harbor Point Club-House Ass'n v. Young, 99 Ill. App. 292.

4. Lowrey v. Danforth, 95 Mo. App. 441.

5. Disken v. Herter, 73 App. Div. (N. Y.) 453.

6. A written agreement whereby a man agreed with a pregnant woman to make certain payments and support the child, in consideration of which she agreed to make no further claim on him was binding on her after she accepted the payments though she failed to sign it—Schnurr v. Quinn, 83 App. Div. (N. Y.) 70.

7. Arnold v. Scharbauer, 116 Fed. 492. The intention may be clearly shown by statements in negotiations—Hinote v. Brigman (Fla.) 33 So. 303. Where negotiations for a contract were carried on by correspondents, the offer was accepted, the acceptance acknowledged, and a final message calling for the contract transmitted, but both parties understood that the written contract was to be executed, the terms of which were not all settled, there was a failure of the contract and not a completed agreement, subject only to be reduced to writing—Brauer v. Oceanic Steam Nav. Co., 77 App. Div. (N. Y.) 407.

8. An agreement in a letter written by one party and accepted by the other reciting as between them that one was entitled to receive certain property in return for services rendered under a former contract, is a contract disposing of all the liability of the other party under the former contract—Spier

A signature to a church subscription by surname followed by the word "family" will bind the signer as his full name.[10]

(§ 1) *B. Offer and acceptance.*[11]—An offer may be withdrawn at any time before notice or knowledge of acceptance without liability to the party making the offer.[12] It is revocable until the opposite party has changed his condition and may be withdrawn without breach before that time.[13] A mere offer not assented to does not amount to a contract,[14] and the rule extends to an offer to modify a contract already made.[15] Acceptance of an offer completes a contract.[16] It must be unconditional and identical with the terms of the offer.[17] It may be shown by acts amounting to acquiescence in the offer.[18] If unconditional, it binds both parties though the offer contains a mistake as to terms.[19] Where one party makes a definite statement of terms which the other accepts in so many words, the contract is not unilateral.[20] An acceptance of "the within" contract which consists of two propositions in alternative form, one to sell, the other to buy land, will not apply to both so that part performance of one applies to the other.[21] Where, after certain negotiations during which an offer of two alternatives as to terms was made, one party accepted one of the alternatives and the other replied by asking for immediate performance, the offer and acceptance was complete.[22]

(§ 1) *C. Reality of consent.*—There can be no contract without the assent of the parties.[23] The minds of the parties must meet as to the terms of the contract.[24] One who has signed a contract, no fraud being practiced upon him, is conclusively

v. Hyde, 78 App. Div. (N. Y.) 151. Sufficiency of evidence of implied contract to pay for board of a relative—Danes v. Slitor, 118 Iowa, 81.

9. Pacific Mut. Ins. Co. v. Shaffer (Tex. Civ. App.) 70 S. W. 566; Commercial Union Assur. Co. v. Urbansky, 24 Ky. L. R. 462, 68 S. W. 653; Fire Ins. Co. v. Sinsabaugh, 101 Ill. App. 55; Continental Ins. Co. v. Roller, 101 Ill. App. 77; Vining v. Franklin Fire Ins. Co., 89 Mo. App. 311.

10. Hodges v. Nalty, 113 Wis. 567.

11. Sufficiency of offer and acceptance in contract of sale—China & J. Trading Co. v. Davis (C. C. A.) 119 Fed. 688; Johnson v. Corbett, 95 Md. 746.

12. Huber Mfg. Co. v. Smithgall, 19 Pa. Super. Ct. 641.

13. Groomer v. McCully, 93 Mo. App. 544.

14. Van Vlissingen v. Manning, 105 Ill. App. 255.

15. J. K. Armsby Co. v. Blum, 137 Cal. 552, 70 Pac. 669.

16. Jones v. Wattles (Neb.) 92 N. W. 765.

17. Monk v. McDaniel, 116 Ga. 108. An offer by a mortgagee to receive less than the amount due in payment before maturity, is not accepted by an answer of the mortgagor that he would like to accept and he expected to have the means to pay in about two weeks, and was withdrawn, where before actual acceptance the mortgagee notified the mortgagor that he had sold the mortgage for its face—Thurber v. Smith, 25 R. I. 60.

18. Where after expiration of a contract, an option was given for continuation, defendant's retention and continued use of the property held under it thereafter changed the option to an executed contract in the absence of a different agreement—Bruckman v. Hargadine-McKittrick Dry Goods Co., 91 Mo. App. 454. Where one party to a verbal contract being requested by the other, prepared and signed a written document and sent it to the other who retained it without objection and acted in compliance with its terms, the latter is estopped from claiming that the writing did not properly express the contract between them—Grafeman Dairy Co. v. St. Louis Dairy Co., 96 Mo. App. 495. Where a creditor promptly notifies a third party of his acceptance of the third party's agreement to pay his debtor's debts in certain amounts, and thereafter brings a suit to enforce the terms of such agreement, he has accepted the contract—Taylor v. Ingersoll (Colo. App.) 71 Pac. 398.

19. This should be subject to the condition that the promisor must fail to show that the acceptor could not reasonably have supposed that the offer was the true intention of the promisor (See Hammon on Contracts, § 95)—Postal Tel. Cable Co. v. Akron Cereal Co., 23 Ohio Circ. R. 516.

20. Warden Coal Washing Co. v. Meyer, 98 Ill. App. 640.

21. Bolton v. Huling, 195 Ill. 384.

22. Hartwig v. American Malting Co., 74 App. Div. (N. Y.) 140.

23. Supplies furnished plaintiff's employes cannot be set up as a defense in an action for a balance due on contract if plaintiff's order for the supplies is not shown—Izzo v. Ludington, 79 App. Div. (N. Y.) 272.

24. As to the amount of goods covered by a contract of sale—Singer v. Grand Rapids Match Co. (Ga.) 43 S. E. 755. Where it is shown by the circumstances at the time of making a contract for the delivery of ice, that the party furnishing the ice, did not understand that deliveries were to be made to several dealers who had formed a corporation with the other party to the contract subsequent to its execution, but the other party insisted upon such compliance, there was no meeting of the minds between the parties—Consumers' Ice Co. v. E. Webster, Son & Co., 79 App. Div. (N. Y.) 350.

presumed to know and assent to its terms, though he failed to read it,[25] and cannot defend on the ground that he did not read it and was ignorant as to its contents;[26] mere ordinary business duties will not excuse negligence in failing to read a written contract at the time of signing so as to prevent the inference of negligence.[27] A settlement of an uncertain boundary line by an executed agreement between the parties is binding on them and their purchasers though it does not determine the true line.[28]

Capacity of parties.—An administrator or executor cannot bind the estate by contracts in his representative capacity.[29] The burden is on one seeking to avoid a contract for mental incapacity to prove it.[30] Old age or physical infirmity will not raise a presumption of want of capacity to make a contract.[31] Contracts between husband and wife may be enforced as other contracts.[32] That a man and his wife are aged illiterates not acquainted with the English language and the meaning of technical terms used in conveyances, and that for this reason they were the more easily imposed upon by their attorney in procuring a mortgage, does not show them to have been incapable of making a contract.[33] A contract made by one while drunk is not void but merely voidable at his election, though his intoxication be caused by the other party, and it may be ratified by him or by conduct inconsistent with rescission.[34]

Mistake.[35]—Where parties to a contract are mutually mistaken as to its terms and the mistake will work a manifest hardship on one to the advantage of the other, damages will not be allowed for breach of the contract,[36] though one of the parties was negligent in ascertaining its contents at execution.[37] One signing a contract under a mistake as to its terms, but giving no attention to the part of the contract concerning the matters as to which he was mistaken, there being no relation of trust or confidence between the parties excusing his lack of care, is bound by the contract as made.[38] If a patent mistake appears and the opposite party knew or should have known of it, the contract is incapable of enforcement.[39] A mistake accepted in good faith by the other party cannot prevent enforcement of the contract.[40] Where the scrivener has made a mistake in reducing a contract to writing, and it has been inadvertently signed by a party, it must be shown in what way the written differs from the oral contract.[41] Where a contract by mistake of both parties was executed on a blank form containing provisions different from those agreed upon, and was performed as intended for over a year, the attempt of one party to insist on the contract as executed was fraudulent.[42] Mere inability to read English will not enable a man of ordinary intelligence to urge that he did not understand a contract he had signed where he does not claim that unfair means were used.[43]

25. Johnston v. Covenant Mut. Life Ins. Co., 93 Mo. App. 580; Bostwick v. Mutual Life Ins. Co. (Wis.) 92 N. W. 246.

26. Catterlin v. Lusk (Mo. App.) 71 S. W. 1109. Mere ignorance of its contents will not amount to mistake—Bostwick v. Mutual Life Ins. Co. (Wis.) 92 N. W. 246.

27. Wilcox v. Tetherington, 103 Ill. App. 404.

28. Egan v. Light (Neb.) 93 N. W. 859.

29. Craig v. Anderson (Neb.) 92 N. W. 640; Hughes v. Treadaway, 116 Ga. 663. Sufficiency of evidence of mental capacity to contract—Lodge v. Hulings, 63 N. J. Eq. 159; Tuite v. Hart, 71 App. Div. (N. Y.) 619.

30. Tuite v. Hart, 71 App. Div. (N. Y.) 619.

31. Chadd v. Moser, 25 Utah, 369, 71 Pac. 870.

32. Bea v. People, 101 Ill. App. 132.

33. Hoffman v. Colgan, 25 Ky. L. R. 98, 74 S. W. 724.

34. Strickland v. Parlin & Orendorf Co. (Ga.) 44 S. E. 997.

35. In execution of note—Bailey v. Wood, 24 Ky. L. R. 801, 69 S. W. 1103.

36. Singer v. Grand Rapids Match Co. (Ga.) 43 S. E. 755.

37. Story v. Gammell (Neb.) 94 N. W. 982.

38. Wood v. Wack (Ind. App.) 67 N. E. 562; Bostwick v. Mutual Life Ins. Co. (Wis.) 92 N. W. 246.

39. Singer v. Grand Rapids Match Co. (Ga.) 43 S. E. 755.

40. In estimates on an offer to construct a building—Brown v. Levy (Tex. Civ. App.) 69 S. W. 255.

41. Story v. Gammell (Neb.) 94 N. W. 982.

42. Home Sav. Ass'n v. Noblesville Monthly Meeting (Ind. App.) 64 N. E. 478.

Fraud and misrepresentation and undue influence.[44]—An innocent party will always be relieved from obligation resulting from fraud;[45] but, if the fraud consists in false representations, he must be actually deceived;[46] the misrepresentations must pertain to matters not open to inspection of both parties alike,[47] and must relate to present facts and not merely future possibilities or opinions,[48] and must have been relied upon by the party to whom they were made,[49] and it is insufficient that he was misled as to the meaning of the contract where nothing was concealed from him,[50] and if he executed the contract freely, with full understanding of his acts, the fraud is harmless.[51] To avail him, the deceit must be practiced at time of signing.[52] A contract will not be set aside because of a false representation that it embodies the verbal understanding of the parties;[53] it is only when knowledge is in possession of one party, and the other, by reason of absence or other sufficient cause, is entitled to, and does, rely upon false representations, that they avoid the contract.[54] Insolvency preventing fulfillment of a contract is insufficient to constitute fraud which will vitiate it.[55] If notes given in compliance with a previous valid contract amount to no more than a satisfaction thereof, fraud in procuring the maker to sign the notes, or drunkenness at the time of execution makes no defense.[56] Renewals of a contract induced by fraud are open to the same defense.[57]

In the absence of undue influence, transactions between attorney and client are held valid,[58] if a full and valid consideration appears.[59] In regard to a contract of employment they stand on an equal footing.[60]

43. Muller v. Kelly, 116 Fed. 545.

44. What constitutes fraudulent concealment or misrepresentation vitiating a contract—Vodrey Pottery Co. v. H. E. Horne Co. (Wis.) 93 N. W. 823; Burnett v. Hensley (Iowa) 92 N. W. 678. Fraud must always be proven; it will never be presumed—Edwards v. Story, 105 Ill. App. 433; Fivey v. Pennsylvania R. Co., 67 N. J. Law, 627.

45. Equitable Loan & Security Co. v. Waring (Ga.) 44 S. E. 320; Indiana, D. & W. R. Co. v. Fowler, 201 Ill. 152; Bostwick v. Mutual Life Ins. Co. (Wis.) 92 N. W. 246.

46. Eccardt v. Eisenhauer, 74 App. Div. (N. Y.) 35.

47. Contract for dredging a channel where both parties could ascertain locality and depth of water—Rowland Lumber Co. v. Ross (Va.) 40 S. E. 922.

48. Representations as to future cost of manufacture of an article of merchandise, made to secure organization of a corporation and investment of capital, are as to future possibilities not present facts and though wrong will not avoid the contract—Macklem v. Fales (Mich.) 89 N. W. 581. Representations made by one party to a dredging contract after soundings in the harbor though not specific as to actual measurements, are of matters of fact not opinions so as to relieve the other party from performance where the statements are false and intentional and the other party being absent was entitled to rely upon them—Hingston v. L. P. & J. A. Smith Co. (C. C. A.) 114 Fed. 294. False representations as to the quality of land, made by one of the parties to an exchange at the time of the exchange, are expressions of opinion rather than statements of fact which will not entitle the other party to avoid the contract—Tryce v. Dittus, 199 Ill. 189. A mere expression of opinion as representation on the making of a contract does not amount to a fraud, in the absence of any showing of fiduciary relations between the parties—Consumers' Brew. Co. v. Tobin, 19 App. D. C. 353.

49. Hale Elevator Co. v. Hale, 201 Ill. 131.

50. Nesbit v. Jencks, 81 App. Div. (N. Y.) 140.

51. Metcalf v. Draper, 98 Ill. App. 399. It is otherwise if he has been actually deceived—Story v. Gammell (Neb.) 94 N. W. 982.

52. Bostwick v. Mutual Life Ins. Co. (Wis.) 92 N. W. 246.

53. The other party must examine for himself—Johnston v. Covenant Mut. Life Ins. Co., 93 Mo. App. 580. One who has signed a written contract without investigating its contents, is estopped by negligence from asking relief from its obligation, though his signature is procured by fraud—Ferrell v. Ferrell (W. Va.) 44 S. E. 187.

54. There is no fraud invalidating a contract, where one of the parties on the false representation of the other that it embodies their verbal agreement, does not himself read it but takes it to a business man of experience and at his advice signs it—Magee v. Verity, 97 Mo. App. 486. One party who is at a distance from the subject matter of a contract is entitled to rely on representations of the other party as to its condition and is not bound by a contract resulting from intentional false representations on which he relied—Hingston v. L. P. & J. A. Smith Co. (C. C. A.) 114 Fed. 294.

55. Stein v. Hill (Mo. App.) 71 S. W. 1107.

56. Strickland v. Parlin & Orendorf Co. (Ga.) 44 S. E. 997.

57. Adams v. Ashman, 203 Pa. 536.

58. A conveyance whereby an attorney received settlement for certain fees and loans made to his client is not to be presumed

Duress.[61]—A note given by the father to the mother of a bastard while he is under arrest on the charge is not void for duress.[62] A mere threat to give information in aid of a pending prosecution against another is not such duress as to avoid a note secured from him in settlement of claims.[63]

Ratification.—A nonenforceable contract may be ratified as well after as before suit;[64] but as to one under disability after removal thereof, the act must be voluntary and a duty which the party recognizes and acknowledges.[65] Though a contract might have been disaffirmed for good cause, failure to repudiate after knowledge of all facts and an attempt to carry out the provisions and enforce the contract, constitute a ratification thereof.[66] The negotiation of a bill of lading by shipper after receipt is a ratification or adoption of its terms as between him and the carriers operating to avoid a prior valid contract under which the goods were shipped and under which rights had vested and obligations accrued.[67]

§ 2. *Consideration.*[68] *Necessity of consideration.*—On a sale of lands the consideration must be fixed.[69] Permission given by the county commissioners' court to connect with the county sewer not founded upon consideration is only a revocable license and not an act of court nor a contract.[70] An agreement to yield a claim to lands in event of winning a pending action is void where the other party neither incurs expense nor forbears suit.[71]

Validity of consideration.—There must be a valuable consideration for modification or extinguishment of an existing contract.[72] There must be a valid consideration.[73] An agreement to marry is a valid consideration for a transfer of property.[74] A note based on a contract void as against public policy is without consideration.[75] A bond to perform a contract under a void ordinance granting an exclusive franchise is invalid as to consideration.[76] A contract containing a recital of one dollar as consideration is valid, though the amount is not actually paid, since it creates an obligation which may be enforced by the other party.[77]

What constitutes a consideration in general.—A contract whereby a railroad superintendent agreed to employ a workman for life as flagman at a certain salary, in consideration of a release of damages for injuries resulting from the negli-

fraudulent because of the relation of the parties—Lindt v. Linder, 117 Iowa, 110.

59. Tippett v. Brooks (Tex. Civ. App.) 67 S. W. 512.

60. Clifford v. Braun, 71 App. Div. (N. Y.) 432.

61. Definition of duress—Batavian Bank v. North, 114 Wis. 637.

62. Jones v. Peterson, 117 Ga. 58.

63. Barger v. Farnham (Mich.) 90 N. W. 281.

64, 65. Snyder v. Gericke (Mo. App.) 74 S. W. 377.

66. University of Virginia v. Snyder (Va.) 42 S. E. 337. Where one of two judgment creditors having a lien on the interest of one of three joint tenants, knows that the other has been paid the amount of his judgment by the purchaser at a partition sale, and allows a settlement to be made by her husband with the purchaser, such settlement amounts to a ratification by her of the retention of the land by the purchaser—Turner v. Baldwin, 81 App. Div. (N. Y.) 639.

67. Farmers' Loan & Trust Co. v. Northern Pac. R. Co. (C. C. A.) 120 Fed. 873.

68. As to consideration, see Brown v. Ohio Nat. Bank, 18 App. D. C. 598.

69. Pulford v. Dimmick, 107 La. 403.

70. Fayette County v. Krause (Tex. Civ. App.) 73 S. W. 51.

71. East Omaha Land Co. v. Hanson, 117 Iowa, 96.

72. Gunby v. Drew (Fla.) 34 So. 305. Logging contract—Kerslake v. McInnis, 113 Wis. 659. Modification due to failure of consideration of original contract—Jackson v. Helmer, 73 App. Div. (N. Y.) 134. An agreement to cancel notes without consideration is unenforceable—Templeton v. Butler (Wis.) 94 N. W. 306. See, also, Accord and Satisfaction, ante, p. 9.

73. Contract for carriage of express limiting liability of company—Adams Exp. Co. v. Carnahan, 29 Ind. App. 606. A condition in a shipping contract limiting the carrier's liability, in certain respects, may be valid where supported by reduced freight rate—Mears v. New York, N. H. & H. R. Co., 75 Conn. 171. A surrender by a widow of all claim to the personal effects of her husband is a valid consideration for a release of her liability for claims of creditors—Gunther v. Gunther, 181 Mass. 217.

74. In re Miller's Estate, 77 App. Div. (N. Y.) 473.

75. Hubbard v. Freiburger (Mich.) 94 N. W. 727.

76. Town of Kirkwood v. Meramec Highlands Co., 94 Mo. App. 637.

77. Southern Bell Telephone & Telegraph Co. v. Harris (Ga.) 44 S. E. 885.

gence of the railroad company, is not invalid as unreasonable.[78] Several considerations may exist for one promise and several promises may be supported by one consideration.[79] Mere motives cannot, of themselves, constitute a sufficient consideration for a promise.[80] It may consist in the relation of the parties.[81] Payment for corporate stock is a consideration for a promise to pay a certain annual dividend, if the corporation failed to pay it.[82] A promise to pay an employer a certain amount for release of another from a contract of service is founded on a consideration.[83]

Mutual promises.—An attempted assignment of a statutory right to redeem from a foreclosure sale constitutes no consideration for the contract, the right being personal to the owner.[84] Mutual and concurrent promises constitute a valuable consideration for each other,[85] though one is executory,[86] but not unless there is mutuality of engagement or obligation, or the party not bound has fully performed.[87]

Forbearance or compromise.—A consideration may consist in a forbearance to enforce rights or a relinquishment of rights or advantages gained by one or both of the parties,[88] or a surrender of conditions whereby one party would be preju-

78. Usher v. New York Cent. & H. R. R. Co., 76 App. Div. (N. Y.) 422.

79. Hammon on Contracts, p. 635.

80. Hammon on Contracts, p. 635; Philpot v. Gruninger, 14 Wall. (U. S.) 570.

81. The relation of husband and wife is a consideration for a conveyance of land—La Fleure v. Seivert, 98 Ill. App. 234; Hammon on Contracts, § 329.

82. Crook v. Scott, 174 N. Y. 520.

83. Person wishing to marry woman employe pays for her release—Holz v. Hanson, 115 Wis. 236.

84. Terry v. Allen, 132 Ala. 657.

85. Steele v. Johnson, 96 Mo. App. 147; Cold Blast Transp. Co. v. Kansas City Bolt & Nut Co. (C. C. A.) 114 Fed. 77. A mutual promise between co-sureties on a note, who have contributed equally to its payment, to divide equally amounts collected thereon from the maker is sufficient—Cramer v. Redman (Wyo.) 68 Pac. 1003. A contract whereby a manufacturer agreed to buy all his raw material of a certain sort for a certain period from another at a certain price which the other agreed to furnish as ordered, it being agreed that the quantity used was understood to be about a certain amount, but that the buyer should have the right to demand twice as much is founded upon a good consideration, since it imposes on both parties an obligation to perform—Loudenback Fertilizer Co. v. Tennessee Phosphate Co. (C. C. A.) 121 Fed. 298.

86. Chenoweth v. Pacific Exp. Co., 93 Mo. App. 185.

87. A promise that a salesman should have the exclusive right to sell goods for a certain company in a certain territory and that the company would fill all his orders, is without consideration, where he did not agree to sell their goods or purchase or order any of the goods or render any counter services—Hirschhorn v. Nelden-Judson Drug Co. (Utah) 72 Pac. 386. A contract by the county commissioners to make a public improvement in consideration of a promise made by certain persons to contribute to the cost, cannot be enforced against the promisors because it cannot be enforced against the commissioners, but if fully performed on the part of the latter, it is binding against the promisors and may be so enforced—Hassenzahl v. Bevins, 24 Ohio Circ. R. 173.

88. Forbearance to bring or continue suit against the other party—Pollak v. Billing, 131 Ala. 519; Weilage v. Abbott (Neb.) 90 N. W. 1128; Waters v. White, 75 Conn. 88; McMicken v. Safford, 197 Ill. 540. Agreement to pay a certain sum to another for forbearance in contesting a will—Clark v. Lyons, 38 Misc. (N. Y.) 516. A forbearance to sue on a claim constitutes a sufficient consideration for a contract—Chenoweth v. Pacific Exp. Co., 93 Mo. App. 185. Forbearance on an overdue claim for a reasonable time, is a sufficient consideration for a promise by a third person to pay it—German Sav. Bank v. Brodsky, 39 Misc. (N. Y.) 100. An agreement not to sue on a debt presently is sufficient consideration for waiver of limitations by the debtor—Pollak v. Billing, 131 Ala. 519. An agreement by a mortgagee to receive less than the amount due in full payment, if the mortgagor will satisfy the mortgage before maturity is based on sufficient consideration—Thurber v. Smith, 25 R. I. 60. A note given by the father to the mother of a bastard in settlement of prosecution is sufficient as to consideration both legal and moral—Jones v. Peterson, 117 Ga. 58. Release of a stock certificate already cancelled in effect, for a credit on a debt already paid—Western Loan & Sav. Co. v. Desky, 24 Utah. 347, 68 Pac. 141. If notes are given in consideration of the cancellation of certain other notes and the discontinuance of actions thereon, the payment of such notes cannot be resisted because formal discontinuance of the actions is not entered before they had been abandoned—West v. Banigan, 172 N. Y. 622. An agreement by certain defendants to assist plaintiff in securing judgment as against the remaining defendants, is sufficient consideration for an agreement by plaintiff not to levy execution against their property—Crook v. Lipscomb (Tex. Civ. App.) 70 S. W. 993. An agreement to forbear from enforcement of a claim for taxes paid in consideration of their payment by another cannot be construed to be indefinite as to time so as to amount to insufficiency of consideration—

diced if obligations of the other were not performed.[89] Refraining from securing a divorce, and resumption of relations with the husband, is sufficient consideration for his agreement to convey property to the children.[90] The settlement or compromise of a dispute or controversy is sufficient as a consideration.[91] A mutual submission to arbitration is a sufficient consideration for a note for the award of arbitrators.[92] The right of other creditors to an equitable enforcement of a scheme to compromise the entire indebtedness of a county is sufficient to make it binding.[93]

Duty already imposed by law or contract.—A promise to do that which the promisor is already legally bound to do does not amount to legal consideration for promise of another.[94] An agreement with a servant on his wrongful discharge that wages due will be accepted as satisfaction of all damages is without consideration.[95]

Consideration for subscriptions.—A note payable at the maker's death to a

Blumenthal v. Tibbits (Ind.) 66 N. E. 159. The relinquishment of advantages and the risks of future costs and litigation is a sufficient consideration given by a county court in condemnation proceedings to open a highway for the promise of the landowner to pay the costs on dismissal—County Court v. Hall, 51 W. Va. 269. A surrender of claims under a contract of agency, amounts to a sufficient consideration for a note given to an agent by his principal in settlement, though the agreement under which it was given provided that the agent might terminate it after a certain period—Barger v. Farnham (Mich.) 90 N. W. 281. Where rights of a party under a contract for the sale of land had expired, but he still held certain equities in land, a later agreement between the parties that his rights as vendee should cease at the end of a year, unless he made certain payment and a promise by him to surrender all right to damages arising from the original contracts and to pay the expense of appraisal by trustees, constituted a sufficient consideration for the new agreement—Lamprey v. St. Paul & C. Ry. Co. (Minn.) 94 N. W. 555. A party to a contract may be held to his promise not only because of a consideration passing to him therefor but by the fact that the other party, in reliance on such promise, has so done or omitted to do things that he would suffer and be injured if the promise was withdrawn. Agreement for settlement of debt by delivery of deeds and transfers of property placed in escrow of which part consideration was forbearance from hostile proceedings to enforce collection of the debt thereby losing advantage to the creditors and resulting in expense to them—Mechanics' Nat. Bank v. Jones, 76 App. Div. (N. Y.) 534. Refraining from securing a divorce by a wife and resumption of relations with her husband is sufficient consideration for his agreement to convey property to their children—Moayon v. Moayon, 24 Ky. L. R. 1641, 72 S. W. 33, 60 L. R. A. 415. Consult the title Accord and Satisfaction, ante, p. 9.

89. Where by a verbal promise one person induced another to convey land to a townsite in alternate blocks so as to accommodate his interest, thereby placing themselves in a position where they would be greatly prejudiced if the contract requiring him to convey property to them was not in force, there was a valid and sufficient consideration for his promise—McCarty v. May (Tex. Civ. App.) 74 S. W. 804. Where prior to his death a decedent induced parties to part with their title to land on a promise to become liable for full value of the land, the debt became a valid claim against his estate and constituted sufficient consideration for an agreement with the administratrix to dismiss a suit to enforce such claim if she would apply for an order of sale of the property and pay the debt from the proceeds—McCarty v. May (Tex. Civ. App.) 74 S. W. 804. Abandonment by one of a valid enforceable lien on property, and of possession of the property under such lien, in order to allow another to attach the property, is a sufficient consideration to support the bonds executed by the agent of the latter as surety, binding him to pay the amount of the lien—Davis, Belau & Co. v. National Surety Co. (Cal.) 72 Pac. 1001.

90. Moayon v. Moayon, 24 Ky. L. R. 1641, 72 S. W. 33, 60 L. R. A. 415.

91. Settlement of dispute as to liability for stolen property suffices to support a promise to pay for work done—Innes v. Ryan, 37 Misc. (N. Y.) 806. Of a dispute concerning liability for support of a pauper—Town of Brandon v. Jackson, 74 Vt. 78.

92. Downing v. Lee (Mo. App.) 73 S. W. 721.

93. Compromise with bond holders—Dyer v. Muhlenberg Company (C. C. A.) 117 Fed. 586.

94. Reeves Pulley Co. v. Jewell Belting Co., 102 Ill. App. 375; Allen v. Plasmeyere (Neb.) 90 N. W. 1125; Wendling v. Snyder, 30 Ind. App. 330; Sommers v. Myers (N. J. Law) 54 Atl. 812. Agreement to pay additional compensation for services which the promisor was already legally bound to give under an old contract—Alaska Packers' Ass'n v. Domenico (C. C. A.) 117 Fed. 99. An agreement by a surety to substitute his individual note for one on which he was surety, is insufficient as consideration, it being no more than his legal duty—Barringer v. Ryder (Iowa) 93 N. W. 56. A promise by an owner to pay a contractor for work as extra which was already included in his contract is without consideration—Wear Bros. v. Schmelzer, 92 Mo. App. 314.

95. Walston v. F. D. Calkins Co. (Iowa) 93 N. W. 49.

preacher to aid the spread of a religious doctrine in which the maker believed is founded on sufficient consideration, where the preacher continues the work.[96] A subscription in writing to a church, made by deceased person in her lifetime, is without sufficient consideration to be made enforceable, though it appears by the oral evidence that she promised to pay the instalments, where no other subscriptions were made on the faith of it, nor was the construction of the church begun.[97] A note given by a decedent in his lifetime to an incorporated charitable institution payable at a future date for the purpose of forming, with other contributions, a permanent endowment fund, which was accepted by the directors of the institution who with the maker's knowledge began work in reliance on the subscriptions, is founded on a sufficient consideration.[98]

Effect of change, modification, or substitution of new contract.—Surrender of a note is a good consideration for a new note,[99] and will bind a third person as surety on the new note.[1] A subsequent oral agreement without new consideration can have no effect on a written lease.[2] No consideration other than release from their respective obligations is necessary to abrogation of a mutually executory contract by agreement of the parties.[3] A mutual release from an old contract after partial completion owing to a change in plans is sufficiently supported by an agreement by one party to work without delay and by the other party to pay for the work under both contracts.[4] Where one party to a contract interfered with its performance in certain particulars, a modification to obviate difficulty is founded on a sufficient consideration;[5] and likewise modification of a contract made necessary by partial failure of consideration.[6] A new consideration is not necessary to a change in the terms of a written contract by parol if it is executory and there has been no breach; if however the agreement is within the statute of frauds the modification must be executed or follow on a new consideration.[7] The want of a new consideration for a parol modification of a contract is obviated by performance.[8] Where extra work was already covered by his contract, a contractor cannot enforce a subsequent promise by the owner for additional compensation for such work.[9] Where a written contract failed because of refusal of one of the parties to execute, a subsequent parol agreement by the remainder of the parties that the contract should stand without him is not binding unless founded upon a new and independent consideration.[10] A second contract, identical with the first except that it provides for additional compensation for the same services, is in so far without consideration and void, especially where the employer is compelled by stress of circumstances to yield to the demand for its execution.[11] A subsequent express promise by a debtor to reimburse another for payment of his debt owing to a third person without his request or obligation is without consideration;[12] likewise, a guaranty by a vendor of land after the contract of sale was completed, that a railroad would be built to a neighboring town in two years or he would re-

96. Woodworth v. Veitch, 29 Ind. App. 589.
97. Lippincott's Estate, 21 Pa. Super. Ct. 214.
98. Albert Lea College v. Brown's Estate (Minn.) 93 N. W. 672.
99. Siemans & H. Elec. Co. v. Ten Broek, 97 Mo. App. 173.
1. Stroud v. Thomas (Cal.) 72 Pac. 1008.
2. Spota v. Hayes, 36 Misc. (N. Y.) 532.
3. Barrie v. King, 105 Ill. App. 426.
4. Anderson v. McDonald (Wash.) 71 Pac. 1037.
5. Logging contract—Kerslake v. McInnis, 113 Wis. 659.
6. Jackson v. Helmer, 73 App. Div. (N. Y.) 134.
7. Bowman v. Wright (Neb.) 91 N. W. 580.
8. Jackson v. Helmer, 73 App. Div. (N. Y.) 134.
9. Wear Bros. v. Schmelzer, 92 Mo. App. 314.
10. Arnold v. Scharbauer, 118 Fed. 1008.
11. Contract for navigation of vessel demanded by seaman in the midst of the voyage—Alaska Packers' Ass'n v. Domenico (C. C. A.) 117 Fed. 99.
12. Thomson v. Thomson, 76 App. Div. (N. Y.) 178.

pay the purchase money and receive a reconveyance;[13] and a contract made subsequent to a contract of sale of a certain business for execution of another instrument embodying a promise not to re-engage in the same business.[14]

Adequacy of consideration.[15]—There must be a sufficient consideration.[16]

13. Pence v. Adams, 116 Iowa, 462.

14. Zanturjian v. Boornazian (R. I.) 55 Atl. 199.

15. See, also, 39 Am. St. Rep. 743; 81 Am. St. Rep. 664.

16. **Sufficiency of consideration in particular contracts.**—Contract for sale of barley—Hartwig v. American Malting Co., 74 App. Div. (N. Y.) 140. Written contract for assistance in formation of corporation—Mendel v. Pickrell, 37 Misc. (N. Y.) 813. Agreement for destruction of notes as between holder and heirs of maker—Lodge v. Hulings, 63 N. J. Eq. 159. For agreement of father to support bastard—Beach v. Voegtlen, 68 N. J. Law, 472; Sponable v. Owens, 92 Mo. App. 174. Agreement between co-sureties for collection on a note paid by them for the maker—Cramer v. Redman (Wyo.) 68 Pac. 1003. Conveyance of lands—Perkins v. Perkins, 181 Mass. 401. Agreement of husband not to change or revoke his will leaving his property to his wife—Kine v. Farrell, 71 App. Div. (N. Y.) 219. A written contract to convey lands is invalid where it contains no terms whereby the owners could enforce payment for their lands—Arnold v. Scharbauer, 116 Fed. 492. Agreement to yield claim to lands—East Omaha Land Co. v. Hanson, 117 Iowa, 96. A promise to supply materials to a contractor is sufficiently supported by the owner's promise to withhold payment from contractor to cover such materials—Roussel v. Mathews, 171 N. Y. 634. A sale of an interest in an estate by a woman of full age and competency for less than half its value will not be set aside at suit of her legatee for inadequacy of consideration—Hagan v. Ward, 38 Misc. (N. Y.) 367. An agreement by commissioners of a county in Ohio with landowners in Michigan regarding a subscription for improvement of a road extending into both states where the land is contiguous and specially benefited, is founded on a valuable consideration—Hassenzahl v. Bevins, 24 Ohio Circ. R. 173. Contract by a builder to repair a heating system in a public building because of injuries resulting from his use of the system in doing work on the building—McClure v. Lorain County Com'rs, 24 Ohio Circ. R. 72. A promise by a railroad company to provide a depot within a mile and a half of plaintiff's land, was sufficient consideration for his donation of a right of way—Cadiz R. Co. v. Roach, 24 Ky. L. R. 1761, 72 S. W. 280. Contract by members of a corporation providing for payment of profits accruing from the lease of a building constructed by the corporation on a loan to two of the stockholders—Maginn v. Lancaster (Mo. App.) 73 S. W. 368. An accepted offer to furnish such goods as another may need during a limited time in an established business is mutual and sufficient as to consideration—Cold Blast Transp. Co. v. Kansas City Bolt & Nut Co. (C. C. A.) 114 Fed. 77. A contract for payment of a certain amount to a railroad company after the road is built to a certain point is completed as to consideration when the road is so built—Los Angeles Traction Co. v. Wilshire, 135 Cal. 654, 67 Pac. 1086. Improvement of land by a daughter in reliance on a promise by her father to convey it to her is a sufficient consideration therefor—Horner v. McConnell, 158 Ind. 280. Since a wife is presumed to suffer damages by a recovery against her husband, a contract with her for conveyance of dower right in order to prevent a recovery of penalty against her husband for failure to convey land sold because of wife's refusal to join is not without consideration —Goldstein v. Curtis, 63 N. J. Eq. 454. Where one party conveyed to another as trustee certain real estate, and part of the consideration was to be paid in stock of a corporation to be afterward organized, the second party agreeing to furnish the first a purchaser for the stock at par within a certain time from date if he desired to sell, a subsequent agreement for conveyance of other realty alleged to have been purchased by first party with money furnished by the second in consideration of certain amount in cash, in place of the stock included in the first contract and of an exclusive right in the land conveyed, is based on sufficient consideration—Hazen v. Colossal Cavern Co. (Ky.) 76 S. W. 116. Where stockholders of two corporations agree to a consolidation, one to receive all the property of the other, to issue stocks and bonds for its payment, to assume all debts of the other, and to issue and set aside a certain amount of bonds to retire bonds of the absorbed corporation, the surplus of such issue of bonds to be divided between existing stockholders of the two corporations, there was a valuable consideration for the disposition of the surplus incorporated in a resolution of the absorbing corporation in conformity of the agreement—Read v. Citizens' St. R. Co. (Tenn.) 75 S. W. 1056. A recognition of the right of the payee of a note to certain rents, and an agreement to pay them according to its terms, amount to a sufficient consideration for the note—Smith v. McLennan, 101 Ill. App. 196. A change in his plans by a client as to litigation to be carried on by his attorney for a fee contingent on success is sufficient consideration to support a contract with the attorney for reasonable compensation regardless of results—Jones v. Haines, 117 Iowa, 80. Aid in securing a contract for work to a firm of architects, is sufficient consideration for payment by the firm of part of their commissions—Lord v. Hull, 80 App. Div. (N. Y.) 194. A provision in a contract for the sale of lands for a reconveyance to the vendor for a certain sum, whenever the purchaser concludes to re-sell is sufficiently supported by the consideration in the original conveyance—Peterson v. Chase, 115 Wis. 239. Where a note is given by a trustee to a creditor of the trust in settlement of a judgment remaining unsatisfied of record, which did not exceed the amount due the creditor for the purpose of preventing further proceedings, an acceptance is founded on a sufficient consideration—Stitzer v. Whittaker (Neb.) 91 N. W. 713. Accepted orders for goods under contracts void for failure of

Where children take property of their parents subject to the debts of the father and give orders to the executors to pay claims of their father's creditors, such orders were not without consideration.[17] An insolvent's agreement with one of his creditors, consenting to the appointment of a receiver in consideration of the creditor's agreement, if appointed, to perform his duties without compensation is founded upon a sufficient consideration.[18] Permission by a city to a company to use land for a cemetery under the supervision of the city sexton in the presence of reasonable and valid ordinances prohibiting interment within certain limits of the city is sufficient consideration for an agreement of the company to limit the prices of burial lots.[19] An assumption of payment of a debt of a life tenant by a remainderman on condition that the life tenant pay interest as long as the remainderman lives is supported by a sufficient consideration.[20] A change in his plans by a client as to litigation to be carried on by his attorney for a fee contingent on success is sufficient consideration to support a contract with the attorney for reasonable compensation regardless of results.[21] The payment to an employe leaving service to engage in a competing business of a sum in excess of that to which he would have been entitled is sufficient consideration for an agreement by him not to enter into a competing business or disclose the secret processes of his employer.[22] The agreement of a third person to pay a judgment creditor a certain amount is sufficient consideration for his agreement to satisfy the judgment and convey lands purchased by him at execution thereunder for more than sufficient to satisfy it.[23] Where a husband and wife sold certain property in a mercantile corporation owned by the wife and certain realty owned by both under a contract providing that neither would engage in that business in the same village while the corporation continued in business is sufficient as to consideration with regard to the husband, since it included land in which he was interested.[24] Where nothing appears to be due the state from the surety on a bond of a deputy officer

consideration, amount to sales of the goods on the terms of the contracts; but they do not validate the agreement as to articles which the one refuses to purchase or the other refuses to sell or deliver under the contract since neither party is bound to take or deliver any amount or quantity of these articles thereunder—Cold Blast Transp. Co. v. Kansas City Bolt & Nut Co. (C. C. A.) 114 Fed. 77.

Consideration for promissory note.—Negotiable instruments are presumed to be based on a consideration and the holder need not prove that one exists—Hammon on Contracts, p. 631. Surrender of a note is a good consideration for making another—Siemans & H. Elec. Co. v. Ten Broek, 97 Mo. App. 173. Note for assignment of interest in mining lease—C. H. Brown Banking Co. v. Fink, 95 Mo. App. 257. A note given to an owner of standing trees by a trespasser who had removed them is supported by a sufficient consideration—Northern Pac. Ry. Co. v. Holmes (Minn.) 93 N. W. 606. The signature of a surety on a note after signature by the principal debtors which was procured under an agreement by the latter with the payee to obtain the surety's signature if the note would be accepted in satisfaction of a pre-existing debt did not require any additional consideration, since his execution took effect as if coincident with the execution by the makers—Stroud v. Thomas (Cal.) 72 Pac. 1008. Cancellation of an old note on delivery of a new one for the same debt is sufficient consideration to bind a third person as surety on the latter note—Stroud v. Thomas (Cal.) 72 Pac. 1008. A note executed by two persons jointly in renewal of a former note made by both, but as to which, one of them had been released, is without consideration as to him—Farmers' & M. Bank v. Hawn, 79 App. Div. (N. Y.) 640. Payment of overdue interest on a note past due is not a sufficient consideration for an agreement to extend time of payment on the note—Stroud v. Thomas (Cal.) 72 Pac. 1008. A note executed by two persons jointly in renewal of a former note is without consideration as to one who had been released from the former note—Farmers' & M. Bank v. Hawn, 79 App. Div. (N. Y.) 640.

Sufficiency of consideration to enable specific performance.—$32 per acre for land worth $35 is not such inadequate consideration as will prevent specific performance—Townsend v. Blanchard, 117 Iowa, 36.

17. Drye v. Cunningham, Medley & Co., 24 Ky. L. R. 2500, 74 S. W. 272.

18. Polk v. Johnson (Ind.) 66 N. E. 752.

19. City of Austin v. Austin City Cemetery Ass'n (Tex.) 73 S. W. 525.

20. Roberts v. Lamberton (Wis.) 94 N. W. 650.

21. Jones v. Haines, 117 Iowa, 80.

22. S. Jarvis Adams Co. v. Knapp (C. C. A.) 121 Fed. 34.

23. Farmer v. Sellers (Ala.) 33 So. 829.

24. Kronschnabel-Smith Co. v. Kronschnabel, 87 Minn. 230.

except from representations of his superior officer, a contract by the latter for release of the surety in consideration of a note is nevertheless not without consideration.[25] An agreement entered into at the time of a sale of goods between the purchaser, the seller and the agent making the sale for the seller, that the purchaser and the seller would pay commission to him, is not supported by a consideration binding on the purchaser, though the services be regarded as rendered to the parties jointly.[26] Where there was a novation by giving of a note from one party to another as substitution for a debt due from a third person, an executory agreement by the party receiving the note to take another from the party giving it for the correct amount under a provision that it was never to become due unless the original debtor completed a contract with the maker was unenforceable as being without consideration to the holder of the note.[27] A contract by a woman of full years and mentally competent to procure money to support an extravagant life, whereby she transferred her interest in the estate which was in dispute for less than half of what the purchaser realized under the contract, will not be set aside for inadequacy of consideration at the suit of the legatee in a small amount under her will.[28] An agreement to convey land to a child, in consideration of being allowed to name it, cannot be held without consideration because the promisor owned no land at the time, where after the child was named he bought a particular tract of land, and, by his declarations and actions, showed that he intended to apply it to fulfillment of his contract.[29]

Past consideration.—A contract cannot depend upon a past consideration,[30] though a promise for future payment is not without consideration because for past services.[31] Acts voluntarily done cannot operate as consideration in a subsequently executed contract,[32] nor obligations already owing under a previous contract;[33] however, voluntary payment of a judgment recovered against another by a third person is sufficient consideration for a subsequent promise of the judgment debtor for repayment.[34] The consideration of a former contract which has been discharged is insufficient.[35] The consideration may consist in a pre-existing debt,[36] but pay-

25. Culver v. Caldwell (Ala.) 34 So. 13.

26. Wulff v. Lindsay (Ariz.) 71 Pac. 963.

27. Dillard v. Dillard (Ga.) 44 S. E. 885.

28. Hagan v. Ward, 115 N. Y. St. Rep. 1128.

29. Daily v. Minnick, 117 Iowa, 563.

30. Promise of landlord during lease to make repairs—Roehrs v. Timmons, 28 Ind. App. 578. A subsequent oral agreement without new consideration can have no effect on a written lease—Spota v. Hayes, 36 Misc. (N. Y.) 532. A second contract for navigation of a vessel demanded in the midst of the voyage, identical with the first except that it provides for additional compensation, is in so far without consideration and void especially where the party is compelled by stress of circumstances to execute it—Alaska Packers' Ass'n v. Domenico (C. C. A.) 117 Fed. 99. Where a contract failed because of refusal of one party to execute, a subsequent parol agreement by the remainder of the parties that the contract should stand without him is not binding unless founded on a new and independent consideration—Arnold v. Scharbauer, 118 Fed. 1008.

31. Dupignac v. Bernstrom, 37 Misc. (N. Y.) 677.

32. Nesbit v. Jencks, 81 App. Div. (N. Y.) 140. Sufficiency of consideration for contract by broker to sell lands for commissions made after transaction had been completed—Perkins v. Smith, 83 App. Div. (N. Y.) 630. A promise by contractors after a sub-contractor had performed extra work without his contract, to pay him for such work, is without consideration—Majory v. Schubert, 82 App. Div. (N. Y.) 633.

33. Wendling v. Snyder, 30 Ind. App. 330; Sommers v. Myers (N. J. Law) 54 Atl. 812. Where work for which a contractor claimed extra pay, was clearly provided for in the contract between the parties, the owner's promise for such pay was without consideration and contractor could not recover—Wear Bros. v. Schmelzer, 92 Mo. App. 314.

34. Wright v. Farmers' Nat. Bank (Tex. Civ. App.) 72 S. W. 103.

35. New contract for navigation of vessel demanded by seamen in midst of voyage—Alaska Packers' Ass'n v. Domenico (C. C. A.) 117 Fed. 99. Consideration of former contract after failure in execution as consideration for new contract—Arnold v. Scharbauer, 118 Fed. 1008. Additional guaranty after completion of contract for sale of land—Pence v. Adams, 116 Iowa, 462. Contract in restraint of trade subsequent to contract for sale of business—Zanturjian v. Boornazian (R. I.) 55 Atl. 199. A note executed by two persons jointly in renewal of a former note made by both, but as to which, one of them had been released, is without consideration

ment of overdue interest on a note past due will not suffice for an agreement to extend the time of payment.[37] If the exact amount due between parties was not determined, a subsequent agreement for full satisfaction is founded upon a sufficient consideration.[38] A new consideration is not necessary to a change in the terms of a written contract by parol if it is executory and there has been no breach; if however the agreement is within the statute of frauds the modification must be executed or follow on a new consideration.[39]

Sufficiency of expression of consideration; terms as to consideration construed.—The value of consideration must not be left wholly in the will of the party from whom it comes.[40] A contract reciting that it was made for value received will be held to be founded on a good consideration unless the contrary is proven.[41] Where a mercantile company agreed to use electric service in its store for a year "in consideration of which, and of payment by the 10th of the month," a certain discount was to be allowed, the consideration for the discount was the agreement to use the service for a year.[42] A written agreement to convey certain realty at the option of the other party failing to show that he gives anything in return for the option is without consideration and is a mere offer which may be withdrawn at choice of the maker.[43]

Want or failure of consideration.[44]—Conditions existing when a contract is made must determine whether or not it rests upon a valuable consideration and it cannot be avoided because it subsequently transpires that the thing sought to be obtained is of no value, unless fraud or imposition appears.[45] Where the consideration for a contract was dependent upon the re-organization of a corporation and existence of a surplus thereafter, the contract was nudum pactum and unenforceable.[46] A mortgage given between husband and wife after marriage to secure a loan made before marriage is void as for want of consideration, the debt being extinguished by marriage.[47] The sale of a future crop is void for want of consideration if the crop fails, though if only the hope of the crop is sold it is otherwise.[48] If the maker of a note is misled as to the identity of a bond to which his name is attached and in liquidation of his liability upon which the note was given, it is without consideration.[49] A note given on conveyance of land under an agreement that the maker should sell the land for the payee, failing in which, the land was to be reconveyed, was invalid for want of consideration on a failure to sell the land.[50] Where the consideration for a discount to be allowed on a contract was the promise of the other party to continue the contract for a year, a failure in such regard will warrant a recovery of all discounts allowed though payments have been promptly made.[51] Under a law making it a misdemeanor for an

as to him—Farmers' & M. Bank v. Hawn, 79 App. Div. (N. Y.) 640.

36. Hibernia Nat. Bank v. Sarah Planting & Refining Co., 107 La. 650.

37. Stroud v. Thomas (Cal.) 72 Pac. 1008.

38. Spier v. Hyde, 78 App. Div. (N. Y.) 151.

39. Bowman v. Wright (Neb.) 91 N. W. 580.

40. Contract for future delivery of personalty leaving quantity entirely in choice of seller—Cold Blast Transp. Co. v. Kansas City Bolt & Nut Co. (C. C. A.) 114 Fed. 77. Contract for sale of goods leaving quantity dependent on want or will of one party—City of Ft. Scott v. W. G. Eads Brokerage Co. (C. C. A.) 117 Fed. 51.

41. McDonough v. Aetna Life Ins. Co., 38 Misc. (N. Y.) 625.

42. Missouri Edison Elec. Co. v. M. J. Steinberg Hat & Fur Co., 94 Mo. App. 543.

43. Tidball v. Challburg (Neb.) 93 N. W. 679.

44. Zanturgian v. Boornazian (R. I.) 55 Atl. 199; Thomson v. Thomson, 76 App. Div. (N. Y.) 178; Pence v. Adams, 116 Iowa, 462. Failure of consideration for bond to perform a contract under an ordinance because of invalidity of the ordinance as granting an exclusive franchise—Town of Kirkwood v. Meramec Highlands Co., 94 Mo. App. 637.

45. Casserleigh v. Wood (C. C. A.) 119 Fed. 308.

46. Patton v. Wells (C. C. A.) 121 Fed. 337.

47. Dillon v. Dillon, 24 Ky. L. R. 781, 69 S. W. 1099.

48. The price must be restored under the first conditions—Losecco v. Gregory, 108 La. 648.

49. Terrill v. Tillison (Vt.) 54 Atl. 187.

50. Holmes v. Farris, 97 Mo. App. 305.

51. Missouri Edison Elec. Co. v. M. J. Steinberg Hat & Fur Co., 94 Mo. App. 543.

insurance agent to offer a rebate of premium for special favor to secure an insurance, it is a defense of want of consideration to an action by such an agent on a premium note which he had paid to the company that he had induced the insured to take the insurance by giving him the benefit of the commission of one-half of the premium belonging to the agent and taking his note for the remainder.[52] Lesion is the injury resulting to one who has not received a full equivalent for what he has given in a commutative contract.[53] Irresponsibility of the maker of a note will not cause failure of consideration as to a bona fide purchaser thereof.[54] Where land is sold for cash on condition that a draft for the price is paid, failure to meet the draft is a failure of consideration.[55] A failure of consideration through neglect or refusal of plaintiff to deliver goods defeats liability to the payee on notes given for the goods.[56] Where a contract is one of bargain and sale of property and securities, binding the seller to convey as good a title as he then had, and he loses title to the property and part of the securities, such loss constitutes a partial failure of consideration.[57] Where a petition to set aside an instrument as without consideration shows that plaintiff received stock in a corporation organized under the conditions of the contract and was employed as superintendent of the business at a salary, no failure of consideration is shown.[58] One who was drilling a well under a contract for a certain price is not bound by consent to perform part of the work at his own risk or to take a less amount without a consideration for the promise.[59] Where a contract was made to pay a royalty for the exclusive privilege of running an observation wheel at a pleasure resort, a subsequent agreement that further royalties should be paid unless the persons running the wheel were able to stop the operation of other wheels which interfered with their business was without consideration and constituted no defense to an action for royalties accrued.[60]

Right to urge want or failure of consideration.—One who has repudiated his contract after partial performance by the other is estopped from denying his obligation for want of consideration.[61] Giving a note for building materials will not estop the owner from pleading failure of consideration in that materials were defective, unless he had full knowledge of the defects which were patent.[62]

§ 3. *Validity of contract.*[63] *A. General principles determining validity.*[64]—A contract is to be held invalid only when it will admit of no other construction.[65] If a clause is rendered ambiguous by an invalid proviso, such a construction will be given the whole contract as will render it legal and operative.[66] The existence of fiduciary relations will render the contract subject to closer scrutiny.[67] It is not ipso

52. Comp. Laws, § 7219—Heffron v. Daly (Mich.) 95 N. W. 714.
53. Smart v. Bibbins, 109 La. 986.
54. Crampton v. Newton's Estate (Mich.) 93 N. W. 250.
55. Time is of the essence of the contract—Coppage v. Murphy, 24 Ky. L. R. 257, 68 S. W. 416.
56. Block v. Stevens, 72 App. Div. (N. Y.) 246.
57. American Nat. Bank v. Watkins (C. C. A.) 119 Fed. 545.
58. Parker v. Allen (Tex. Civ. App.) 76 S. W. 74.
59. Wendling v. Snyder, 30 Ind. App. 330.
60. Sommers v. Myers (N. J. Law) 54 Atl. 812.
61. Cadiz R. Co. v. Roach, 24 Ky. L. R. 1761, 72 S. W. 280.
62. Means v. Subers, 115 Ga. 371.
63. Gambling contracts. A forthcoming article will treat specifically of champertous contracts, see Champerty and Maintenance.
64. Validity of contract respecting corporate stock—Stokes v. Foote, 172 N. Y. 327. Validity of contract by city to levy tax to pay rentals for water hydrants to trustee named in mortgage given by water company to secure an issue of bonds—City of Centerville v. Fidelity Trust & Guaranty Co. (C. C. A.) 118 Fed. 332.
65. Equitable Loan & Security Co. v. Waring (Ga.) 44 S. E. 320.
66. An assignment is not invalid because of a provision calling for illegal action by the assignee where such provision is followed by another which enables him to follow the provisions of the statute—Validity under Mansfield Dig. Ark. c. 8, § 307—Rainwater-Bradford Hat Co. v. McBride (C. C. A.) 117 Fed. 597.
67. The purchase of a judgment from a client by her attorney while in his hands for collection is presumed invalid and the burden is on him to show otherwise—Stubinger v. Frey, 116 Ga. 396.

facto void because it is not enforceable in the courts of a state and contravenes its statutes.[68] The illegal intent of one party will not avoid a contract unless the other knew or should have known of it.[69] If it is not illegal in its provisions or object, it cannot be declared illegal because performance may enable a party to assist third persons in the violation of law.[70] A contract which does not provide for labor on Sunday, nor tend to disturb peace and good order, nor constitute a violation of the criminal laws, is valid and enforceable.[71] A contract is not void because of failure to affix internal revenue stamps, unless it is shown that failure resulted from intent to defraud the government.[72] The name or character given to a contract by the parties has no weight in determining whether it is void as a gaming contract.[73]

(§ 3) *B. Validity as to subject-matter or consideration. Character of subject-matter or object.*[74]—Contracts for a fraudulent or unlawful purpose will not be enforced nor will damages be awarded for their breach,[75] nor can the contract be specifically enforced;[76] but transactions in the ordinary course of business will not be disturbed because of a secret intention of the purchaser to apply the subject-matter to an illegal purpose.[77] One who makes and sells an article which he knows to be designed exclusively for gambling purposes cannot recover for the price.[78] A loan to pay gambling losses may be recovered though the sender knew the character of the transaction.[79] A judgment on a note in settlement of a gambling transaction is sometimes made unenforceable.[80] A contract for services as housekeeper on a money

68. Alleghany Co. v. Allen, 68 N. J. Law, 68.

69. Gambling contracts—McCarthy v. Weare Commission Co., 87 Minn. 11. This was true at the common law—Gaylord v. Duryea, 95 Mo. App. 574.

70. Damages for breach of a contract to deliver ice cannot be lessened by a claim that part of the damages claimed were profits to be derived from a sale of ice to persons violating the laws regulating the sale of liquors—Crystal Ice Co. v. Wylie, 65 Kan. 104, 68 Pac. 1086.

71. McCurdy v. Alaska & C. Commercial Co., 102 Ill. App. 120.

72. First Nat. Bank v. Stone (Iowa) 91 N. W. 1076.

73. Sharp v. Stalker, 63 N. J. Eq. 596.

74. Where a life policy was assigned under agreement with beneficiaries that the assignee should receive certain amount of the insurance in consideration of his paying the premiums, the contract was invalid and the insurer refusing to recognize the validity of the assignment, in a suit by the assignee to recover premiums paid by him, his right was founded necessarily on the illegal contract with the insured and not on the contract of insurance, and he could not recover on the ground that the latter was executory and that he could retire from such contract at any time—Bruer v. Kansas Mut. Life Ins. Co. (Mo. App.) 75 S. W. 380.

75. A nonsuit will be directed—Wyckoff v. Weaver, 66 N. J. Law, 648. Sale of liquor—P. Schoenhofen Brew. Co. v. Whipple (Neb.) 89 N. W. 751. Where the liquor is bought with intent to violate the law in selling whether the seller knew of such intent is immaterial (Rev. St. c. 27, § 56)—Pollard v. Allen, 96 Me. 455. A contract whereby an individual was to carry on the sale of liquors in his own name for the benefit of a brewing company which was to lease a building to him for such purpose, provide the money for the bond and secure a license in its own name, is void as against public policy, since such person has no right to carry on business under a license issued to the company—Koppitz-Melchers Brew. Co. v. Behm (Mich.) 90 N. W. 676. Judgment on a note given in settlement of a gambling transaction is unenforceable (Hurd's Rev. St. 1899, p. 590)—Butler v. Nohe, 98 Ill. App. 624. A contract for greater fees to the sheriff for service of writs and process than the law allows cannot be enforced, though a custom allowing such increase existed among officers and attorneys—Edgerly v. Hale, 71 N. H. 138. An agreement by a prospective dealer in stocks with brokers, to indemnify them for any loss resulting from the illegality of his dealings is void as an attempt to nullify the statute against dealings on margins with no intent to receive or deliver. The agreement will furnish no ground for enjoining an action under the statute—Corey v. Griffin, 181 Mass. 229.

76. Buettgenbach v. Gerbig (Neb.) 90 N. W. 654. Contract for division of property in violation of testamentary trust—Rochevot v. Rochevot, 74 App. Div. (N. Y.) 585. Excessive use of right of eminent domain contemplated by contract—Driscoll v. New Haven, 75 Conn. 92.

77. A verdict cannot be directed for defendant in an action to recover for liquor sold because defendant claims that plaintiff knew that the liquor was bought for an illegal purpose where it appeared from the evidence that plaintiff sold in the ordinary course of business, was altogether indifferent as to their sale by defendant and did not co-operate in such sale—Fuller v. Hunt, 182 Mass. 299.

78. Ohlson v. Wilson (Tex. Civ. App.) 71 S. W. 768.

79. Charleston State Bank v. Edman, 99 Ill. App. 235.

80. Hurd's Rev. St. 1899, p. 590—Butler v. Nohe, 98 Ill. App. 624.

consideration is valid though the parties illegally cohabited during performance, where the contract was not made in contemplation of concubinage.[81] An assignment of future earnings in an existing employment is a valid and enforceable contract,[82] but it is otherwise if no present employment exists.[83] A contract requiring a teacher in a public school to take an examination before a certain officer binds neither party, where no such officer exists.[84] A contract of indemnity, made by one who receives certain property from another, for protection against the latter's unlawful act in seizing the property, is void.[85] That one to whom money was loaned was doing business under another name in order to deceive his creditors with knowledge of the lender will not prevent recovery by the latter since the loan could in no way hinder the creditors.[86]

Certainty as to subject-matter.—A contract must be definite as to subject-matter,[87] so that the jury may understand its provisions,[88] and so that the measure of damages for breach may be ascertained.[89] A contract authorizing plaintiff to cut timber from lands belonging to a certain person on certain rivers in a certain county of the state describes the lands with sufficient definiteness to show the subject of contract.[90] That a person since deceased did not own land at the time that he agreed to convey land to a child in consideration of the right to name it will not render such contract void for uncertainty, where he subsequently purchased land, which he stated he intended to convey in fullfilment of the contract.[91]

Consideration.—If the contract is separable and the remaining consideration is sufficient, partial invalidity of consideration is harmless.[92] A note given for a gambling debt is uncollectible.[93] A bond given by a husband for the payment of a certain amount to his abandoned wife and child on provision that an indictment

81. Lytle v. Newell, 24 Ky. L. R. 188, 68 S. W. 118.

82. Rydson v. Larson (Neb.) 93 N. W. 195; Wenham v. Mallin, 103 Ill. App. 609; Brewer v. Griesheimer, 104 Ill. App. 323; Tolman v. Union Casualty & Surety Co., 90 Mo. App. 274; Bell v. Mulholland, 90 Mo. App. 612.

83. Bell v. Mulholland, 90 Mo. App. 612.

84. Crabb v. School Dist. No. 1, 93 Mo. App. 254.

85. Rice Bros. & Nixon v. National Bank of Commerce (Mo. App.) 73 S. W. 930.

86. Kingsbury v. Waco State Bank (Tex. Civ. App.) 70 S. W. 551.

87. Sufficiency of description in contract for sale of standing timber to pass title—Hays v. McLin, 24 Ky. L. R. 1827, 72 S. W. 339. One by which defendant agrees to furnish plaintiff three hundred men on demand, and plaintiff agrees to work not less than one hundred men is sufficiently certain to be valid—McConnell v. Arkansas Brick & Mfg. Co., 70 Ark. 568. Contract for manufacture of goods executed as too indefinite and uncertain to be enforced—Howie v. Kasnowitz, 83 App. Div. (N. Y.) 295. Contract for services as sufficiently definite and certain in the work to be performed so as to be enforceable—Banta v. Banta, 84 App. Div. (N. Y.) 138. A contract by which plaintiff was employed to manage sales of a certain department for a certain percentage of the profits without regard to time, is unenforceable for uncertainty as to time of employment—Faulkner v. Des Moines Drug Co., 117 Iowa, 120. Where a contract for delivery of bonds was uncertain, in that it did not specify the particular bond to be delivered, the transferee has no forceable interest in bonds delivered to others, but can only recover the value of those to be delivered to him as on an implied contract—Cushing v. Chapman, 115 Fed. 237. A contract by an actress for the season of a play to commence at a certain date, was not indefinite so as to be unenforceable, where a provision for performance during Christmas week of the same year showed that the contract did not apply to the summer season of that year alone—Shubert v. Angeles, 80 App. Div. (N. Y.) 625. A contract containing a provision that one party should assume payment of a third person's note to a bank in consideration of its securing to such person the assignment of a share of stock to be held as collateral for the benefit of the bank and the note, is not void for uncertainty as to what kind of assignment was intended—First Nat. Bank v. Park, 117 Iowa, 552.

88. Truitt v. Fahey, 3 Pen. (Del.) 573.

89. Faulkner v. Des Moines Drug Co., 117 Iowa, 120. A written contract between stockholders by which one agreed to provide by loan to the corporation, whatever additional capital is needed to provide a working fund, is too uncertain and vague to enable enforcement by an action to recover damages for breach—Jones v. Vance Shoe Co. (C. C. A.) 115 Fed. 707.

90. Strubbe v. Lewis (Ky.) 76 S. W. 150.

91. Daily v. Minnick, 117 Iowa, 563.

92. Contract valid and enforceable in its terms, but the consideration of which consists in part of the consideration of a previous contract between the same parties, which was illegal.—Washington Irr. Co. v. Krutz (C. C. A.) 119 Fed. 279.

93. Hurd's Rev. St. 1899, p. 590—Butler v. Nohe, 98 Ill. App. 624.

pending against him for abandonment should be suspended is not invalid because of such consideration, since it is for performance of a duty which he owed independently of his written obligation.[94] Under a statutory provision to the effect that if part of the consideration for a contract is unlawful the entire contract is void, a contract with a county clerk for the collection of data from his records and other sources, part of which is void because of his official duty to collect data without extra compensation, is void as to the whole.[95]

(§ 3) *C. Mutuality of obligation.*—The contract must mutually bind the parties,[96] and if written should be signed by both.[97] Each party to the negotiations must define his position and create an obligation upon himself in order to bind the other.[98] A clause attached to a contract, and signed by one of the parties only, which concerns matters distinct from the subject-matter of the contract, will not bind either party.[99] If the quantity of personalty to be taken under a contract of sale depends on the want or will of one party, the contract lacks mutuality.[1] A condition allowing one party the right of rejection will not confer upon him the authority arbitrarily to decide so as to render the contract void for want of mutuality.[2] A unilateral con-

94. Bea v. People, 101 Ill. App. 132.

95. Civ. Code, § 1608—Humboldt County v. Stern, 136 Cal. 63, 68 Pac. 324.

96. Contracts held valid. A contract whereby defendant agreed to sell and plaintiff to buy a certain amount of oil for a certain period is sufficient as to mutuality—Manhattan Oil Co. v. Richardson Lubricating Co. (C. C. A.) 113 Fed. 923. And a contract by which coal is to be furnished for a certain period, to be used in a certain building, its quality to be passed upon by a third person—Hercules Coal & Min. Co. v. Central Inv. Co., 98 Ill. App. 427. And a contract to allow another to name a child in consideration of conveyance of land to the child—Daily v. Minnick, 117 Iowa, 563. And a contract to sell land to a corporation to be formed in consideration of a sum part in cash and the balance in stock—Burke v. Mead, 159 Ind. 252. A condition in a contract for the sale of land to re-convey for a certain price when the purchaser concludes to re-sell, is mutual in its terms—Peterson v. Chase, 115 Wis. 239. A contract to furnish a party with as much goods of a certain kind as he might need in his business in a year, is not lacking in mutuality as requiring the purchaser only to take such goods as he chose, where the character and amount of his business was known to the other party—Excelsior Wrapper Co. v. Messinger (Wis.) 93 N. W. 459. A lease of a coal mine is not void for want of mutuality where the lessee is required to pay a certain price for the coal he mines, to furnish the lessor a certain amount free each year, and not to stop work longer than a year at a time—Ingle v. Bottoms (Ind.) 66 N. E. 160. A contract providing that plaintiffs will buy all their mirror plates from defendant, if defendant will sell on certain terms, implies a covenant on the part of plaintiffs to buy in return for defendant's covenant to sell and is not void for want of mutuality—Fuller v. Schrenk, 171 N. Y. 671. Nor a contract whereby a manufacturer agreed to buy all his raw material of a certain sort for a certain period from another at a certain price which the other agreed to furnish as ordered, it being agreed that the quantity used was understood to be about a certain amount, but that the buyer should have the right to demand twice as much—Loudenback Fertilizer Co. v. Tennessee Phosphate Co. (C. C. A.) 121 Fed. 298. A contract for the construction of a switch track giving the right to one to maintain and operate it while business is carried on at a certain mill thereon, is not void for lack of mutuality, because such party was given the right to remove the track whenever in its opinion its maintenance was not justified—Michigan Cent. R. Co. v. Chicago, K. & S. Ry. Co. (Mich.) 93 N. W. 882.

Contracts held invalid. A contract concerning burial lots in a cemetery which does not designate the lots with sufficient certainty so that they may be identified is invalid—Buckley v. Wood, 67 N. J. Law, 583. And a contract by a husband for his wife with another made without her knowledge or authority—Davis v. Walker, 131 Ala. 204. And a contract reciting that certain parties desired to ship certain loads of lumber and that the other party agreed to carry any and all of this lumber as may be desired by the former—Dennis v. Slyfield (C. C. A.) 117 Fed. 474.

97. A contract for sale of goods during a certain time, at a certain price, binding in its terms only as to so much goods as the purchaser shall use in connection with that particular portion of his construction during that time is sufficiently mutual—Laclede Const. Co. v. Tudor Iron Works, 169 Mo. 137. A contract between a brewing company and an individual signed by the latter alone, delegating him to buy beer and to pay rent to the company for its premises in return for money paid by it for his license, is unilateral and unenforceable, where it appears that the consideration was never paid—Koppitz-Melchers Brew. Co. v. Behm (Mich.) 90 N. W. 676.

98. Arnold v. Cason, 95 Mo. App. 426.

99. Baylies v. Automatic Fire Alarm Co., 70 App. Div. (N. Y.) 557.

1. City of Ft. Scott v. W. G. Eads Brokerage Co. (C. C. A.) 117 Fed. 51.

2. Lilienthal Bros. v. Stearns, 121 Fed. 197.

tract may become binding by performance,[3] and if a contract not mutual be accepted and performed by one, equity will compel performance by the other.[4]

(§ 3) *D. Unreasonable or oppressive contracts; provisions as to lapse or forfeiture.*—The terms of a contract must be reasonable,[5] but if it appears fair at time of execution in view of facts and information on which the parties acted at that time, that it proves unreasonable and inequitable by later developments after acceptance and enjoyment of benefits, cannot prevent its enforcement.[6] The benefits to be received from a contract by one of the parties do not necessarily show it to be unconscionable in the absence of fraud or proof that such benefits were excessive.[7] Lapses or forfeitures are not favored,[8] but reasonable provisions will not be disturbed;[9] and to render a contract unlawful because dependent for success on foreitures or lapses, it must appear that it is not only largely so dependent but that it is so beyond the range of reasonable probability that the number of forfeitures or lapses necessary to render it effectual will not occur in the time required.[10] All ambiguities in a contract will be resolved against the existence of forfeitures, but if a forfeiture is provided for in unmistakable terms, it will not be relieved against either at law or in equity.[11]

(§ 3) *E. Effect of public policy in general.*[12]—The power of the courts to declare a contract void as against public policy should never be exercised unless the case is one clear from doubt.[13] They will be much less inclined to declare void as against public policy, contracts made by persons of full age, sound mind, and without disa-

3. Allen v. New Domain Oil & Gas Co., 24 Ky. L. R. 2169, 73 S. W. 747; Friend v. Mallory, 52 W. Va. 53; Hoffman v. Colgan, 25 Ky. L. R. 98, 74 S. W. 724; Los Angeles Traction Co. v. Wilshire, 135 Cal. 654, 67 Pac. 1086. Construction of contract as unilateral—Automatic Vending Co. v. Heins, 115 N. Y. St. Rep. 301. A building contract providing that one of the parties and the architect shall determine conclusively disputes as to the construction or what constitutes extra work, will not bind the other party since one party to the contract cannot stipulate that he shall arbitrate differences—Fulton County Com'rs v. Gibson, 158 Ind. 471. An agreement by a land owner to pay a broker a certain commission in case he himself sold the land is invalid on its face as a unilateral contract but the broker by taking steps to secure a sale may perform sufficiently to be entitled to its enforcement—Lapham v. Flint, 86 Minn. 376.

4. Corbet v. Oil City Fuel Supply Co., 21 Pa. Super. Ct. 80.

5. A contract whereby an individual agrees with the county board of supervisors to discover taxable property in the county which had escaped taxation through fraud or otherwise, and pay all costs and attorney's fees incurred in collecting such taxes for a compensation of one-half the amount so collected, is not necessarily unreasonable or unjust or excessive as to compensation—Shinn v. Cunningham (Iowa) 94 N. W. 941. A contract of sale containing a condition that the sellers would not engage or become interested in catching or manufacturing products from certain fish along the Atlantic coast in competition with the purchaser for the period of 20 years is not oppressive and unreasonable so as to be void as against public policy—Fisheries Co. v. Lennen, 116 Fed. 217. A contract whereby a corporation promises to assist holders of it and other contracts in purchasing homes for themselves in consideration of stated payments, is against public policy where some of the contributors can receive no benefit for more than seventy years—State v. Nebraska Home Co. (Neb.) 92 N. W. 763.

6. Wood v. Casserleigh, 30 Colo. 287, 71 Pac. 360.

7. Sufficiency of showing that attorney's fees exacted were unreasonable—In re Fitzsimons, 77 App. Div. (N. Y.) 345, 12 N. Y. Ann. Cas. 250.

8. If it appears that a material benefit has been secured by a contract to one of the parties who is asking to enforce a forfeiture thereunder, or that he has suffered no damages by a defect in performance by the other, the forfeiture will not be enforced—Knight v. Orchard, 92 Mo. App. 466.

9. A provision in a contract for sale of goods which gives the purchaser the right to reduce or cancel the order at any time before shipment of the goods without liability for damage is valid—Hypse v. Avery Mfg. Co. (Tex. Civ. App.) 74 S. W. 812.

10. Equitable Loan & Security Co. v. Waring (Ga.) 44 S. E. 320. Contract for sale of coupons redeemable in merchandise is against public policy where it will certainly leave purchasers of coupons finally of no value—Hubbard v. Freiburger (Mich.) 94 N. W. 727.

11. Equitable Loan & Security Co. v. Waring (Ga.) 44 S. E. 320.

12. Contract to recover for services in brokerage business—Cullison v. Downing, 42 Or. 377, 71 Pac. 70. An agreement for the exclusive privilege of running an observation wheel at a pleasure resort during the life of a patent thereon, is not against public policy—Sommers v. Myers (N. J. Sup.) 54 Atl. 812.

13, 14, 15. Equitable Loan & Security Co. v. Waring (Ga.) 44 S. E. 320.

bilities, than those made by persons under disability or of unsound mind.[14] That a contract is merely unwise or foolish is insufficient to render it void as against public policy.[15] There must appear elements of bad faith or intentions inimical to public interests.[16]

(§ 3) *F. Contracts limiting liability for negligence or releasing damages.*[17]—Contracts limiting the liability of carriers for loss resulting from negligence of the carriers or their agents are generally void,[18] except perhaps in certain particulars allowed by statute,[19] though in Maine they will be held valid as to injuries to one riding on a pass,[20] but in Washington even such contract cannot extend to the death of the passenger.[21] A carrier may limit his liability for loss of goods where such contract is made as a basis merely for carrier's charges and responsibility,[22] as where it is entered into in consideration of a reduced rate of shipment;[23] and likewise a carrier may, for a valuable consideration, make a contract fixing the value of property to be transported as a limitation of liability.[24] The giving of insurance on goods in favor of a carrier by a consignor, fully protecting the carrier from loss, is valuable consideration for a promise by the carrier not to insist on an exemption from liability for loss by fire.[25] He may contract against the assumption of liability accruing to him merely as bailee.[26] A contract by a railroad company relieving it from liability is not against public policy where it is not made with a passenger for hire or shipper regarding a contract of carriage.[27] A contract by a railroad company to build a sidetrack for convenience of a saw-mill in consideration of a release of all damages from killing of stock thereon is not invalid as violating a statute against

16. The action of the attorney for a mortgagee in foreclosure in procuring an assignment of the judgment was not contrary to public policy though the interest of the mortgagor was sold later under execution on a junior judgment—Miller v. Cousins (Iowa) 90 N. W. 814. Money recovered by plaintiff in the court of claims because of Indian depredations on property jointly owned by himself and his sister under an agreement to pay her an equal share of the money, may be recovered by her, there being no intent nor conspiracy between them to defraud the government—Padilla v. Padilla (N. M.) 70 Pac. 563. A contract between stockholders in a bank and another, to elect him cashier for five years unless he resigns sooner, providing that he should purchase certain shares of the stock to be repurchased by them when he left their employ, is not void as against public policy where it does not appear that it was not made in good faith and to promote the interest of the bank—Bonta v. Gridley, 77 App. Div. (N. Y.) 33. A contract of a corporation made through its general manager providing for a lease to another company of a manufacturing plant, and that such manager shall superintend the plant and represent the other company, is not against public policy, where the first corporation approved the contract through its director or permitted him to act with full knowledge of the fact—Pungs v. American Brake-Beam Co., 200 Ill. 306. A contract whereby one creditor of an embarrassed debtor outwardly agrees to a reduction equal to that of other creditors while secretly exacting full payment in order to induce other creditors to settle their claims at such reduction, is void as against public policy and notes in pursuance thereof cannot be enforced—John T. Hardie's Sons & Co. v. Scheen (La.) 34 So. 707.

17. Contract by railroad company for carrying passengers construed as not void as against public policy because of exemption from liability for negligence—Seaboard Air Line Ry. Co. v. Main, 132 N. C. 445.

18. Norfolk & W. Ry. Co. v. Tanner (Va.) 41 S. E. 721; Morse v. Canadian Pac. Ry. Co., 97 Me. 77; Fasy v. International Nav. Co., 77 App. Div. (N. Y.) 469.

19. Comp. St. c. 72, art. 1, § 3—Chicago, R. I. & P. R. Co. v. Hambel (Neb.) 89 N. W. 643.

20. Duncan v. Maine Cent. R. Co., 113 Fed. 508.

21. Northern Pac. Ry. Co. v. Adams (C. C. A.) 116 Fed. 324.

22. O'Malley v. Great Northern Ry. Co., 86 Minn. 380.

23. Mears v. New York, N. H. & H. R. Co., 75 Conn. 171; Adams Exp. Co. v. Carnahan, 29 Ind. App. 606.

24. Adams Exp. Co. v. Carnahan, 29 Ind. App. 606. A limitation in a bill of lading of the carrier's liability to damages resulting only from negligence of itself or its agents, is binding—Louisville & N. R. Co. v. Landers, 135 Ala. 504.

25. Texas & P. Ry. Co. v. Cau (C. C. A.) 120 Fed. 15, 645.

26. Chicago, St. P., M. & O. R. Co. v. Schuldt (Neb.) 92 N. W. 162.

27. Liability for fire communicated to a building—Ordelheide v. Wabash R. Co. (Mo.) 75 S. W. 149. A contract by an express messenger which relieves a railroad company from liability for personal injuries to him while performing his duties upon its train, resulting from ordinary negligence of railroad employes, is not invalid as against public policy—Peterson v. Chicago & N. W. Ry. Co. (Wis.) 96 N. W. 532.

limitation of liability.[28] A city cannot escape liability for damages resulting from its negligence in permitting a sewer to remain in a defective condition by means of an ordinance permitting sewer connections to be made on condition that the person for whose benefit they are made shall not recover for any damages resulting from the connection.[29] Contracts between a master and his servant, or instructions and rules for service which are attempted to be made a part of such contracts, by reason of which the liability of the master for injuries to his servants resulting from his negligence is limited, are against public policy and void,[30] unless the employe is left free to decide between the benefits under the contract and his right of action.[31]

(§ 3) *G. Contracts affecting marriage or divorce.*—A bequest by a son to his mother on condition that she should not remarry is not void as against public policy,[32] or a contract by one who is desirous of marrying a woman to pay for a release of her contract for employment is not void as in restraint of marriage.[33] An agreement between a husband and wife calculated to facilitate the securing of a divorce of a vinculo matrimonii,[34] or a conveyance from a husband to his wife, the consideration of which is calculated to bring about a separation, is against public policy;[35] but an agreement between a husband and wife whose relations were unsatisfactory is not necessarily collusive so as to be invalid, though one of them was contemplating divorce, and the other relying on the agreement did not appear in the divorce proceedings, since there is nothing in the act committed or appearing to have been committed, which constituted grounds for divorce.[36] An assignment of part of her alimony by a divorced wife for services contravenes public policy.[37]

(§ 3) *H. Contracts made or to be performed on Sunday.*—A note signed on Sunday is valid if delivered on another day.[38] In Minnesota, contracts casually executed or delivered on Sunday are not void under the statute.[39] A church subscription signed on Sunday is valid in Wisconsin.[40] A contract for a theatrical performance on Sunday is not contrary to public policy because of a statute forbidding sporting on Sunday or employment at common labor.[41]

(§ 3) *I. Contracts regarding control or disposition of property.*—An agreement in consideration of relinquishing a right to administration,[42] or a contract whereby one of two legatees agrees to pay a bequest to the other, is void;[43] but a contract by an administrator with his surety, after administration has proceeded for

28. Rev. St. art. 320—Missouri, K. & T. R. Co. v. Carter, 95 Tex. 461.

29. Murphy v. Indianapolis, 158 Ind. 238.

30. Contract between express company and messenger by which the latter agreed to assume risk of accidents and injuries resulting from the negligence of carriers (Violation of Code, Iowa, §§ 2071, 2074, and Acts 27 Gen. Assembly, c. 49)—O'Brien v. Chicago & N. W. Ry. Co., 116 Fed. 502. Stipulation in application for employment on a railroad whereby the company attempts to compel the employe to assume the risk of obstructions near a track—Gulf, C. & S. F. Ry. Co. v. Darby (Tex. Civ. App.) 67 S. W. 446. Rules posted by mining company which it attempts to make a part of its contract with its employes whereby notice is given that the employes assume the risk of falling roofs—Consolidated Coal Co. v. Lundak, 196 Ill. 594; Himrod Coal Co. v. Clark, 197 Ill. 514.

31. A contract between a corporation and employes becoming members of its "Relief Department," providing for release of damages for injuries in consideration of benefits so received is not invalid as against public policy. The employe is given the right to elect to receive benefits from the "Department" or sue for injuries and need not decide without opportunity for counsel and advice (Rev. St. 1899, § 2876)—Hamilton v. St. Louis, K. & N. W. R. Co., 118 Fed. 92.

32. Overton v. Lea, 108 Tenn. 505.

33. Holz v. Hanson, 115 Wis. 236.

34. Palmer v. Palmer (Utah) 72 Pac. 3.

35. Brun v. Brun (Neb.) 90 N. W. 860.

36. Comp. Laws 1887, § 2568—Burgess v. Burgess (S. D.) 95 N. W. 279.

37. Lynde v. Lynde (N. J. Law) 52 Atl. 694.

38. Hofer v. McClung & Co., 24 Ky. L. R. 355, 68 S. W. 438; Barger v. Farnham (Mich.) 90 N. W. 281.

39. Gen. St. 1894, §§ 6510-6513—Holden v. O'Brien, 86 Minn. 297.

40. Rev. St. 1878, § 4595—Hodges v. Nalty, 113 Wis. 567.

41. Contract for music and dancing each day of the week including Sunday construed in connection with Criminal Code, § 241—Wirth v. Calhoun (Neb.) 89 N. W. 785.

42. Lewis' Estate, 21 Pa. Super. Ct. 393.

43. Mitchell v. Mitchell, 132 N. C. 350.

nearly two years, that in consideration of signing his new bond, the administrator will pay half of the commission due him as soon as received,[44] or whereby the promisor agrees to include in his will a legacy compensating the other for services performed,[45] or one by which a decedent grants all of his property at his death to another if she will continue to live with him until that time, and care for him as a daughter, is not void as against public policy.[46] A secret agreement between prospective heirs whereby one agrees to induce the ancestor not to change his will is against public policy unless the ancestor knows of and assents to the agreement.[47] A contract whereby defendant promises to pay plaintiff a certain amount of money, if a testator, in whose property each was to share, would not change his will so as to give plaintiff more property as he intended to do, does not relate exclusively to an expectancy where it appears that the testator stated definitely that he had decided to so change his will, and may be enforced in a court of law.[48] An agreement whereby stockholders of a private trading corporation arranged that on the death of one or more of them, the remainder should have an option to purchase the stock of such deceased person or persons at its value,[49] or a gift causa mortis to one who is to care for the donor during life, pay his debts after death, and after applying the remainder to his gift, deliver any surplus to the donor's sister, is not against public policy.[50] An oral agreement that a son shall become vested with the family homestead on death of his parents in consideration of their support during life, fairly made and substantially performed, is valid under the law as to homesteads.[51]

(§ 3) *J. Contracts controlling or promoting litigation.*[52]—Any contract with an attorney for the conduct of a suit on a contingent fee which limits the client's control over the litigation is void as against public policy,[53] unless it appears that the attorney already had an interest which entitled him to be considered in the settlement.[54] An assignment of one-third of "whatever may be recovered" in a suit about to be instituted "or by way of compromise" as attorney's fees is not against public policy as preventing compromise.[55] A contract whereby an attorney agrees to prosecute claims at his own expense is invalid as being champertous.[56] A contract between the state and an agent for prosecution of a claim is not against public policy because of a provision for a contingent fee.[57] Contracts to secure litigation for an attorney,[58] or to furnish evidence, will not be upheld.[59] A provision in a contract for arbitra-

44. May v. Moore (Mo. App.) 72 S. W. 476.
45. Banks v. Howard, 117 Ga. 94.
46. Hall v. Gilman, 77 App. Div. (N. Y.) 458.
47, 48. De Boer v. Harmsen (Mich.) 90 N. W. 1036.
49. Fitzsimmons v. Lindsay, 205 Pa. 79.
50. Deneff v. Helms, 42 Or. 161, 70 Pac. 390.
51. Teske v. Dittberner (Neb.) 91 N. W. 181.
52. **Contracts interfering with powers of courts.** A contract whereby an insolvent for whose property a receiver was about to be appointed agreed with one of his creditors to ask the court to appoint the latter receiver in consideration of his agreement to act without pay, if appointed, was not against public policy as an unwarrantable interference with the power of the court in the appointment—Polk v. Johnson (Ind.) 66 N. E. 752. A condition in a contract between citizens of a foreign country, partly to be performed in the United States and partly abroad, that the courts of such foreign country should have exclusive jurisdiction of actions thereon, is not against public policy so that the courts of Massachussetts will refuse to give it the validity which it has under the foreign law according to the treaty with the foreign country giving the citizens of each full rights in the courts of the other—Mittenthal v. Mascagni, 183 Mass. 19.
53. Contract providing that no settlement should be made unless the attorney was present and directed it—Davis v. Chase, 159 Ind. 242. Contract with an attorney providing for a contingent fee on recovery or settlement and that no settlement can be made without the attorney's presence and direction limits the client's direction of the case—Id.
54. Ft. Worth & D. C. Ry. Co. v. Carlock (Tex. Civ. App.) 75 S. W. 931.
55. Galveston, H. & S. A. Ry. Co. v. Ginther (Tex.) 72 S. W. 166.
56. 3 Rev. St. (5th Ed.) p. 478, § 72; Code Civ. Proc. § 74—Stedwell v. Hartmann, 173 N. Y. 624.
57. Opinion of the Justices (N. H.) 54 Atl. 950.
58. A contract between a layman and an attorney by which the former agrees to secure business for the latter in the prosecution of suits for a third person and to look up

tion will not prevent an action thereon,[60] but an agreement whereby parties stipulate in advance that they will not enforce substantial rights in the courts, which may subsequently arise in dispute between them, but will submit such rights to a private tribunal,[61] and a condition in an insurance policy that an award by arbitration fixing the loss shall precede any action against the insurer is void.[62] A contract providing that the payment of fees to a disclosure commissioner should be dependent on collection from the judgment debtors is void as against public policy,[63] but otherwise as to an agreement that hearsay evidence of a witness' testimony may be offered in consideration of abandonment of a proceeding to perpetuate it.[64]

(§ 3) *K. Contracts compounding offenses or interfering with prosecution.*—Contracts by which the commission of offenses is condoned,[65] concealed,[66] or the prosecution therefor suppressed or dismissed,[67] are void.

(§ 3) *L. Contracts interfering with public service, office, or trust.*—Contracts which tend to injure public service by public or quasi-public servants,[68] as,

witnesses, whose testimony is to be used in such case for a share of the fees received by the attorney, is void as against public policy—Langdon v. Conlin (Neb.) 93 N. W. 389.

59. Contract whereby a patentee promises to furnish evidence to a third person in actions which he agrees to bring against assignees of the patentee to set aside a transfer of patents to them—Cowles v. Rochester Folding Box Co., 81 App. Div. (N. Y.) 414. One who contracted with another to furnish evidence to establish the latter's interest as an heir in certain property and to commence suit to recover such interest of which he should have full direction and control, and all the expenses of which he was to pay, in consideration of two-thirds of the interest recovered, is a contract for the purpose of gambling in litigation and is void because of public policy though not voidable under the local statute against maintenance—Casserleigh v. Wood (C. C. A.) 119 Fed. 308.

60. Turner v. Stewart, 51 W. Va. 493. A provision in a building contract that the amount of the work to be paid for shall be determined by the engineers whose finding should be conclusive is not a general arbitration clause attempting to limit the jurisdiction of courts, but within the rule authorizing a provision that no suit shall be brought until certain acts shall be performed by a third person—National Contracting Co. v. Hudson River Water Power Co., 170 N. Y. 439.

61. Provision for arbitration in insurance policy as condition precedent to action upon the policy—Hartford Fire Ins. Co. v. Hon (Neb.) 92 N. W. 746.

62. Phoenix Ins. Co. v. Zlotky (Neb.) 92 N. W. 736; Hartford Fire Ins. Co. v. Hon (Neb.) 92 N. W. 746.

63. Watson v. Fales, 97 Me. 366.

64. Thompson v. Ft. Worth & R. G. Ry. Co. (Tex. Civ. App.) 73 S. W. 29.

65. Notes given by an employe by a surety company which had issued his employment bond for the amount of his defalcation from his employer whom the company had reimbursed in consideration of a promise of the company not to prosecute for embezzlement —United States Fidelity & Guaranty Co. v. Charles, 131 Ala. 658.

66. Contract, the consideration of which is concealment of a crime already committed —Folmar v. Siler, 132 Ala. 297. That a contract void because based on a promise to conceal a crime already committed contains an additional consideration which is legal will not make the contract valid—Id.

67. Contract by the president of a corporation while under arrest founded on a promise that he will not be prosecuted—Metropolitan Land Co. v. Manning (Mo. App.) 71 S. W. 696. Note, the consideration of which is the suppression of a criminal prosecution or the dismissal of a prosecution already instituted—Smith Premier Typewriter Co. v. Mayhew (Neb.) 90 N. W. 939. Agreement between the attorney of a railroad company and the attorney of the commonwealth that an appeal shall be taken from a successful prosecution of two indictments against the company, and if the judgment is affirmative, the company will consent to a fine in three of the twelve remaining indictments, and that the other nine shall be dismissed—Spalding v. Hill, 24 Ky. L. R. 1802, 72 S. W. 307. An agreement whereby one promised to repay for property stolen from another by the former's relative, if the latter would not prosecute for the theft, is illegal, though acted upon by the promisee so that the thief was permitted to escape with his property—Giles v. De Cow (Colo.) 70 Pac. 681.

68. **Contracts held valid.** Agreement by a railroad company to build and maintain a switch for a private property owner which did not affect the performance of the duties of the company to the public—Scholten v. St. Louis & S. F. R. Co. (Mo. App.) 73 S. W. 915. Agreement that a public officer should look to clients and not to their attorney for fees if suits were unsuccessful—Edgerly v. Hale, 71 N. H. 138. A sale of school apparatus to a school board where no deceit was used in obtaining signatures of members of the board to the contract, though each signed without consulting the others, and the supplies were accepted and used by the district—Johnson v. School Corp., 117 Iowa, 319. Mortgage given by an officer when he was suspected of having embezzled public funds, to indemnify his sureties in case of defalcation—Harlan County v. Whitney (Neb.) 90 N. W. 993. A contract made by a public officer whereby he releases a surety on the bond of his deputy in consideration of a note made to him by the surety which he promises to repay from his

where they affect election or appointment to office,[69] or which have for their object unfair dealing in public property or rights,[70] or which contravene the spirit of laws

salary—Culver v. Caldwell (Ala.) 34 So. 13. An agreement by a mill owner to release a railroad for all damages to his property resulting by fire from the operation of the road, in consideration of which the company establishes a switch where none existed, merely for the individual use of the mill owner, is not void where it does not relieve the company from its public duty in the operation of its road—Missouri, K. & T. R. Co. v. Carter, 95 Tex. 461.

Contracts held invalid.—Agreement whereby the majority in interest of the owners of a vessel surrender the control permanently or indefinitely—Smith-Green Co. v. Bird, 96 Me. 425. Agreement between a town and a town collector of taxes who had guaranteed the town against loss for unpaid taxes, whereby the collector is to have warrants continued in force after he has paid the town, to enable him to compel tax payers to reimburse him—Page v. Claggett, 71 N. H. 85. Contract with the wife of a member of the board of trustees, employing her to teach in a school over which the board has supervision. Under Sess. Laws 1899, p. 96, providing that no trustee shall be pecuniarily interested in any contract made by the board of which he is a member—Nuckols v. Lyle (Idaho) 70 Pac. 401. Agreement between an officer and an attorney that the officer should receive nothing for the service of writs unless the actions were successful—(Const. pt. II, art. 70; Pub. St. c. 25, § 1, c. 212, §§ 3, 4, 6, 7)—Edgerly v. Hale, 71 N. H. 138. Special contract between a town and its tax collector whereby he guarantees the collection of all the taxes for a certain consideration—Page v. Claggett, 71 N. H. 85. A contract for the purchase by the county from the register of deeds of a set of abstract books amounting to a numerical index is invalid under the statute providing that officers are prohibited from taking any contract for performing work for their own profit in and about the office which they control. Gen. St. 1901, § 2364 construed in connection with section 1736 authorizing commissioners to order the register to furnish a numerical index—Sedgwick County Com'rs v. State (Kan.) 72 Pac. 284. Assignment of a future salary of a public officer—First Nat. Bank v. State (Neb.) 94 N. W. 633. A contract by a corporation with a public officer, in respect to matters with which he had to deal as a public officer, which was formed shortly after expiration of his term, though he had rejected an offer for the same contract during his term of office, is so blended with his former rejection of the offer as to constitute a single transaction void and unenforceable as against public policy—Washington Irr. Co. v. Krutz (C. C. A.) 119 Fed. 279. A contract by a bank clerk by which he was to receive $50 a month for his services including notarial fees, is not against public policy on the ground that a contract by a public officer to accept less than his legal fees, is void where it appears that the amount of salary accepted was greater than his notarial fees—Second Nat. Bank v. Ferguson, 24 Ky. L. R. 1298, 71 S. W. 429. An agreement with a landowner whereby a railroad company agrees to establish and maintain a station at a particular point and no other, within a certain distance thereof, is against public policy, and will not be enforced in equity though a remedy at law may be given one who has conveyed valuable property to the company on the faith of such agreement without wrongful intent—Beasley v. Texas & P. Ry. Co. (C. C. A.) 115 Fed. 952.

69. Agreement between a majority of the members of a public board of officers by which the appointments in their hands are to be divided between them, each binding himself to vote for the other's candidate—Sallade v. Schuylkill County, 19 Pa. Super. Ct. 191. Contract whereby the owner of a newspaper agrees to use its influence to secure nomination of a certain person for a political office—Livingston v. Page, 74 Vt. 356. Contract by a candidate for clerk of court to appoint another as his deputy if elected and to retain him as such during the full term of office at a stated salary—Horstman v. Adamson (Mo. App.) 74 S. W. 398. Contract contained in the bond of a deputy sheriff which provides for the farming out of a part of the office (Code, c. 7, § 5)—White v. Cook, 51 W. Va. 201. A contract for sale of a deputyship by a sheriff for a sum payable at all events is void and unenforceable, but if it is sold for part of commissions or for an allowance made the jailer by the county for his services, it is valid (Code 1899, § 5, c. 7)—Stephenson v. Salisbury (W. Va.) 44 S. E. 217.

70. Contracts held valid.—An agreement of city to build cross-walks in consideration of consent of abutting owners to building street railway is not invalid as a purchase of frontage consent for a consideration accruing to the exclusive benefit of any owner—Farson v. Fogg, 105 Ill. App. 572. Agreement between a county board of supervisors and an individual for services of the latter in investigating and discovering taxable property which has been omitted through fraud or otherwise from taxation, and to report such property to public officers—Shinn v. Cunningham (Iowa) 94 N. W. 941. Contract to pay commissions to an agent for orders for applies for government vessels to the extent of one-half the net profits—Swift v. Aspell & Co., 40 Misc. (N. Y.) 453. Contract between county officers and another, giving the latter a certain proportion of taxes recovered for discovering omitted taxes—Disbrow v. Board of Sup'rs of Cass County (Iowa) 93 N. W. 585. Written subscription in aid of a public improvement by persons having a peculiar and local interest therein or whose property will be specially benefited thereby—Hassenzahl v. Bevins, 24 Ohio Circ. R. 173.

Contracts held invalid.—Contract to procure legislative action to depreciate market value of securities of a certain corporation, providing that profits arising from speculation in such securities should be divided between the parties—Veazey v. Allen, 173 N. Y. 359. Contract to use personal influence to secure the consent of property holders to enable a council to authorize construction of an elevated railroad—Union El. R. Co. v. Nixon, 199 Ill. 235.

regulating public morals,[71] or of the laws regulating the sale and occupation of public lands,[72] or which tend to defeat the purpose of a public judicial sale of property,[73] are void as against public policy. A contract by public officials is not necessarily invalid because its period extends beyond the terms of such officers.[74] An agreement by a disclosure commissioner to wait for his fees until the defendant has collected them is invalid as a defense.[75] One who contracts with a city for printing need not comply with a provision inserted in the advertisement requiring the work to bear a union label, it being void.[76] A contract for transfer of a patent switch operator containing a covenant that in case patentee made further improvements, he would disclose the same to the other party and grant a like license was not void as against public policy if construed to mean improvements in switch operating mechanisms generally.[77] The fees allowed by law to a sheriff may be recovered by him though he has made a void contract with an attorney for the payment of fees greater than those allowed by law, but only as to services to which the agreement did not apply.[78] An attorney who, under a contract in violation of statute, pays a sheriff larger fees than are allowed by law may recover the excess in assumpsit or by set off though paid under a mistake of law.[79] Illegality of a contract between a sheriff and his deputy for farming out the office will not prevent the sheriff from recovering money collected by the deputy on process since he received them in his capacity as a de facto officer as well as by virtue of the contract.[80]

(§ 3) *M. Contracts in restraint of trade; combinations and monopolies.*[81]—

71. Note given in return for execution of written consent for the establishing of a saloon as required by statute. Written consent of adjoining property owners required by Acts 25th Gen. Assem. c. 62, § 17—Greer v. Severson (Iowa) 93 N. W. 72.

72. Agreement by a wife, deserted by her husband, that her son should contest an entry by the husband of a timber claim to prevent its contest by a stranger, obtain title in his own name and convey to his mother—Fleischer v. Fleischer, 11 N. D. 221.

Contracts held valid.—Contract between an entryman of public lands and another to sell the land to the latter made between final proof and receipt of patent is not invalid as an entry by one person for benefit of another—Doll v. Stewart, 30 Colo. 320, 70 Pac. 326. One who enters public land under an agreement with a third person that in consideration of advancements of money to get the patent, he will sell him timber on the land, may properly so sell the timber. Under Rev. St. U. S. §§ 2290, 2291, 2296—Butterfield Lumber Co. v. Hartman (Miss.) 34 So. 328. An agreement whereby a bidder at a lease of public lands was to bid on two tracts, one of them for another who was present and who would take the lease if the bid was successful, was not necessarily against public policy where the bidding was not chilled and the agreement was known to the officers taking the lease—State v. Follmer (Neb.) 94 N. W. 103.

73. Contract, the intent of which is to lessen competition at a foreclosure sale—Nitro-Phosphate Syndicate v. Johnson (Va.) 42 S. E. 995. Agreement whereby one party contracts not to bid at a public auction so as to enable the other to acquire the property—Coverly v. Terminal Warehouse Co., 70 App. Div. (N. Y.) 82.

74. Contract for convict labor—McConnell v. Arkansas Brick & Mfg. Co., 70 Ark. 568.

75. Watson v. Fales, 97 Me. 366.

76. Marshall & Bruce Co. v. Nashville (Tenn.) 71 S. W. 815.

77. Squires v. Wason Mfg. Co., 182 Mass. 137.

78. Pub. St. c. 287, § 32—Edgerly v. Hale, 71 N. H. 138.

79. Pub. St. c. 287, § 32, prohibiting such fees imposes a penalty on the officer only—Edgerly v. Hale, 71 N. H. 138.

80. White v. Cook, 51 W. Va. 201.

81. See further Combinations and Monopolies.

Definition of trust or combination in restraint of trade—Barataria Canning Co. v. Joulian, 80 Miss. 555; Herpolsheimer v. Funke (Neb.) 95 N. W. 687. Validity of contract for sale of coal and coke exclusively to one company—Chesapeake & O. Fuel Co. v. United States (C. C. A.) 115 Fed. 610. Construction of act of June 20, 1893, Illinois, relating to control of trusts and combinations, as repealing act of 1891—People v. Butler St. Foundry & Iron Co., 201 Ill. 236. An agreement between dealers that each will not sell to any one in debt for purchases from any of the others until such debt is paid, is against public policy as lessening free competition (Rev. St. 1899, § 8966)—Ferd Heim Brew. Co. v. Belinder, 97 Mo. App. 64.

[Note.]—**Agreements in restraint of trade.** An agreement restraining trade limited as to time, place or persons, is not necessarily void—Hammon on Contr. p. 449. The courts of a few states have held that a contract not to engage in a particular business at any place within the state is illegal per se, but the weight of modern authority holds that such an agreement is valid if the public interests are not specially injured, and the restriction does not extend, as to space or otherwise, beyond what the court considers reasonably necessary for protection of the promisee, regard being had to the nature of the trade or

Contracts in restraint of trade which apply to a particular business and its territory have been upheld,[82] but the validity of such contracts is dependent upon the peculiar circumstances of each case.[83] The provisions of such contracts must be reasonable in the judgment of the court.[84] Combination by contract is unlawful if its purpose

business—Hammon on Contr. Id. Where the contract restricts the industry of a party so as to deprive the public of it, or where he is prevented from pursuing his occupation so as to support himself or family, the contract is void, and these occur where the contract is general not to pursue his trade at all, or not to pursue it in the entire country—Oregon Steam Nav. Co. v. Winsor, 20 Wall. (U. S.) 64; Hammon, on Contr. § 244a. The question of the reasonableness of a contract in restraint of trade is to be determined by the court and depends upon the circumstances of each case, such as the nature of the agreement, the business affected by it, the situation and population of the place where the business is located, the extent of territory covered by the business, and other circumstances—Hammon on Contr. p. 455, and cases there cited.

82. A provision in a contract by which a firm agreed to bind themselves not to engage in the business in a certain territory, will bind partners—Raymond v. Yarrington (Tex.) 73 S. W. 800.

83. **Agreements in restraint of trade.**—An agreement by a former employe that for six years after severing his relations with his master he will not engage in the manufacture or sale of any of the articles so handled by his employer within the United States is in restraint of trade—Mallinckrodt Chemical Works v. Nemnich, 169 Mo. 388.

Agreements not in restraint of trade.—Agreement by one dealing in building materials on a sale of his business, to buy from the other parties and no one else, certain materials during five years—Trentman v. Wahrenburg, 30 Ind. App. 304. Where the owners of a building, who were conducting a department store, leased a portion to a firm engaged in a certain kind of business and covenanted not to sell articles of the same character as the latter firm during the lease, the agreement was not in general restraint of trade but merely prohibited the lessors from competing with the lessees in the same building and was valid—Herpolsheimer v. Funke (Neb.) 95 N. W. 687.

84. Hoops Tea Co. v. Dorsey, 99 Ill. App. 181.

Reasonableness as shown in particular cases.—An agreement by contractors selling their business and good will in building public buildings, not to bid on public works in a certain county for five years, is not in restraint of trade—Trentman v. Wahrenburg, 30 Ind. App. 304. An agreement providing that one party shall not engage in a competitive business for a time of reasonable length and within a limited area no larger than is reasonably necessary for the protection of the other, is not invalid as in restraint of trade—Herpolsheimer v. Funke (Neb.) 95 N. W. 687. A provision in a contract of sale of a business that the seller will not engage in a like business in any territory from which he secures his patronage, so as to compete with the buyer, is void as indefinite with regard to territory—Shute v. Heath, 131 N. C. 281. An agreement by one dealing in building materials, on a sale of his business, not to engage in that business for five years in a certain county, is not so unreasonable as to time and place of restriction as to be void—Trentman v. Wahrenburg, 30 Ind. App. 304. A covenant by an employe in consideration of his employment for a stated term that he will not during such time engage in business in competition with his employer any where within 1,500 miles of the latter's place of business is not void as against public policy and in restraint of trade, where the employer's business is the manufacture and sale of goods within the greater part of the territory covered by the covenant and where such manufacture involves secreting processes which must of necessity be communicated to the employe—Harrison v. Glucose Sugar Refining Co. (C. C. A.) 116 Fed. 304. Where a husband and wife sold certain shares owned by her in a corporation, and certain land owned by both of them which was then used by the corporation in business, and agreed as to part of the contract that they would not engage in the same business in that village as long as the corporation continued in such business there, the contract was not void as in restraint of trade by interference with the interests of the public—Kronschnabel-Smith Co. v. Kronschnabel, 87 Minn. 230. Where a contract with the employe of a corporation on leaving its service provided that in consideration of a certain amount of money he surrendered his interest in stock of a corporation and his right to purchase stock under his contract of employment, and agreed that for a certain period, he would not engage in a competing business nor disclose the secret process used by the corporation in its business, it was not valid as in restraint of competition, since it was for the protection of the value of stock, his equitable title to which he had transferred to the corporation—S. Jarvis Adams Co. v. Knapp (C. C. A.) 121 Fed. 34. The restrictive covenant in a contract made by a party not under disability, unlimited in time and covering the whole United States is subsidiary to the main contract, being consideration of payment for the sale of good will and is reasonable, where it is no broader than is necessary to save the rights and privileges to the purchaser for which he has paid—National Enameling & Stamping Co. v. Haberman, 120 Fed. 415. A contract of sale containing a condition that the sellers would not engage or become interested in catching or manufacturing products from certain fish along the Atlantic coast in competition with the purchaser for the period of 20 years is not oppressive and unreasonable so as to be void in restraint of trade—Fisheries Co. v. Lennen, 116 Fed. 217. A written contract for dissolution of a partnership of physicians by which one agrees not to practice medicine in a certain vicinity is void under the statute. Under Wilson's Rev. & Ann. St. 1903, § 820, because not limited as to time during which the party must refrain from carrying on business—Hulen v. Earel (Okl.) 73 Pac. 927.

and effect necessarily restrain interstate trade,[85] or if intended to restrict production and prevent competition in trade, the invalidity depending on the peculiar circumstances of each case;[86] however, contracts relating to prices or exclusive sale of patented articles do not come within the rule.[87] The validity of a combination between retail dealers to prevent sales by wholesalers to person not belonging to the combination does not depend upon the number of members in proportion in the combination, or their number in proportion to the whole number of dealers in the trade.[88] Mere disadvantage of others not amounting to discrimination will not warrant interference with business on the ground of monopoly.[89] A contract or the grant of a franchise, made by a municipality, which tends to restrain trade and create a monopoly, is void.[90] A dealer injured by unlawful combination between retail lumber dealers to prevent sale of lumber by wholesalers to retailers not members of the association may bring an action under the statute against a member or members of the association personally, for damages.[91]

85. Under the anti-trust Act of 1890—Gibbs v. McNeeley (C. C. A.) 118 Fed. 120; United States v. Northern Securities Co., 120 Fed. 721. An agreement between manufacturers of a certain commodity in one state which is an article of commerce in other states to reduce production and raise the price by destroying competition is in restraint of interstate commerce. (Anti-trust law of 1890)—Gibbs v. McNeeley (C. C. A.) 118 Fed. 120. 60 L. R. A. 152. A combination to restrict competition between the members as individuals and outside competitors cannot be defended merely because no injury has resulted to the public or because the combination is thereby enabled to extend its field of operation; the effect of the contract under the anti-trust law as restraining interstate commerce is the only criterion—Chesapeake & O. Fuel Co. v. United States (C. C. A.) 115 Fed. 610.

86. **Particular contracts.**—A sale of a patent by a corporation to another stipulating that the machinery for its manufacture should remain in the seller's building and that it should furnish power for the manufacture, is not void as in restraint of trade, no element of combination appearing—Pungs v. American Brake-Beam Co., 200 Ill. 306. An agreement between firms, sometimes competing with each other in buying grain, that all purchases at a certain place shall be on joint account is not illegal as in restraint of trade (Code. § 5060)—Willson v. Morse, 117 Iowa, 581. Where the price of compressing cotton in the state is regulated by the railroad commission and the cotton is required to be compressed at the nearest point, the purchase of six compresses by one company on the same day cannot be held invalid as a combination to restrict competition—State v. Shippers' Compress & Warehouse Co., 95 Tex. 603. Cove oysters are a "commodity" within the Mississippi statute against a combination to limit, increase or reduce the price of a commodity—Barataria Canning Co. v. Joulian, 80 Miss. 555. An agreement between the manufacturers of patent medicines and the wholesale dealers for the maintenance of prices established by the manufacturers, is not void as in restraint of trade though it destroyed competition as to prices, where it places no restriction as to the quantity to be sold or the territory for the transaction of business—Park v. National Wholesale Druggists' Ass'n, 175 N. Y. 1. An agreement whereby dealers and manufacturers agreed with a plumbers' association to sell supplies to none but members, the latter to boycott dealers found selling to plumbers without the association, is unlawful—Walsh v. Association of Master Plumbers, 97 Mo. App. 280.

87. Conditions to keep up a monopoly or fix prices imposed in a license by a patentee are not a violation of the Federal law against monopolies or restraint of trade—Bement v. National Harrow Co., 186 U. S. 70. A contract by which the owner of certain patents gives to another an exclusive right to lease instruments at certain rates within a certain territory, property in the instrument to remain in the owner, is not a violation of public policy as restraining freedom of sale and transfer of patented article—Whitson v. Columbia Phonograph Co., 18 App. D. C. 565. An agreement whereby a druggist purchased goods from a proprietor of a patent medicine providing that he will maintain the prices fixed by the manufacturer, is valid so that damages may be recovered for its breach—Park v. National Wholesale Druggists' Ass'n, 175 N. Y. 1.

88. Comp. St. 1901, c. 91 a, § 1—Cleland v. Anderson (Neb.) 92 N. W. 306. Compare, Park v. National Wholesale Druggists' Ass'n, 175 N. Y. 1.

89. State v. New Orleans Warehouse Co., 109 La. 64.

90. **Validity of particular grants or contracts.**—A contract with a company for lighting a town and furnishing light to inhabitants for a period of ten years is not void as creating a monopoly—Denver v. Hubbard (Colo. App.) 68 Pac. 993. A grant of the sole right to collect ashes and other harmless substances from private premises in a city invades the personal rights of citizens and is in restraint of trade as creating a monopoly. The articles are not in themselves nuisances though they would become such if allowed to accumulate—Iler v. Ross (Neb.) 90 N. W. 869. The power of the Alabama legislature to revoke a franchise containing exclusive features as to water supply for a city is not limited by the constitution to revocations that will work no harm to the corporators (Const. art. 1, § 23, and art. 14, § 10, construed together)—Bienville Water Supply Co. v. Mobile, 186 U. S. 212.

91. Comp. St. 1901, c. 91a, § 11—Cleland v. Anderson (Neb.) 92 N. W. 306.

(§ 3) *N. Effect of invalidity of contract.*—The rights of parties in the subject matter of a contract void as against public policy may, nevertheless, be enforced when they do not depend on the contract itself.[92] The law will not interfere to aid either of the parties to an unlawful contract,[93] nor will equity intervene,[94] but equity will not refuse aid to a party to an illegal transaction if he does not require the aid of the illegal transaction to establish his right.[95] The breach of a contract will not be ground for recovery of damages for loss, where the contract is invalid under the statute.[96] An illegal contract will not prevent enforcement of taxes.[97] An officer may collect salary for his services though appointed under an illegal contract if he was in no way connected therewith.[98] In a suit on notes given in pursuance of a contract, the maker may plead that the contract was void as against public policy.[99] That a contract for a lease of realty was in violation of law, will not prevent the landlord from recovering possession after expiration of the term.[1] A wife cannot recover money paid by her husband in an attempt to conceal his fraud in regard to lands while acting as attorney for the owners.[2] That one is a member of a combination which violates anti-trust law of 1890, will not prevent his obtaining an injunction against third persons who attempt infringement of a patent which he owns.[3]

Separable and inseparable contracts.—The presence of harsh provisions in a contract, unenforceable in equity is no defense in a suit to enforce valid provisions thereof.[4] A contract partly invalid and separable so as to be enforceable as to the valid portion, must be enforced as to both parties in so far as it is valid.[5] A contract is void in toto if it is void in part and not severable;[6] hence a valid contract

92. Card v. Moore, 173 N. Y. 598.

93. Bass v. Smith (Okl.) 71 Pac. 628. Especially where both parties had knowledge of the illegality—Wheeler v. Mutual Reserve Fund Life Ass'n, 102 Ill. App. 48. Recovery of money invested in a bet on a foot race—Snyder v. Nelson, 101 Ill. App. 619. Recovery by sheriff under contract with attorney for higher fees than allowed by law cannot be had, nor can the attorney recover back fees paid—Edgerly v. Hale, 71 N. H. 138. Where one of several parties engaged in maintaining an illegal lottery received money to further its purpose by bribing officers, and converted it to his own use, no recovery can be had by the other parties—Smith v. Richmond, 24 Ky. L. R. 1117, 70 S. W. 846.

94. Contract by one procuring settlers for public lands in violation of Organic Act, § 24—Bass v. Smith (Okl.) 71 Pac. 628.

95. A wife who had conveyed lands to another to enable her husband to leave the state to escape prosecution for a felony may have a conveyance of the land by her grantee to a third person set aside in order to subject the land to her judgment recovered on notes given for the purchase price—Robson v. Hamilton, 41 Or. 239, 69 Pac. 651.

96. Contract for sale of family homestead invalid because not signed by wife (Comp. St. c. 36, § 4)—Meek v. Lange (Neb.) 91 N. W. 695.

97. Contract between a town and collector of taxes extending the life of warrants in consideration of his guaranty of all taxes to be collected so as to enable him to compel taxpayers to reimburse him, will not avail a property owner who has not paid his taxes so as to prevent his arrest by the collector for delinquency—Page v. Claggett, 71 N. H. 85.

98. Sallade v. Schuylkill Company, 19 Pa. Super. Ct. 191.

99. John T. Hardie's Sons & Co. v. Scheen (La.) 34 So. 707.

1. Sittel v. Wright (C. C. A.) 122 Fed. 434.

2. Hamblet v. Harrison, 80 Miss. 118.

3. General Elec. Co. v. Wise, 119 Fed. 922.

4. Michigan Cent. R. Co. v. Chicago, K. & S. Ry. Co. (Mich.) 93 N. W. 882.

5. Edwards v. Michigan Tontine Inv. Co. (Mich.) 92 N. W. 491. Contract for management of a ranch and for its sale in violation of the insolvency laws—McVicker v. McKenzie, 136 Cal. 656, 69 Pac. 495. Tontine provisions in a life insurance policy because contravening statute, will not avoid the whole policy—Wheeler v. Mutual Reserve Fund Life Ass'n, 102 Ill. App. 48. An illegal contract between a sheriff and his deputy for farming out the office, being separable as to the authority to manage the office and to receive public funds, will not prevent the sheriff from recovering money collected by the deputy on process—White v. Cook, 51 W. Va. 201. Contract for sale and management of ranch invalid as to the sale but enforceable as to the management; the agent must be allowed to recover for his services in management as well as required to account to the owner for money received—McVicker v. McKenzie, 136 Cal. 656, 69 Pac. 495. Stipulations that purchasers of a business of selling building materials will refrain from bidding on public works in a certain county for five years, and that the sellers will buy materials from the buyers for buildings during that period alone, may be separated so that the invalidity of one will not affect the other—Trentman v. Wahrenburg, 30 Ind. App. 304.

6. Pardridge v. Cutler, 104 Ill. App. 89. Conveyance of interest in firm together with a homestead entry which was void because final proof had never been made—Horseman v. Horseman (Or.) 72 Pac. 698.

joined with one void because of public policy is unenforceable where it is not separable therefrom.[7]

§ 4. *Interpretation of contracts.*[8] *A. General rules of interpretation.*[9]—The intention of the parties is to be determined in construing a contract, not from the facts as they existed, but as the parties supposed them to be.[10] The court will attempt to place itself in the position of the contracting parties so that it may view the subject-matter as they viewed it.[11] Previous understandings or agreements between the parties must not be considered to determine their intention, but it must be obtained from the instrument itself,[12] but circumstances attending the execution of the contract may be considered,[13] and the interpretation given by the acts of parties is entitled to great weight in determining their intention,[14] especially where the instrument itself is lost.[15] Where there are several stipulations, the intention of the parties must be determined from the entire agreement.[16] Conditions not expressed in a written contract cannot be introduced by inference.[17] A contract will be construed and enforced according to the law in force when it was made.[18] A debt created by a contract must be deemed to have been created on the day when the contract was made.[19] A contract will be so construed, if possible, as to promote benefits and prevent delay and idleness of property.[20] A contract uncertain in terms will be construed, if at all, most strongly against the party who caused the uncertainty to exist.[21] The law does not favor forfeitures and a provision in a

7. Sedgwick County Com'rs v. State (Kan.) 72 Pac. 284.

8. **Construction of particular contracts.**—Contract between prospective lessees of property, requiring one party to pay to the other annual payments during its occupation of the property—Stitt v. Rector, 70 Ark. 613, 69 S. W. 552. Agreement by debtor to waive limitations on debt—Pollak v. Billing, 131 Ala. 519. Contract for conveyance of mining rights—Sharp v. Behr, 117 Fed. 864. Installment contract for erection of building as to rights of owner to plead defects as defense in action to recover the last payment though certificates had been given by the architects—Blanchard v. Sonnefield (C. C. A.) 116 Fed. 257. Contract for railroad right of way—Pontiac, O. & N. R. Co. v. Reed (Mich.) 90 N. W. 658. Contract as to irrigation rights—Mabee v. Platte Land Co. (Colo. App.) 68 Pac. 1058; Paterson v. Numberg (Colo. App.) 68 Pac. 134. For lease of water rights to particular lands—Bible v. Centre Hall Borough, 19 Pa. Super. Ct. 136. Contracts with cities for public improvements—Gartner v. Detroit (Mich.) 90 N. W. 690; Piedmont Pav. Co. v. Allman, 136 Cal. 88, 68 Pac. 493. See, also, Public Works and Improvements; Public Contracts; Municipal Corporations. Contracts with the United States—Venable Const. Co. v. United States, 114 Fed. 763; United States v. Barlow, 184 U. S. 123; Monroe v. United States, 184 U. S. 524. Contract whereby land should be deeded to persons who hold it in trust, and divide in city lots and sell it for not less than a certain price, as to rights to reimbursement and lien on the share of the other party in the land for its enforcement—Griggs v. Gower, 29 Wash. 86, 69 Pac. 745. Contract for surrender of mortgage to third persons on payment of a certain debt to the holder owing from the mortgagee—Von Arnim v. Moore, 82 App. Div. (N. Y.) 271. Contract between railroad companies for use of bridge belonging to independent corporation—Pittsburg, C., C. & St. L. R. Co. v. Dodd, 24 Ky. L. R. 2057, 72 S. W. 822. Contract by one to build house on land of another at cost after which the premises were to be sold and net profits divided equally between the parties—Davis v. Kellar, 25 Ky. L. R. 279, 74 S. W. 1100. Contract between a brewing company and an individual for the sale of a saloon with provisions requiring exclusive purchase of beer manufactured by the brewing company—Maloney v. Iroquois Brew. Co., 173 N. Y. 303. Contract for consolidation of corporation—Parks v. Gates, 84 App. Div. (N. Y.) 534.

9. Construction of mining lease as giving by implication the right to build a switch track to mines—Ingle v. Bottoms (Ind.) 66 N. E. 160.

10. Parrish v. Rosebud Min. & Mill. Co. (Cal.) 71 Pac. 694.

11. O. H. Jewell Filter Co. v. Kirk, 200 Ill. 382.

12. Pierpont v. Lanphere, 104 Ill. App. 232.

13. Pietri v. Seguenot, 96 Mo. App. 258.

14. Lewiston & A. R. Co. v. Grand Trunk Ry. Co., 97 Me. 261.

15. Humphreys v. Ft. Smith Traction, Light & Power Co. (Ark.) 71 S. W. 662.

16. Pressed Steel Car Co. v. Eastern Ry. Co. (C. C. A.) 121 Fed. 609.

17. Forfeitures not included in oil lease—Core v. New York Petroleum Co., 52 W. Va. 276.

18. Kendall v. Fader, 199 Ill. 294.

19. Wabash R. Co. v. People, 202 Ill. 9.

20. Oil lease—Parish Fork Oil Co. v. Bridgewater Gas Co., 51 W. Va. 583.

21. Keith v. Electrical Engineering Co., 136 Cal. 178, 68 Pac. 598; Kohlsaat v. Illinois Trust & Sav. Bank, 102 Ill. App. 110. Deeds are construed most favorably to the grantee—Chicago & A. R. Co. v. Hogan, 105 Ill. App. 136. Contracts limiting the liability of carriers, though construed strictly against the carriers, are construed generally

contract to prevent forfeiture will be upheld if possible,[22] but the court cannot exceed a fair construction of the language used.[23]

(§ 4) *B. What constitutes part of the contract.*—If a statute requires that certain conditions must be inserted in a contract made by a city they are by force thereof inserted in the contract, but if such statute proves to be unconstitutional, such conditions do not bind the parties.[24] The presence of internal revenue stamps on a written contract will not prevent the printing beneath them from being treated as a part of the writing.[25] Marginal figures on a negotiable note are generally held not a part thereof.[26] Acceptance of an offer to contract under certain written terms will constitute them a part of the contract.[27] Where one of the parties had a copy of a written contract with a writing attached concerning portions thereof and knew of the construction of certain improvements under such writing, his possession and acceptance of the whole, when completed, amounted to a recognition that the writing constituted part of the contract.[28] Appended writings explaining the contract,[29] or terms of a contract on which a subcontract depends,[30] constitute a part of the contract, but otherwise as to an indorsement on a written contract in terms different from those in the body of the instrument.[31] Representations made by one of the parties to a contract, but not embodied therein, cannot be considered a part thereof.[32] Only such unexpressed conditions as are necessarily implied will be treated as a part of the contract.[33]

(§ 4) *C. Character of contract; joint or several; promise or receipt.*[34]—A con-

by the same rules as other contracts—Adams Exp. Co. v. Carnahan, 29 Ind. App. 612.

22. Equitable Loan & Security Co. v. Waring (Ga.) 44 S. E. 320. Forfeiture for delay—King v. United States, 37 Ct. Cl. 428. Where a prospective passenger on a steamboat failed to notice a condition on the back of his ticket reserving the right to the carrier to re-sell rooms not called for within 30 minutes after departure, thereby failing to secure his room, he was entitled either to the use of the room or to have his money refunded—Clark v. New York, N. H. & H. R. Co., 40 Misc. (N. Y.) 691. A provision in a building contract that the owner may, in case of default by the contractor, proceed to finish the building on his own account, using materials brought to the place by the contractor for that purpose, is not a forfeiture of the contract, but is to be fairly construed as in the interest of both parties—Duplan Silk Co. v. Spencer (C. C. A.) 115 Fed. 689. And the contractor is entitled to any balance of the contract price remaining after deduction of the costs of such completion—White v. Livingston, 69 App. Div. (N. Y.) 361.

23. Behling v. Northwestern Nat. Life Ins. Co. (Wis.) 93 N. W. 800.

24. Cleveland v. Clements Bros. Const. Co., 67 Ohio St. 197, 59 L. R. A. 775.

25. Sloman v. National Exp. Co. (Mich.) 95 N. W. 999.

26. Sexton v. Barrie, 102 Ill. App. 586.

27. Utah Lumber Co. v. James, 25 Utah, 434, 71 Pac. 986.

28. General Fire Extinguisher Co. v. Mooresville Cotton Mills (N. C.) 43 S. E. 942.

29. Where the last clause of a contract which set a particular price for work, proposed that any extra work not included in the specifications should be supplied by the owner, or if by the contractor, at certain prices, a writing appended to the contract specifying what constituted such extra work and the prices for its construction was a part of the contract, and when such extra work was completed by the contractor, he was entitled to recover the extra compensation at the rates therein prescribed—General Fire Extinguisher Co. v. Mooresville Cotton Mills (N. C.) 43 S. E. 942.

30. Woarms v. Becker, 84 App. Div. (N. Y.) 491.

31. Insurance contract—Bushnell v. Farmers' Mut. Ins. Co., 91 Mo. App. 523.

32. Representations as to the cost of manufacture of a machine for which a contract was made to organize a corporation—Macklem v. Fales (Mich.) 89 N. W. 581.

33. Where a contract does not in express terms require that one of the parties should perform certain conditions without value, an agreement for such performance will not be implied—Arthur v. Baron De Hirsch Fund (C. C. A.) 121 Fed. 791. In a contract to construct a ditch for a drainage district it is an implied condition that the district will furnish the right of way—Rood v. Claypool Drainage & Levee Dist. (C. C. A.) 120 Fed. 207. A contract of suretyship will not be extended by implication but will be subject to the same rules of construction as other contracts—Ewen v. Wilbor, 99 Ill. App. 132. Where a contract for building an annex to an old schoolhouse contained provisions showing that the construction of the annex was dependent on the continued existence of the old building, there was an implied condition that destruction of the old building before completion of the contract should terminate it—Krause v. Board of School Trustees (Ind. App.) 66 N. E. 1010.

34. Whether a contract is of sale or bailment will be discussed in Sales; Bailments; and like titles.

tract requiring a dealer to furnish material according to the builder's plans and specifications did not amount to a mere sale on inspection, but was a building contract requiring the material to conform to such plans and specifications.[35] An instrument acknowledging receipt of certain moneys to be repaid to a certain person or order within a certain time, whenever business will permit, at a certain rate of interest, is not a mere receipt, but a promise under seal for payment of money according to its terms.[36] A contract for drilling a well simply requires that the work be done with ordinary skill and in a workmanlike manner, and there is no implied warranty that water will be obtained or that the well will be a success either as to quantity or quality of water.[37] A contract cannot be so construed as to give the parties the right to sue thereon both jointly and separately without express authority, nor can it be treated as joint or several at the choice of the promisees.[38] If two or more persons undertake an obligation, the undertaking is presumptively joint at common law, and the presumption must be overcome by words of severance.[39] If a promise is implied by law and the consideration therefor comes from several persons jointly, the promise will be joint as to them.[40] A note given by two persons to obtain money for one of them is joint as well as several.[41] A contract for the purchase of property by several persons, each to pay so much for a share therein, in cash or in deferred payments, "secured by joint and several notes with interest," is a several and not a joint contract, binding each to pay the separate payments and not the entire price.[42] Where a number of corporations engaged in business separately, signed a contract to furnish contractors with materials, which contained nothing by which an action could be maintained against any one for breach thereof, there was a joint contract of the corporations.[43] The character of a contract as entire or divisible depends on the intention of the parties as shown by the language used, rather than the character of the subject-matter or of the consideration, though this may be considered, and if the duties of one party consist of several distinct things, and the price to be paid by the other is apportioned to each or left to be implied by law, the contract is severable.[44] A contract made partly by correspondence and partly orally will be treated as oral.[45]

35. Utah Lumber Co. v. James, 25 Utah, 434, 71 Pac. 986.

36. Jacobs v. German Workingmen's Ass'n, 183 Mass. 3.

37. Butler v. Davis (Wis.) 96 N. W. 561.

38. A contract requiring certain expenses to be apportioned in certain parts between three parties, will not bind one of them beyond his share, though another is insolvent and in default as to his portion—Harris v. Mercur, 202 Pa. 313.

39. Hill v. Combs, 92 Mo. App. 242.

40. Eveleth v. Sawyer, 96 Me. 227.

41. Under Civ. Code, §§ 1431, 1659—Leonard v. Leonard, 138 Cal. xix, 70 Pac. 1071.

42. McArthur v. Board (Iowa) 93 N. W. 580.

43. Booth Bros. & H. I. Granite Co. v. Baird, 83 App. Div. (N. Y.) 495.

44. Nolt v. Crow, 22 Pa. Super. Ct. 113.

Entire contracts.—A compromise of judgments in consideration of compromises by other creditors, and one with the same creditor in consideration of the first recited—Dyer v. Muhlenberg County (C. C. A.) 117 Fed. 586. Contract for different sorts of work in improvement of a house but for a lump sum—Pitcairn v. Philip Hiss Co. (C. C. A.) 113 Fed. 492. Contract for purchase of all of a certain material to be used in a factory for five years, at a certain price per ton, to be shipped on orders as required—Loudenback Fertilizer Co. v. Tennessee Phosphate Co. (C. C. A.) 121 Fed. 298. Where a contract for cutting timber provided that cedar timber should not be removed so as to endanger pine by fire, and a subsequent contract by which the purchaser sold the cedar provided that it should not be cut until after the pine but should be cut before a certain time, or all timber then standing should revert to the seller, the provision for forfeiture in the later contract was entire and not severable—Small v. Robarge (Mich.) 93 N. W. 874. A contract to construct four buildings for a certain sum payable semi-monthly to the extent of 75% of the cost, and the remainder payable within certain time after completion of the buildings, is entire and not a severable contract, though it provides for a division of payment by specifying sums for each building—Wehrung v. Denham, 42 Or. 386, 71 Pac. 133.

Severable contracts.—Contract to train horses for a certain amount per month and ten per cent of purses won—Brien v. Stone, 82 App. Div. (N. Y.) 450. Contract to receive three specified cars of goods each representing a particular class of cars—Oliver

(§ 4) *D. Interpretation of language used.*[46]—Words in a contract free from

v. Oregon Sugar Co., 42 Or. 276, 70 Pac. 902. A contract for cutting and getting out timber from a certain tract to be paid for by installments as the work progressed is severable in that full performance is not necessary to recovery of compensation. The contractor may recover for part performance less damages for failure to perform remainder—Kerslake v. McInnis, 113 Wis. 659. A contract for the construction of a sample machine at a certain price and for thirty others at a certain price for each machine when delivered complete, is severable and the price for the sample machine may be recovered on its completion—Flather v. Economy Slugging Mach. Co., 71 N. H. 398. A contract for a certain number of cars of lumber to be taken as they could be produced during a certain period of time, complied with as to a part thereof is severable so that having been partly performed payment could be recovered for the lumber already shipped without the completion of the contract, where it provided for the reception of each car individually—Henderson Lumber Co. v. Stilwell (Mich.) 89 N. W. 718. Where a building contract included 86 houses, but the price of work on each was separately fixed and payments were to be made in amounts and at time enumerated in the estimate, the liens to be released on the houses on which the contract price has been paid and in default of payment and liens to be filed only on the houses as to which payment was in arrears, the contract was divisible, the consideration and remedy as to the subject matter being separate as to each building—Nolt v. Crow, 22 Pa. Super. Ct. 113.

45. Stauffer v. Linenthal, 29 Ind. App. 305.

46. Words and phrases in particular contracts.—Particular words and trade terms in contract for sale of coal—Withers v. Moore (Cal.) 71 Pac. 697. Words "held in trust," used in an insurance policy—Southern Cold Storage & Produce Co. v. Dechman (Tex. Civ. App.) 73 S. W. 545. Phrase "use and occupancy" in a contract for insurance —Tanenbaum v. Simon, 40 Misc. (N. Y.) 174. Phrase, "terms cash, less 1½%," in a contract—Lawder v. Albert Mackie Grocer Co. (Md.) 54 Atl. 634. "By" and "through" —Wishon v. Great Western Min. Co., 29 Wash. 355, 69 Pac. 1105. Words "so as to be successfully operative" in contract for construction of railroad—Flanagan Bank v. Graham, 42 Or. 403, 71 Pac. 137, 790. Words "delivered Galveston" without explanatory note in a contract for purchase of wheat; evidence to be introduced on the question of construction before the jury—Cameron Mill & Elevator Co. v. Orthwein (C. C. A.) 120 Fed. 463. "Settlement or recovery" in a contract giving an attorney a certain fee in case of such result—Randel v. Vanderbilt, 75 App. Div. (N. Y.) 313. Word "equipment" in contract for construction of street railway—McDonald v. Grout, 39 Misc. (N. Y.) 18; In re McDonald, 80 App. Div. (N. Y.) 210. Where the word "required" in a contract for the sale of coal is construed by the parties as "needed," that construction will be adopted in a suit on the contract—Purcell v. Sage, 200 Ill. 342. The word "proceeds" in a contract whereby defendant agreed to hold certain notes and contracts in trust, and out of the proceeds of their collection to pay certain debts, the collection to be without expense to one of the beneficiaries, meant as to such beneficiary the gross amount of the collection to an extent sufficient to pay him and the collection expenses cannot be taken out of the fund applied to his benefit—Wheeler & W. Mfg. Co. v. Winnett (Neb.) 91 N. W. 514. "Profits" in salary contract—Mayer v. Nethersole, 71 App. Div. (N. Y.) 383. A contract of partnership providing that one of two brothers was to furnish services to the firm and "to board himself," was not a contract requiring him to pay board to his brother while living with him—Hancock v. Hancock's Adm'r, 24 Ky. L. R. 664, 69 S. W. 757. Testimony is admissible to show in construction of a lease that the lessee told the lessor that he was about to build a smelter, and that the premises were desired for dumping purposes, and that the word "tailings" used in the lease was used in its broader sense and intended to cover slag (Code Civ. Proc. §§ 3136, 3137)—Butte & B. Consol. Min. Co. v. Montana Ore Purchasing Co. (C. C. A.) 121 Fed. 524. Soapstone is "rock" within a contract to drill a well—Okey v. Moyers, 117 Iowa, 514. The word "claim" in a contract for purchase of a mechanic's lien, provided it was a first claim on the property included taxes and the existence of a prior lien for unpaid taxes and will release the purchaser from taxation—Dodson v. Crocker (S. D.) 94 N. W. 391. The word "may" in a contract for construction of a sewer providing that if emergency demands the engineer may make alterations will be construed according to its usual meaning and not as "shall." The clause is for benefit of the commonwealth alone—National Contracting Co. v. Commonwealth (Mass.) 66 N. E. 639. Where a contract contained the words "nominal horse-power" which had no technical meaning in the trade, they must be construed as referring to the rated or professed horsepower and distinguished from the capacity above or below the nominal horse-power actually developed in use—Heine Safety Boiler Co. v. Francis Bros. (C. C. A.) 117 Fed. 235. A contract with a boom company to carry on its business as it "is now required" to carry it on does not require the party assuming control to keep the booms and piers in repair though the boom company was under obligations to its predecessor to maintain the booms and piers—Rumford Falls Boom Co. v. Rumford Falls Paper Co., 96 Me. 96. Because a contract to cut and deliver dead and down timber uses the word "about" or "more or less." in designating the quantity, the party executing it is not authorized to cut a large excess over the quantity mentioned—Pine River Logging Co. v. United States, 186 U. S. 279. Construction of a contract for a dam in certain contingencies as between a mill company and a water company using water from its mill pond, as to what constituted a part of the dam—Paris Mill. Co. v. Paris Water Co., 24 Ky. L. R. 1372, 71 S. W. 513.

ambiguity will be given their plain and ordinary meaning,[47] and nothing can be added to it or taken from it by the court in construing it.[48] The purpose of the contract therefore will be given effect, if possible, by any reasonable construction of the language used,[49] and if the meaning is doubtful, that construction will be given which will give effect to all parts of the instrument,[50] and the more reasonable and probable of two constructions of which an ambiguous contract is susceptible will be adopted.[51] Clauses in general terms which would be conflicting if taken literally must be construed according to the most probable intention of the parties under all the circumstances.[52] Where a contract is subject to two constructions, one of which will make it valid and the other invalid, that construction will be adopted which will make it valid.[53] A plain and unambiguous contract cannot be misconstrued by reason of the voluntary payments made by one party through mistake which were not required by its terms nor demanded by the other party.[54] If two clauses of a contract are repugnant, the earlier prevails unless the inconsistency is such as to destroy the instrument as uncertain.[55] In construing a particular clause in a contract, the court must consider the entire contract, the relation of the parties, their connection with the subject-matter, and the circumstances of its execution.[56] The interpretation of the parties themselves in their dealings together will be adopted in an action on a contract,[57] especially where the contract is doubtful

47. The purpose of construing a contract is to learn the intentions of the parties and these when discovered will prevail over inapt expressions and verbal inaccuracies—Pressed Steel Car Co. v. Eastern Ry. Co. (C. C. A.) 121 Fed. 609; Williams v. South Penn Oil Co., 52 W. Va. 181. The rule applies to contracts of insurance—Hoover v. Mercantile Town Mut. Ins. Co., 93 Mo. App. 111; Fitzgerald v. First Nat. Bank (C. C. A.) 114 Fed. 474. Construction of contract between owners of related patents as to division of license fees and amounts received for damages for infringement—Wooster v. Trowbridge (C. C. A.) 120 Fed. 667. A contract for the purchase of a mechanic's lien providing it proved to be a first claim on the property, does not show an intention on the part of the purchaser to exclude the lien of taxes under his contract—Dodson v. Crocker (S. D.) 94 N. W. 391. A contract requiring one to refrain from making claim against an estate for a debt in consideration of a share in any surplus remaining in winding up of a firm of which the decedent was a member if such surplus did not exceed his claim against the estate, does not mean that he would make no claim against the partnership assets but merely against the individual—Whitman v. Taylor, 182 Mass. 37.

48. Hart v. Hart (Wis.) 94 N. W. 890.

49. Provident Sav. Life Assur. Soc. v. Cannon, 201 Ill. 260. That construction of a contract which does not comport with the interest of other party, will not be adopted unless expressed in clear terms—Lewiston & A. R. Co. v. Grand Trunk Ry. Co., 97 Me. 261.

50. McGavock v. Omaha Nat. Bank (Neb.) 90 N. W. 230. The construction of a contract with regard to certain words which appeared to be ambiguous must be determined by the court as a question of law, and if under its determination, the words are not ambiguous, parol evidence cannot be admitted to show the construction of either party so as to vary or contradict such meaning, though the court may properly hear parol evidence of the collateral facts and circumstances to determine the true meaning of the words; but on the other hand, when testimony of a contradictory character is admitted to show the meaning of such words, the question is for the jury, and plaintiff must establish the meaning he asserts by the weight of his evidence—Cameron Mill & Elevator Co. v. Orthwein (C. C. A.) 120 Fed. 463.

51. Pressed Steel Car Co. v. Eastern Ry. Co. (C. C. A.) 121 Fed. 609.

52. Losecco v. Gregory, 108 La. 648.

53. Equitable Loan & Security Co. v. Waring (Ga.) 44 S. E. 320; Culver v. Caldwell (Ala.) 34 So. 13; Horton v. Rohlff (Neb.) 95 N. W. 36. The same is true of a single clause—State v. Mortensen (Neb.) 95 N. W. 831. Possible invalidity as suspending power of alienation in agreement for distribution of an estate—Union Trust Co. v. Owen, 77 App. Div. (N. Y.) 60. Where a contract is capable of construction either as legal or illegal, and either party, especially the party upon whom the main obligation rests, has uniformly construed it in the manner which would render it legal, that fact will be considered in determining its validity—Equitable Loan & Security Co. v. Waring (Ga.) 44 S. E. 320.

54. Sharp v. Behr, 117 Fed. 864.

55. Covenant to buy goods followed by stipulation releasing liability to purchaser—Vickers v. Electrozone Commercial Co., 67 N. J. Law, 665.

56. Mayer v. Goldberg (Wis.) 92 N. W. 556; Losecco v. Gregory, 108 La. 648. Contract for purchase of iron containing provisions against loss by fire or strikes and for transference of the contract—Western Hardware & Mfg. Co. v. Bancroft-Charnley Steel Co. (C. C. A.) 116 Fed. 176.

57. Clark v. University of Illinois, 103 Ill. App. 261; Williams v. Auten (Neb.) 93 N. W. 943; Linehan Ry. Transfer Co. v. New Orleans & N. W. R. Co., 107 La. 645; Porter v. Allen (Idaho) 69 Pac. 105, 236; City of Baxter Springs v. Baxter Springs Light &

as to its meaning.[58] Where there is an obvious mistake on the face of a written contract, which is corrected by other expressions, it will be construed according to the evident intent of the parties as shown by the entire contract.[59] A statute will not be construed to avoid a contract unless it so specifically declares.[60] Where one who is ignorant and entirely unable to read or write English is induced to enter into a written contract by representations of the other party's agent altogether inconsistent with the contents of the instrument, which fact was known to the agent at the time of making the representations, the court will give such contract the construction understood and agreed to by the party so signing.[61]

(§ 4) *E. Custom or usage as aids to interpretation.*[62]—Contracts are always presumed to be made with reference to the existing customs, unless they are excluded by the contractual terms,[63] but usage cannot create a contract, where none existed without it,[64] and a custom to violate the law cannot be shown,[65] nor can usage be shown beyond what is sufficient to make clear the meaning of the contract.[66] Usage may be proven in order to give the intended effect to an ambiguous contract.[67] The parties must have knowledge of the custom or usage,[68] but it need not be coextensive with the state.[69]

Power Co., 64 Kan. 591, 68 Pac. 63; Fitzgerald v. First Nat. Bank (C. C. A.) 114 Fed. 474. Construction of constitution of New York Exchange—In re Hayes, 37 Misc. (N. Y.) 264. Rejection of words from contract—Ricketts v. Buckstaff (Neb.) 90 N. W. 915. Contract for royalty in manufacture of dynamo by inventor of improved armature—Keith v. Electrical Engineering Co., 136 Cal. 178, 68 Pac. 598. A contract for additional compensation is a practical construction of the original contract between the parties for construction of a building—Board of Com'rs v. Gibson, 158 Ind. 471. In construing contracts in restraint of trade, reference should be had to the object sought to be attained and they will not be given a construction which, though warranted by the language, cannot be reasonably supposed to have been contemplated by the parties in view of their circumstances and context of the writing—Herpolsheimer v. Funke (Neb.) 95 N. W. 687.

58. Laing v. Holmes, 93 Mo. App. 231.

59. Noe v. Witbeck, 105 Ill. App. 502.

60. Citizens' State Bank v. Nore (Neb.) 93 N. W. 160.

61. People's Bldg., Loan & Sav. Ass'n v. Klauber (Neb.) 95 N. W. 1072.

62. Custom as fixing rate of compensation—People v. Clarke, 79 App. Div. (N. Y.) 78. See, also, 174 N. Y. 259.

63. Lupton v. Nichols, 28 Ind. App. 539; McCurdy v. Alaska & C. Commercial Co., 102 Ill. App. 120. The practice of years may establish a custom—Hayes v. Union Mercantile Co., 27 Mont. 264, 70 Pac. 975. Custom as to place of weighing goods sold—Gehl v. Milwaukee Produce Co. (Wis.) 93 N. W. 26. Custom as to "season" for traveling salesman—Johnston-Woodbury Hat Co. v. Lightbody (Colo. App.) 70 Pac. 957. Custom to sustain implied contract—Bryan v. Brown, 3 Pen. (Del.) 504. If there is a certain definite, uniform and reasonable custom in regard to certain transactions, that custom is binding in dealings of that sort between parties. Dealings by cablegram, in which custom requires an answer to be sent within twenty-four hours—Robeson v. Pels, 202 Pa. 399. Where a custom is shown to have been as extensive and general as the business itself in which a contract was made, and defendant is shown to have been familiar with the customs of the business, he will be bound by such custom—Heyworth v. Miller Grain & Elevator Co. (Mo.) 73 S. W. 498. Where a contract for manufacture of a patent provided that the cost of labor should be calculated at the "average shop cost per man," it was proper in determining such cost to employ a custom of the manufacturer in adding 60% to the actual cost of labor for operating expenses—Bates Mach. Co. v. Cookson, 202 Ill. 248. Where parties to a contract have agreed on a particular point, but there is a controversy as to the terms, usages respecting them cannot be shown, since they are excluded by special agreement—Currie v. Syndicate Des Cultivators Des Oignons a' Fleur, 104 Ill. App. 165; McIntosh v. Pendleton, 75 App. Div. (N. Y.) 621; Thompson v. Exum, 131 N. C. 111. Custom in a certain trade cannot be shown in an action on a contract specifying the manner in which work was to be done—Independent School Dist. v. Swearingin (Iowa) 94 N. W. 206. A custom of land agents to get benefits from both parties to a sale while representing one cannot be shown in an action on a contract for securing an exchange of property on consideration of receiving certain personalty—Distad v. Shanklin, 15 S. D. 507.

64. Currie v. Syndicate Des Cultivators Des Oignons a' Fleur, 104 Ill. App. 165.

65. Action by brewing company to recover for money loaned a saloon keeper, in which plaintiff attempted to show that brewing companies were accustomed to take out licenses in their own names to be used by third persons—Koppitz-Melchers Brew. Co. v. Behm (Mich.) 90 N. W. 676.

66. Currie v. Syndicate Des Cultivators Des Oignons a' Fleur, 104 Ill. App. 165.

67. Baer v. Glaser, 90 Mo. App. 289. Construction of Constitution of New York Stock Exchange as to disposition of proceeds to membership of insolvent member—In re Hayes, 37 Misc. (N. Y.) 264.

68. Hendricks v. W. G. Middlebrooks Co.

(§ 4) *F. Terms as to subject-matter.*[70]—An agreement as to the application of credits in an account which was afterward closed would not cover an account subsequently opened unless expressly so provided.[71] Bringing together materials for performance of a building contract gives the owner no right therein and he cannot restrain their removal by the contractor.[72] Where a subcontract for a building required work to cease, or extra work to be done on direction of the owner or architects, and a deduction or extra pay as a result, whatever the case might be, the contractor was not precluded from doing extra work.[73] Where, at the time a building contract was made, it was intended that part of an old building should be used in the construction of the new, and as the work progressed it became apparent that such portion could not be so used, extra work in making the new construction to take its place was not covered by the contract.[74] Where specifications require that the foundations of a building should go down to actual undisturbed earth and deeper than the drawings necessary for that purpose, the sinking of the foundation below the point shown in the drawings was not beyond or outside the contract and the contractor cannot charge therefor as extra work.[75] A contract for the sale of logs cannot be held to include logs sold and delivered to another under a previous contract.[76] A contract whereby a theatrical firm was to produce a play, restrictions being given against publication or transfer of rights and the author having control of the production, will not allow the firm to license production by other companies.[77] Where a new permit was necessary to reopen streets for repaving, after gas mains were laid and trenches filled, such permit must be secured by the commissioner of highways under a contract between him and the gas company providing for gas mains to be laid in the streets and requiring the commissioner to secure the necessary permits.[78] A contract whereby a doctor agreed to sell his practice and give

(Ga.) 44 S. E. 835; Consumers' Ice Co. v. Jennings (Va.) 42 S. E. 879; Great Western Elevator Co. v. White (C. C. A.) 118 Fed. 406.

69. Rastetter v. Reynolds (Ind.) 66 N. E. 612.

70. **Construction as to subject matter.**—Whether sale of a crop was of the crop itself or the mere hope of a crop—Losecco v. Gregory, 108 La. 648. Whether sale of a crop included damaged tobacco—Jacobson v. Tallard (Wis.) 93 N. W. 841. On a sale of goods failure to deliver the particular goods is immaterial if other goods equally good are delivered—Walker v. Taylor (Del.) 53 Atl. 357. As to quantity—Scully v. Detroit Iron Furnace Co. (Mich.) 93 N. W. 885; Excelsior Wrapper Co. v. Messinger (Wis.) 93 N. W. 459. What was included in sale of a machine for dipping chocolate—Weeks v. Robert A. Johnston Co. (Wis.) 92 N. W. 794. Compliance of grain with sample—Butterfield v. Butterfield (Colo. App.) 71 Pac. 639. Definiteness of shipping articles as to voyage—The Falls of Keltie, 114 Fed. 357; The Mermaid (C. C. A.) 115 Fed. 13. Construction of oil, gas and mineral lease as to amount of product to which lessor is entitled—Dickson v. Fertig, 21 Pa. Super. Ct. 283. Discharge from "any and all liability on judgments" for sum specified includes liability for costs and interest—Dyer v. Muhlenberg County (C. C. A.) 117 Fed. 586. A contract to sell land confers an interest on the vendee who is to pay a certain debt and continue to occupy and pay rent for the lands though he has paid none of the debt and has performed only in respect to the other promises—Cone v. Cone (Iowa) 92 N. W. 665. A condition in a sub-contract for erection of a building, that final payment should be due when the work was completed and the sub-contractor had furnished the original contractor releases of all liens and claims, referred only to such as might arise under the mechanic's lien law of the state—Turner v. Wells, 67 N. J. Law, 572. Where co-sureties on a note paid it in equal portions under an agreement to hold it and share collections from the principal, and afterward one of them obtained assignment of a contract from the principal, under which he was to advance the principal money to carry out such contract, and was to receive payment on his debt out of the proceeds, such money was subject to the division under the agreement between him and his co-surety—Cramer v. Redman (Wyo.) 68 Pac. 1003.

71. Boody v. Pratt, 68 N. J. Law, 295.

72. Cameron v. Orleans & J. Ry. Co., 108 La. 83; Orleans & J. Ry. Co. v. International Const. Co., 108 La. 82.

73. Isaacs v. Dawson, 174 N. Y. 537.

74. Langley v. Rouss, 116 N. Y. St. Rep. 1082.

75. Wear Bros. v. Schmelzer, 92 Mo. App. 314.

76. Yellow Poplar Lumber Co. v. Stephens, 24 Ky. L. R. 621, 69 S. W. 715.

77. Herne v. Liebler, 73 App. Div. (N. Y.) 194.

78. Under City Charter of New York, §§ 524, 525—Norton v. New Amsterdam Gas Co., 174 N. Y. 538.

up his office to the other party did not require that he should make arrangements with his landlord, of whom he rented the office, for its use by the purchaser, or with the other physician with whom he shared such office, but merely required that he vacate so that the purchaser might occupy it if he so chose.[79] Where one owning an interest in lands contracted for improvements to be paid for at certain stages of the work, and subsequently agreed to hold money due the contractor for benefit of the material man, no liability existed under the latter agreement where the work was not completed so as to entitle the contractor to the first payment.[80] A contract between husband and wife, declaring that irreconcilable differences existed and that a permanent separation was desired and a divorce was contemplated, which settled on the wife a small portion of the property in lieu of alimony and contained an agreement of dissolution of the marriage relations, was not one for mere separation, but was for the purpose of securing a divorce.[81]

(§ 4) *G. Terms as to parties; privity of contract.*—The construction of the terms of contracts as to who is privy thereto, or entitled to benefits, depends so much upon the circumstances of the particular case that no definite analysis is attempted, but the cases will be found represented in the footnotes. Some few instances have been thought worthy of attention in the text.[82] A party to a contract who is injured

79. Wallingford v. Aitkins, 24 Ky. L. R. 1995, 72 S. W. 794.

80. Young v. Smith, 202 Pa. 329.

81. Palmer v. Palmer (Utah) 72 Pac. 3.

82. Parties to license for use of patented machine—Warth v. Mertens, 173 N. Y. 626. Parties to railroad lease—Southern Ry. Co. v. Ensign Mfg. Co. (C. C. A.) 117 Fed. 417. An agreement to pay taxes on trees growing on lands of another will not bind the state to look to the promisor though it is binding as between the parties—Williams v. Triche, 107 La. 92. Sufficiency of recitals to show that contract was made for benefit of a firm—Williams v. Magee, 76 App. Div. (N. Y.) 512. An assignment of a contract under an agreement that the assignee shall assume all obligations thereunder does not render him a party so that he may be sued by the other party—Goodyear Shoe Machinery Co. v. Dancel (C. C. A.) 119 Fed. 692. An agreement by an insolvent husband to deed property to his wife if she will discontinue a divorce proceeding brought may be set aside by creditors of the husband—Oppenheimer v. Collins (Wis.) 91 N. W. 690. A creditor who claims the benefit of a contract by a third person with the debtor to pay the debt, is bound by equities arising between the parties out of the agreement—Hargadine-McKittrick Dry Goods Co. v. Swofford Bros. Dry Goods Co., 65 Kan. 572, 70 Pac. 582. A written contract signed by the "building committee" of a certain church following the names of the committee, and containing an express promise on the part of the members, without a statement that they promised for or on behalf of each other, was a personal obligation of the committee, where no authority to bind each other was shown—Copeland v. Hewett, 96 Me. 525. An employee injured by an explosion of oil purchased by his employer cannot sue the seller to recover for injuries because the oil was inferior in quality, that being a foundation of an action for breach of contract, as to which he was not a party or privy—Standard Oil Co. v. Murray (C. C. A.) 119 Fed. 572. Where at the time of sale of a paper mill to another corporation a side track had been constructed to the mill by the railroad company and used by the prior owner for nearly a year, the purchaser, charged with notice of its existence, was bound by the terms of the contract as to its construction and maintenance made by the vendor with the railroad company—Michigan Cent. R. Co. v. Chicago, K. & S. Ry. Co. (Mich.) 93 N. W. 882. Where a contract was made whereby a person since deceased was allowed to name a child in consideration of his agreement to convey land to the child, and the latter continued to bear the name down to the time of bringing suit to obtain the land, he thereby ratified the contract made by his parents, and there was sufficient privity between him and the promisor to entitle him to sue—Daily v. Minnick, 117 Iowa, 563. If the purchaser of premises agrees to pay claims for materials used in buildings thereon, for which the vendor is liable, he becomes the principal debtor and the vendor a surety, but his undertaking will not inure to the benefit of a claimant if the vendor was not liable therefor—Hurd v. Wing, 76 App. Div. (N. Y.) 506. Where an agreement for the conveyance of land was on the consideration that the grantee should pay third persons a certain sum, though such sums were really gifts, the promise as to such third persons was supported by the consideration between the immediate parties as though the beneficiaries were actual parties, regardless of acts of the parties without consent of the beneficiaries—Tweeddale v. Tweeddale (Wis.) 93 N. W. 440. Mere consent on the part of a chattel mortgagee of cattle, that the owner might employ another to care for them, raises no liability on his part to pay for such care—Boston & K. C. Cattle Loan Co. v. Dickson, 11 Okl. 680, 69 Pac. 889. A sale of stock in a railroad company by a stockholder with covenants to erect a sawmill on lands adjacent to the road and ship lumber at a certain rate followed by subsequent transfers of the timber rights with the covenants attached confers no

cannot recover damages from a third person whose negligence rendered performance by the other party impossible,[83] or from one not a party and without interest therein, though he made fraudulent representations which induced the contract.[84] A third person, for whose benefit a contract is made, may enforce it whether he had knowledge of it at the time of making or whether he formally assented thereto before action,[85] but one for whose benefit a bond on appeal was not made has no privity of contract therein which will allow him to compel the sureties to pay.[86] If a party assumes the fulfillment of a contract for another, the one to whom the latter is bound, if informed of and assenting to the agreement, is in privity of contract with the party assuming such fulfillment.[87] A debtor may sue another on a contract whereby the latter agrees to assume payment of his debt, but in a suit by the creditor, the third person may urge any set off in defense he might have had against the debtor in a suit on the agreement.[88] One who has an indirect interest in an undertaking by another to pay the debts of a third person is not in sufficient privity as to be enabled to maintain an action at law thereon.[89] A deed providing that a surety of the grantee shall have a lien on the land as indemnity gives a lien in his favor which may be enforced though he is not a party to the deed,[90] but it must appear that there was an intent by the promisee or person with whom the contract was made, to secure the benefit to the third party and that some privity existed between such persons.[91] The promise of individuals that a certain corporation which they intend to organize shall make certain payments will not bind the corporation, it not being in existence nor does it render them personally liable.[92] An agreement by the life tenant to buy improvements made by his lessee will not

rights on the railroad company there being no privity between the company and the covenantors. The railroad corporation cannot contract in the name of an individual stockholder; it cannot enjoin carriage of the timber over another road—Waycross Air Line R. Co. v. Southern Pine Co., 115 Ga. 7. One who contracted for a contingent fee with defendants in an action to secure evidence to show that the ancestor of one of them who located a mining claim was a citizen, was entitled to recover from defendants his part of a judgment rendered in favor of defendants and third persons made parties to the action. The contract amounted to an assignment of so much of the judgment rendered in favor of defendants—Wood v. Casselleigh, 30 Colo. 287, 71 Pac. 360. Where a street railway company purchased all the equipment of a previously existing railway under a stipulation that the sale did not include the franchise, leases, contracts or power house machinery of the seller, the street railway company did not thereby become the successor of the railway company within a contract which obligated such company and its successors to pay for maintenance of a flagman at a steam railroad crossing—Chicago & N. W. Ry. Co. v. Fox River Elec. Ry. & Power Co. (Wis.) 96 N. W. 541. A verbal agreement to sell a certain privilege to land without conveyance of title, cannot be set up to defeat the right to recover the balance of the purchase price under a subsequent written conveyance, whereby with consent of both parties, such privilege is sold to a third person at an advanced price—Upchurch v. Bunn, 117 Ga. 54.

83. Byrd v. English, 117 Ga. 191.

84. Lemon v. Wheeler, 96 Mo. App. 651.

85. Erdman v. Upham, 70 App. Div. (N. Y.) 315. The law creates the relation of privity between the promisor and the beneficiary—Tweeddale v. Tweeddale (Wis.) 93 N. W. 440. If a fund is placed by a debtor in the hands of a third person to be applied to the payment of a certain debt, the creditor may sue the holder of the fund, though he was not present when the transaction was made—Howes v. McCrea, 21 Pa. Super. Ct. 592. A promise by a son to his father on receipt of property from the latter that on the father's death a certain amount should be paid to a daughter, created a right in favor of the father, which, being assigned to the daughter, could be enforced by her —Ebel v. Piehl (Mich.) 95 N. W. 1004.

86. Partner has no interest in an appeal bond given by another who alone appealed from a judgment against the firm—Rowe v. Moon, 115 Wis. 566.

87. Contract to maintain another for life —Moore v. Hooker, 101 Ill. App. 177.

88. The creditor cannot sue at law but may be subrogated to the debtor's rights in equity—Greene v. McDonald, 75 Vt. 93.

89. Central Elec. Co. v. Sprague Elec. Co. (C. C. A.) 120 Fed. 925.

90. Blakeley v. Adams, 24 Ky. L. R. 263, 324, 68 S. W. 393, 473.

91. Frerking v. Thomas (Neb.) 89 N. W. 1005. Such a rule enunciated by statute in New Jersey does not extend the right of enforcement to third parties who would be benefited incidentally by performance. Pub. Laws 1898, p. 481, providing that third persons for whose benefit contracts were made, may sue thereon in their own name—Styles v. F. R. Long Co., 67 N. J. Law, 413.

92. Durgin v. Smith (Mich.) 94 N. W. 1044.

bind the remainderman.[93] Executors who sign a contract agreeing to do certain acts as executors and others in an individual capacity are only bound to the acts which they agree to do as executors.[94] Connecting carriers are not liable on an interstate contract of shipment, which in terms limits each carrier to its own line, there being no agency or partnership between them.[95]

(§ 4) *H. Terms as to place and time.*[96]—Where no time is given for performance of a contract it will be construed to require performance within a reasonable time.[97] A contract requiring work thereunder to commence "immediately" will be held to mean such time as is reasonably required to fulfill such terms.[98] A promise to pay when able cannot be sued upon without proof of ability to pay,[99] and the same is true of promise to pay money "as soon as he could."[1] A condition in a contract by a state officer that he would meet an obligation as fast as he could spare funds

93. Chilvers v. Race, 196 Ill. 71.

94. Myers v. Metzger (N. J. Law) 52 Atl. 274.

95. Texas & P. Ry. Co. v. Byers Bros. (Tex. Civ. App.) 73 S. W. 427.

96. Time as of the essence of the contract—Thacker Wood & Mfg. Co. v. Mallory, 27 Wash. 670, 68 Pac. 199. Construction of electric power service contract as to the time when power should be taken by the purchaser—Laclede Power Co. v. Stillwell, 97 Mo. App. 258. Contracts as to time and voyage of vessels under charter—The Donald, 115 Fed. 744; The Helios (C. C. A.) 115 Fed. 705. Where a contract with the manager of a corporation, requires him to place it on a paying basis and gives him a substantial interest in future earnings without regard to services rendered "thereafter," it will be construed to mean after payment of debts of the corporation and not after the execution of the contract—Dupignac v. Bernstrom, 37 Misc. (N. Y.) 677. A contract for the raising of money and the organization of a corporation for the purchase of land, providing for payment of a certain sum by one of the parties when such money should be raised and title to the lands secured, only required the payment of such sum after the raising of the money for the purchase of the land and the securing of the title—Oliver v. Morse, 104 Ill. App. 129. A clause in a construction contract for work during five years and providing that the consideration is to be paid for services and materials and "the complete execution of said contract," is not a necessary condition to payment but merely an independent covenant giving a right to recoupment or to an action for breach thereof—Chapman v. Salfisberg, 104 Ill. App. 445. Where a contract between a railroad company and a ferry company, for transportation of cars across a river, provided that it should remain in force for ten years, that if at the end of five years the railroad should wish to buy the property of the ferry company, the basis should be founded on the fifth year's business for the remaining five years of the contract, and that if the parties desired to terminate the contract at the end of ten years, then the railroad company should have the right to purchase the boats and incline for a fair compensation, the contract terminated at the end of ten years with the right in the railroad company, if it did not wish to renew, to purchase the property at a fair price—Linehan Ry. Transfer Co. v. New Orleans & N. W. R. Co., 107 La. 645. Where land was conveyed to another in consideration of a contract for certain services to be performed by him conditioned on his retaining title during performance, and in case of sale to pay certain other persons specified sums of money, on a sale of the property the debt to such third persons became absolute immediately—Tweeddale v. Tweeddale (Wis.) 93 N. W. 440. Where a contract for bidding in land under foreclosure and holding the title for benefit of the owner until redeemed, fails because the purchaser did not pay the price and the land was resold and purchased by the purchaser for the benefit of another, the contract extended to the second sale and its binding effect was not destroyed by the subsequent contract made to purchase for another—Williams v. Avery, 131 N. C. 188. A contract for maintenance of a side track to a mill, during the time that business was carried on at the mill, referred to the particular business for which the mill was constructed and did not terminate by the sale of the mill, where it was operated for the same purpose thereafter—Michigan Cent. R. Co. v. Chicago, K. & S. Ry. Co. (Mich.) 93 N. W. 882.

97. Walker v. Taylor (Del.) 53 Atl. 357; Murphy v. Dernberg, 84 App. Div. (N. Y.) 101; Krause v. Board of School Trustees (Ind. App.) 66 N. E. 1010. Building contract—Andrae v. Watson (Tex. Civ. App.) 73 S. W. 991. Contract to procure a loan—Collier v. Weyman, 114 Ga, 944. An agreement to work a farm in consideration of a half interest to be conveyed at some future time implies that a deed therefor will be given in a reasonable time—Reynolds v. Reynolds, 74 Vt. 463. Oil lease—Parish Fork Oil Co. v. Bridgewater Gas Co., 51 W. Va. 583. A contract providing that work should be done as to a certain particular within 30 days, the remainder as soon as practicable thereafter, did not require that it should have been done as soon as possible, with the best appliances, utmost facilities and extraordinary diligence, but as soon as could be by exercise of due diligence and without unreasonable delay—Williams v. Rittenhouse, 198 Ill. 602.

98. Ephrata Water Co. v. Ephrata Borough. 20 Pa. Super. Ct. 149.

99. In re Knab. 38 Misc. (N. Y.) 717.

1. Wright v. Farmers' Nat. Bank (Tex. Civ. App.) 72 S. W. 103.

from his salary does not render payment subject to such contingency but merely fixes time for payment.[2] A second contract made after performance under the first, providing that payment was to be made thereunder when the finances of the party permitted, means that payment is to be made when the party is able.[3] Unavoidable delay,[4] or delay caused by the other party,[5] or accepted by him,[6] will not affect the contract. Where one alternative of a contract expires by default the party obligated is immediately liable on the other.[7] Under a building contract prescribing a penalty for each day after a certain date until the building is completed, the contractor is not entitled to a deduction for Sundays.[8] Where a material man agreed to furnish materials to a contractor, if the owner with the consent of the contractor would retain control of sufficient funds due the latter, to protect him, he was not obliged to wait until the building was complete before recovering on the contract.[9] A contract continued through five years without an accounting as to receipts and disbursements, though legally due and not because of a failure in this regard, must continue in operation until a settlement is had between the parties.[10] Where a contract provided that plaintiff should receive one-half the profits above a certain price on a sale of property made by him for defendant, recovery cannot be had until the proceeds are reduced to money or defendant has so appropriated them as to constitute a complete equivalent to him of their money value.[11] Where a contract was partly written and partly oral, and the owner had made representations on which the other relied but which were misleading as to the amount of work to be done, and the work required more time than was contemplated, but was accepted, the time for completion was impliedly and necessarily extended.[12] If anything remains to render a contract binding, it is deemed executed at the place where the last act necessary was done.[13] The contract only remains in force until superseded by a later and inconsistent one, whether written or parol.[14]

(§ 4) *I. Terms as to compensation.*[15]—If a contract does not fix the compen-

2. Culver v. Caldwell (Ala.) 34 So. 13.

3. Flather v. Economy Slugging Mach. Co., 71 N. H. 398.

4. Where a contract for the manufacturing and delivery of railroad cars stated a certain time for delivery, with a forfeit for over time, subject however, to delay for unavoidable contingencies, the maker was not liable for delay for such unavoidable contingency, since the time specified in the earlier part of the contract was modified by the provision regarding delay—Pressed Steel Car Co. v. Eastern Ry. Co. (C. C. A.) 121 Fed. 609.

5. Where a building contract required the owner to furnish materials and shop drawings, and inspectors for the work were appointed on approval of the shop drawings, the owner could not complain of delay in notifying him of the appointment of such inspectors in an action by the building contractors for delay in the furnishing of the materials—Christopher & S. Architectural Iron & Foundry Co. v. Yeager, 202 Ill. 486.

6. Where an architect was also the owner's superintendent and on complaint of the contractor because of delay by other contractors, he assured the contractor that he should have had additional time and agreed to the amount of time demanded, a demand for such time in writing was unnecessary—Vanderhoof v. Shell, 42 Or. 578, 72 Pac. 126.

7. Where a contract provided for the conduct of litigation in consideration of conveyance of certain land within a certain time and in default thereof of payment of a certain amount of money, when the time had expired for conveyance, the party obligating himself to convey could no longer perform in that manner, but became absolutely liable for the payment of the amount of money specified—Ehrich v. Durkee (Colo. App.) 72 Pac. 814.

8. Vanderhoof v. Shell, 42 Or. 578, 72 Pac. 126.

9. Roussel v. Mathews, 171 N. Y. 634.

10. Derouen v. Romero (La.) 34 So. 415.

11. Rogers-Ruger Co. v. McCord, 115 Wis. 261.

12. Malloy v. Lincoln Cotton Mills, 132 N. C. 432.

13. Emerson Co. v. Proctor, 97 Me. 360.

14. Copeland v. Hewett, 96 Me. 525.

15. News carrier's contract—Stewart Law & Collection Co. v. Krambs (Cal.) 73 Pac. 854. Contract allowing one railway company to cross tracks of the other as to alternative conditions for payment of a certain sum or interest on such sum annually—Stockton v. Railway Co. (Fla.) 33 So. 401. Contract as to rate of wages and reimbursement for board of employes—Hilbrand v. Dininny, 73 App. Div. (N. Y.) 511. Contract for electric lights as to discounts—Missouri-Edison Electric Co. v. Hat & Fur Co., 94 Mo. App. 543. Mode of payment under terms of instalment contract—Caryl v. Kellogg (Colo. App.) 68 Pac. 114. Particular clauses in contract for furnishing gas

sation definitely,[16] or if the benefits received are without its terms or are due to alterations, the measure of compensation is the value of benefits received,[17] but if the con-

as to prices—Muncie Natural Gas Co. v. City of Muncie (Ind.) 66 N. E. 436. The word "profits" in a contract with an actress for two seasons for a weekly salary, and a commission on "profits" in excess of a certain sum, means the difference between receipts and running expenses without regard to the production account—Mayer v. Nethersole, 71 App. Div. (N. Y.) 383. Under an agreement to board plaintiff and an assistant while they were drilling a well for defendant, defendant was not entitled to recover for board furnished after the time stated within the contract, where it appears that such statement was uncertain and amounted to a mere matter of opinion on the part of the other party as to the time required for the drilling of the well —Butler v. Davis (Wis.) 96 N. W. 561.

Conditions precedent to payment.—Necessity of final certificate of approval of construction given by New York Board of Underwriters to contractor equipping a factory with fire sprinklers, as to final payment—New York & N. H. Automatic Sprinkler Co. v. Andrews, 173 N. Y. 25. Where a building contract required a certificate to be issued to the contractor by the architect as an order on the owner to pay part of the value of the labor and material to a certain time, the making of such certificate and sending it to the owner who objected to the allowance therein and returned it to the architect did not amount to an issuance, there being no delivery to the contractor—Wear Bros v. Schmelzer, 92 Mo. App. 314. A provision in a building contract requiring that contractors shall make no claim for extra work unless pursuant to architect's order, and that notice of claim shall be made to him in writing within ten days of the beginning, the order and not the notice is necessary to recovery—Teakle v. Moore (Mich.) 91 N. W. 636. Where specifications in a building contract required the contractor to allow a certain amount for one item, and the materials used on that item amounted to a much larger amount, on which the owner was credited with the first amount, that the seller of the materials filed a lien on the building for the balance, will constitute no defense against the contractor's claim for final payment, on the ground that under the contract plaintiff was not entitled to final payment until the owner was satisfied that no liens existed against the property—Vanderhoof v. Shell, 42 Or. 578, 72 Pac. 126.

Particular building or material contracts.—See "Building and Construction Contracts." Instalment contract for construction of a building as to payments during progress of the work—Mullin v. Langley, 37 Misc. (N. Y.) 789. Where a contract for material set out an itemized statement thereof and the price, one party was bound to furnish only the amount specifically mentioned and the other was bound to pay only a reasonable compensation for additional material furnished with his consent—Libby v. Deake, 97 Me. 377. Where a contract for an entire piece of work is made with one who has authority under his contract with the owner only to incur expenses sufficient to satisfy a mortgage which he holds on the property, the contractor may nevertheless recover his full amount from such person where he did not know of the limits as to expenditures—Hill Bros. v. Bank (Mo. App.) 73 S. W. 307. Where a building contract provided specifications as to the manner in which the work should be done, as to extra work required by conditions arising after the work had begun, the contractor was entitled to rely upon such specifications, and if they work incorrectly and render extra work necessary, he was entitled to recover—Langley v. Rouss, 116 N. Y. St. Rep. 1082. Where a construction contract with specifications provides that extras shall not be paid for unless the price was agreed upon in writing before the work was done, recovery may be had for extra work though there was no writing, where the specifications for that particular work contained no such provision—Teakle v. Moore (Mich.) 91 N. W. 636. Where a building contract provides that if any evidence of a lien appeared against the contractor, the owner should retain sufficient to indemnify him against it, the owner was entitled to credit for a subcontractor's judgment in enforcing a lien against the property in an action against him by the contractor—Wear Bros. v. Schmelzer, 92 Mo. App. 314. Where a contractor receives and disposes of all the materials for a certain work, under a contract to pay one-half in cash and the rest in bonds secured by mortgage at market value, and fails to complete the contract, the materialmen may demand the full compensation—Cameron v. Railroad Co., 108 La. 83. Where a contract for an excavation provides that it will be necessary to pile the earth removed because of the presence of quick sand, the contractor is entitled to compensation for all earth necessarily removed at the agreed price, though part of it consisted of earth which flowed into the excavation from the sides during the process of the work—Carroll Contracting Co. v. Roofing & Paving Co. (Mo. App.) 71 S. W. 1119.

16. Where a contract for yearly rental of hydrants to a city provides that the price shall not be more than $50, the value of the use is the criterion of compensation in the absence of any further agreement—City of Valparaiso v. Water Co., 30 Ind. App. 316. Where there was no agreement as to the compensation an engineer should receive in superintending the work of placing electric wires under ground for several electric companies, and the contractor was to receive monthly payments on estimates furnished by engineer, it will be presumed as benefits accrued with progress of the work that the compensation of the engineer was apportionable and he was entitled to recover for services rendered during progress of the work and before its completion—Wagner v. Illuminating Co. (Mo.) 75 S. W. 966.

17. Reichert v. Brown, 38 Misc. (N. Y.) 782; Barnes v. District of Columbia, 37 Ct. Cl. 342; Isaacs v. Dawson, 70 App. Div. (N.

tract stipulates a certain compensation, such compensation may be recovered though greater than the real value,[18] and a claim for extra work on a contract cannot be made where it does not appear whether there was an express or implied consent of the other party thereto.[19] Where a party contracting to perform certain work is required to meet extra expenditures not contemplated by the contract through the action of the other party, he is entitled for reimbursement therefor,[20] but unforeseen expenses occurring which were not contemplated by the conditions of the contract need not be met by the other party in the absence of an express agreement so to do.[21] Work and material made necessary because of the defective manner in which a contract was performed will not entitle the contractor to extra compensation.[22] Where by reason of the acts of one of the parties to a contract, the other is prevented from performance, he may still recover at the contract price for the portion of the contract completed.[23] To recover for work anticipated under the terms of the contract as necessary in a certain contingency, it must appear that the contingency occurred.[24] An express promise to pay for services must be shown.[25] Where the rate for publication of legal notices in a city was fixed, that the customary rate, during a long course of dealing before passage of the charter, was greater, will not justify its allowance.[26] One who solicits work for another for a portion of the net profits thereon is entitled to no compensation where the latter settles an action for services at a loss unless it is shown that recovery might have

Y.) 232. If a contractor is required to furnish material and do work outside his contract, he may recover a reasonable sum as provided in addition to the actual cost of such extra materials and work—Venable Const. Co. v. United States, 114 Fed. 763. Where a contract is for an aggregate price merely, the measure of value for extra work and materials is the cash market value and not the price paid for similar materials and labor under the main contract—Board of Commissioners of Fulton County v. Gibson, 158 Ind. 471. A manufacturer may recover the increase in cost of manufacture of a sample machine due to changes in plans, following an oral agreement subsequent to the original written one, since the law implies a promise therefor—Flather v. Economy Slugging Mach. Co., 71 N. H. 398. Where a contract provided for the setting of terra cotta blocks in the floors of a building except as to the ground floor, where there was a basement and a cellar also, the basement being referred to as the basement or ground floor, the setting of blocks on the ground floor by the contractor under the express direction of his superior was extra work for which he was entitled to recover in addition to compensation named in his contract—Isaacs v. Dawson, 70 App. Div. (N. Y.) 232.

Compare.—Where it appears that part of the work done under a certain contract was not contemplated in the original contract but was accepted by the other party, the builder was entitled to recover for such work at the rate he was paid for work originally contemplated—Malloy & Boggs v. Cotton Mill Co., 132 N. C. 432.

18. Niemoller v. Duncombe, 50 App. Div. (N. Y.) 614.

19. Niemeyer v. Woods, 72 App. Div. (N. Y.) 630.

20. Illinois Cent. Ry. Co. v. Manion, 23 Ky. L. R. 2267, 67 S. W. 40. Though a contract for grading a city street provides that the engineer was the contractor's agent in fixing grades, where the contractor called attention of the city to an error therein, and was directed to proceed according to the engineer's directions regardless of his objection, he was entitled to recover for work made necessary by the error—Becker v. City of New York, 77 App. Div. (N. Y.) 635.

21. Expenses of injunction suit to prevent the raising of a sunken vessel by a third person, incurred by one who had contracted with the owner for that work—Murphy v. Northern S. S. Co. (Mich.) 91 N. W. 142. Where specifications submitted by one of the parties, to a contract for sinking piers, to the other, show the character of the different strata through which the work was to be done, and such party bid on the work relying on such specifications, it could not recover damages for extra work because of a necessity of removing logs in excavation, since the plans only warranted substantial accuracy and did not guarantee the conditions to be as represented—Groton Bridge & Mfg. Co. v. Railway Co., 80 Miss. 162.

22. Vanderhoof v. Shell, 42 Or. 578, 72 Pac. 126.

23. Pitts v. Davey, 40 Misc. (N. Y.) 96. One who has contracted to do work on a building may recover for the portion of the work done which was to be paid for in instalments, where the building fell while in course of construction through the negligence of the owner's agents—Teakle v. Moore (Mich.) 91 N. W. 636.

24. National Contracting Co. v. Com. (Mass.) 66 N. E. 639.

25. Patton v. Wells (C. C. A.) 121 Fed. 337.

26. People ex rel. Smith v. Clarke, 79 App. Div. (N. Y.) 78.

been had by prosecution.[27] Where by a contract for prosecution of a claim to a Mexican grant, an attorney was to receive as compensation one-tenth of the land less 640 acres, it was intended that that amount should be taken from his tenth after division.[28]

(§ 4) *J. Terms for compromise or arbitration.*[29]—An arbitration clause in a building contract on which a bond is given to a corporation without reference to its successors or assigns does not apply to a dispute as to whether such bond could be assigned.[30] A provision in a building subcontract, that disputes regarding the meaning of drawings or specifications shall be decided by the architect, does not cover a dispute as to whether certain work required by them is included in the subcontract.[31] Where a clause of a building contract provides for reference of disputes to certain architects, a member of the firm of architects named, who was in charge of the work and recognized by the parties, though his name did not appear in the firm name, is a proper arbitrator and his acts are binding on the parties.[32] A condition in a contract to furnish coal to a city for a certain period provided that the water engineer should interpret its conditions and that his decision in case of dispute was to be final did not apply to the question whether the city was in default because of nonpayment of instalments on the contract.[33]

(§ 4) *K. Terms as to performance.*[34]—To constitute performance or completion of the contract it must reasonably appear that benefits received by one party re-

27. Comer v. Illinois Car & Equipment Co., 108 La. 179.

28. Adams v. Hopkins (Cal.) 69 Pac. 228.

29. What constituted proper subject for arbitration under terms of building contract —McClellan v. McLemore (Tex. Civ. App.) 70 S. W. 224. A contract providing for liquidated damages for delay in completion of a building, and that alterations must be made by written order of the architect, the value of the work to be computed by him and added to or taken from the contract price and damages for delay to be determined by the architect or by arbitration, does not require that the damages caused by the failure to complete within the limit should be submitted to the architect or the arbitrator—Drumheller v. American Surety Co., 30 Wash. 530, 71 Pac. 25. Where a contract for the furnishing of materials provides for arbitration by the architects whose decision should be final, a dispute as to whether the subcontractor should recover for all materials specified, though he had not delivered the whole amount because such amount was rendered unnecessary by reason of rock foundation being found sooner than was anticipated, is a matter of dispute within the arbitration clause—Wymard v. Deeds, 21 Pa. Super. Ct. 332.

30. Citizens' Trust & Surety Co. v. Howell, 19 Pa. Super. Ct. 255.

31. Isaacs v. Dawson, 70 App. Div. (N. Y.) 232.

32. Wymard v. Deeds, 21 Pa. Super. Ct. 332.

33. City of Baltimore v. Schaub Bros., 96 Md. 534.

34. Contract by second mortgagees with lienors for foreclosure and settlement—Jones v. Garrigues, 75 App. Div. (N. Y.) 539. Contract by general manager of railroad company for construction of a road within a stated time "so as to be successfully operative," in consideration of all donations and bonuses given to the company—Flanagan Bank v. Graham, 42 Or. 403, 71 Pac. 137. Where a city engineer in charge of a contract for construction of a sewer had reason to believe that part of the sewer had been laid on the wrong grade, and possessed power to change the construction if imperfect, he has authority to require work to be done by other parties if the contractor refuses to correct the defect and such action does not amount to an ousting of the contractor from the work—Brown v. City of Baton Rouge, 109 La. 967. A contract for aid to secure consent of adjacent property owners to the erection of an elevated railroad loop, giving a bonus for successful effort in locating road, could not be construed to make the right to receive such bonus conditional on passage of an ordinance giving the right to build the entire loop, where part of it was already constructed when the contract was made and various ordinances were given for construction of remainder, though no one ordinance provided for construction of the entire loop —Union Elevated R. Co. v. Nixon, 199 Ill. 235.

Extent of obligation; terms as to liability for breach.—A contract to furnish beef to the men working for a contractor in building a railroad does not apply to the men employed by subcontractor under it, where he is also building part of the road on his own account—Fitzgerald v. First Nat. Bank (C. C. A.) 114 Fed. 474. A contract whereby one person agrees to disclose the whereabouts of another so as to enable a third person to capture him requires the first party to give information of facts actually in existence which will lead to the capture or enable the other party to accomplish it—Cash v. Southern Exp. Co., 133 Ala. 272. An agreement between a manufacturer and a patentee for the manufacture of certain articles, by which the patentee agreed to protect the manufacturer from infringe-

sulted from the efforts of the other under its terms.[35] Where parties for whom certain work is to be performed have as good means of knowing of the completion of the

ment suits, will not require a bond of indemnity on the bringing of a suit, and a failure therein will not amount to a breach of the contract—National Machine & Tool Co. v. Machinery Co., 181 Mass. 275. Insurance by railroad employe in accident company, the premium of which was paid partly by the employe and partly by the company, and acceptance by him of benefits thereunder will not discharge the company from liability for his injuries where there is no contract by which he agrees to accept the insurance benefits in settlement of his claim against the company—Dover v. Railway (Mo. App.) 73 S. W. 298. It is no defense to an action to recover unpaid instalments of royalty on a contract for the exclusive privilege of running an observation wheel at a pleasure resort, that during a part of the time for which royalty was demanded, defendants did not own or run the wheel—Sommers v. Myers (N. J. Sup.) 54 Atl. 812. Where a mortgagee agrees with a contractor who has arranged to build houses for the owner, that if the contractor will complete the buildings he will retain sufficient money coming to his hands for the owner and instead of paying it to the contractor when he receives it, pays it to the owner, the contractor may collect the amount from the mortgagee under the contract—Prata v. Green, 70 App. Div. (N. Y.) 224. A contract whereby one agreed with the guardian of a minor to recover the minor's inheritance from a certain estate and to pay all fees for attorneys employed from his own share of the fund to be recovered will require that the claim of an attorney employed should be enforced against the one undertaking the recovery and not against the estate of the minor—Kersey v. O'Day (Mo.) 73 S. W. 481. A contract providing for erection of an ice plant and for acceptance or rejection by the other party, and that if rejected such party should permit the builder to enter and remove machinery without charge, does not limit the latter's liability for failure to fully perform, to a return of the money received for construction of the plant, though it provides for such return in the contract —Harrison Bros. v. Murray Iron Works Co., 96 Mo. App. 348. A requirement in an advertisement for bids on a building, that the successful bidder shall give a bond, contemplates security to the owner for performance of the contract and not that he must perform acts which he is not otherwise required to perform so as to protect the surety, and he is not required to accept the bond stipulating that he give immediate notice in writing of default to the surety and that he institute any suit on the bond within six months after completion of the work—Brown v. Levy (Tex. Civ. App.) 69 S. W. 255. A contract between a mill company and a water company, allowing the latter to take a certain amount of water from the stream and providing that the former should not lower water in a pond below a certain level unless to make repairs, whereupon notice should be given to the water company which should without delay at its cost, construct a suitable cofferdam, the provision for such dam was not merely for the benefit of the water company and the dam must be sufficient to allow the mill company to make repairs—Paris Milling Co. v. Paris Water Co., 24 Ky. L. R. 1372, 71 S. W. 513.

Waiver of terms.—Either party may waive a provision in a building contract so far as intended for his benefit which requires that a claim for alterations or extra work shall be first described in writing and the valuation agreed upon in writing—Copeland v. Hewett, 96 Me. 525. Where a provision in a building contract required that the materials furnished and the work done should satisfy a certain architect as agent of the owner, he had authority to waive a provision declaring that no extra work should be paid for without an itemized estimate by the contractor and the architect's written order for payment—Langley v. Rouss, 116 N. Y. St. Rep. 1082. Oral direction and sanction of an architect to the performance of extra work under a contract requiring work and materials to conform to his satisfaction acting as the owner's agent, will entitle the contractor to recover for such extra work without the architect's certificate, as required by the contract, if he unreasonably refused to provide it—Langley v. Rouss, 116 N. Y. St. Rep. 1082. Failure of the architect to reject promptly defective building materials or construction, as work proceeds, amounts to a waiver of such defects under a condition providing that materials used and work done shall be subject to his judgment—Siebert v. Roth (Wis.) 95 N. W. 118. Where a building contract requires payments to be made only on architect's certificate, and provides that he should have power to reject any work not in accordance with the specifications, and should be the arbiter of disputes, and it appears that during the work he inspected materials and work and approved them and made directions for the correction of errors, which were complied with, and afterward he agreed with the parties to accept the contract excepting certain alterations, there was a waiver of the requirement of his final certificate as a condition precedent to a suit for final payment—Vanderhoof v. Shell, 42 Or. 578, 72 Pac. 126.

35. Where several reports concerning a mine were furnished to a prospective buyer, evidence merely that he became the purchaser, will not entitle one who made one of the reports under a contract for certain compensation, if a sale is effected "by" and "through" his report, to compensation—Wishon v. Great Western Min. Co., 29 Wash. 355, 69 Pac. 1105. Where a prospective purchaser of mineral lands saw the report of a geologist whom the owner had engaged to examine it as to its value under a contract for compensation in case his report should lead to a sale of the lands, such report will be deemed to have indirectly aided the sale if it was in the purchaser's mind at the time of sale and was regarded by him as a means for future sale—Wheeler v. Chestnut, 95 Mo. App. 546.

contract as the party who is to perform, they are not entitled to notice of such completion in the absence of special agreement.[36] Where the sale of a business includes good will, the sellers may re-engage in the same business in the same vicinity in absence of an agreement not so to do, but they cannot appeal to their old customers to deal with them or not to deal with the purchasers.[37] A contract to rent land to a good, reliable tenant, who can provide himself during its tilling and can plant a certain amount of grain, does not necessarily bind the party making it, that the land shall in any event be put into crops, but only to furnish a tenant able and willing to put in the crops.[38] Where a contract for work on a boiler house and engine room provided that it should be performed in a thorough and mechanical manner and water tight, subject to the approval of the architect, the construction was to be water tight only so far as the flowing of the plant would produce such result.[39] A provision in a subcontract for a building, requiring the subcontractor to omit work called for in his contract or to do extra work when directed by the owners or architects, for a deduction from the contract price or extra pay as the case might be, will not prevent him from doing extra work.[40] Under a contract for the construction of a sewer providing that the engineer should make weekly allowances for work done reasonable in his judgment according to the relative difficulty of the work, the contractor could not stop work in difficult ground and excavate in other places in order to recover payment.[41] Where a contract for the sale of a stage line called for payment of a certain amount per month unless an opposition line was operated, the purchaser was justified in refusing payments where it appeared that other vehicles were used for carrying passengers and were advertised as a stage line, and succeeded in drawing considerable business away from him.[42] Where a contract with the United States for construction provides that articles will be loaned the contractor for performing the contract, to be returned in good condition, or replaced if lost or damaged, he cannot be required to replace articles because of ordinary wear, but only because of damage in excess of wear.[43] Where specifications in a building contract for the United States, recited, as to an alternative bid, that the work must be performed in compliance with drawings furnished, "including all necessary changes on account of said proposed construction," they were for the benefit of the government and it had the right to require use of iron beams, though they were not usually required in such buildings without liability for extra compensation.[44]

(§ 4) *L. Terms for acceptance or rejection of performance.*—A provision in a contract that one party shall determine all questions of performance will not entitle him to reject performance without reason and the other party may raise the question of substantial performance;[45] but if performance is to be subject to the acceptance of a certain person, his right of rejection in good faith is absolute.[46] Where

36. Drew v. Goodhue, 74 Vt. 436.

37. Zanturjian v. Boornazian (R. I.) 55 Atl. 199.

38. Barr v. Cardiff (Tex. Civ. App.) 75 S. W. 341.

39. Dwyer v. New York, 77 App. Div. (N. Y.) 224.

40. Isaacs v. Dawson, 70 App. Div. (N. Y.) 232.

41. National Contracting Co. v. Commonwealth (Mass.) 66 N. E. 639.

42. Monroe v. Wilson, 29 Wash. 121, 69 Pac. 633.

43. United States v. McIntosh, 117 Fed. 963.

44. Miles v. United States, 113 Fed. 1011.

45. Schliess v. Grand Rapids (Mich.) 90 N. W. 700.

46. Barrett v. Coal Co., 51 W. Va. 416. Engineer as arbiter of railroad construction contract—North American Ry. Const. Co. v. R. E. McMath Surveying Co. (C. C. A.) 116 Fed. 169. Conclusiveness of architect's certificate—Heberlein v. Wendt, 99 Ill. App. 506; Perry v. Levenson, 82 App. Div. (N. Y.) 94. Where a contract for street paving is subject to the approval of the board of public works, their decision is binding as to its rejection, unless it appears that they acted unreasonably, arbitrarily or fraudulently—Brownell Imp. Co. v. Critchfield, 197 Ill. 61.

a construction contract provides that the right of final acceptance or rejection could not be waived at any time during progress of the work, the failure of the contractor to object while on the ground during progress of the work did not amount to an acceptance.[47]

(§ 4) *M. Terms for election under the contract and its exercise.*—Where two joint tenants after judgment in partition agreed with the judgment creditors holding a lien on the interest of the other tenant that he would purchase and hold as trustee for them and that if at the end of a year the property had not been sold, they might elect to buy, giving him a certain amount or that he might buy from them at a certain amount, the judgment creditors were required to elect whether they would buy the entire property at the expiration of the year or within a reasonable time.[48] Where a contract for work provided that it should be done in a workmanlike manner, but provided two alternative methods, the contractor was not required to use one of such methods, but was allowed to choose whichever of the two would be most likely to insure the desired result.[49] After election under conditions in a contract giving that right, and performance in accordance with such election, a party cannot rescind his action and choose the other alternative.[50]

§ 5. *Conflict of laws.*[51]—A contract will depend for its validity and construction upon the law of the place where it is made,[52] unless contrary to the public policy or morals of the state where it is sought to be enforced,[53] or, unless by its terms, it is to be performed elsewhere,[54] or unless it refers to real property when

47. Brownell Imp. Co. v. Critchfield, 197 Ill. 61.

48. Turner v. Baldwin, 81 App. Div. (N. Y.) 639.

49. Independent School Dist. v. Swearingin (Iowa) 94 N. W. 206.

50. Gloe v. Chicago, R. I. & P. Ry. Co. (Neb.) 91 N. W. 547. Where creditors, after judgment for partition sale, acquiesced in a purchaser's retaining property for fifteen months after expiration of the year, they could not elect to take the property so as to bind the purchaser—Turner v. Baldwin, 81 App. Div. (N. Y.) 639.

51. See further the title Conflict of Laws.

52. In re St. Paul & K. C. Grain Co. (Minn.) 94 N. W. 218; Bath Gaslight Co. v. Rowland, 84 App. Div. (N. Y.) 563; Emerson Co. v. Proctor, 97 Me. 360. Validity of terms of a contract as to interest—Kroegher v. Calivada Colonization Co. (C. C. A.) 119 Fed. 641. Form and solemnity in execution—Roubicek v. Haddad, 67 N. J. Law, 522. Contract to sell lands as governed by statute of frauds—Goldstein v. Scott, 76 App. Div. (N. Y.) 78. Life insurance policy—Franklin Life Ins. Co. v. Galligan (Ark.) 73 S. W. 102. Statutory provisions of the state cannot be avoided in an insurance policy by a provision adopting the laws of another state—Albro v. Manhattan Life Ins. Co., 119 Fed. 629; Born v. Home Ins. Co. (Iowa) 94 N. W. 849; Pietri v. Seguenot, 96 Mo. App. 258. However, it has been held that an application for life insurance in a New York company made in the state of Washington providing that it shall be construed according to the laws of New York, and a policy issued thereon reciting the same condition, will render the contract of insurance a new York contract governed by its laws—Mutual Life Ins. Co. v. Hill (C. C. A.) 118 Fed. 708. Contract of shipment—Herf & F. Chemical Co. v. Lackawanna Line (Mo. App.) 73 S. W. 346. Where a contract between the officers of a New York corporation and other parties, to share in profits from construction and equipment of a railroad, was made without making the railroad company a party, and afterward the company was consolidated with another organized under the laws of Pennsylvania, the contract though void in the latter state may be enforced there as between the parties, where it is valid in New York—Rumsey v. New York & P. R. Co., 203 Pa. 579. Sale of liquors—P. Schoenhofen Brew. Co. v. Whipple (Neb.) 89 N. W. 751; J. J. Eager Co. v. Burke, 74 Conn. 534; Bluthenthal v. McWhorter, 131 Ala. 642. Purchase of stock—Gaylord v. Duryea, 95 Mo. App. 574 See ante, p. 560, note 61.

53. Parker v. Moore (C. C. A.) 115 Fed. 799; Palmer v. Palmer (Utah) 72 Pac. 3. Marriage settlement void in one state because of marriage within a year after divorce will not be enforced there though valid in state where made—Wood v. Wood's Estate, 137 Cal. 148, 69 Pac. 981. An indorsement and assignment in another state of a certificate of deposit in payment of losses at gambling, will not be void even against innocent purchaser in the state, where it is attempted to be enforced, where the law of the other state is not so offensive or shocking to the morality of the state of suit as to make it necessary to apply the law of the forum—Sullivan v. German Nat. Bank (Colo. App.) 70 Pac. 162.

54. Born v. Home Ins. Co. (Iowa) 94 N. W. 849; Farmer v. Etheridge, 24 Ky. L. R. 649, 69 S. W. 761. Effect of statute of frauds—Jones v. National Cotton Oil Co. (Tex. Civ. App.) 72 S. W. 248. Contract for sale of gambling device—Price v. Burns, 101 Ill. App. 418. Promissory note—Hewitt v. Bank of Indian Territory (Neb.) 92 N. W. 741.

the law of the situs of the property will control.[55] If a contract of a married woman is valid, where made and to be performed, it is valid everywhere, unless she is domiciled in a state where the law imposes a total incapacity on the part of married women to a contract.[56] Where a contract was sent from Maryland to a corporation in Maine, signed by the party sending, and was there signed by the corporation on assenting to the proposition and returned by mail, an acceptance was complete when the contract was deposited and it became a Maine contract.[57] Notes executed in Indian Territory and payable in Arkansas will be regulated by the laws of the latter state, since such laws prevail in Indian Territory.[58] A statute making members, agents, and employes of a corporation liable for its debts where it does business within the state without complying with its laws does not apply to contracts made without the state giving the corporation title to lands in the state.[59] The law of the forum governs as to the remedy on foreign contracts.[60]

§ 6. *Modification and merger of contracts.*—A change or merger may take place when there is an accord and satisfaction of a pre-existing contract liability,[61] or a novation,[62] or release,[63] may work a similar result.

Modification.[64]—Stipulations in a building contract limiting weekly payments may be waived as between contractor and subcontractor.[65] Modification of a contract cannot be made without the actual consent of both parties to the change.[66] The compensation of a continuing contract cannot be changed without notice.[67] That alterations of a building contract were made without the written order of the architect as required will not prevent recovery, where the owner was present and consented to the alterations.[68] Acceptance of a modified proposition is legally a rejection of the original and where a new proposition is substituted for a contract acceptance by the other party must be shown.[69] A valid oral contract is not affected by an attempt to execute a void written contract in its stead.[70] An agree-

53. Where a contract concerned immovable property in another state and was made between two corporations of that state, and that it had been declared illegal by the highest court of that state, it will not be enforced in New York—Bath Gaslight Co. v. Rowland, 84 App. Div. (N. Y.) 563. The capacity of husband and wife to deal with each other with regard to immovable property in Louisiana, must be determined by the laws of that state—Rush v. Landers, 107 La. 549, 57 L. R. A. 353. See ante, p. 564, § 7.

56. Young v. Hart (Va.) 44 S. E. 703.

57. Emerson Co. v. Proctor, 97 Me. 360.

58. Clark v. Porter, 90 Mo. App. 143.

59. Goldberry v. Carter (Va.) 41 S. E. 858.

60. Young v. Hart (Va.) 44 S. E. 703; Thompson v. Traders' Ins. Co., 169 Mo. 12; Interstate Sav. & Loan Ass'n v. Badgley, 115 Fed. 390; Crebbin v. Deloney, 70 Ark. 493. See, further, Conflict of Laws, p. 564, § 8.

61. See Accord and Satisfaction.

62. See Novation.

63. See Releases.

64. Modification of contract without his consent as discharging surety, see Suretyship.

What constituted a modification of the original contract for the drilling of a well—Wendling v. Snyder, 30 Ind. App. 330. Modification of agreement for purchase of mining claim—Sherman v. Sweeny, 29 Wash. 321, 69 Pac. 1117. Alterations within terms of a contract with the commonwealth for a sewer providing that in certain contingencies the engineer in charge might order certain alterations in work or materials—National Contracting Co. v. Commonwealth (Mass.) 66 N. E. 639. Modification of a contract between a manufacturer and owner for introduction of the former's goods into the territory covered by their business—L. N. Brunswig & Co. v. Wm. S. Merrell Chemical Co. (La.) 34 So. 417. A construction contract providing that further details to fully explain the general drawings will be furnished the contractor at the proper time during performance of the work, and that such drawings and specifications are intended to cover a complete and first class construction, anything omitted to be done by the contractor without extra charge, will not authorize a change in the plans by the architect—Dwyer v. New York, 77 App. Div. (N. Y.) 224.

65. O'Dwyer v. Smith, 38 Misc. (N. Y.) 136.

66. Farmers' Loan & Trust Co. v. Northern Pac. R. Co. (C. C. A.) 120 Fed. 873; J. K. Armsby Co. v. Blum, 137 Cal. 552, 70 Pac. 669. Evidence of a proposal for a change in terms for delivery of goods under a contract without an acceptance will not show a modification—J. K. Armsby Co. v. Blum, 137 Cal. 552, 70 Pac. 669.

67. Contract for board—Rule v. McGregor, 115 Iowa, 323.

68. Perry v. Levenson, 82 App. Div. (N. Y.) 94.

69. Kimbark v. Illinois Car & Equipment Co., 103 Ill. App. 632.

70. Word v. Kennon (Tex. Civ. App.) 75 S. W. 365.

ment concerning the use of a note and mortgage executed by one of the parties to the other may be changed by mutual consent, where there was no attempt to substitute a different debt for the one secured or a new consideration for one that had failed.[71] Where a contract provides against alterations in the work unless on written order of the architect, no such order is necessary for a change in the parties doing the work.[72] There must be a valuable and sufficient consideration for the change.[73] A change in a contract due to partial failure of consideration is founded on a good consideration, and the contract as modified may be enforced.[74] The authorities differ as to modification of a written contract by a subsequent oral agreement, the differences being generally due to statute.[75] That a party agreed to contract only in writing will not prevent a parol modification.[76] Performance will render such parol modification binding.[77] Where a contract with a corporation provides for payment of a certain sum in a certain time and that it shall not be modified except by resolution of the directors, proof that the officers of the company informed the other party of a modification is inadmissible in an action on the contract to show that it would mature earlier.[78] Where a valid contract is made in substitution of a previous one, the obligations of the latter are annulled,[79] but a

71. Sheats v. Scott, 133 Ala. 642.

72. Drumheller v. American Surety Co., 30 Wash. 530, 71 Pac. 25.

73. Modification of unsealed written contract by subsequent parol agreement—Gunby v. Drew (Fla.) 34 So. 305. Where one of the parties to a contract was to direct its performance in certain particulars and he refused to allow it to be performed as the other party intended, a modification changing the duties of the latter was supported by a sufficient consideration. Logging contract—Kerslake v. McInnis, 113 Wis. 659.

74. A colt was given for a lease and proved afflicted with disease; the former owner then agreed to buy the colt at a certain price in the fall, or if it died to reimburse the other party—Jackson v. Helmer, 73 App. Div. (N. Y.) 134.

75. In Florida an unsealed written contract may be modified by subsequent parol agreement—Gunby v. Drew (Fla.) 34 So. 305. A written contract of guaranty not within the statute of frauds may be modified by parol in Oregon. Agreement by assignee of check and certificates of deposit to pay them if not paid by the bank—Kiernan v. Kratz, 42 Or. 474, 69 Pac. 1027, 70 Pac. 506. In Washington a verbal modification will not be allowed to alter a written contract; the statute requires acceptance in writing—Nelson v. Nelson Bennett Co. (Wash.) 71 Pac. 749. In Kentucky it is allowable, unless forbidden by the statute of frauds—Illinois Cent. R. Co. v. Manion, 23 Ky. L. R. 2267, 67 S. W. 40. In Montana the oral modification must be executed (Civ. Code, § 2281)—Armington v. Stelle, 27 Mont. 13, 69 Pac. 115. It may be shown in Texas to avoid the defense of the statute of limitations—Liner v. J. B. Watkins Land Mortg. Co. (Tex. Civ. App.) 68 S. W. 311. A passenger ticket cannot be thus modified by an agreement with the train crew—Illinois Cent. R. Co. v. Harris (Miss.) 32 So. 309. If the subsequent oral agreement is an independent and consistent agreement it will not be construed as a modification—Cerrusite Min. Co. v. Steele (Colo. App.) 70 Pac. 1091. A sealed instrument cannot be modified in Illinois by a subsequent unexecuted oral agreement—Jones v. Chamberlain, 97 Ill. App. 328, but otherwise as to a contract not under seal—Palmer v. Bennett, 96 Ill. App. 281. A written lease cannot be modified in New York by a new oral agreement without further consideration—Spota v. Hayes, 36 Misc. (N. Y.) 532. In North Carolina a subsequent agreement relating to the manner in which the contract is to be performed may be shown—Hardwood Log Co. v. Coffin, 130 N. C. 432. Agreement by trustees and mortgagee for benefit of preferred creditors that another creditor will be included in the preference will be allowed to vary the preference in Michigan—Wolff v. Alpena Nat. Bank (Mich.) 92 N. W. 287. In New York a parol agreement extending the time of payment and increasing the rate of interest on a mortgage under seal which was not paid at maturity, is a valid modification of the mortgage—New York Life Ins. Co. v. Casey, 81 App. Div. (N. Y.) 92. And a subsequent oral agreement between the parties may work a modification of a written contract not under seal before breach—Eagle Iron Works v. Farley, 83 App. Div. (N. Y.) 82.

76. Copeland v. Hewett, 96 Me. 525.

77. An oral agreement reducing rent on a written lease is binding in Nebraska after payment and acceptance—Bowman v. Wright (Neb.) 91 N. W. 580. Parol modification of written contract binding in New York after performance though within the statute of frauds and no new consideration passed—Jackson v. Helmer, 73 App. Div. (N. Y.) 134.

78. Cleckley v. Mutual Fidelity Co. (Ga.) 43 S. E. 725.

79. Howard v. Scott (Mo. App.) 72 S. W. 709. A written contract between the same parties and embodying the same subject matter supersedes a previous oral contract—Curtis Bros. Lumber Co. v. McLoughlin, 80 App. Div. (N. Y.) 636. Where a contract for construction of an electric light plant under a certain statement for a certain price, was changed by substitution of another statement, the contractor could only recover for a reasonable value of the work done and not

modification which renders useless work already done under the original contract will not prevent liability therefor.[80] Alterations made orally by the owner in plans for buildings under construction accepted by the builder amount to a waiver of a contract requiring written evidence to render the owner liable.[81] A steamship company purchasing the property of another company thereby assumes a contract for shipment made by the latter company providing for substitution, on notifying the other party of such change.[82] Acceptance of a note from a debtor in security of a claim will not bind the creditor to extend the time of maturity of the debt to the maturity of the note except on clear proof that the parties so understood the arrangement.[83] Where railroad companies comply with contract for use of a bridge at a certain price for some time and then threaten to withdraw if a reduction was not made, a payment of a less amount by the companies for 19 years, which was accepted by the bridge owners amounted to a modification of the contract.[84] Where an engineer employed by a city to supervise and inspect the construction of a sewer system was directed by city council to take charge of the completion of the system after its abandonment by the contractor, he may bring an action to recover for services on a quantum meruit though he may have failed to perform some of the duties required by his prior contract.[85]

Merger.—Promises or agreements concerning terms of a contract made prior to or at the same time with the execution of the contract in writing are merged therein.[86] An agreement between parties for services which does not exactly settle the compensation therefor is merged into and extinguished by a subsequent agreement specifying full amount for satisfaction, and cannot be enforced merely because one party failed to perform the subsequent agreement.[87] Contracts made for the purchase of a certain business, the seller agreeing not to engage in such business while the purchaser remains therein, are not merged in a contract made several years later whereby the purchaser agreed on the seller's purchase of certain land and re-purchase of the business, not to engage in such business in a certain territory for a certain period.[88] Where water rents for irrigation purposes under a contract were not collected during the first year owing to a loss of crops for insufficiency of water, and the next year a new contract was made without demand for such previous rents, it will be presumed in an action to set aside for nonperformance that the debt of the first year was merged in the consideration for the later contract.[89]

§ 7. *Discharge of contract by performance or breach.*[90] *A. General rules.*—Either party to a contract may perform and charge the other with liability, without the latter's consent or acquiescence.[91] The question as to which of two parties first broke a contract depends not upon the demands of either beyond his rights thereunder but upon which failed first to do what he was required by its terms to do.[92] If a contract requires performance on demand, the demand is absolutely necessary to place the other party in default,[93] but if one party agreed to perform on demand

the price agreed upon in the original contract—Davis v. Bingham, 39 Misc. (N. Y.) 299.

80. Construction of modified contract—Flather v. Economy Slugging Mach. Co., 71 N. H. 398.

81. Crowley v. United States Fidelity & Guaranty Co., 29 Wash. 268, 69 Pac. 784.

82. Morris v. Wilson (C. C. A.) 114 Fed. 74.

83. Philadelphia v. Howell, 19 Pa. Super. Ct. 76.

84. Pittsburg, C., C. & St. L. R. Co. v. Dodd, 24 Ky. L. R. 2057, 72 S. W. 822.

85. City of Newport News v. Potter (C. C. A.) 122 Fed. 321.

86. Cannon v. Michigan Mut. Life Ins. Co., 103 Ill. App. 414.

87. Spier v. Hyde, 78 App. Div. (N. Y.) 151.

88. Adams v. Adams (Ind.) 66 N. E. 153.

89. Perkins v. Frazer, 107 La. 390.

90. Interpretation of terms fixing obligation, undertaking or acts to be done, see ante, § 4-K.

91. Central Coal & Coke Co. v. Geo. S. Good & Co. (C. C. A.) 120 Fed. 793.

92. Emack v. Hughes, 74 Vt. 382.

and notice and refused so to perform, a further demand is unnecessary.[94] The breach must relate to the identical contract,[95] but a breach of a second contract, entered into in contemplation of the first, and which constituted an inducement to one of the parties to enter into the first contract, is a good defense to an action for enforcement of the first contract as against his assignee.[96]

(§ 7) *B. Acceptance of performance; waiver of breach or insufficient performance.*—Acquiescence in a contract as performed, by payment or otherwise, amounts to acceptance,[97] unless the right of objection is expressly reserved as to subsequently discovered breach,[98] and persons claiming under the parties will be bound by their acceptance.[99] Acts which might otherwise amount to acceptance will not excuse latent defects.[1] A demand for performance after expiration of the contractual period amounts to an extension of time.[2] A specific rejection of performance and the pointing out of defects therein will prevent acceptance though such party himself directed performance.[3] Mere occupancy of a building by the owner or his tenant after completion will not excuse defective construction,[4] nor will his taking possession after expiration of the contractual period,[5] with the contractor's consent, to complete the construction.[6] Alterations of the plans by the owner in completing a building after default by the contractor will not affect the rights of the former.[7] Performance by one party may be waived by acts of the other,[8] and likewise lia-

93. Rodger v. Tollettes Co., 37 Misc. (N. Y.) 779. Where a party agreed to pay the consideration of a contract by raising crops on a farm during the current year, if possible, a demand by the other is necessary to put him in default, otherwise he will be given more time for performance—Thompson v. Easton, 73 App. Div. (N. Y.) 114.

94. Loeb v. Stern, 198 Ill. 371.

95. Macklem v. Fales (Mich.) 89 N. W. 581. The failure of an electric light company to bury its wires and paint its poles as required by an ordinance constitutes no breach of a contract with the city to furnish lights —Kaukauna Electric Light Co. v. City of Kaukauna, 114 Wis. 327.

96. Falvey v. Woolner, 71 App. Div. (N. Y.) 331.

97. Weekly action by a city on reports concerning progress of a building contract made by its agents after inspection and payments on their estimates amount to acceptance and prevent a claim of breach of the contract—Schliess v. City of Grand Rapids (Mich.) 90 N. W. 700. A delivery of a building to the owner who went into possession under an agreement that he accepted, except with regard to certain alterations then agreed upon, constituted an unequivocal acceptance of the work, where the alterations were subsequently performed to the satisfaction of the architect—Vanderhoof v. Shell, 42 Or. 578, 72 Pac. 126. A contractor who failed to put his men and the teams at work so as to complete the contract in the time fixed, by afterward permitting the other party, without objection, to complete the work, and by assisting him in so doing waived his right to insist on a fulfillment by a date fixed in the contract—McArthur Bros. Co. v. Whitney, 202 Ill. 527. Where a father contracted with his daughter for the occupancy of his house, to be hers on his death on certain conditions, one of which was that she must pay the taxes, a payment of taxes by the father after the daughter's failure to pay while she was in possession amounted to a waiver of forfeiture where he made no complaint at the time, and a devisee of the house 11 years after his death who had known of her payment of taxes during that time could not raise any ground of forfeiture and avoid the contract—Sheldon v. Dunbar, 200 Ill. 490.

98. Temporary settlement on a contract for work with provision that the contractor shall be liable for any defects subsequently discovered will expressly bind him for any breach in performance—Brownell Imp. Co. v. Critchfield, 197 Ill. 61.

99. A failure to comply with the terms of a contract cannot be raised by persons claiming under another party where the latter has excused the nonperformance or default. Contract for location of lands at expense of locator—Lane v. De Bode (Tex. Civ. App.) 69 S. W. 437.

1. Payment or part payment on the contract—Charley v. Potthoff (Wis.) 95 N. W. 124. An owner is not precluded from showing defects in material used in a building which were latent, merely because he used finishing material provided without discovering such defects—Utah Lumber Co. v. James, 25 Utah, 434, 71 Pac. 986.

2. Building contract—Krause v. Board of School Trustees (Ind. App.) 66 N. E. 1010.

3. Building contract—Mitchell v. Williams, 80 App. Div. (N. Y.) 527.

4. Mitchell v. Williams, 80 App. Div. (N. Y.) 527.

5. Cannon v. Hunt, 116 Ga. 452.

6. The act of the owner is a privilege and raises no duty to the contractor—Mitchell v. Williams, 80 App. Div. (N. Y.) 527.

7. Changes in detail which might reasonably be made—Delray Lumber Co. v. Keohane (Mich.) 92 N. W. 489.

8. A life insurance company cannot refuse to fulfill its contract to make a loan on a policy for failure of deposit of the original policy, where it was lost and on notification the company furnished a certified copy and received premiums thereon—Reid v. N. Y.

bility for defective performance.[9] The acts of unauthorized agents or representatives will not, however, amount to such waiver of defects.[10] A delay of a few days by one party before refusing a demand by the other for performance will not prevent the reliance of the former on a prior breach of the demanding party, where it appears that he had no intention of waiving his rights and was not fully informed as to the acts of the other.[11] The rule that acceptance without objection or failure to object within a reasonable time after knowledge of facts or opportunity of knowledge will waive defects in performance does not apply to acceptance of an exhibit by a theatrical company by one who has engaged it to perform in his theater where he has already rented the theater, sold the tickets, and invested the proceeds in advertising.[12] Acceptance by the owner will not bind the surety as to compensation if his liability is thereby changed.[13]

(§ 7) *C. Excuses for nonperformance.*[14]—Where failure in performance of a contract was entirely due to acts of one party over which the other had no control, it constitutes no defense to the claim of the latter for compensation.[15] The existence of undisclosed conditions cannot be assigned by the party as an excuse for failure,[16] or delay in performance of a contract.[17] Inability of a party to perform his contract can never be made a defense to an action for breach, unless that inability amounts to an impossibility,[18] but impossibility of performance will relieve him of performance of provisions of a contract which entitle him to enforcement of other provisions as against the other party.[19] That subsequent circumstances, which might have been in contemplation of the parties at time of making a contract, render its completion impossible will not relieve the party in default from liability to the other in accordance with its terms.[20] Where a party diligently attempted to

Life Ins. Co., 65 S. C. 295, 43 S. E. 654. A condition in a contract that each of the parties should deposit in a certain bank his certified check for a certain amount payable to the other as security for the faithful performance of the contract is waived by the acceptance by each party of the other's uncertified check, but such waiver does not affect the remaining portions of the contract and its provisions as to venue of actions brought thereon are still in force—Millar v. Smith (Tex. Civ. App.) 67 S. W. 429.

9. Breach of a contract for the carriage of goods by a vessel because of the insufficient capacity of the vessel cannot be claimed where it appears that no complaint was made on that account at the time of loading nor until after two voyages for which it was chartered had been completed—Gow v. William W. Brauer S. S. Co., 113 Fed. 672.

10. An acceptance of work under a contract by the United States and payment of compensation after a test by officers designated for that purpose will not prevent the United States from holding the contractors liable for subsequently discovered defects, where made in ignorance of the defects which could not be discovered in the test though its engineers had knowledge of them but were without authority to waive objections or bind the government by estoppel—United States v. Walsh (C. C. A.) 115 Fed. 697.

11. Loudenback Fertilizer Co. v. Tennessee Phosphate Co., (C. C. A.) 121 Fed. 298.

12, 13. Charley v. Potthoff (Wis.) 95 N. W. 124.

14. Where the whole consideration for a promise not to charge interest on money lue was a promise by the other party to furnish goods at a certain price, and the whole consideration of the promise to furnish such goods was the promise of the other not to charge such interest, the promises were not independent and the failure of one to perform excuses the other from liability—Schmidt v. Mitchell, 117 Ga. 6.

15. Walsh v. Hyatt, 74 App. Div. (N. Y.) 20.

16. Where a contract bound a party to erect a building upon such site as might be selected by the other parties, that difficulties were encountered in laying of the foundation by reason of the weakening of the soil by its previous use as a cemetery, did not relieve him from performing the contract in a good and workmanlike manner according to its terms, and such conditions must be held to have been considered by him in making his terms for the contract—Zimmerman v. Conrad (Mo. App.) 74 S. W. 139.

17. First Nat. Bank v. Park, 117 Iowa, 552.

18. Bates Mach. Co. v. Norton Iron Works (Ky.) 68 S. W. 423.

19. Sale of mining lease under a provision calling for its operation by the purchaser and sale of its ore and for a repurchase by the seller at the expiration of one year in consideration thereof—Buchanan v. Layne, 95 Mo. App. 148.

20. A contract for transportation of contract labor from one country to another, legal in both countries when made, is not abrogated by passage of a regulation in the midst of performance which prevents securing the laborers so as to absolve the importer for liability for the hire of the ship for the remaining voyages—Tweedie Trad-

perform, but on account of unavoidable circumstances was prevented, he will have performed sufficiently by tendering performance at the earliest possible moment, if no demand has previously been made upon him.[21] That work under a contract costs more than any one anticipated, will not excuse breach of the contract.[22] Where one party notifies the other that he will not complete a contract partly performed, the other is not required to perform further.[23] Failure to perform does not amount to a breach where it was to follow performance by the other party who failed.[24] A breach,[25] or forfeiture cannot be asserted on a contract where the party to perform has been improperly interfered with by the other party,[26] or caused delay in performance by the other.[27] If there is no time limit in a building contract, a delay of three weeks because of a strike will not prevent recovery.[28] Where an engineer in charge of a construction contract has full authority to order necessary changes, his unreasonable action in ordering them will not excuse performance by the contractor.[29] Where a party performs his contract as required by its terms, which do not contain a guaranty as to its permanence, he is not responsible for loss arising from the natural conditions as to which risks would be assumed by the other party.[30] Where a party to a contract for the harvest of grain fails to commence until ten days after the time agreed upon for beginning, whereby much of the grain was

ing Co. v. James P. McDonald Co., 114 Fed. 985; James P. McDonald Co. v. Tweedie Trading Co., Id.

21. Contract for the delivery of small fruit vines to be raised which it was impossible to raise during the following year because of a drought—Thompson v. Easton, 73 App. Div. (N. Y.) 114.

22. Hanthorn v. Quinn, 42 Or. 1, 69 Pac. 817.

23. Miller v. Sigler (Mo. App.) 69 S. W. 479; Wallingford v. Aitkins, 24 Ky. L. R. 1995, 72 S. W. 794. Where work already done under a partial performance of a contract is rejected by the other party, the contractor is excused from further performance, if the work has been performed in compliance with the contract—Davis v. Bowers Granite Co. (Vt.) 54 Atl. 1084.

24. Griffin v. Bass Foundry & Machine Co., 135 Ala. 490; La Vallette v. Booth, 131 N. C. 36.

25. Where the merging of the business of a firm into a corporation rendered it impossible for a party to a contract with the firm to determine how much ice was necessary for its use, the firm could not recover for breach of a contract by refusal of such party to comply with the contract requiring the furnishing of ice for the retail trade of the firm—Consumers' Ice Co. v. E. Webster, Son & Co. 79 App. Div. (N. Y.) 350.

26. Building contract—King v. United States, 37 Ct. Cl. 428. One who prevents exercise of an option he has granted within the time specified must give a reasonable time thereafter for exercise—Blodgett v. Canyon Zinc Co. (C. C. A.) 120 Fed. 893.

27. Failure in completion by appointed time—Ocorr & Rugg Co. v. City of Little Falls, 77 App. Div. (N. Y.) 592. Where a contract is made for the furnishing of certain materials in weekly quantities, and the purchaser notifies the seller not to deliver, but subsequently requests him to resume delivery, which he does, the seller is not liable on failure to complete the contract, for the extra cost of materials which the purchaser had to buy elsewhere—Pitts v. Davey, 40 Misc. (N. Y.) 96. Failure to complete a building within the time specified because of failure of the owner to comply with requirements of building department, and because further of an alteration of the work, and neglect of the owner's architect to furnish sufficiently detailed plans, will not bar recovery on the contract, especially where the season during which the work was done was unusually wet and the owner made no complaint as to delay—Perry v. Levenson, 82 App. Div. (N. Y.) 94. Where delay in a building contract was caused by the owner's decision to change from the use of mortar to adamant whereby other contractors were secured to do part of the work, which was not done promptly nor in workmanlike manner, and by reason of which the contractor was delayed in completing the building, he could recover a reasonable allowance of extra time in computing the number of days of delay for which the owner was entitled to damages under the contract—Vanderhoof v. Shell, 42 Or. 578, 72 Pac. 126.

28. Happel v. Marasco, 37 Misc. (N. Y.) 314.

29. National Contracting Co. v. Com. (Mass.) 66 N. E. 639.

30. Construction of a wall which was ruined by freezing of mortar—Schliess v. City of Grand Rapids (Mich.) 90 N. W. 700. Where lumber which had been sawed by one of the parties to a contract under its terms was burned in the yards before delivery through fault of neither party, compensation could still be recovered for its manufacture—Rhodes v. Hinds, 79 App. Div. (N. Y.) 379. The owner of an iron mill is not liable for nonperformance under a contract to furnish its output, providing that he should not be liable for loss or damage arising from failure to perform, because of fire or strikes and giving the other party the right to transfer the contract to other manufacturers, if they so desire, where the mill was destroyed by fire before full performance—Western Hardware & Mfg. Co. v. Bancroft-Charmley Steel Co. (C. C. A.) 116 Fed. 176.

lost by shelling, the fact that such shelling was caused by the high winds did not make the loss an act of God, so as to relieve him from liability.[31] Though a contract will not be discharged by the intervention of an act of God rendering performance impracticable, yet if it is apparent from the nature of the contract that the parties intended that it should rest on the continued existence of a given person or thing, there is an implied condition that if performance becomes impossible from the death of the person or the destruction of the thing, performance is excused, and this in spite of unqualified promissory words.[32]

(§ 7) *D. Sufficiency of performance; acts amounting to breach.*[33]—Performance of an entire contract must be complete and not partial to require acceptance by the other party.[34] Proper performance of a contract is required though the contract

31. Holt Mfg. Co. v. Thornton, 136 Cal. 232, 68 Pac. 708.

32. Dow v. State Bank of Sleepy Eye (Minn.) 93 N. W. 121.

33. Pungs v. American Brake Beam Co., 200 Ill. 306; Wallace v. Williams (Tenn.) 69 S. W. 267. Sufficiency of performance of service in examination of a subway by an electrical expert to entitle him to compensation—Rosewater v. Glen Telephone Co., 81 App. Div. (N. Y.) 275. Contract for exclusive lease of building for sale of liquors as to performance or breach—Wallace v. Williams (Tenn.) 69 S. W. 267. Payment of moneys coming to the hands of a mortgagee of premises for the owner to the latter amounts to a breach of an agreement between the mortgagee and a sub-contractor furnishing supplies to erect a house that the former would withhold such money as security if the latter would continue to furnish the materials—Prata v. Green, 70 App. Div. (N. Y.) 224. An agreement to discontinue a pending action without further costs is broken by the entry by plaintiff's attorney of a judgment to protect his lien, thereby imposing more costs—Rosenthal v. Rudnick, 76 App. Div. (N. Y.) 624. Unskillful performance of a contract by construction of defective machinery under a contract for first class appliances is an active violation of a contract—Payne v. Amos Kent Brick & Lumber Co. (La.) 34 So. 763. Failure to follow plans and specifications of a building and use of poor material so that the floors were so unlevel that furniture leaned forward or to the side, the roof leaked and the doors and windows could not be closed, was an open violation of the contract—Sarrazin v. Alfred A. Adams & Co. (La.) 34 So. 301. An attempt to disinherit one with whom a contract was made for services in consideration of a legacy at death of the promisor is a breach thereof entitling the other to recover the reasonable value of her services—Clark v. West (Tex.) 73 S. W. 797. Where sufficient money was advanced, under a contract with attorneys to carry on litigation, to preserve the proceedings from default, a failure of the attorneys to proceed because of refusal of the other party to advance more moneys amounted to a breach relieving the other party from performance; likewise a failure of a member of the firm to give his personal attention to the case according to the contract amounts to a breach—Nelson v. Hatch, 70 App. Div. (N. Y.) 206. A contract for the purchase of fishing plants on the Atlantic Coast and for the good will of the sellers, stipulating that they were not to engage in fishing or the manufacture of certain fishing products for 20 years on the Atlantic seaboard, included all waters on the eastern coast of the United States and was violated by the sellers going into Chesapeake Bay and conducting fishing operations both within and outside the bay, nor are these consequences of the contract relieved by the fact that the purchasers, being a non-resident corporation, were prevented by law from fishing within such waters—American Fisheries Co. v. Lennen, 118 Fed. 869.

34. Price v. Engelke (N. J. Sup.) 53 Atl. 698. There was a breach of a building contract to be completed within a stipulated time, where the work had not followed the stipulations though completed at the time for delivery—Hay v. Bush (La.) 34 So. 692. Where boilers to be furnished for a heating plant under a contract, were to be subjected to three particular tests, each was an essential element of the contract and a failure in any one regard constituted a breach thereof—Heine Safety Boiler Co. v. Francis Bros. (C. C. A.) 117 Fed. 235. If a contract fixes no time for payment, substantial performance of the entire contract is necessary to render the other party liable for the whole or any part of the consideration, though prices may be fixed on different portions of the work and materials. Contract for placing heating plant in building under schedule giving price for materials and labor—Riddell v. Peck-Williamson Heating & Ventilating Co., 27 Mont. 44, 69 Pac. 241. Where one of the joint owners of a large plantation failed to account to his co-owners for five years as required under a contract for the exclusive charge and management of such plantation, though repeatedly requested so to do, there is a breach of the contract rendering it null—DeRouen v. Romero (La.) 34 So. 415. An arrangement concerning debts merely good between the parties thereto will not amount to performance of a contract to secure an assignment of stock to be held as security for notes to be valid as against attaching creditors—First Nat. Bank v. Park, 117 Iowa, 552. Where a building contract required work to be done in a thorough workmanlike manner to the owner's satisfaction before he will become liable for the price, a finding that the contractor had failed to finish the work to the extent of one seventh the value of the price, but that there was a substantial performance and that the owner should pay six-sevenths of the agreed price, was not in ac-

is silent in that regard,[35] but a party who has fully performed is not liable for unsatisfactory results from performance.[36] Substantial performance will entitle the party to recovery,[37] but substantial performance cannot be shown, where such party has departed willfully and intentionally from the contract,[38] nor can custom or usage be employed in defiance of positive terms of a contract.[39] Acts not called for by the contract cannot be required.[40] A breach of the contract occurs when one of the parties refuses to be bound by its terms.[41] Where part performance was to be made at stated periods, failure at expiration of one period is a breach of the whole contract.[42] Delay in performance may amount to a breach,[43] as may also acts preventing performance by the other party.[44] The making of a similar contract for

cordance with the terms of the contract—Mitchell v. Williams, 80 App. Div. (N. Y.) 527.

35. Though a building contract does not describe the materials to be furnished or the manner in which the work is to be done, the contractor must select the proper materials and perform the work properly—Cannon v. Hunt, 116 Ga. 452.

36. Building contract carried out as to work and quality of materials—Cannon v. Hunt, 116 Ga. 452. Where a contract to erect a passenger elevator called for a motor of a certain strength, the purchaser could not complain if such motor was furnished, though the conditions required one of larger power—Morse v. Puffer, 182 Mass. 423. Where a contractor had followed the specifications given him carefully but had failed to complete the work to the satisfaction of the commissioners and the architect who were to be the final arbiters, he was entitled to recover without re-construction—Dwyer v. New York, 77 App. Div. (N. Y.) 224.

37. City of Elizabeth v. Fitzgerald (C. C. A.) 114 Fed. 547; Perry v. Levenson, 82 App. Div. (N. Y.) 94; Anderson v. Harper, 30 Wash. 378, 70 Pac. 965. Where a building contract provides for extra compensation for changes in the original plans, the contractor may recover therefor, though he did not make the changes at the time they were ordered—Essex v. Murray (Tex. Civ. App.) 68 S. W. 736. A contract to build the road of a street railroad company to a certain place, does not fail of fulfillment because the builder provided for the use of part of a track constructed by another company, since it will be presumed that both parties entered the contract with knowledge that such use was permitted by law, nor did the construction of a single track, where the railway turned a corner, amount to a violation of the contract, though it stipulated for a double track railway—Los Angeles Traction Co. v. Wilshire, 135 Cal. 654, 67 Pac. 1086.

38. Harris v. Sharples, 202 Pa. 243, 58 L. R. A. 214. Failure to follow plans—Sarrazin v. Alfred A. Adams & Co. (La.) 34 So. 301. Substitution of inferior materials and workmanship—D'Amato v. Gentile, 173 N. Y. 596; Loudenback Fertilizer Co. v. Tennessee Phosphate Co. (C. C. A.) 121 Fed. 298. If a contractor used different materials from those specified in the contract, the owner may recover damages though materials used are nearly as good as those required—Cannon v. Hunt, 116 Ga. 452. Where a contract called for the delivery of bonds on a certain day named or payment of their amount in cash, a delivery or tender of an accepted order on the treasurer of the corporation having them in charge for delivery of the bonds when they should be issued, was not a fulfillment of the contract and entitled the other party to claim the cash payment—Barrett v. Twin City Power Co., 118 Fed. 861. Where a contractor was prohibited by his contract from subletting work without the consent of the architect and was compelled to submit all the material to the latter, he was liable for a breach of a sub-contract which was made without following these requirements, though they might have constituted a good defense to the owners as against the sub-contractor—Herry v. Benoit (Tex. Civ. App.) 70 S. W. 359.

39. A contract to furnish catalogue covers based upon a proof in which the firm name of the printers did not appear at the bottom of the last page, is not fulfilled by the printing of such covers with such name so represented, without permission of the other party, though it is customary for printers to submit proofs without such imprint and to place it on the copy afterwards unless otherwise ordered, and though the artistic effect was not thereby diminished—Harris v. Sharples, 202 Pa. 243, 58 L. R. A. 214.

40. Dudley v. Sanders Mfg. Co., 114 Fed. 981. Failure to prosecute appeal from a decision of land commissioners is not a breach of a contract to apply to the proper authorities for the establishment of a right of preferment to the purchase of certain tide lands—Schwede v. Hemrich, 29 Wash. 124, 69 Pac. 643.

41. Northrop v. Mercantile Trust & Deposit Co., 119 Fed. 969.

42. National Mach. & Tool Co. v. Standard Shoe Machinery Co., 181 Mass. 275; Anderson v. McDonald (Wash.) 71 Pac. 1037.

43. Failure to operate a mine under a contract impliedly requiring operation with reasonable diligence amounts to a breach of the contract—Sharp v. Behr, 117 Fed. 864.

44. Refusal of an employer to make payments on a contract for work and labor providing for cash payments or to allow laborers to proceed—Anderson v. McDonald (Wash.) 71 Pac. 1037. Failure of a sugar manufacturer to receive cane from a grower under a contract due to the defective condition of a tram road built under his supervision—Robichaux v. Segura Sugar Co. (La.) 34 So. 744. Where a contract was made for delivery of materials in weekly installments for a certain period, but the seller was notified not to deliver after the first delivery, until further notice, there was a breach preventing performance of the contract if it

services with another party is not a breach of the first unless damage results to the other party on the first contract, especially where made with knowledge and consent of the latter.[45] The beginning of bastardy proceedings is a breach of a settlement by the mother with the father in consideration of which she agrees not to make further claim upon him.[46]

(§ 7) *E. Rights after default or nonperformance.*[47]—Where one party to an executory contract elects to treat it as in full force after breach by the other who has partially performed, the latter is entitled to receive the benefits resulting from partial performance and is liable for any damages resulting from the breach.[48] That part of payments made by one party to another, under an agreement that the latter should purchase property to be conveyed by him to the former, were made to a third person for such party does not affect the right to recover them back on a default in conveyance where all payments were made on the promises for conveyance.[49] Where by the provisions of the contract, the owner, on default of the contractor, may proceed to complete construction, using materials placed on the ground by the contractor, the owner has such a qualified right to the property in such materials as to make them a security for advances on the contract and to give him the right to their use for its fulfillment.[50] Where a contract provided that proceeds of certain claims should be equally divided among three parties after deducting expenses, one who received his proportionate share after deduction of expenses cannot complain because payment of the balance of a certain item of expense was not equally divided between the others.[51] Where a contract binding an advertiser to provide the publisher with copy was broken immediately by countermanding of the order, the publisher was not entitled to insert matter prepared by himself in the space covered by the contract which tended to advertise the business of the other party and then sue for the contract price.[52] A contract for digging a well, requiring that the landowner should furnish board for the employes and feed for the teams, required the contractors to use all reasonable diligence and care in completing the work, and if the first attempt failed through negligence, they were not entitled to a second trial.[53]

§ 8. *Damages for breach.*[54]—Where a contract is actively or visibly violated, default is not necessary to recovery of damages,[55] but a loss or detriment must have

could have been fulfilled without such interference—Pitts v. Davey, 40 Misc. (N. Y.) 96.

45. Contract to secure shipment of produce over a certain railroad in consideration of a freight commission made by one already having such a contract with another railroad made with knowledge and assent of president of first railroad company—Paul v. Delaware, L. & W. R. Co., 72 App. Div. (N. Y.) 449.

46. Schnurr v. Quinn, 83 App. Div. (N. Y.) 70.

47. Where one who has failed to collect a judgment on a certain trust deed and notes sues for damages for breach of a contract for repurchase of the securities by the person from whom he bought, the latter cannot contend that in event of payment he would be entitled to the deficiency judgment—Loeb v. Stern, 198 Ill. 371.

48. Orr v. Cooledge, 117 Ga. 195.

49. Hayes v. Stortz (Mich.) 90 N. W. 678.

50. Duplan Silk Co. v. Spencer (C. C. A.) 115 Fed. 689.

51. Adams v. Crown Coal & Tow Co., 198 Ill. 445.

52. Wm. E. Peck & Co. v. Kansas City Metal Roofing, etc., Co., 96 Mo. App. 212.

53. Peacock v. Gleesen, 117 Iowa, 291.

54. The question of damages is treated fully in the title "Damages."

55. Payne & Joubert v. Amos Kent Brick & Lumber Co. (La.) 34 So. 763. Particular cases showing application of rules and estimating damages for breach of contract—Jeffery v. Babcock, 98 Ill. App. 15; Knowlson v. Piehl (Mich.) 90 N. W. 415; Miller v. Sigler (Mo. App.) 69 S. W. 479; Deering v. Johnson, 86 Minn. 172; Rule v. McGregor, 115 Iowa, 323; Boughton v. Petigny, 72 App. Div. (N. Y.) 76; Meyer v. Haven, 70 App. Div. (N. Y.) 529; Bates Mach. Co. v. Norton Iron Works (Ky.) 68 S. W. 423; Griffen v. Sprague Electric Co., 115 Fed. 749. Damages for breach of a contract to deliver stock on demand, which had been bought by a broker on a margin, is the highest intermediate value of stocks between the default and the time reasonably following such default, before which the customer, with notice, has reasonable opportunity to replace the stocks—In re Swift, 114 Fed. 947; Ex parte Harrigan, Id. Damages for breach of a contract to make a loan is the difference between the rate of interest under the contract, and the rate, not exceeding the local rate, which the borrower was required to pay elsewhere, unless it appears that the

befallen.[56] Reasonable diligence to prevent damages by reason of breach is required.[57]

The general rule for estimating damages for breach of a contract is the difference between what plaintiff would have received had the contract been performed and what he actually received thereunder if anything.[58] It must be such amount as will compensate the injured party for the breach.[59] The evidence of damages for breach of a contract must be reasonably certain and not given to speculation and conjecture,[60] else a verdict may be directed.[61] Such damages as are the natural and probable consequence of the breach of a contract are not too remote or speculative to be awarded in an action thereon,[62] and damages naturally arising from circumstances which may reasonably be considered to have been in contemplation of

money was to be used for a special purpose and could not be procured elsewhere—New York Life Ins. Co. v. Pope, 24 Ky. L. R. 485, 68 S. W. 851. Damages for breach of contract for services as manager for a few days, as excessive—Hoover v. Haynes (Neb.) 91 N. W. 392. Amount of damages for breach of contract for services of an actress—Evesson v. Ziegfeld, 22 Pa. Super. Ct. 79. Damages for failure to construct a building according to contract are measured by the difference between the value of the building as constructed and its value as it should have been constructed, and not the cost of alteration to make it conform to the contract—Walter v. Hangen, 71 App. Div. (N. Y.) 40.

56. Damages cannot be recovered for refusal to make a loan unless it is shown that plaintiff could not secure the money elsewhere at the same rate of interest agreed upon—New York Life Ins. Co. v. Pope, 24 Ky. L. R. 485, 68 S. W. 851.

57. Error of judgment is not want of diligence—The Thomas P. Sheldon, 113 Fed. 779; The S. L. Watson, Id. The damnified party is not required to take steps which would result in a further loss to himself—Tradewater Coal Co. v. Lee, 24 Ky. L. R. 215, 68 S. W. 400.

Where the other parties to a contract could not reasonably do otherwise than to accept its performance, though unskillful, and to make the best possible use of appliances furnished in their defective condition, he did not thereby waive his right to damages—Payne & Joubert v. Amos Kent Brick & Lumber Co. (La.) 34 So. 763. By going into possession while the contractor was at work, the owner of a building estopped herself from recovery for delay in delivery of the building—Sarrazin v. Alfred A. Adams & Co. (La.) 34 So. 301.

58. Truitt v. Fahey (Del. Super.) 52 Atl. 339.

59. Standard Oil Co. v. Denton, 24 Ky. L. R. 906, 70 S. W. 282. For breach of a contract to install a plant it is the difference between the contract price and the amount which it would have cost plaintiff—Wood v. Wack (Ind. App.) 67 N. E. 562. On a contract to provide for plaintiff during life it is the cost of such care during life of plaintiff less the costs of the care already received—Poston v. Eno, 91 Mo. App. 304. The measure of damages to a party who is prevented from performing his contract by repudiation of the other is the profits which would have accrued from full performance, with interest from time of refusal, including commissions paid by the party to his agent for obtaining the contract—Peck-Hammond Co. v. Heifner, 136 Ala. 473. The measure of damages for breach of a contract of service before performance is begun is the contract price less the amount that might be obtained by the exercise of reasonable diligence for the same services from other parties—Wm. E. Peck & Co. v. Kansas City Metal Roofing & Corrugation Co., 96 Mo. App. 212. Where a building contract was performed in an unworkmanlike manner and out of poor material, a balance remaining in payment on the contract was allowed to the owner in order to put the building in a proper condition of construction—Sarrazin v. Alfred A. Adams & Co. (La.) 34 So. 301. Contract for service dependent on peculiar ability of plaintiff—United Press v. A. S. Abell Co., 79 App. Div. (N. Y.) 550.

On breach of contract for sale the measure of damages is the difference between the price to be paid and money value at time of breach, not exceeding the amount demanded in the suit—Wallingford v. Aitkins, 24 Ky. L. R. 1995, 72 S. W. 794; but in Michigan the measure of damages for refusal to accept personal property on a sale, after tender, is fixed by law at the contract price. Express provisions of Comp. Laws § 4590, as to property, the title to which is vested by reason of tender under § 3258—Dowagiac Mfg. Co. v. Higinbotham, 15 S. D. 547.

60. Truitt v. Fahey (Del. Super.) 52 Atl. 339.

Evidence of sales of similar goods between the time of the breach of the contract and the time of trial may be shown as bearing upon the damages resulting to plaintiff, by loss of profits—Hichhorn v. Bradley, 117 Iowa, 130. Where the price of the sale of cane for sugar was to be regulated by the market price of sugar, evidence of what defendant paid during the season for cane received under a contract with plaintiff and under similar contracts with other cane growers is properly admitted and the average of such price may be accepted as the price which cane lost by reason of defendant's negligence would have brought, if he had accepted delivery according to contract—Robichaux v. Segura Sugar Co. (La.) 34 So. 744.

61. Raymond v. Yarrington (Tex. Civ. App.) 69 S. W. 436.

62. Herring v. Armwood, 130 N. C. 177; Holt Mfg. Co. v. Thornton, 136 Cal. 232, 68 Pac. 708.

the parties at time of contract may also be awarded.[63] Interest may be allowed as an element of damages from the time of the commencement of the action,[64] but if the damages be unliquidated they must be certain and definite in their possibility of estimation.[65] The damages may also include any moneys plaintiff may have advanced on the contract or expense which he may have incurred.[66]

Prospective profits may be recovered where they are not so uncertain as to be incapable of proof,[67] but mere speculative and conjectural estimates of profits which might possibly have been made cannot be allowed.[68] The deprivation of intellectual enjoyment and mental suffering may be elements of damages resulting from breach of a contract in Louisiana.[69]

A party who without fault fails to completely perform may recover for what he has done.[70] His measure of damages is such proportion of the entire price as the fair cost of the work done bears to the fair cost of the whole work, together with special profits in respect to the work not done as he would have realized by performing it.[71]

The contract may itself specify and fix what shall be the recovery for a breach,[72] but an unreasonable penalty will not be enforced.[73] General damages may be recovered in addition to a stipulated right to deduct from the price enough to complete an abandoned contract.[74]

§ 9. *Rescission and abandonment of contract.*[75] *A. Contracts which may be*

63. Meyer v. Haven, 70 App. Div. (N. Y.) 529. Where a passenger rented a stateroom on a steamer for the night, but failed to notice a condition on the back of his ticket reserving the right to the carrier to resell rooms not called for within 30 minutes after departure, and did not call for his room within that time so that it was resold, and was refused the return of his money or another room, so that he was compelled to sit up all night, he was not entitled to exemplary but might recover actual damages—Clark v. Railroad Co., 40 Misc. (N. Y.) 691.

64. Roussel v. Mathews, 62 App. Div. (N. Y.) 1; Peck-Hammond Co. v. Heifner, 136 Ala. 473. In an action on a breach of warranty of chattels, interest may be allowed on the difference between the actual worth of the chattels and their value had they been as represented—Ash v. Beck (Tex. Civ. App.) 68 S. W. 53. Damages for delay in the carriage of live stock—Texas & P. Ry. Co. v. Smissen (Tex. Civ. App.) 73 S. W. 42.

65. Dady v. Condit, 104 Ill. App. 507; Brownell Improvement Co. v. Critchfield, 197 Ill. 61.

66. Nelson v. Hatch, 70 App. Div. (N. Y.) 206.

67. Profits from increase of a flock of sheep—Schrandt v. Young (Neb.) 89 N. W. 607. Profits from cattle to be kept by plaintiff and sold for profits to be divided between parties—Rule v. McGregor, 115 Iowa, 323. The amount to be recovered is not limited to the actual expenses to be incurred by the plaintiff, but may include whatever chance of profits he may have derived from contracts, the performance of which was prevented by the breach—Pender Lumber Co. v. Wilmington Iron Works, 130 N. C. 584. On breach of a contract to deliver lumber within a certain time, the injured party may recover to the amount of the loss sustained on profits of his business of which he has been deprived—E. B. Williams & Co. v. Bienvenue, 109 La. 1023.

68. Douglass v. Railroad Co., 51 W. Va. 523.

69. Lewis v. Holmes, 109 La. 1030.

70. Tichenor v. Bruckheimer, 40 Misc. (N. Y.) 194. Where a party to a contract is prevented in its completion by the other after part performance, the measure of damages is the contract price for the work already done and not its market price—Hoyle v. Stellwagen, 28 Ind. App. 681.

71. Wilson v. Borden (N. J. Err. & App.) 54 Atl. 815.

72. Where a contract was made for the conduct of certain litigation in consideration of conveyance of certain lands at a specified time, or in default thereof of payment of a certain amount of money after failure in the conveyance, the other party was entitled to recover the full amount specified by the contract and was not limited to actual damages—Ehrich v. Durkee (Colo. App.) 72 Pac. 814. Though the essential features of a scheme for securing and publishing classified advertisements were not originated by the seller, if certain forms by which it was to be effected were devised by him, to that extent the use of the scheme by a purchaser was such a use of the plan as entitled the seller to recover the amount of stipulated damages provided for in a contract of purchase and sale—Taylor v. Times Newspaper Co. (Minn.) 93 N. W. 659.

73. No evidence was offered as to actual damage sustained—Zimmerman v. Conrad (Mo. App.) 74 S. W. 139.

74. McGrath v. Hogan, 72 App. Div. (N. Y.) 152.

75. See Cancellation of Instruments, ante, p. 413, which treats of the procedure to annul written instruments. Rescission or abandonment of contracts with United States, see "United States."

rescinded; manner of rescission.[76]—A marriage contract cannot be rescinded or modified except as provided by laws of the land even though one or both of these parties may have violated its terms or obligations.[77] Negligence of a party will not prevent his right to rescind the contract, if the other party has not been injured by such negligence.[78] If a contract is made for the benefit of a third person, neither of the immediate parties can rescind it or prejudice the rights without his consent.[79] If the parties to a contract deal with the subject matter in a manner which shows no intention to demand a strict compliance with the terms as to time, neither will be permitted to rescind without giving the other a reasonable opportunity to perform.[80] Though according to its terms a contract may be terminated at will of either party on reasonable notice, it does not follow that it is binding upon them as long as they continue to act thereunder before revocation or termination.[81] A mere claim by one party that the other had broken the contract and that he had acted in accordance with such breach is insufficient to show a rescission.[82] A contract in writing for sale of realty may be rescinded by parol.[83] A building contract providing that if the contractor is not proceeding with sufficient dispatch or is departing from the plans, the contract may be canceled after due notice, cannot be canceled by the other party solely on his own decision as to the state of the work and its performance by the contractor.[84]

(§ 9) *B. Causes for rescission. Mistake; default or defective performance.*[85]—That a mistake may be ground of setting aside a contract, it must have been mutual and rescission must be made without delay after discovery;[86] then the party, who relied on the representations of the other who knew he was so relying, may rescind.[87] A willful failure of one party to a contract to perform will entitle the other to a rescission without alleging or proving fraud,[88] unless the latter knew of and sanctioned the default.[89] Violation of a contract will warrant cancellation,[90] but not unless the party is injured by it,[91] or where the violation was due to unauthorized acts of

76. Expense incurred by lessee as precluding termination of lease by lessor under its terms—American Window Glass Co. v. Williams, 30 Ind. App. 685. A suit in equity by the grantor in an absolute deed for a reconveyance under an oral agreement made when the deed was executed, was not an election to treat such oral agreement as rescinded, so as to prevent him from suing for the damages for its breach, where it did not appear that the suit sought a remedy without the oral contract or specific performance of it, and defendant's answer did not plead the statute of frauds and relied on the oral agreement—Hurley v. Donovan, 182 Mass. 65.

77. Palmer v. Palmer (Utah) 72 Pac. 3.

78. Failure to docket mortgage—Jones v. Glathart, 100 Ill. App. 630.

79. Tweeddale v. Tweeddale (Wis.) 93 N. W. 440.

80. Price v. Beach, 20 Pa. Super. Ct. 291.

81. Kenny v. Knight, 119 Fed. 475.

82. Walsh v. Hyatt, 74 App. Div. (N. Y.) 20.

83. Mahon v. Leech, 11 N. D. 181.

84. Hoyle v. Stellwagen, 28 Ind. App. 681.

85. Mistake as ground of rescission—Illinois Cent. R. Co. v. Manion, 23 Ky. L. R. 2267, 67 S. W. 40.

86. Travelers' Ins. Co. v. Jones (Tex. Civ. App.) 73 S. W. 978.

87. Garrett Co. v. Halsey, 38 Misc. (N. Y.) 438.

88. Agreement to deed farm at death in consideration of support during life—Howlin v. Castro, 136 Cal. 605, 69 Pac. 432. Abandonment of the contract will justify rescission—Vickers v. Electrozone Commercial Co., 67 N. J. Law, 665. Where in violation of the terms of a contract one of the parties failed to make payments notwithstanding the demands of the other, the latter was justified in rescinding the contract—Eastern Forge Co. v. Corbin, 182 Mass. 590. Where goods delivered under a contract are defective in quality, the buyer is justified in rescinding—Grafeman Dairy Co. v. St. Louis Dairy Co., 96 Mo. App. 495. Under a contract to furnish coal to a city for a certain period on monthly payments, such monthly payments were of the essence of the contract and on failure thereof, the seller was authorized to terminate the contract though the city had failed to perform its contract in analyzing the coal through no lack of diligence—Baltimore v. Schaub Bros., 96 Md. 534.

89. Peuchen v. Behrend, 71 App. Div. (N. Y.) 619.

90. Privilege granted for a show—Mackay v. Minnesota State Agricultural Soc. (Minn.) 92 N. W. 539.

91. Where the terms of a contract required one of the parties to perform work for no other persons than the other party, the performance of such other work will not justify a rescission of the contract where it did not interfere with the work performed for the parties to this particular contract—Reindl v. Heath, 115 Wis. 219.

third persons.[92] Demands made by one of the parties inconsistent with the terms of the contract will release the other party from performance.[93] If the contract is severable, default in one part will not justify rescission of the whole contract,[94] nor will default in a subsequent parol subsidiary agreement justify rescission of the prior written contract;[95] but default in part of an inseparable contract will enable rescission of the whole.[96] Where one, because of insolvency, is compelled to pay for property bought on delivery and refused so to do, he has no right to rescind a contract for purchase merely because of the manner adopted by the vendor in enforcing his remedy.[97]

Incompetency; fraud and misrepresentation.—The contract of a person of weak mental powers will be rescinded in equity, when it appears that he has not exercised a deliberate judgment or has been misled by undue influence.[98] Fraud is cause for rescission,[99] though the contract itself may have been illegal,[1] unless the fraud was regarding trivial matters which could not have influenced the other party.[2] The fraud must consist in representations of existing facts, not mere expressions of opinion regarding future probabilities,[3] but such expressions as to the future may suffice if false and the party making them knew they could not be fulfilled.[4] The

92. An agreement for settlement of claims by creditors provided they would not seek to enforce their claims by hostile procedure, cannot be rescinded merely because of acts of a deputy sheriff in going upon the premises of the debtors and levying on execution, where he did not take actual possession of the property and where he went contrary to the instructions of the creditors —Mechanics' Nat. Bank v. Jones, 76 App. Div. (N. Y.) 534.

93. Cooney v. McKinney, 25 Utah, 329, 71 Pac. 485. Where after a contract was partly performed, one of the parties demanded conditions not required by its terms or by the customs of the trade with which it was concerned, the other was entitled to rescind the contract, refuse further performance and recover compensation due for the part already performed—Minaker v. California Canneries Co., 138 Cal. 239, 71 Pac. 110.

94. Where a contract provides for the performance of an entire work in a certain time and of each particular part of the work within a proportionate part of the time and for rescission by the other party for failure to perform, a failure to perform the first part of the work within its proportion of time will not justify a rescission of the entire contract—Cody v. New York, 71 App. Div. (N. Y.) 54. A contract calling for several acts within a reasonable time for which consideration has been paid in full, cannot be rescinded for failure to perform one of the subsidiary acts within a reasonable time, the remedy for such failure being a suit for damages—Luce v. New Orange Industrial Ass'n, 68 N. J. Law, 31.

95. Under a building contract, giving the contractor the right to cancel if the subcontractor gets behind in his work, and providing for weekly payments to the latter in a certain amount, failure of the subcontractor to carry out a subsequent parol agreement to put on more men if the weekly payments be increased, because of a strike for one day of such extra men due to the payments being insufficient to meet their wages, will not warrant the contractor in cancelling the contract—O'Dwyer v. Smith, 38 Misc. (N. Y.) 136.

96. A failure to pay as agreed for part of goods delivered will entitle the seller to rescind and sue for those delivered at the contract price—Purcell Co. v. Sage, 200 Ill. 342.

97. Pratt v. Freeman & Sons Mfg. Co., 115 Wis. 648.

98. Meyer v. Fishburn (Neb.) 91 N. W. 534.

99. Where a contract for building a railroad provides that the amount of work shall be determined by the calculations of the engineer in charge, any fraud by him is a ground for relief from the contract—Illinois Cent. R. Co. v. Manion, 23 Ky. L. R. 2267, 67 S. W. 40.

1. Recovery of money paid to a national bank on a contract of which rescission is sought for fraud, is not prevented because the transaction was forbidden by law, since to prevent rescission is to compel reliance on the contract with its attendant burden of fraud—Petrie v. National Bank & Loan Co., 167 N. Y. 589; National Bank & Loan Co. v. Petrie, 189 U. S. 423; National Bank & Loan Co. v. Carr, 189 U. S. 426.

2. Garrison v. Technic Electrical Works, 63 N. J. Eq. 806.

3. False representations in regard to the capacity of certain cotton presses and the merchantable quality of the cotton produced by them, together with representations as to savings in freight and the successful operations of the machines, which induced the making of a contract, were not merely expressions of opinion as to future transactions but representations of existing facts within the knowledge of defendants, entitling plaintiffs to rescind the contract and secure cancellation of deeds thereunder—American Cotton Co. v. Collier (Tex. Civ. App.) 69 S. W. 1021.

4. Though representations which secured the execution of a contract, were mere expressions of opinion as to the future, they are sufficient for cancellation of such contract if they were false and the parties making them knew that they could not be performed—American Cotton Co. v. Collier (Tex. Civ. App.) 69 S. W. 1021.

misrepresentation must relate to material facts and must be made with intent to deceive.[5] An accord and satisfaction may be rescinded for fraud and the original liability enforced.[6]

Insolvency; accident or natural causes.—Mere danger of insolvency of the other party will not warrant a rescission of the contract by a failure to perform; insolvency must exist.[7] Insolvency of a purchaser at time of a contract of sale is not ground for rescission by the seller.[8] Where a contract is made for the construction of a building on a foundation and out of materials to be furnished by the owner, and after partial completion it is destroyed by a storm, performance has not been rendered so impossible as to cause a termination of the contract and enable the builder to recover both for the labor lost and the erection of a new building; nor is the contract terminated on the theory that the materials on which the contractor agreed to work have been destroyed.[9]

(§ 9) *C. Waiver of right to rescind.*—Though a party has decided to rescind his contract, he may, while the conditions are still unchanged, decide to go on with the contract, though he has been notified by the other party that he will consider the contract at an end;[10] but if he actually intends to rescind he must do no act inconsistent with such intention.[11] He may receive part payment after part performance without waiving his right to rescind.[12] If two compromises be of the same contract, acceptance of delayed performance in payment of one waives a delay in payment of the other.[13]

(§ 9) *D. Time for rescission.*—The injured party must rescind within a reasonable time after discovery of the fraud or after a reasonable opportunity for its discovery.[14] Delay is fatal,[15] unless the party is fraudulently prevented from learning the facts.[16]

(§ 9) *E. Conditions precedent to rescission; return of benefits or consideration.*[17]—One desiring to rescind a contract for fraud,[18] or want of consideration,[19] as, for defects in subject-matter,[20] must return or offer to return the benefits or consideration received within a reasonable time after discovery;[21] but one refusing to perform

5. Scott v. Boyd (Va.) 42 S. E. 918.
6. See ante, pp. 10, 11.
7. F. W. Kavanaugh Mfg. Co. v. Rosen (Mich.) 92 N. W. 788.
8. Johnson v. Groff, 22 Pa. Super. Ct. 85.
9. Vogt v. Hecker (Wis.) 95 N. W. 90.
10. Perkins v. Frazer, 107 La. 390.
11. The filling of a portion of an order without objection will waive the right to rescind a contract because the agent through whom it was sent for acceptance was interested in the firm for which the order was given, where such fact was known before performance—Columbia Mfg. Co. v. Hastings (C. C. A.) 121 Fed. 328. Where a party knew when he filed an original bill for rescission, that a fraud had been practiced upon him, and then obtained an injunction against the other parties, restraining them from breaking his contract, he has waived his right to a rescission—Tolman v. Coleman, 104 Ill. App. 70.
12. It is sufficient that he still refuses to complete performance—Eastern Forge Co. v. Corbin, 182 Mass. 590.
13. Compromises of county bonds—Dyer v. Muhlenberg County (C. C. A.) 117 Fed. 586. It was held immaterial that acceptance was in part the act of another if he was privy to the contract.
14. Dickey v. Winston Cigarette Mach. Co., 117 Ga. 131; Bostwick v. Mutual Life Ins. Co. (Wis.) 92 N. W. 246; Pekin Plow Co. v. Wilson (Neb.) 92 N. W. 176. Rescission for fraud, undue influence or duress—Mortimer v. McMullen, 202 Ill. 413.
15. A transfer by heirs of a succession to the usufructuary of the property will not be disturbed after ten years—Sallier v. Rosteet, 108 La. 378.
16. Four and a half months delay in discovering a fraud in the substitution of another insurance policy for the one which the applicant expected to receive, will not, as a matter of law, forfeit his right to rescission, where he was fraudulently prevented from examining the policy at the time of delivery—Bostwick v. Mutual Life Ins. Co. (Wis.) 92 N. W. 246.
17. Sufficiency of placing in statu quo to authorize rescission of a contract for exchange of stocks and bonds of an old corporation for those of a new corporation—Jewell v. McIntyre, 172 N. Y. 638.
18. Mortimer v. McMullen, 202 Ill. 413.
19. Sale of machine which proved defective—Massillon Engine & Thresher Co. v. Schirmer (Iowa) 93 N. W. 599.
20. J. I. Case Threshing Mach. Co. v. Lyons, 24 Ky. L. R. 1862, 72 S. W. 356; Massillon Engine & Thresher Co. v. Schirmer (Iowa) 93 N. W. 599.
21. One who is prevented in fulfillment of his contract after part performance, by acts of the other, cannot recover consideration paid during the time of performance,

a contract because of fraud in its inception need not restore that which in any event he would recover,[22] and on rescission of a contract because of undue influence, it is not necessary that the property received should be returned, but a mere tender of the value is sufficient.[23]

(§ 9) *F. Rescission or termination under terms of contract.*—Contracts may be rescinded under terms providing for rescission,[24] but the rescission must faithfully follow such terms.[25] Where a contract authorizes termination by one party if the other suspends work for 10 days, Sundays should not be counted in computing the suspension.[26] If a buyer attempts to return goods, where under the contract he has no right to return them, and the seller refuses to accept, there can be no recovery on the price paid.[27]

Contracts for service of a continuing nature not specifying any time or duration may usually be revoked at will by either party upon reasonable notice and in good faith.[28]

because of a breach committed by the other giving him a right to rescind where he cannot place the other party in statu quo. Rent of premises for restraurant privileges—De Montague v. Bacarach, 181 Mass. 256. Though a contract is unilateral, it becomes binding after the party who is to perform acts thereunder has proceeded with the performance, and cannot be rescinded by the other party without a restoration of his expenses incurred. Contract to pay railroad company a certain sum on completion of road—Los Angeles Traction Co. v. Wilshire, 135 Cal. 654, 67 Pac. 1086.

22. Hargadine-McKittrick Dry Goods Co. v. Swofford Bros. Dry Goods Co., 65 Kan. 572, 70 Pac. 582. It need not be done where for instance an accord and satisfaction is treated as void for fraud and an action brought on the original liability so that the money paid may be proved as partial satisfaction. See Accord and Satisfaction, ante, p. 11 et seq. and cases there cited.

23. Meyer v. Fishburn (Neb.) 91 N. W. 534.

24. Where it appears that work under a building contract was defectively done, the owner has cause to terminate the contract and take charge of the building, where there is a stipulation that in case of default he would have such right—Hay v. Bush (La.) 34 So. 692.

25. Contract for macadamizing a driveway and authorizing the city to rescind on failure of the contractor to complete any part of the work to the satisfaction of the park commissioners—Cody v. New York, 71 App. Div. (N. Y.) 54. Where a contract requires that a machine sold, should be returned if it fails to work, a mere notice that it is held subject to the seller's order is not a compliance therewith—Dickey v. Winston Cigarette Mach. Co., 117 Ga. 131. A notice by the purchaser of a machine that it was held subject to the seller's order, was in compliance with the terms of the contract for rescission which provided that he should return it at once to the agent if it failed to work, and he was not relieved from liability where the seller never took possession—McCormick Harvesting Mach. Co. v. Allison, 116 Ga. 445. Where a contract provided that if one of the parties should suspend operations thereunder for 10 days, the other would be entitled to rescind, the condition was not broken by suspension of work for 9 days and an offer of continuance on the 10th, from performance of which the party was prevented by default of the other who was entitled to rescission—Brown v. Rasin Monumental Co. (Md.) 55 Atl. 391.

Building contracts.—A condition that the certificate of the architect to the effect that the contractor is not fulfilling his contract as precedent to a termination of the contract by the owner is absolute—White v. Mitchell, 30 Ind. App. 342. Where a contract for a building provided that the owner might terminate the employment and complete the work on a certificate of the architect to the effect that the contractor is not properly performing his contract, a certificate that the work is not being properly performed and that the owner may, if he deems best, take such action, is insufficient—Id. Where a building contract provided that the owner may terminate the contract if the architect shall certify that the contractor is not complying with the contract, the architect occupies a judicial position thereunder and a private letter expressing his opinion to the owner, of which no communication is made to the contractor, is insufficient to justify a rescission—Wilson v. Borden, 68 N. J. Law, 627. Where a contract provided that a certificate by the architect to the owner that the contractor has refused or neglected to supply workmen or materials to complete the contract will entitle the owner to terminate the employment on three days' written notice to the contractor, the owner was not entitled under such condition to give notice merely of an intention to furnish labor and materials and not to terminate the contract—McClellan v. McLemore (Tex. Civ. App.) 70 S. W. 224.

26. Brown v. Rasin Monumental Co. (Md.) 55 Atl. 391.

27. Loader v. Brooklyn Chair Co., 75 App. Div. (N. Y.) 621.

28. Taylor v. Martin, 109 La. 137. Compare titles Agency, ante, p. 47 and cases cited, also Master and Servant to be published in a later issue.

29. Kelly v. Short (Tex. Civ. App.) 75 S. W. 877. Compare Accord and Satisfaction, ante, p. 8.

(§ 9) *G. Rescission by mutual agreement.*—A contract is entirely abrogated by repudiation by both of the parties where each recognized and accepted the repudiation of the other and acted thereon,[29] but a subsequent agreement or acquiescence of both is necessary,[30] though this may be shown by implication from circumstances and the conduct of the parties.[31] No consideration other than the release from their respective obligations is necessary to abrogation of a mutually executory contract by agreement of the parties.[32] Where one party claimed his right to rescind in proper time, and asked for a return of the consideration which defendant promised, the latter acquiesced in the rescission.[33] Where one of the parties withdrew before the contract was complete, the other accepted his withdrawal by securing another person to take his place, thereby relieving him from obligation.[34]

(§ 9) *H. Rights on rescission.*—One party may sue to recover money paid on a contract from the other, where the latter acts in a manner assenting to the rescission of the contract by the other after such rescission,[35] but on disaffirmance and suit to recover consideration, profits cannot be recovered but merely the amount paid with interest.[36] If the owner of a partially completed building wrongfully prevents the builder from completing it and the latter elects to treat his act as a rescission of the contract, recovery may be had for reasonable value of the work done prior to the decision where no apportionment of compensation is provided by the contract.[37] Where under a contract to build a railroad, the decision of the engineer is final as to any dispute and any right to sue at law or otherwise is waived, the latter provision does not apply on rescission of the contract where the contractor sues to recover for loss thereon but makes no claim for work done.[38] Under a contract to furnish iron by a certain time, after default by the materialman, the contractors were justified in going into the market and paying for materials at a higher price than that provided by the contract, and were also justified in securing "substantially" the same kind of material as was required by the contract.[39]

(§ 9) *I. Actions for rescission.*[40]—Even though a party could combine with a suit on a contract an action for rescission of the same contract for fraud, the latter action should be nonsuited where it appears that he had received from the other party sums he had himself paid on the contract and that no restoration or offer to restore had been made.[41] In rescission for misrepresentation, the misrepresentation must be set out in the pleading.[42] On termination of a contract for construction of a building. the owner must show failure of the contractor to perform his contract as a condition precedent to a rescission thereof.[43] The party seeking rescission must show the making of fraudulent representations and their falsity, but when he has done so the burden shifts and the other party must prove that such representations did not influence the contract.[44] Evidence of the circumstances and facts under which a contract was executed may be shown in action for rescission as bearing on the question of good faith.[45] Where the consideration of a contract fails without the

30. Central Coal & Coke Co. v. George S. Good & Co. (C. C. A.) 120 Fed. 793.
31. Retaking possession of land and collecting and retaining rents therefrom without attempting to enforce payment of remaining installments of purchase price amounts to a rescission of its sale—Evans v. Jacobitz (Kan.) 72 Pac. 848.
32. Barrie v. King, 105 Ill. App. 426.
33. Luce v. New Orange Industrial Ass'n, 68 N. J. Law, 31.
34. Sutton v. Griebel, 118 Iowa, 78.
35. Luce v. New Orange Industrial Ass'n, 68 N. J. Law, 31.
36. Hayes v. Stortz (Mich.) 90 N. W. 678.
37. Geo. M. Newhall Engineering Co. v. Daly (Wis.) 93 N. W. 12.
38. Dobbling v. York Springs Ry. Co., 203 Pa. 628.
39. Christopher, etc., Foundry Co. v. Yeager, 202 Ill. 486.
40. Consult the title Cancellation of Instruments, ante, p. 413.
41. Cleckley v. Mutual Fidelity Co. (Ga.) 43 S. E. 725.
42. Scott v. Boyd (Va.) 42 S. E. 918.
43. White v. Mitchell, 30 Ind. App. 342.
44. Garrison v. Technic Electrical Works 63 N. J. Eq. 806.
45. Jewell v. McIntyre, 172 N. Y. 638.

avail of other party as in the sale of a patent, which under the terms was to be successful but which proved to be unsuccessful, both parties will be restored to their original situations in equity.[46]

(§ 9) *J. Abandonment of contract.*—Formal release or cancellation is not necessary to abandonment of a written contract but it may be shown by the conduct of the parties and the circumstances;[47] the act of one party in rendering performance impossible is an abandonment.[48] After abandonment there can be no enforcement according to the terms of the contract,[49] though recovery may be had for partial performance on a quantum meruit, where it appears that the abandonment was by mutual consent without any provision as to compensation.[50] Where a building contract is abandoned by the contractor and completed by another under conditions therein, the work of completion is done under the contract and on account of the contractor, and he is entitled to any balance remaining after the cost of completion.[51] On failure of contractors to substantially complete a building and their abandonment on refusal of the owner to pay an instalment of the price, he may complete the building and hold them responsible for the expense.[52] Where in a contract for the construction of sewers, errors in grade and cavings of banks were anticipated by agreement that on occurrence of such events the parties shall allow their obligations to be adjusted by the chief engineer of the city, and the expenditures and losses shall be charged as provided by the contract remaining in force, the contractor cannot abandon the work and refuse to accept the adjustment fixed by the contract.[53] On abandonment of a contract by a subcontractor, he should not be allowed, though entitled to remove his plant, to remove any part which is necessary to preserve the work until a reasonable time during which another plant may be substituted.[54]

§ 10. *Remedies for breach of contract.*[55] *A. Rights of action in general.*—Illegality of a contract will not prevent relief if the rights of plaintiff do not require aid of the illegal transaction.[56] If a contract has been modified by subsequent agreement, suit must be brought on it as modified.[57] That a party in default may have incurred a criminal liability by nonperformance of his contract will not prevent its enforcement or action thereon.[58] After a party to an unexecuted contract has stopped performance, an action will lie only for the breach and not for the price of the goods purchased.[59] Harsh provisions in a contract, unenforceable

46. Hoffman v. Duryea, 38 Misc. (N. Y.) 553.

47. Creamery Package Mfg. Co. v. Sharples Co. (Mo. App.) 71 S. W. 1068. A letter between the parties to a contract stating that the writer declined to have anything further to do with it amounted to a renunciation giving the other party the right to the recovery of any damages sustained—Wallingford v. Aitkins, 24 Ky. L. R. 1995, 72 S. W. 794. Where one party to a contract notifies the other after partial performance that he will not proceed, it amounts to a breach and the other is released from further performance—Miller v. Sigler (Mo. App.) 69 S. W. 479.

48. Where parties agree to act together in consolidation of a corporation, but before the contract was performed one of the parties affected another consolidation which rendered it impossible for him to perform, such act constituted an abandonment of the agreement and authorized any arrangement by the other party for consolidation without responsibility to the first for a division of accruing profits—Parks v. Gates, 84 App. Div. (N. Y.) 534.

49. Tribune Ass'n v. Eisner & M. Co., 70 App. Div. (N. Y.) 172. Rebates on the price according to terms of the contract cannot be enforced—Id.

50. Tribune Ass'n v. Eisner & M. Co., 70 App. Div. (N. Y.) 172.

51. White v. Livingston, 174 N. Y. 538.

52. Hansen v. Hackman, 37 Misc. (N. Y.) 290.

53. Brown v. Baton Rouge, 109 La. 967.

54. Building city underground railway—McCabe v. Hunt, 40 Misc. (N. Y.) 466.

55. Cancellation in equity of written contracts. See ante, p. 413.

56. Robson v. Hamilton, 41 Or. 239, 69 Pac. 651.

57. Iroquois Furnace Co. v. Bignall Hardware Co., 201 Ill. 297.

58. Baum v. Union Surety & Guaranty Co., 19 Pa. Super. Ct. 23.

59. Contract of sale of goods—Herring-Hall-Marvin Co. v. Smith (Or.) 72 Pac. 704.

in equity, will not prevent enforcement of valid provisions therein.[60] Where there was an implied contract to pay for litigation necessary to performance of a contract, an accounting could be had to determine such expenses though charges could not be made for expenses within control of the party, or for his services, or for losses resulting from the litigation.[61] To be effective, a waiver of the right to sue on the contract must be under a valid condition and must concern the identical contract.[62] An unaccepted offer of payment will not waive an action for breach,[63] nor will an act calculated merely to protect plaintiff's rights made necessary by defendant's default,[64] nor mere assertion of a right under the contract.[65]

(§ 10) *B. Form of action.*—In a suit brought on a contract for purchase of certain goods and on notes given for the price, plaintiff cannot be required to elect whether he will sue on the contract or the notes.[66] If the default of defendant is as much a wrong as a breach of contract, plaintiff may sue for either.[67] Assumpsit will lie for failure to fulfill an offer which was to remain open until a particular date and to be accepted in a certain manner, but which plaintiff was prevented from accepting by the fault of defendant,[68] or on a special contract terminated by its terms by agreement of the parties or by improper conduct of defendants,[69] or to enforce a simple contract debt growing out of a conveyance.[70] If a contract has been fully executed except for payment of an agreed price, plaintiff may sue on the common counts,[71] a special declaration being unnecessary,[72] but after declaration on a special contract and proof thereof, plaintiff cannot abandon his position and recover on the common counts.[73] Where the owner, at his own cost, completes construction under a building contract, which had been renounced by the contractor, he cannot recover for such cost on the common counts but must sue for breach of contract.[74] In an action on a special building contract to which common counts were added, if there was an express contract for construction, recovery could not be had under the common counts for money due on account and for work, unless there was compliance with the contract or an acceptance of the construction as done.[75] Recovery cannot

60. Michigan Cent. R. Co. v. Chicago, K. & S. Ry. Co. (Mich.) 93 N. W. 882.

61. Murphy v. Northern S. S. Co. (Mich.) 91 N. W. 142.

62. A condition in a contract that courts of another country shall have exclusive jurisdiction of actions on a contract made therein except certain suits, is not waived by suit against parties, not identical, on a later contract, nor by a suit to preserve the rights of one of the parties provided such condition should be held to be invalid—Mittenthal v. Mascagni, 183 Mass. 19.

63. An offer by the owner of a building to pay the contractor and his surety a small amount due on the contract for erection before bringing action for breach of contract, will not bar recovery where they refused to accept—Ramlose v. Dollman (Mo. App.) 73 S. W. 917.

64. Foreclosure by a purchaser of a trust deed and notes on refusal of the seller to repurchase under the contract of sale, and failure to realize the full amount, will not estop him from suing for breach of the contract—Loeb v. Stern, 198 Ill. 371.

65. Holding out by the owner of a building of an amount agreed upon between him and the contractor as demurrage stipulated for delay in completion by a certain time, will not prevent an action by him against the contractor for breach of the contract—Ramlose v. Dollman (Mo. App.) 73 S. W. 917.

66. Strickland v. Parlin & Orendorf Co. (Ga.) 44 S. E. 997.

67. Where a building near an excavation by a railroad company suffered damage through faulty design of a wall built by the company under an agreement to make the building safe, the owner could sue for breach of contract or in tort—Paterson Extension R. Co. v. Church of Holy Communion (N. J. Sup.) 53 Atl. 449; Church of Holy Communion v. Paterson Extension R. Co. (N. J. Sup.) 53 Atl. 1079.

68. Acceptance was to be signified by payment of a certain amount of money—Guilford v. Mason, 24 R. I. 386.

69. Zapel v. Ennis, 104 Ill. App. 175.

70. Where a debtor conveys his land to his creditor under an arrangement that it should discharge his debt and that both should use their efforts to sell the property, any surplus above the debt to be paid to the debtor, he was entitled to recover such surplus—Moran v. Munhall, 204 Pa. 242.

71. McDermott v. St. Wilhelmina Benev. Aid Soc. (R. I.) 54 Atl. 58.

72. Union El. R. Co. v. Nixon, 199 Ill. 235.

73. Burton v. Rosemary Mfg. Co. (N. C.) 43 S. E. 480.

74. Wygent v. Marrs (Mich.) 90 N. W. 423.

75. Aarnes v. Windham (Ala.) 34 So. 816.

be had on a quantum meruit for goods delivered under a contract invalid for noncompliance with the statute as to execution,[76] nor for breach of a contract to leave a legacy to plaintiff in return for services.[77] A cause of action as on a quantum meruit may be joined with the declaration on a special contract.[78] Equity will not construe a written contract and give damages for its breach, if a reformation is not asked and neither fraud nor mistake is alleged.[79] If the party in default has received no benefits, he cannot be called to account in equity but the other must sue for the breach.[80]

(§ 10) *C. Accrual of right of action.*—The action for breach accrues to one party on refusal of the other to perform or to be bound,[81] and the right of action thus accruing to one party on the other's breach is not affected by a subsequent offer to perform.[82] Instalments due may be sued for though performance is not complete.[83] An action begun five years after the beginning of a contract which was to continue four years was not premature, though the cost of work done or the amount of rent chargeable as provided by its terms had not been determined by the parties.[84] Damages may be recovered presently for breach of a contract to give a note payable in the future.[85]

(§ 10) *D. Conditions precedent to bringing action.*[86]—One attempting to enforce performance of a contract must show performance on his own part,[87] or readiness and willingness to perform if permitted so to do,[88] and if he has himself broken the contract he cannot recover consideration paid,[89] regardless of the validity or inva-

76. Contract with a township—Peck-Williamson Heating & Ventilating Co. v. Steen School Tp. (Ind.) 66 N. E. 909.

77. Banks v. Howard, 117 Ga. 94.

78. Burton v. Rosemary Mfg. Co. (N. C.) 43 S. E. 480.

79. Clarke v. Shirk (C. C. A.) 121 Fed. 340; Bank v. Belington Coal & Coke Co., 51 W. Va. 60.

80. Where parties entered into a contract to form a consolidated corporation, providing that profits arising therefrom should be divided among promoters, but the contract was abandoned and the parties agreed to act together in further efforts for the consolidation, but before one of them had prosecuted his efforts to a successful issue, the other formed a different consolidation, from which it did not appear that any profits were derived except such as were derived by party as underwriter of bonds for the consolidated corporation, the first party was not entitled to recover in equity for an accounting of profits but only for a breach of contract against the other if at all—Parks v. Gates, 84 App. Div. (N. Y.) 534.

81. Shields v. Carson, 102 Ill. App. 38. Though time for performance of some conditions has not yet arrived—Northrop v. Mercantile Trust & Deposit Co., 119 Fed. 969. The action for breach of a contract to leave plaintiff a legacy in return for services performed accrues at death of defendant—Banks v. Howard, 117 Ga. 94.

82. Emack v. Hughes, 74 Vt. 382.

83. Cramer v. Redman (Wyo.) 68 Pac. 1003.

84. Rumford Falls Boom Co. v. Rumford Falls Paper Co., 96 Me. 96.

85. Deering v. Johnson, 86 Minn. 172.

86. An agreement by the owner to accept a certain sum for failure of the contractor to complete minor details, and as to the balance due, will complete the contract so as to entitle the materialmen to recover the amount due from the contract—Roussel v. Mathews, 62 App. Div. (N. Y.) 1.

87. Stern v. McKee, 70 App. Div. (N. Y.) 142. Execution and tender of deed must be shown in an action on a contract for sale of land—Evans v. Jacobitz (Kan.) 72 Pac. 848. One who is guilty of a breach of a contract cannot sue the other for subsequent failure or refusal to perform—Loudenback Fertilizer Co. v. Tennessee Phosphate Co. (C. C. A.) 121 Fed. 298. Substantial performance will entitle plaintiff to recovery—City of Elizabeth v. Fitzgerald (C. C. A.) 114 Fed. 547; as to what constitutes such performance—Harris v. Sharpless, 202 Pa. 243, 58 L. R. A. 214. Because of the disproportionate amount of work left undone and greater expenses incurred by plaintiffs in completing the contract, there was a substantial performance before bringing action—Drew v. Goodhue, 74 Vt. 436. Impossibility of performance of certain conditions by plaintiff will obviate necessity of performance to recover on other provisions—Buchanan v. Layne, 95 Mo. App. 148; as will also abandonment of the contract after part performance—Tribune Ass'n v. Eisner & Mendelson Co., 70 App. Div. (N. Y.) 172. Failure to perform in a small particular will not render the action premature where, after the action was begun, plaintiff completed performance with due care—Drew v. Goodhue, 74 Vt. 436. Failure of contract to make alterations ordered at time of order will not prevent his recovery—Essex v. Murray (Tex. Civ. App.) 68 S. W. 736. Failure of a contractor to complete a building within a certain period will not give the other the right to complain of the breach, where he failed to make payments as prescribed—Harris' Assignee v. Gardiner, 24 Ky. L. R. 103, 68 S. W. 8; Brooks v. Greer's Adm'r, Id.

88. Stern v. McKee, 70 App. Div. (N. Y.) 142; Leek Milling Co. v. Langford (Miss.) 33 So. 492.

89. Consideration paid on a contract of

lidity of the contract;[90] but subsequent promises not a part of the contract need not be fulfilled.[91] However, acceptance by defendant of part performance may waive full performance as a condition precedent to recovery.[92] Plaintiff need not give notice of performance where defendant has equally as good an opportunity to know of the completion of the contract.[93] A tender of performance by plaintiff is not necessary if performance is rendered impossible by default of the other party,[94] and a notice by defendant that he has put it beyond plaintiff's power to perform is a waiver of such tender;[95] the offer to perform is sufficient as to an assigned contract if made to the original party on breach by the assignee.[96] Generally, a demand of performance is necessary before bringing an action for breach of a contract,[97] but no demand is necessary if the other party has renounced the contract,[98] or it is apparent from the conduct of the other party that it will be unavailing,[99] or the other party has voluntarily put it out of his power to perform.[1] Where a building contract provides that final payment should be due when the work was completed and accepted by the architect, his certificate was a condition precedent to such payment.[2] Though the architect's certificate was necessary to payments on a building contract, it was not necessary to an action on such contract, where the owner had declared it forfeited and taken possession to complete the building himself,[3] if the contractors have substantially performed and no reason

privilege to conduct an exhibition on the state fair grounds where the contract is canceled by the fair association for violation by the licensee—Mackay v. Minnesota State Agricultural Soc. (Minn.) 92 N. W. 539. As to a contract without time, substantial performance of the entire contract by plaintiff is necessary to liability of the other party though the liability may be separate as to different items—Riddell v. Peck-Williamson Heating & Ventilating Co., 27 Mont. 44, 69 Pac. 241.

90. Contract for building permit for street railroad by which company forfeited deposit for failure to build a certain distance in a given time—West Springfield & A. St. Ry. Co. v. Bodurtha, 181 Mass. 583.

91. Failure to give a bond for faithful performance of a contract which plaintiff promised after the contract was fully made will not prevent recovery where the referee concluded that the promise was not a part of the contract—Disken v. Herter, 73 App. Div. (N. Y.) 453.

92. Where one of the parties to a contract insisted that the other had not complied therewith, whereupon the latter agreed to complete the contract according to its conditions, and on the strength of this promise was paid the greater part of the price, and the work was accepted, it cannot be claimed that complete performance is a condition precedent to the recovery of the balance of the price, but the amount of the claim for work may be reduced by the amount of damages the other party has sustained because of lack of complete performance—Gray v. Village of New Paynesville (Minn.) 94 N. W. 721.

93. Drew v. Goodhue, 74 Vt. 436.

94. Where the co-owners of a plantation are out of possession so that it is impossible for them to know what balance is due, if any, on an account by another owner under a contract for exclusive management and control, they are relieved from an antecedent tender in bringing an action for breach of the contract wherein they so alleged—Derouen v. Romero (La.) 34 So. 415.

95. Notice by mortgagee to mortgagor that he has sold the mortgage will excuse tender of performance of contract to purchase the mortgage at a discount before maturity—Thurber v. Smith, 25 R. I. 60.

96. Bowen v. Young, 37 Misc. (N. Y.) 547.

97. Sufficiency of demand and failure to comply constituting a breach of contract giving the demanding party immediate right of action—In re Swift, 114 Fed. 947; Ex parte Harrigan, Id. Sufficiency of description of town lot in demand made for conveyance of such lot under contract calling for such conveyance within a certain period of time in consideration of services rendered the owner—Ehrich v. Durkee (Colo. App.) 72 Pac. 814. In action to recover the value of property which under the contract defendant was to furnish plaintiff—Ingram v. Bussey, 133 Ala. 539. Sufficiency of legal demand and refusal to pay to prevent objection that plaintiff was not entitled to payment when demand was made, in action for recovery for services performed before rescission by defendant—South End Imp. Co. v. Harden (N. J. Eq.) 52 Atl. 1127.

98. Contract to convey lands in consideration of support of grantor for life, renounced by prospective grantee—Van Horn v. Mercer, 29 Ind. App. 277. Where sellers of certain securities agree to repurchase on certain notice, and such notice was given, further demand after their refusal is unnecessary—Loeb v. Stern, 198 Ill. 371.

99. And this, though the terms of the contract expressly require a demand—Loeb v. Stern, 198 Ill. 371.

1. Murphy v. Dernberg, 84 App. Div. (N. Y.) 101.

2. McGlauflin v. Wormser (Mont.) 72 Pac. 428.

3. Ocorr & Rugg Co. v. City of Little Falls, 77 App. Div. (N. Y.) 592.

for its refusal appears,[4] nor to an action of assumpsit to recover for work done.[5] There must be an award or settlement of disputes before action on a contract providing for an arbiter whose decision shall be final,[6] but if plaintiff's demands are not questioned arbitration is unnecessary.[7] Defendant cannot urge a provision for arbitration as to value of work done where he neither took steps to select arbitrators and neither demanded nor offered arbitration.[8]

(§ 10) *E. Defenses and recoupment.*—That a debt sued for has been attached in defendant's hands in a foreign jurisdiction by plaintiff's creditors is no defense to an action on the contract.[9] In an action on a contract for the furnishing of evidence to establish a right to a mining claim, an objection that plaintiff did not own the evidence which he agreed to furnish but obtained it under a contract with a third person is no defense; nor a failure by plaintiff to advance money necessary to perform the contract, where the defendants did not terminate the contract for that reason but continued the litigation and accepted the benefits.[10] In an action for a balance of compensation on a building contract, if there has been an acceptance there cannot be a recoupment, but only if the recovery is on a quantum meruit alone, especially where it appears that the work was performed in accordance with a guaranty which was made a part of the contract.[11]

(§ 10) *F. Place of trial.*—The place where a contract is dated will not necessarily control the place of trial of an action thereon.[12] The right to sue on a written contract in a certain county is not dependent upon any express provision in the contract that it is to be performed there, but it is sufficient if the contract must necessarily be performed where suit is brought.[13]

(§ 10) *G. Parties.*—In an action for breach of a contract to deliver goods to two persons, both are necessary parties.[14] The surviving co-party on one side of a contract may sue thereon in his own name as though a surviving partner.[15] One who does not sustain such relation to a contract that he could sue upon it for breach thereof cannot sue in tort for such breach.[16] Under the common law, where it appears from the declaration in an action ex contractu that there are too many defendants, any of them may demur for misjoinder.[17] Where a building contract required the contractor to give a bond for faithful performance, and for materials and labor, his laborers and materialmen were beneficiaries and proper parties to sue for its enforcement.[18] In a several action brought on a joint contract, nonjoinder of parties plaintiff need not be raised by plea in abatement nor by special plea of the joint contract, since the defense is not affirmative and plaintiff must establish his cause of action.[19] Where one partner dies pending an action against the firm on a contract, as his administrators appear to defend, plaintiff may be permitted to amend by discontinuance as to the living partner and proceeding against the administrators.[20]

4. Happel v. Marasco, 37 Misc. (N. Y.) 314.
5. Board of Com'rs of Fulton County v. Gibson, 158 Ind. 471.
6. Citizens' Trust & Surety Co. v. Howell, 19 Pa. Super. Ct. 255.
7. Charges for extras under a building contract providing for arbitration—Essex v. Murray (Tex. Civ. App.) 68 S. W. 736.
8. Van Note v. Cook, 55 App. Div. (N. Y.) 55.
9. Bailey v. Pennsylvania R. Co. (N. J. Sup.) 54 Atl. 248.
10. Wood v. Casserleigh, 30 Colo. 287, 71 Pac. 360.
11. Mosaic Tile Co. v. Chiera (Mich.) 95 N. W. 537.
12. Contract of guaranty; Code, § 27—Smith v. Post Printing & Publishing Co. (Colo. App.) 68 Pac. 119.
13. Rev. Sts. 1895, art. 1194, subd. 5—Darragh v. O'Connor (Tex. Civ. App.) 69 S. W. 644.
14. Lemon v. Wheeler, 96 Mo. App. 651.
15. Northness v. Hillestad, 87 Minn. 304.
16. Styles v. F. R. Long Co., 67 N. J. Law, 413.
17. Cunningham v. Town of Orange, 74 Vt. 115.
18. Town of Gastonia v. McEntee-Peterson Engineering Co., 131 N. C. 363.
19. Blackburn v. Blackburn (Mich.) 94 N. W. 24.
20. Under Public Sts. c. 136, § 8, providing

(§ 10) *H. Pleading and proof. The complaint or petition*[21] must allege a performance by plaintiff as far as possible and that he was ready and willing to perform,[22] unless a sufficient excuse for nonperformance is given;[23] as, where there are no precedent conditions to be performed by plaintiff to entitle him to demand performance, or the right of defendant to demand performance by plaintiff must be preceded by performance, wholly or in part, by defendant;[24] a breach in that there was default by defendant;[25] that the time for performance is due;[26] the obligations of defendant;[27] the things he has failed to do;[28] a waiver of conditions by defendant;[29] a demand for performance by defendant or facts showing a demand to have been useless;[30] the value of the property concerned so as to furnish a basis for deter-

that when one of several persons indebted on a joint contract dies, his estate shall be liable as though the contract were joint and several—Philadelphia & R. Coal & Iron Co. v. Butler, 181 Mass. 468.

21. Sufficiency of petition for breach of building contract as showing that a discontinuance of the work by plaintiff contractors did not amount to a breach on their part—McClellan v. McLemore (Tex. Civ. App.) 70 S. W. 224. Of petition in action for recovery of loan to insolvent on strength of promise by a county judge to retain money to repay it from a debt owing from the county to the insolvent—Huffman v. Ahl, 24 Ky. L. R. 1877, 72 S. W. 343. Of declaration in connection with bill of particulars in action for breach of contract for sale of lands—Culver v. Smith (Mich.) 91 N. W. 608. Petition as counting on contract or in tort—Lambert v. Jones, 91 Mo. App. 288; Wallrath v. Bohnenkamp, 97 Mo. App. 242. Sufficiency of allegation of breach of a contract for manufacture and sale of goods to show that any performance was ever made by the plaintiff—Howie v. Kasnowitz, 83 App. Div. (N. Y.) 295. Of complaint in action for breach of a contract of employment to purchase cotton seed—Stokes-Evans Co. v. Clay County Cotton Oil Co. (Miss.) 33 So. 283. In action for breach of agreement to deliver a note on sale of machinery—Deering v. Johnson, 86 Minn. 172. Of complaint as to validity of contract—De Boer v. Harmsen (Mich.) 90 N. W. 1036. Of complaint in action on a sale of lumber to show that it was used in construction of buildings on premises of defendant—Hurd v. Wing, 76 App. Div. (N. Y.) 506. Sufficiency of allegations as to happening of emergency necessitating change in construction contract anticipated by its terms—National Contracting Co. v. Commonwealth (Mass.) 66 N. E. 639. Sufficiency of bill to show contractual relations between parties—Moore v. Hammond (C. C. A.) 121 Fed. 759. Of petition to show a contract between the parties under its averments—Standard Oil Co. v. Goodman Drug Co. (Neb.) 95 N. W. 667.

22. Crafton v. Carmichael (Ind. App.) 64 N. E. 627. Under Burns' Rev. St. 1901, § 373—Magic Packing Co. v. Stone-Ordean-Wells Co., 158 Ind. 538. A general allegation that plaintiffs had at all times performed their part of a contract without enumerating several acts done, is sufficient—Dennis v. Slyfield (C. C. A.) 117 Fed. 474. A petition to recover damages for breach of a construction contract requiring the work to satisfy the plans, specifications and orders of the engineer in charge, must allege that the petitioner has performed his part according to contract—National Contracting Co. v. Commonwealth (Mass.) 66 N. E. 639. An allegation that plaintiff had done all required to be done by him under the terms of his contract, was insufficient as to performance of conditions precedent to a right to terminate the contract—White v. Mitchell, 30 Ind. App. 342. A complaint on a construction contract, alleging that the contractor has fulfilled and performed all conditions on his part to be performed, is sufficient without a specific allegation of acceptance of the work by the engineer of the other party as required by the contract. Under Code Civ. Proc. § 533, providing that it is not necessary to state facts constituting performance if a general statement is made that due performance has been done—Vandegrift v. Bertron, 83 App. Div. (N. Y.) 548. If the contract provides expressly that estimates of the value of the work done by the engineer in charge should be made as basis of weekly payments when the work was progressing in accordance with the contract, it is necessary to allege that the express agreement had been complied with—National Contracting Co. v. Commonwealth (Mass.) 66 N. E. 639.

23. Buchanan v. Layne, 95 Mo. App. 148.

24. Where a building contract stipulated that payments should depend on the progress of the work and on certificates of the architect as to its performance, the owner in an action for breach of the contract need not plead performance of the conditions of the contract—Ramlose v. Dollman (Mo. App.) 73 S. W. 917.

25. Crafton v. Carmichael (Ind. App.) 64 N. E. 627.

26. Borough of Bradley Beach v. Atlantic Coast Elec. R. Co. (N. J. Sup.) 52 Atl. 231.

27. A complaint on a contract for settlement of partnership matters and collection of debts by one partner to be shared by both, merely setting out the contract without showing any personal indebtedness or promise to pay is insufficient—Brewer v. Swartz, 94 Mo. App. 392.

28. In order to take advantage of a passive violation of a contract in Louisiana—City of Alexandria v. Morgan's Louisiana & T. R. & S. S. Co., 109 La. 50.

29. Condition in a building contract requiring a written order of an architect for alterations—Essex v. Murray (Tex. Civ. App.) 68 S. W. 736.

30. Contract to deliver property—Ingram v. Bussey, 133 Ala. 539. In the absence of a demurrer and in presence of an answer showing that a demand would have been unavailing, a demand for payment under a written contract is sufficiently shown by an

mining damages claimed;[31] and, if the contract is ambiguous in its application to the subject-matter, must point out in what particular the contract is uncertain, and construe definitely its meaning.[32] Where money is to be paid, the time for payment must be alleged.[33] In any court outside of the justice court where formal pleadings are not required, ratification of a contract must be pleaded to become the theory of recovery.[34] A statute allowing the representative of a deceased party to a joint contract to be joined does not dispense with pleading insolvency or inability of the joint debtors when the representative is joined.[35] One who sued for breach of a warranty in a contract could not recover the amount of notes executed by him in part payment without alleging that such notes had been negotiated and that he was liable thereon.[36] If the contract is written, the complaint may either set out the language thereof or merely its legal effect.[37] In Louisiana, the petition need only set forth the contract and the breach.[38] A condition in the contract merely fixing time for payment and not determining liability need not be alleged.[39] That part of a complaint on a written contract which sets it forth in haec verba cannot be disregarded on the theory that the contract pleaded must be treated as an exhibit merely.[40] An allegation that the contract was entered into by defendant will not cover negotiations made through an agent.[41] On proof of part performance of a contract requiring plaintiff to do three distinct things, there must be an allegation seeking to recover on a quantum meruit.[42] A complaint not as complete as it might have been but which showed the nature of the demand and the amount of damages claimed is sufficient as against a motion to take the case from the jury because of failure to state a cause of action.[43] Where stock was purchased in consideration of an agreement by another that he would pay a dividend thereon if the corporation failed to pay, a complaint for recovery against such promisor need not allege that plaintiff was the owner of the stock at time of bringing action.[44] A complaint in an action brought by a certain company on a contract, addressed to that company under a title including another name, and embodying an instrument in which the company was referred to under the latter name as the contracting party, is sufficient, after answer, as to its allegations that both names referred to the same organization as plaintiff.[45] A complaint in an action by a contractor for failure of the owner to allow completion of the work according to the contract must show the character and amount of the work done in preparation for the construction, that a profit would have resulted and the amount thereof.[46] A complaint on a contract for dealing in lands, alleging that the contract was partly oral and partly written, and to be executed in a foreign state, and showing that it was valid and

allegation in the complaint that defendant was bound under the contract to pay a certain sum out of certain moneys received by him but failed and refused so to do—Abby v. Dexter (Colo. App.) 72 Pac. 892.

31. Crafton v. Carmichael (Ind. App.) 64 N. E. 627.

32. Johnson v. Kindred State Bank (N. D.) 96 N. W. 588.

33. Crafton v. Carmichael (Ind. App.) 64 N. E. 627.

34. Snyder v. Gericke (Mo. App.) 74 S. W. 377.

35. Code Civ. Proc. § 758—Potts v. Dounce, 173 N. Y. 335.

36. Low, Hudson & Gray Water Co. v. Hickson (Tex. Civ. App.) 74 S. W. 781.

37. Abby v. Dexter (Colo. App.) 72 Pac. 892.

38. Miller v. Kline, 108 La. 31.

39. Agreement by state officer to pay obligation as rapidly as he could spare the money from his salary—Culver v. Caldwell (Ala.) 34 So. 13.

40. Abby v. Dexter (Colo. App.) 72 Pac. 892.

41. Blotcky v. Miller (Neb.) 91 N. W. 523.

42. Felton v. Tally (Tex. Civ. App.) 72 S. W. 614.

43. Johnson v. San Juan Fish & Packing Co. (Wash.) 71 Pac. 787.

44. Having been alleged the owner he is presumed to continue the owner—Crook v. Scott (N. Y.) 66 N. E. 1106.

45. Herring-Hall Marvin Co. v. Smith (Or.) 72 Pac. 704.

46. Andrae v. Watson (Tex. Civ. App.) 73 S. W. 991.

binding in that state, is sufficient as against a demurrer alleging that under the law of the forum such a contract must be in writing.[47] A complaint alleging that defendant agreed to pay plaintiff a certain amount for release from a contract of employment of a woman whom defendant wished to marry, on the faith of which promise she was released, sufficiently shows a consideration for her obligation to remain in the service of plaintiff.[48]

Answer or plea and affidavit of defense.[49]—If defendant relies on the illegality of the contract, he must plead it,[50] unless it is the duty of the court to notice the illegality of its own motion.[51] Allegations of false representations as inducement to the contract must also declare that defendant was deceived or that the contract was procured by fraud.[52] A partial defense pleaded as a complete defense is demurrable; but, though insufficient as a complete defense, it may be good as a counterclaim.[53] If a defense of failure of warranty is sufficient, the pleading of bad intent is not material.[54] An allegation in an answer in an action for services that plaintiff was to receive a certain amount under a special contract which had been paid amounts to a plea of payment.[55] An answer setting forth a contemporaneous agreement which varies the terms of a written contract sued upon but fails to show that such agreement was oral is not liable to a general demurrer.[56] An answer alleging that the purpose of the sale of a distillery was to endeavor to establish a monopoly throughout the United States, sufficiently shows that the contract was against the public policy of the forum, without regard to the lex loci contractus, and incapable of enforcement.[57]

In an action based on a promise to pay in event of the sale of certain realty, an affidavit of defense averring that such realty was not sold but exchanged for other realty which was not yet sold, and that consequently time of payment had not arrived, is sufficient.[58] Where defendant alleges that the contract was entered into because of false representations of the agent of plaintiff, the denial of liability because of the untruth must be as broad in the affidavit of defense as the allegation of the representations.[59]

47. Gates v. Paul (Wis.) 94 N. W. 55.

48. Holz v. Hanson, 115 Wis. 236.

49. Sufficiency of an answer in action for breach of contract containing several separate defenses—Falvey v. Woolner, 71 App. Div. (N. Y.) 331. Answer in suit for breach of contract as setting up defense of voluntary acceptance by plaintiff's assignor, with full knowledge of facts, of defendant's vendee as bound to carry out defendant's contract—Falvey v. Woolner, 71 App. Div. (N. Y.) 331. An answer, in an action to recover money paid on purchase of a mining claim, denying that payment was made after making the contract, sufficiently controverts a statement in the complaint that payments were made in accordance with its terms—Sherman v. Sweeny, 29 Wash. 321, 69 Pac. 1117. An answer in an action on a building contract that the contractor has failed to obtain a decision of the engineers in charge as to the fulfillment of the contract, in accordance with a clause therein, must be construed liberally to plead noncompliance with a condition precedent, and is not demurrable as stating an insufficient defense—National Contracting Co. v. Hudson River Water Power Co., 170 N. Y. 439.

50. Horton v. Rohlff (Neb.) 95 N. W. 36.

51. Illegality of an insurance contract, under a law making it a misdemeanor for an agent to give any inducement by rebate for special favors for the securing of insurance, need not be pleaded in defense in an action on a premium note, since it is the duty of the court on its own motion to take notice of the illegality—Heffron v. Daly (Mich.) 95 N. W. 714. A motion to dismiss an action for breach of an oral contract, because it was unenforceable by reason of statutes, cannot be granted defendant where he pleads general denial only and does not set up the statute either as affirmative defense by objection of introductory evidence or as ground for dismissal—Banta v. Banta, 84 App. Div. (N. Y.) 138.

52. Eccardt v. Eisenhauer, 74 App. Div. (N. Y.) 35.

53. Sufficiency of answer pleading a partial defense which it sought to make a complete defense—Ivy Courts Realty Co. v. Morton, 73 App. Div. (N. Y.) 335.

54. Code, § 3639—Perpetual Building & Loan Ass'n v. United States Fidelity & Guarantee Co. (Iowa) 92 N. W. 686.

55. Burton v. Rosemary Mfg. Co., 132 N. C. 17.

56. Tablet & Ticket Co. v. La Feber (Neb.) 93 N. W. 414.

57. Falvey v. Woolner, 71 App. Div. (N. Y.) 331.

58. Schoenbaechler v. Land Title & Trust Co., 21 Pa. (Super. Ct.) 415.

A plea of whole or partial failure of consideration must state facts showing such failure, though a general plea of no consideration may allege the fact in general terms.[60] In New Jersey a plea of want of consideration in an action on a sealed instrument reciting mutual covenants of the parties as respective considerations is insufficient to raise the question of sufficiency of the consideration, the proper pleading being demurrer or plea of non est factum.[61]

Reply.[62]—Where defendant pleaded the making of a subsequent contract as superseding the one on which action was brought, plaintiff need not reply but may interpose in defense showing that such subsequent contract never existed or was rendered void.[63]

Issues and proof; evidence admissible under pleadings; variance.[64]—A contract sued on must be substantially proven as alleged.[65] A party declaring on one contract cannot recover on proof of another,[66] nor can he declare on an express contract and recover on a quantum meruit.[67] Plaintiff may be required to show whether he sues on a written or verbal contract.[68] Where the complaint averred full performance within the limited time, no recovery can be had unless a full performance is established.[69] A nonsuit for failure to prove performance of a condition in a contract cannot be granted where the pleadings thereon did not raise any issue as to performance thereof.[70] Proof of the things in which the other party has defaulted is necessary to take advantage of passive violation of a contract.[71] In an action by a contractor for additional work, the original contract must be introduced to show whether the work was beyond such contract, and the rate of payment.[72] Before one party can recover for failure of the other to allow him to perform, he must show the contract valid and certain in its terms, a breach thereof, and damages.[73] Recovery cannot be had in an action on a contract to collect notes for plaintiff, unless proof is shown that defendant has collected sums on such notes, or by particular diligence could have so done, and that loss resulted to plaintiff.[74] In a suit on a contract for construction of a

59. Manufacturers' Record Pub. Co. v. Holton, 22 Pa. Super. Ct. 120.

60. Osborne & Co. v. Hanlin, 158 Ind. 325; Raritan R. Co. v. Middlesex & S. Traction Co. (N. J. Sup.) 51 Atl. 623.

61. Pub. Laws 1900, p. 362—Raritan R. Co. v. Traction Co. (N. J. Sup.) 51 Atl. 623.

62. Sufficiency of reply in action for breach of contract as setting up the same contract as the one set out in the complaint—McCorkle v. Mallory, 30 Wash. 632, 71 Pac. 186. Necessity of reply in order for plaintiff to prove fraud in avoidance of a new agreement set up in an answer in action for breach of a contract; construction of Code Civ. Proc. § 522—Nesbit v. Jencks, 81 App. Div. (N. Y.) 140.

63. Spier v. Hyde, 78 App. Div. (N. Y.) 151.

64. Issues in pleading in action on contract for sale of mining property—Sherman v. Sweeny, 29 Wash. 321, 69 Pac. 1117. Sufficiency of complaint for failure to properly construct a tramway to admit evidence of defects—Lipscomb v. Railroad Co., 65 S. C. 148. Admissibility of proof of renting of building by owner and of acts of tenant after entry under pleadings in action by contractor to recover for construction—Mitchell v. Williams, 80 App. Div. (N. Y.) 527. Variance in action on contract leaving time for performance to be settled by subsequent agreement—Iroquois Furnace Co. v. Elphicke, 200 Ill. 411. What constitutes a variance in action for breach of contract where the complaint did not allege a condition which was to be performed by plaintiff nor its performance—Griffin v. Bass Foundry & Machine Co., 135 Ala. 490.

65. Mooneyham v. Cella, 91 Mo. App. 260. No recovery can be had for breach of an implied warranty arising out of a written contract—Taussig v. Wind (Mo. App.) 71 S. W. 1095.

66. Brigger v. Mutual Reserve Fund Life Ass'n, 75 App. Div. (N. Y.) 149; Iroquois Furnace Co. v. Bignall Hardware Co., 201 Ill. 297. Proof that one was authorized to collect rents is not evidence of authority to make contracts for leases—Dieckman v. Weirich, 24 Ky. L. R. 2340, 73 S. W. 1119.

67. Hayes v. Bunch, 91 Mo. App. 467.

68. Lombard v. Citizens' Bank of La., 107 La. 183.

69. Stern v. McKee, 70 App. Div. (N. Y.) 142.

70. Walterboro & W. Ry. Co. v. Hampton & B. R. & Lumber Co., 64 S. C. 383.

71. City of Alexandria v. Morgan's La. & T. R. & S. S. Co., 109 La. 50; Morgan's La. & T. R. & S. S. Co. v. City of Alexandria, Id.

72. Board of Com'rs of Fulton County v. Gibson, 158 Ind. 471.

73. Truitt v. Fahey (Del. Super.) 52 Atl. 339.

74. Wight v. Commercial Bank of Albany, 115 Ga. 787.

city pavement to be subject to approval of the city commissioner of public works, the contractor must prove that in rejecting the work, the commissioner acted unreasonably, arbitrarily or fraudulently.[75] Fraud cannot be shown as a ground of damages where the pleadings show merely failure of performance,[76] nor can false representations be shown under an answer failing to allege that plaintiff knew them to be false.[77] Where the answer is a general denial, evidence only tending to prove a rescission is not primarily admissible.[78] Proof of facts excusing or waiving full performance cannot be admitted under a complaint to recover for full performance, nor can recovery be had on that theory;[79] the complaint must allege facts constituting the excuse and that plaintiff, though ready and willing to perform, was prevented by the other parties.[80] Plaintiff's evidence cannot be excluded on the ground of illegality of the contract, where such illegality does not clearly appear on the face of the petition;[81] nor can the illegality be shown under a general denial unless it appears on the face of the complaint or necessarily from the evidence given by plaintiff.[82] Under a plea of total failure of consideration it may be shown that the instrument was executed under misrepresentations as to the value of the consideration.[83] A defense of total failure of consideration for a note should be admitted under a general denial and an offer to show that the holders purchased with knowledge of the want of consideration.[84] Evidence of another contract relating to an entirely distinct transaction cannot be admitted where there is no connection with the alleged broken contract.[85] Letters between parties to a contract written to obviate a defect therein may be considered in an action thereon though based on the original contract unless an objection of variance is made.[86] Evidence offered in proof of passive violation of a contract, without an allegation of violation in the particulars sought to be proven, and without an allegation as to putting in default, cannot be admitted.[87] Evidence tending to show that an architect's certificate was unreasonably withheld cannot be allowed under a complaint merely alleging complete performance.[88] Evidence regarding the specifications under a building contract may be excluded in an action to recover for work as extra, though called for by the specifications, where expressly excepted from the contract.[89] Where two counts appear in the complaint and plaintiff elects to stand on the first, evidence on the second cannot be introduced by defendant.[90] Where a complaint in an action for final payment on a building contract alleged facts showing the contractor entitled to the architect's final certificate, which on his demand had

75. Brownell Improvement Co. v. Critchfield, 197 Ill. 61.

76. Poston v. Eno, 91 Mo. App. 304.

77. Walsh v. Hyatt, 74 App. Div. (N. Y.) 20.

78. William E. Peck & Co. v. Kansas City Metal Roofing & Corrugating Co., 96 Mo. App. 212.

79. Tribune Ass'n v. Eisner & Mendelson Co., 70 App. Div. (N. Y.) 172.

80. Stern v. McKee, 70 App. Div. (N. Y.) 142.

81. Horton v. Rohlff (Neb.) 95 N. W. 36.

82. Lee v. Lee, 40 Misc. (N. Y.) 251.

83. Negotiable Instrument act, §§ 9, 10—Taft v. Myerscough, 197 Ill. 600.

84. Comp. Laws, §§ 767, 769—Hibbard v. Freiburger (Mich.) 94 N. W. 727.

85. Inman v. Crawford, 116 Ga. 63. A separate mortgage executed by a former mortgagor to agents of defendant is properly excluded in an action to recover balance due for threshing grain mortgaged to the defendant—Hill Bros. v. Bank of Seneca (Mo. App.) 73 S. W. 307. Where a contract was executed for the formation of a corporation by defendant, and subsequently on receiving payment of the consideration he executed a contract to return such sum if the corporation failed, testimony as to a breach of the first contract cannot be admitted except on a question of the consideration for the second, where in an action to recover such consideration, plaintiff's witnesses testified that the action was on the second contract—Mendel v. Pickrell, 37 Misc. (N. Y.) 813.

86. Laclede Construction Co. v. Tudor Iron Works, 169 Mo. 137.

87. City of Alexandria v. Morgan's La. & T. R. & S. S. Co., 109 La. 50.

88. Dwyer v. City of New York, 77 App Div. (N. Y.) 224.

89. Isaacs v. Dawson, 70 App. Div. (N Y.) 232.

90. Doyle v. Edwards, 15 S. D. 648.

been refused, evidence is admissible showing that the certificate had been refused at the instance of the owner.[91] Evidence of the value of land to be exchanged for other property by plaintiff for defendant may be properly excluded in an action on the contract, where the consideration was certain personalty which plaintiff was to receive from defendant.[92] Evidence of the value of work performed under a contract to defendant will not affect the right of recovery where the work was performed at a stipulated price and the action was not brought on a quantum meruit.[93] Letters constituting part of correspondence by which a contract was made are properly admitted, though they may constitute a modification of the contract, where the defendant pleaded such modification as an affirmative defense, and if properly introduced as part of the correspondence they may be considered as showing the modification.[94] An excuse for nonperformance cannot be shown under a plea of performance of a condition precedent.[95] Where a contract provided that in consideration of the conduct of a certain suit defendant would convey to plaintiff at a certain time certain lands in default of which he would pay a certain amount of money, the fact that time was or was not of the essence of the contract was not material in an action to enforce the payment thereunder, since when defendant failed to procure the conveyance he became absolutely liable for the payment of the money.[96] No recovery can be had on an implied contract under paragraphs of a complaint counting on a special contract.[97] Proof as to a subsequent oral agreement modifying a written contract pleaded constitutes a variance.[98] Plaintiff cannot disregard an invalid portion of his contract in an action for breach thereon and recover on the remainder, on the theory that the contract is severable where his petition is not drawn on that theory.[99] Allegations of a petition in an action for breach of a construction contract that materials furnished were not good and that the work was not properly performed will not entitle plaintiff to recovery because of failure to protect the construction after it was made, where it was properly done.[1] Proof of performance of a contract for a year's service during ten months and of a waiver of the continued performance is a fatal variance from a counterclaim founded on the entire period of service and alleging performance.[2] A nonsuit was properly granted because of a failure of proof rather than a departure in the evidence where defendant showed the contract to have been greatly modified by a subsequently written agreement, and there was no proof of any breach of the modified contract.[3] Where a note is only collaterally involved in a suit for breach of a contract to reimburse the maker, a variance in describing the note in the complaint as signed by plaintiff only, whereas it was signed by another also, is immaterial.[4] Where a complaint in an action for breach of a contract to advance a law firm certain money for prosecution of litigation did not allege that the payments advanced were not used for the purpose of litigation, but evidence on that point had been received without objection, it

91. Vanderhoof v. Shell, 42 Or. 578, 72 Pac. 126.
92. Distad v. Shanklin, 15 S. D. 507.
93. Craig v. French, 181 Mass. 282.
94. Lost Lake Lumber Co. v. Smith, 29 Wash. 713, 70 Pac. 134.
95. White v. Mitchell, 30 Ind. App. 342.
96. Ehrich v. Durkee (Colo. App.) 72 Pac. 814.
97. Davis v. Chase, 159 Ind. 242.
98. Duval v. American Telephone & Telegraph Co., 113 Wis. 504.
99. Laclede Construction Co. v. Tudor Iron Works, 169 Mo. 137.
1. Taussig v. Wind (Mo. App.) 71 S. W. 1095.
2. Nelson v. Hatch, 70 App. Div. (N. Y.) 206.
3. Lost Lake Lumber Co. v. Smith, 29 Wash. 713, 70 Pac. 134.
4. Culver v. Caldwell (Ala.) 34 So. 13.

may be considered that the complaint was amended in order to give effect to such evidence.[5]

(§ 10) *I. Evidence. Presumptions and burden of proof.*[6]—A consideration will be persumed as to a contract under seal,[7] or a contract in writing.[8] One signing a contract without being influenced by fraud is presumed to know its contents.[9] It will not be presumed that the parties intended to provide for an illegal act or one which would avoid their contract.[10] A contract undertaken by two or more persons is presumed, at the common law, to be joint until the presumption is overcome by words of severance.[11] A conveyance from a client to an attorney in payment of fees and loans is not presumed fraudulent,[12] however, in Georgia, the purchase of a judgment from a client by his attorney is presumed invalid.[13] Mere testimony that one party knew of certain facts at the time of the making of the contract is too indefinite to warrant a presumption that they contracted with reference to such facts, where nothing was said between the parties at the time regarding them.[14] Plaintiff must prove the obligation of defendant under the contract,[15] and performance of the contract.[16] He who asserts a waiver of a provision in a contract,[17] or the absence,[18] or partial illegality of consideration,[19] or mental incapacity to contract,[20] must prove it. Defendant must show fraud in the execution of a written contract,[21] or illegality of the contract,[22] unless it is the duty of the court to notice the illegality of its own motion;[23] but if a written statement in evidence is set up as a false representation, and its falsity is sought to be proved by other evidence, complainant nevertheless has the burden of proving its falsity.[24] In an action on an account for intoxicating liquor, defendant has the burden of proving illegal sales.[25] The owner sued on a

5. Scheurer v. Monash, 37 Misc. (N. Y.) 803.

6. Presumption of invalidity of contract for purchase of client's judgment by attorney—Stubbinger v. Frey, 116 Ga. 396. That plaintiff, his wife and several children resided for a year at a hotel belonging to his mother and operated by another son as her agent, and that plaintiff and his children did not live in the family of the mother or render her any services, and that an allowance was made for the services of his wife to the mother, will raise no presumption that board was furnished them gratuitously, but a contract to pay will be implied—Weitnauer v. Weitnauer, 117 Iowa, 578.

7. Howie v. Kasnowitz, 83 App. Div. (N. Y.) 295.

8. Ash v. Beck (Tex. Civ. App.) 68 S. W. 53; Kiesewetter v. Kress, 24 Ky. L. R. 1239, 70 S. W. 1065; Rev. St. 1899, § 894—Holmes v. Farris, 97 Mo. App. 305; Tapley v. Herman, 95 Mo. App. 537; Lowrey v. Danforth, Id. 441; Brown v. Johnson Bros., 135 Ala. 608; Woodworth v. Veitch, 29 Ind. App. 589; Pritchett v. Sheridan (Ind. App.) 63 N. E. 865; Gallagher v. Kiley, 115 Ga. 420; McMicken v. Safford, 197 Ill. 540.

9. Fivey v. Railroad Co., 67 N. J. Law, 627.

10. Horton v. Rohlff (Neb.) 95 N. W. 36; Bostwick v. Insurance Co. (Wis.) 92 N. W. 246; Johnston v. Insurance Co., 93 Mo. App. 580.

11. Hill v. Combs, 92 Mo. App. 232.

12. Lindt v. Linder, 117 Iowa, 110.

13. Stubbinger v. Frey, 116 Ga. 396.

14. Murphy v. Dernberg, 84 App. Div. (N. Y.) 101.

15. Plaintiff suing for balance of compensation under a contract for performance of a theatrical exhibition must prove an alleged agreement by defendant to pay at some future time an unsatisfied balance of the contract price made during the last performance—Charley v. Potthoff (Wis.) 95 N. W. 124.

16. Special contract—Aarnes v. Windham (Ala.) 34 So. 816; Froelich v. Christie, 115 Wis. 549. In an action by one for services under a contract making it optional with the other party as to whether such services should be continued, plaintiff must show that he performed the services—Shedrick v. Young, 72 App. Div. (N. Y.) 278.

17. Sessa v. Arthur (Mass.) 66 N. E. 804.

18. Howie v. Kasnowitz, 83 App. Div. (N. Y.) 295.

19. A party alleging in an action on a contract that a certain promise was based on an illegal consideration, as a reason for his failure in its fulfillment, must prove such allegations—Anderson v. Carlson, 99 Ill. App. 514.

20. Tuite v. Hart, 71 App. Div. (N. Y.) 619.

21. Fivey v. Railroad Co., 67 N. J. Law, 627; Edwards v. Story, 105 Ill. App. 433; Harrington v. Mining Co., 27 Mont. 1, 69 Pac. 102.

22. Horton v. Rohlff (Neb.) 95 N. W. 36.

23. Heffron v. Daly (Mich.) 95 N. W. 714.

24. Garrison v. Technic Electrical Works, 63 N. J. Eq. 806.

25. Overstreet v. Brubaker (Mo. App.) 71 S. W. 1090.

building contract must show that an architect's certificate presented by the contractor was secured by fraud;[26] and if he counterclaims liquidated damages for failure to complete the work in the agreed time, he must show such failure.[27] Where plaintiff declared on an open account but defendant pleaded a verbal contract, which plaintiff admitted while testifying that it was restricted to a time stated, he must prove the restriction.[28] The burden is on an attorney to show that his purchase of a judgment from his client was fair and for a sufficient consideration.[29] In an action for wages, the employer must show that other and more profitable employment had been offered to plaintiff and declined by him, or might have been found, in order to reduce the damages.[30] In an action for services, an allegation in the answer that plaintiff was to receive a certain amount under a special contract, which had been paid, amounted to a plea of payment and the burden was on defendant to prove the contract he alleged.[31] Where water rents for irrigation purposes under a contract were not collected during the first year owing to a loss of crops for insufficiency of water, and the next year a new contract was made without demand for such previous rents, it will be presumed in an action to set aside for nonperformance that the debt of the first year was merged in the consideration for the later contract.[32]

Admissibility of evidence.[33]—Parol evidence is inadmissible to vary, contradict, or modify a written contract unambiguous in its terms,[34] especially where

26. Schultze v. Goodstein, 82 App. Div. (N. Y.) 316.

27. Dunn v. Morgenthau, 73 App. Div. (N. Y.) 147.

28. Austin v. Schwing (La.) 34 So. 700.

29. Stubbinger v. Frey, 116 Ga. 396.

30. Griffin v. Brooklyn Ball Club, 68 App. Div. (N. Y.) 566.

31. Burton v. Manufacturing Co., 132 N. C. 17.

32. Perkins v. Frazer, 107 La. 390.

33. Evidence admissible in action by subcontractor to recover for work as extra which was called for by specifications—Isaacs v. Dawson, 174 N. Y. 537. Evidence in action by a surety against a state officer for breach of a contract to reimburse the surety for money paid on the bond of the deputy of the officer, as to examination by the public examiner of the accounts of the department—Culver v. Caldwell (Ala.) 34 So. 13. Evidence of what persons in the audience said on leaving a theater during exhibitions may be admitted on the question of compliance of the opera company with its contract for the exhibition in an action by it to recover compensation—Charley v. Potthoff (Wis.) 95 N. W. 124. Expert evidence as to whether there were cases in which earthen sewer pipe was preferable to iron, where the contractor was seeking to excuse its substitution for iron pipe required by the contract, on the ground that the condition of the soil made it necessary; and as to the size of pipe which is preferable under laundry tubs, may be admitted on the issue in a building contract, where it appeared that the smaller size conformed to the regulations of the building department—Schultze v. Goodstein, 82 App. Div. (N. Y.) 316.

34. Koffman v. Southwest Missouri Elec. Ry. Co., 95 Mo. App. 459; Sexton v. Barrie, 102 Ill. App. 586; Heard v. Tappan, 116 Ga. 930; Consumers' Ice Co. v. Jennings (Va.) 42 S. E. 879; Foote & Davies Co. v. Malony, 115 Ga. 985; Rolfs v. Atchison, T. & S. F. Ry. Co. (Kan.) 71 Pac. 526; Wear Bros. v. Schmelzer, 92 Mo. App. 314; Walther v. Stampfli, 91 Mo. App. 398; Dady v. O'Rourke, 172 N. Y. 447; Brewer v. Grogan, 116 Ga. 60; New Idea Pattern Co. v. Whelan, 75 Conn. 455; National Computing Scale Co. v. Eaves, 116 Ga. 511; Wilson v. Hinnant, 117 Ga. 46; Grand Lodge, A. O. U. W., v. Bunkers, 23 Ohio Circ. R. 487; De Sola v. Pomares, 119 Fed. 373; Over v. Walzer, 103 Ill. App. 104. Contract to pay debt of another—Fritch v. Citizens' Bank, 202 Pa. 287. Evidence of what the parties to a written contract construed it to mean, cannot be shown to change or alter its terms—Hart v. Hart (Wis.) 94 N. W. 890. An oral promise by one of the parties to a written contract cannot be admitted to add to the contract on the ground that it is collateral unless it relates to a subject distinct from that to which the instrument relates—Johnson v. Kindred State Bank (N. D.) 96 N. W. 588. Contract for construction of a telephone and telegraph line over property different from that mentioned in the subsequent parol contract sought to be shown—Southern Bell Telephone & Telegraph Co. v. Harris (Ga.) 44 S. E. 885. Where a shipping receipt was filled out by the shipper and signed by the carrier's agent, the conditions therein stated became the contract of shipment between the parties so that oral evidence was inadmissible to show that the goods were shipped under a special agreement as to time of delivery—Sloman v. National Exp. Co. (Mich.) 95 N. W. 999. Executed writings express on their face the complete contract between the parties and neither express nor implied warranties may be injected into the contract by proof of prior oral conversation—Telluride Power Transmission Co. v. Crane Co., 103 Ill. App. 647. Oral evidence that the sellers of a certain business agreed never to re-engage in the business in the same vicinity cannot be admitted to vary

neither fraud nor misrepresentation is shown;[35] but consideration for a written contract may be shown by parol,[36] or a mistake in consideration,[37] or in the name of a party,[38] or the place of performance, if the contract is silent in that particular,[39] or the subject-matter may be identified.[40] If a written contract purports on its face to contain the whole agreement of the parties, oral evidence cannot be received to add to or vary its terms, but it if appears from the face of the instrument that the whole agreement was not reduced to writing, and that the instrument does not express the entire agreement, the oral part of the contract may be shown under proper allegations.[41] A conversation by the parties with reference to a written instrument may be admitted.[42] Evidence of circumstances surrounding the making of a contract is admissible on the issue as to its terms.[43] A misunderstanding between the parties to a contract as to its construction cannot be shown from testimony of one party that he understood it differently from the claim of the other, but only from the language used.[44] Negotiations in regard to a second contract, on a different basis, after expiration of the first, will not constitute evidence of renewal of the first contract.[45] Where a contract with a corporation provides for payment of a certain sum in a certain time and that it shall not be modified except by resolution of the directors, proof that the officers of the company informed the other party of a modification is inadmissible in an action on the contract to show that it would mature earlier.[46] Corrections and interlineations clearly shown to have been made before a contract was signed will not render it inadmissible as evidence.[47] A written instrument constituting part of the contract, made and delivered to defendant by the other party at the time of execution, is admissible in a suit on the contract.[48] Under the statutes of 1851, Illinois, deeds not recorded prior to that time were admissible in ejectment, though not accompanied by certificate of magistracy.[49] Full opportunity to a purchaser for examination of the subject-matter consti-

a written agreement for the sale of the business specifying merely that good-will is included—Zanturjian v. Boornazian (R. I.) 55 Atl. 199.

35. Mefford v. Sell (Neb.) 92 N. W. 148. Admissibility of parol evidence to show fraud in execution of written contract (Le Bleu v. Savoie, 109 La. 680); it must be pleaded to be admitted (New Idea Pattern Co. v. Whelan, 75 Conn. 455; Telluride Power Transmission Co. v. Crane Co., 103 Ill. App. 647); character of evidence as parol (American Cotton Co. v. Collier [Tex. Civ. App.] 69 S. W. 1021; Hurlbert v. Kellogg Lumber & Mfg. Co., 115 Wis. 225; Leicher v. Keeney [Mo. App.] 72 S. W. 145). It cannot be introduced to enable recovery on a contract not expressed by the writing—Koffman v. Southwest Missouri Elec. Ry. Co., 95 Mo. App. 459.

36. Deeds—Martin v. White, 115 Ga. 866; Poor's Ex'r v. Scott, 24 Ky. L. R. 239, 68 S. W. 397; Columbia Nat. Bank v. Baldwin (Neb.) 90 N. W. 890; Harkless v. Smith, 115 Ga. 350; Lenhardt v. Ponder, 64 S. C. 354. Notes—Vradenburg v. Johnson (Neb.) 91 N. W. 496; Folmar v. Siler, 132 Ala. 297. Mortgages—Boren v. Boren (Tex. Civ. App.) 68 S. W. 184. Bill of sale—Wolf v. Haslach (Neb.) 91 N. W. 283. Contract for sale of standing timber; under express provisions of statutes 1889, § 470—Strubbe v. Lewis (Ky.) 76 S. W. 150. The writing imports a consideration—Ash v. Beck (Tex. Civ. App.) 68 S. W. 53.

37. An allegation of fraud, accident or mistake is unnecessary—Boren v. Boren (Tex. Civ. App.) 68 S. W. 184.

38. Stokes v. Riley (Tex. Civ. App.) 68 S. W. 703.

39. Cook v. Todd, 24 Ky. L. R. 1909, 72 S. W. 779; Gehl v. Milwaukee Produce Co. (Wis.) 93 N. W. 26.

40. Where a contract for the sale of standing timber sufficiently describes the land to show the subject of contract, parol evidence may be admitted to identify the land intended—Strubbe v. Lewis (Ky.) 76 S. W. 150.

41. Johnson v. Kindred State Bank (N. D.) 96 N. W. 588.

42. Copeland v. Copeland, 64 S. C. 251. Evidence of negotiations between the parties before the contract is reduced to writing cannot be admitted in an action on the contract except to aid the court to construe the instrument—Arthur v. Baron De Hirsch Fund (C. C. A.) 121 Fed. 791.

43. Anderson v. Harper, 30 Wash. 378, 70 Pac. 965.

44. Durgin v. Smith (Mich.) 94 N. W. 1044.

45. O'Connor v. Briggs, 182 Mass. 387.

46. Cleckley v. Mutual Fidelity Co. (Ga.) 43 S. E. 725.

47. Crowley v. United States Fidelity & Guaranty Co., 29 Wash. 268, 69 Pac. 784.

48. Sivell v. Hogan, 115 Ga. 667.

49. Laws 1851, p. 122—Stalford v. Goldring, 197 Ill. 156.

tutes evidence of good faith of the vendor.[50] The good reputation of a contractor for fair and honorable dealing cannot be shown on issue as to whether he had complied with terms of a building contract.[51] On the question of damages for breach of a contract to sell goods in certain territory, evidence of sales of similar goods between the time of the breach and of the trial may be shown where the damages are confined to loss of profits.[52] Evidence of cost of extra work to plaintiff is not admissible to establish the liability under a building contract, where no evidence of the amount of the work or its value as fixed by the terms of the contract is shown.[53] As tending to show the history of a transaction in which a contract was made for the purchase of timber lands on commission, evidence is properly admitted of the hiring of men and teams to aid in inspecting the lands though it was not claimed that the prospective purchaser was liable therefor.[54] In an action on a contract between co-sureties for payment of a note and division of all collections made thereon, evidence of their joint demand on the principal to pay the balance due may be admitted as showing that defendant had recognized their joint interest in the debt.[55] Where it appears that a great number of changes were made in the original plans for a building by the architect, and that much extra work was required, evidence was admissible to show what work was done under direction of the architect as well as under the original plans, which had therefore become inadequate.[56]

Sufficiency of evidence.[57]—To render one liable for breach of a contract, he must be shown to have obligated himself to perform the conditions which it

50. Garrison v. Technic Electrical Works, 63 N. J. Eq. 806.

51. Cannon v. Hunt, 116 Ga. 452.

52. Hichhorn v. Bradley, 117 Iowa, 130.

53. North American Ry. Const. Co. v. R. E. McMath Surveying Co. (C. C. A.) 116 Fed. 169.

54. Culver v. Smith (Mich.) 91 N. W. 608.

55. Cramer v. Redman (Wyo.) 68 Pac. 1003.

56. McClellan v. McLemore (Tex. Civ. App.) 70 S. W. 224.

57. Sufficiency of evidence of mistake in execution of note—Bailey v. Wood, 24 Ky. L. R. 801, 69 S. W. 1103. Of undue influence—Lodge v. Hulings, 63 N. J. Eq. 159. Of abandonment of a contract—Eagle Iron Works v. Farley, 83 App. Div. (N. Y.) 82; Kelly v. Short (Tex. Civ. App.) 75 S. W. 877. Of breach of wrecking contract by masters of a vessel—The Helios (C. C. A.) 115 Fed. 705. Of rescission of contract—Walsh v. Hyatt, 74 App. Div. (N. Y.) 20. Of intention to evade tax on mortgage by contract for second mortgage—Brown v. Newell, 64 S. C. 27. Of contract to pay for services by making will in favor of servant—Leahy v. Campbell, 70 App. Div. (N. Y.) 127. Of contract for cancellation of notes—Templeton v. Butler (Wis.) 94 N. W. 306. Of the offer and acceptance of a contract for plastering houses—Disken v. Herter, 73 App. Div. (N. Y.) 453. In an action for breach of a contract to purchase a mechanic's lien provided it was a first claim on the property—Dodson v. Crocker (S. D.) 94 N. W. 391. In action between co-sureties on a contract to pay the notes secured and divide collections made thereon as against the principal—Cramer v. Redman (Wyo.) 68 Pac. 1003. In action for breach of a contract for sawing lumber—Harris v. Gano (Ga.) 44 S. E. 8. In action to recover freight under a contract—Hunter v. Helsley (Mo. App.) 73 S. W. 719. In an action to recover for property lost in sleeping car where it was left under a promise of care by an employe of the company operating the car—Noble v. Great Northern Ry. Co. (Minn.) 94 N. W. 434. In an action by a building contractor for the value of extra work, to show that a demand by the owner for arbitration to settle the compensation for such extra work was fully justified—Van Note v. Cook, 171 N. Y. 659. To show that one attempting to recover a portion of the gross commissions received by a brokerage firm as an employe knew that the commissions were earned in a manner contrary to public policy—Cullison v. Downing, 42 Or. 377, 71 Pac. 70. To show ratification of contracts and deeds in a suit for their cancellation—American Cotton Co. v. Collier (Tex. Civ. App.) 69 S. W. 1021. To show that a party to a contract was mentally capable of ratifying it—Denny v. Stokes (Tex. Civ. App.) 72 S. W. 209. To show the insolvency of a party at the time a contract was made, entitling the other party to disaffirming on account of fraud—University of Virginia v. Snyder (Va.) 42 S. E. 337. To show breach of a contract for delivery of goods—J. E. Dunn & Co. v. Smith (Tex. Civ. App.) 74 S. W. 576. To show that a failure to deliver building materials within a certain time had been waived by the other party—Boyle v. Fox, 72 App. Div. (N. Y.) 617. To show substitution of verbal for original written contract—Rowland Lumber Co. v. Ross (Va.) 40 S. E. 922. To show a contract between the parties—Standard Oil Co. v. Goodman Drug Co. (Neb.) 95 N. W. 667. To show contract to make an heir of one who rendered service to deceased—McElvain v. McElvain, 171 Mo. 244. To show failure to

is alleged he failed to perform.[58] Evidence of damages for breach of a contract must be reasonably certain and not founded in speculation and conjecture.[59] That plaintiff misunderstood the terms of a contract will not suffice to show fraud.[60] Mere presence of old age or physical infirmity will not raise a presumption of incapacity to contract.[61] In an action on a contract for services, it must be proven by reasonable preponderance that there was an express promise to pay for the services in case they were rendered.[62] Evidence of compensation for services received under a contract is insufficient to show the validity of its execution.[63] In an action for services, it must be proven by reasonable preponderance that there was an express promise to pay for the services in case they were rendered.[64] In an action on a promise made in a letter written by a deceased, the testimony of his wife that the letter was in the handwriting of her husband without corroborative evidence in the record to show the fact was insufficient to prevent a nonsuit.[65] The certificate of an architect showing compliance by the contractor and his right to payment is conclusive, unless impeached for fraud.[66] Recital of a debt owing to the mortgagee in a mortgage, given to secure him in an agreement to pay the debt of the mortgagor owing to a third person, is prima facie evidence thereof under a plea of set off in a suit in equity by the third person to enforce the agreement.[67] In an action by a bank president against the cashier to recover the share of profits alleged to have been made by the latter in the sale of stock, held as collateral security for the debt of a corporation after it had been re-organized by the cashier and the debt paid, evidence of mere gen-

perform contract according to its terms—International Soc. v. Dennis, 76 App. Div. (N. Y.) 327. To show that court's allowance for extras and alterations on a building contract was excessive—California Iron Const. Co. v. Bradbury, 138 Cal. 328, 71 Pac. 346, 617. To show that a license under a patent was granted to a partnership and not to a corporation subsequently organized under the same name so as to entitle the latter to sue thereon—Toppan v. McLaughlin, 120 Fed. 705. To show right to enforcement of a contract to convey a fourth interest in a mining claim—Jordan v. Coulter, 30 Wash. 116, 70 Pac. 257. To establish right to extra compensation under a contract for services in securing consent of property holders to the erection of an elevated railroad—Union El. R. Co. v. Nixon, 199 Ill. 235. Showing a right in a purchaser of certain lots in a plat to compel the vendor to open a street by a deflected course over a lot originally conveyed by him to another but afterwards re-purchased—Miller v. Mackey, 204 Pa. 345. To establish a writing by defendant in an action on a contract as binding him for the amount sued for under an agreement for services—Davison v. McWhorter, 115 Ga. 844. To show that a transaction carried on by plaintiff's husband, whereby stock belonging to her was delivered to a corporation, constituted a loan from her and not a donation from her husband—Fanny Rawlings Min. Co. v. Tribe, 29 Colo. 302, 68 Pac. 284. Of reconventional demand for damages resulting from breach in action on contract—Payne v. Amos Kent Brick & Lumber Co. (La.) 34 So. 763. Transgression of public policy must clearly appear by the evidence—Equitable Loan & Security Co. v. Waring (Ga.) 44 S. E. 320. Where a change in the plans of work under a contract between an individual and a partnership resulted in the withdrawal of several members of the firm from the contract, and the individual consented to its continuance by the remainder in an action for wages by the latter, it was sufficient to show as against a motion for non-suit on the ground that the first contract had not been abrogated by the parties, that there had been an abandonment of the first contract by those who refused to continue so that the remainder were not prevented from making a new contract—Anderson v. McDonald, 31 Wash. 274, 71 Pac. 1037.

58. Defendant cannot be held to pay a specified compensation for services where no promise is shown to any other party to pay such compensation—Dudley v. Sanders Mfg. Co., 114 Fed. 981.

59. Truitt v. Fahey, 3 Pen. (Del.) 573; Raymond v. Yarrington (Tex. Civ. App.) 69 S. W. 436.

60. Nesbit v. Jencks, 81 App. Div. (N. Y.) 140.

61. Chadd v. Moser, 25 Utah, 369, 71 Pac. 870.

62. Patton v. Wells (C. C. A.) 121 Fed. 337.

63. Smith v. Bank of New England (N. H.) 54 Atl. 385.

64. Patton v. Wells (C. C. A.) 121 Fed. 337.

65. The evidence of the wife was introduced in violation of Code Civ. Proc. subd. 1, § 1881, and her testimony was afterward stricken out by the court leaving the letter unsupported by any evidence—Metz v. Bell, 137 Cal. xix, 70 Pac. 618.

66. Schultze v. Goodstein, 82 App. Div. (N. Y.) 316.

67. Greene v. McDonald, 75 Vt. 93.

eral conversations between the parties about the affairs of the bank and not tending to show that the cashier intended to bind himself to divide any surplus arising is insufficient to show contract for division of the profits.[68]

(§ 10) *J. Questions of law and fact.*[69]—If the explanation of a contract requires extrinsic evidence, its construction in view of such evidence is for the jury.[70] The existence of a contract from conflicting evidence, partly parol and partly documentary,[71] the intention of the parties as to the terms of a contract,[72] the acceptance of an order for sale of machinery,[73] the question of consideration,[74] the compromise of a doubtful claim where one of the parties has given his note for such claim,[75] whether the parties were justified in terminating a contract for failure in performance,[76] whether a written contract was procured by fraud and misrepresentation,[77] whether writings purporting to contain a contract were signed by the parties and if signed whether they were delivered,[78] whether a contract expressly providing remuneration to plaintiff for time and services, while acting as director and officer of a bank, was made,[79] whether a contract under which illegal acts were done was entered into in contemplation of the performance of such illegal acts,[80] the character of a contract as a loan or a sale where the pleadings raise the issue,[81] the character of an agreement, whether conditional or uncondi-

68. Patton v. Wells (C. C. A.) 121 Fed. 337.

69. Sufficiency of evidence to warrant direction of verdict for plaintiff—Knowlson v. Piehl (Mich.) 90 N. W. 415. In an action on a contract for resale of property to carry to the jury the question whether defendant elected to take the notes of the purchaser as assets of his own, so as to render him liable to the seller—Rogers-Ruger Co. v. McCord, 115 Wis. 261. Right of plaintiff suing on written contract to have question of liability of defendant on an implied contract submitted to the jury after voluntary nonsuit—Koffman v. Southwest Missouri Elec. Ry. Co., 95 Mo. App. 459. Where correspondence between certain persons introduced in evidence clearly shows a contract for services by plaintiff for certain compensation, such issue could not be submitted to the jury to be settled in connection with a subsequent agreement regarding the same services made after breach of the first contract by the defendants as shown by their own evidence—Roberts v. Pacific & A. Ry. & Nav. Co. (C. C. A.) 121 Fed. 785. The question whether an architect had ordered a change in plans for a building involving extra expense, is for the jury, where there was evidence that he made such change for his own benefit and made no extra charge therefor, that he denied having ordered the change, and testimony was contradicted though there was no evidence of an agreement between the parties as to price of such work—Essex v. Murray (Tex. Civ. App.) 68 S. W. 736. The determination of an expert as to whether he could be of service to one who wished him to furnish an affidavit, was not conclusive upon the other party, and whether his affidavit so furnished was serviceable was a question of fact—Rosewater v. Glen Tel. Co., 81 App. Div. (N. Y.) 275.

70. Haskell v. Read (Neb.) 93 N. W. 997; Dillon v. Watson (Neb.) 92 N. W. 156.

71. If a contract is to be made out partly by correspondence and partly by evidence of conversations, as to the exact statements of which and as to the circumstances under which the conversation was uttered, there is conflicting evidence, the question as to whether a contract existed as well as what it was, is for the jury—Telluride Power Transmission Co. v. Crane Co., 103 Ill. App. 647.

72. Clark v. Shannon, 117 Iowa, 645. In an action on a contract for the harvesting of grain to recover for loss of grain resulting from high winds during a delay in the performance of the contract, the question whether the high winds were contemplated by the parties when the contract was made, is for the jury—Holt Mfg. Co. v. Thornton, 136 Cal. 232, 68 Pac. 708. Whether a word used in a written contract is so used in a technical sense more comprehensive than its ordinary meaning, is for the jury—Butte & B. Consol. Min. Co. v. Montana Ore Purchasing Co. (C. C. A.) 121 Fed. 524.

73. Elfring v. New Birdsall Co. (S. D.) 92 N. W. 29.

74. Missouri, K. & T. R. Co. v. Carter, 95 Tex. 461.

75. School Dist. of Barnard v. Matherly, 90 Mo. App. 403.

76. Lincoln v. Orthwein (C. C. A.) 120 Fed. 880. Contract between building contractors and manufacturer of materials limiting performance to a certain date and providing that if materials were not furnished by that time, the contractors after giving five days' notice might purchase elsewhere, when there was a delay in providing materials and proper notice was given—Christopher, etc., Foundry Co. v. Yeager, 202 Ill. 486.

77. Guilford v. Mason, 24 R. I. 386.

78. Telluride Power Transmission Co. v. Crane Co., 103 Ill. App. 647.

79. Patton v. Wells (C. C. A.) 121 Fed. 337.

80. Lytle v. Newell, 24 Ky. L. R. 188, 68 S. W. 118.

81. Martin v. Dowd (Idaho) 69 Pac. 276.

tional, and the waiver or fulfillment of conditions,[82] the existence of an indebtedness under a contract,[83] performance[84] or repudiation,[85] the reasonable time for performance of a contract,[86] or for acceptance of goods under the terms of the contract,[87] or for termination of a contract by one of the parties under its terms;[88] all these are questions for the jury. Words in a contract relating to tools to be used in a particular class of work are to be construed by the jury in the view of competent expert testimony.[89]

The court must settle the sufficiency of writings to constitute a contract whether made by commercial correspondence or formal documents.[90] The court and not the jury should construe a contract,[91] with a view to finding the intention of the parties,[92] as to the real object of the parties in its execution,[93] or as to its legal effect, there being no fraud or mistake.[94] The amount of compensation due cannot be left to the jury when the evidence shows it to be a sum certain.[95] Where a contract gave no time in which rights thereunder must be exercised, the reasonableness of the time within which a demand was made was for the court.[96] Whether an offer of rescission is made within a reasonable time is a mixed question of law and fact.[97]

The construction of a contract with regard to certain words which appeared to be ambiguous must be determined by the court as a question of law, and if under its determination the words are not ambiguous, parol evidence cannot be

82. Jewell v. Posey (Iowa) 93 N. W. 379. The question whether there had been a waiver of a requirement in the specifications of a building contract as shown by conversation between the parties, is for the jury—Woarms v. Becker, 84 App. Div. (N. Y.) 491. Whether a provision in a building contract requiring alterations or additions to be expressed in writing has been waived by one of the parties, is for the jury—Copeland v. Hewett, 96 Me. 525.

83. Greene v. McDonald, 75 Vt. 93.

84. Patton v. Wells (C. C. A.) 121 Fed. 337; Gunther v. Gunther, 181 Mass. 217. In an action on a contract to recover the balance of compensation agreed to be paid for theatrical exhibitions where the defense is that the performances failed to comply with the contract, the question of proper performance is for the jury—Charley v. Potthoff (Wis.) 95 N. W. 124. In an action to recover for the performance of a surgical operation, the question as to whether the plaintiffs gave proper and reasonable care to the patient, is for the jury—Seabrook v. Orto, 70 Ark. 503. The question as to which of two parties had refused to perform a contract for personal services, where both parties alleged readiness to perform, is for the jury—Kochmann v. Baumeister, 73 App. Div. (N. Y.) 309. The question of reasonable performance of a contract within its fair intent, where it has not been performed exactly to the letter, is for the jury—Drew v. Goodhue, 74 Vt. 436. The question of substantial performance of a contract is for the jury—Pitcairn v. Philip Hiss Co. (C. C. A.) 113 Fed. 492.

85. Gunther v. Gunther, 181 Mass. 217.

86. Los Angeles Traction Co. v. Wilshire, 135 Cal. 654, 67 Pac. 1086.

87. In an action on a contract for manufacture of certain goods to be accepted within a reasonable time—Bowen v. Young, 37 Misc. (N. Y.) 547.

88. E. H. Taylor, Jr., & Sons v. Louisville Public Warehouse Co., 24 Ky. L. R. 1656, 72 S. W. 20.

89. Glenn v. Strickland, 21 Pa. Super. Ct. 88.

90. Telluride Power Transmission Co. v. Crane Co., 103 Ill. App. 647. The effect of letters containing the proposal and acceptance of a contract—Lost Lake Lumber Co. v. Smith, 29 Wash. 713, 70 Pac. 134.

91. Hinman v. F. C. Austin Mfg. Co. (Neb.) 90 N. W. 934; Grasmier v. Wolf (Iowa) 90 N. W. 813; Foster v. Chicago, 197 Ill. 264; Bullock-McCall-McDonnell Elec. Co. v. Coleman, 136 Ala. 610. Building contract inconsistent and contradictory in its provisions—Keefer v. Sunbury School Dist., 203 Pa. 334. A written contract subsequently signed governing a shipping contract previously agreed upon by the parties—Ft. Worth & D. C. Ry. Co. v. Wright (Tex. Civ. App.) 70 S. W. 335. This is true of a written contract though the language is so plain as not to require explanation of the extrinsic evidence—Davis v. Bowers Granite Co. (Vt.) 54 Atl. 1084.

92. Sexton v. Barrie, 102 Ill. App. 586.

93. Pease v. Rand & L. Desk Co., 100 Ill. App. 244.

94. Hughes v. Rudy, 15 S. D. 460.

95. Where the testimony of plaintiff in an action for services, showed that he was to be paid separate amounts for each of two particular kinds of services if required to perform both, and that he never performed but one of them, the liability on which was admitted by defendant, the question as to the amount he is entitled to recover, cannot be left to the jury—Plass v. Weil, 81 N. Y. Supp. 299.

96. Loeb v. Stern, 198 Ill. 371.

97. Meyer v. Fishburn (Neb.) 91 N. W. 534.

admitted to show the construction of either party so as to vary or contradict such meaning, though the court may properly hear parol evidence of the collateral facts and circumstances to determine the true meaning of the words; but on the other hand, when testimony of a contradictory character is admitted to show the meaning of such words, the question is for the jury, and plaintiff must establish the meaning he asserts by the weight of his evidence.[98]

(§ 10) *K. Instructions.*[99]—The jury may be charged on the legal effect of a contract in an action thereon.[1] Where a joint liability of parties, sued jointly on a contract, is shown by the evidence, the jury cannot be instructed that finding may be had against one or all.[2] A general charge cannot be given for plaintiff where the evidence as to performance in accordance with the contract is conflicting.[3] Where a contract was made in consideration of certain acts of plaintiff, and it appears that such acts constituting the consideration had been performed before the making of the contract, it was proper to instruct that there was no consideration.[4] An instruction, in an action on a written contract for payment of one-half of certain claims when collected, that plaintiff must recover on any claims collected less expense, is incorrect as ignoring the terms of the contract.[5] Where, in an action for damages because of a breach of a contract, defendant's only request was that the jury allow nominal damages only, the court was not required to instruct more fully than that the jury should award such damages as would compensate the plaintiff for the loss resulting from the failure of the plaintiff to perform.[6] An instruction in an action on an entire contract for

98. Cameron Milling & Elevator Co. v. Orthwein (C. C. A.) 120 Fed. 468.

99. An instruction in an action to recover the balance due for threshing grain, mortgaged to the defendant, limiting defendant's creditors to a certain amount when his mortgagor had paid the plaintiffs' an additional amount to be applied on the threshing, was correct where plaintiffs' evidence showed clearly that the latter amount was applied to payment of an account for threshing other grain—Hill Bros. v. Bank of Seneca (Mo. App.) 73 S. W. 307. Where certain whiskey was deposited in a warehouse under a contract whereby it was to be held for a certain charge per barrel, per month, and loans to be secured thereon and renewed at a certain amount so long as it remained in the warehouse, but the warehousemen failed to renew the loans and forced the sale of the whiskey at a loss, an instruction in an action for the breach, that if the warehousemen gave the owner reasonable notice that the loan would not be renewed, then the jury should find only the amount the owner would have been compelled to pay to carry the loan without the warehousemen's assistance, was incorrect in its application to the facts—E. H. Taylor, Jr., & Sons v. Louisville Public Warehouse Co., 24 Ky. L. R. 1656, 72 S. W. 20.

Building and construction contracts. Sufficiency of instructions in an action by contractors for breach of building contract—McClellan v. McLemore (Tex. Civ. App.) 70 S. W. 224. Where in an action for breach of a building contract, the court instructed that if the jury would find that plaintiff believed contract to be on certain basis, and defendant believed it to be on a certain other basis, their minds did not meet so as to make a contract, and plaintiff could recover what his services were reasonably worth, was proper as in effect instructing the jury that if the parties did not come to an agreement there was no special contract—Burton v. Rosemary Mfg. Co., 132 N. C. 17. Where a contract for furnishing building materials provided that if there were delays in the furnishing, materials might be procured elsewhere and charged to the seller, an instruction on the question whether the purchasers could bind the seller by contract for heavier materials in case of delay, was properly refused where the court had instructed that they would have no right to charge the seller with additional cost owing to change in the size and weights of materials—Christopher, etc., Foundry Co. v. Yeager, 202 Ill. 486. Where a contract for labor was rescinded after partial performance and a new one made providing that work should be paid for at a certain rate under both contracts, evidence that the employer told the laborers after commencing work under the new contract, that he was in charge of the work and that there was nothing more for them to do, is sufficient on which to found an instruction in an action against him for wages that if he refused to permit the laborers to proceed, a verdict should be found against him for work under both contracts—Anderson v. McDonald, 31 Wash. 274, 71 Pac. 1037.

1. Ash v. Beck (Tex. Civ. App.) 68 S. W. 53.

2. Sutherland v. Holliday (Neb.) 90 N. W. 937.

3. Special building contract—Aarnes v. Windham (Ala.) 34 So. 816.

4. Nesbit v. Jencks, 81 App. Div. (N. Y.) 140.

5. Brewer v. Swartz, 94 Mo. App. 392.

6. Anderson Carriage Co. v. Pungs (Mich.) 96 N. W. 563.

construction that the presence of defective material will not prevent recovery if the contract is "otherwise" substantially performed takes from the jury the question whether the entire contract has been substantially performed.[7]

(§ 10) *L. Verdict and findings; judgment.*—A finding against one of several defendants will not be supported by evidence of joint liability on a contract.[8] A finding that a subsequent agreement for notice of completion of a written contract had no effect on the contract and that the rights of the parties were deducible from the latter means that no legal liability under the requirement of notice was intended in making the contract.[9] A finding that before plaintiff accepted a proposition for settlement pursuant thereto, defendant stated to the plaintiff how much was due, which representations were not true though relied upon by plaintiff who was ignorant of the facts, did not amount to a finding that defendant's representations were made with knowledge that they were untrue and with intent that they should be acted on by plaintiff and that he did so act thereon.[10] After verdict for plaintiff in a suit for specific performance of a contract for reconveyance of realty on termination of insanity proceedings, the plaintiff cannot move to set aside the verdict because the contract was illegal as entered into by the parties to annul the court's action in lunacy proceedings.[11] Where a contract is substantially but not fully performed at the time of bringing suit thereon but plaintiffs thereto complete it to the letter, the judgment cannot include the value of work done after the action was brought.[12] Where, in an action on a contract, the complaint was allowed to be amended to conform to the proof of substantial instead of full performance, and plaintiff was aided in his defect of proof by defendant's evidence, the court could properly make up the judgment.[13] Where it is alleged in a complaint that a third person was indebted by a note to plaintiff and that defendant indorsed on the note an agreement to pay it when a mortgage by the maker was fully paid, and that such mortgage was foreclosed and proved insufficient to pay all the debts of the mortgagee, a judgment for plaintiff for his pro rata share of the sum realized on the mortgage was proper.[14]

CONTRIBUTION.

§ 1. *General principles.*—Infants as well as adults are liable to contribution.[1] One liable only for his share cannot pay more and enforce contribution unless common property is thereby protected.[2]

§ 2. *As between persons in particular relations.*—A tenant in common is entitled to contribution from his co-tenants if he pay more than his share for the benefit of the common property.[3]

7. Pitcairn v. Philip Hiss Co. (C. C. A.) 113 Fed. 492.
8. Sutherland v. Holliday (Neb.) 90 N. W. 937.
9. Drew v. Goodhue, 74 Vt. 436.
10. Spier v. Hyde, 78 App. Div. (N. Y.) 151.
11. Lee v. Lee, 40 Misc. (N. Y.) 251.
12. Drew v. Goodhue, 74 Vt. 436.
13. Niemeyer v. Woods, 72 App. Div. (N. Y.) 630.
14. Gorman v. Lamb (Minn.) 94 N. W. 435.
1. Tenants in common—discharge of incumbrance—Case v. Case, 103 Ill. App. 177.
2. McArthur v. Board (Iowa) 93 N. W. 580.
3. Taxes—McClintock v. Fontaine, 119 Fed. 448; Arthur v. Arthur, 76 App. Div. (N. Y.) 330. But one of several remaindermen who has leased the property from the life tenant cannot recover from his fellows on account of taxes paid—Downey v. Strouse (Va.) 43 S. E. 348. Discharge of incumbrance—Grove v. Grove (Va.) 42 S. E. 312. Extinguishment of adverse claim—McClintock v. Fontaine, 119 Fed. 448; Case v. Case, 103 Ill. App. 177. The right to contribution for excess payment on purchase price does not accrue until partition—Grove v. Grove (Va.) 42 S. E. 312. For expenditure after the co-tenant's death, the claim is against the heirs, not against the estate—De Grange v. De Grange, 96 Md. 609.

As between co-sureties indemnity given by the principal to one accrues to all.[4] Between joint tort feasors there is no contribution except by statute.[5]

§ 3. *Proceedings to enforce.*—Statutory remedies are usually regarded as cumulative.[6] Contribution may be granted in connection with other relief.[7] All persons from whom contribution is sought should be joined.[8] Indemnity should be first exhausted.[9]

CONVERSION AS TORT.

§ 1. *What constitutes.*[10]—Wrongful assumption of dominion, such as refusal of landlord to allow tenant to remove his chattels,[11] wrongful removal of soil from plaintiff's land,[12] refusal by an owner to allow unused materials to be removed on rescission of an agreement between contractor and materialman for their purchase,[13] a wrongful levy though without removal or sale,[14] refusal by a corporation to transfer stock to a purchaser on its books,[15] constitutes a conversion, and guilty intent is essential only when the taking is otherwise rightful,[16] but a mere assertion of title by defendant, a bailee, in his answer,[17] abatement of a nuisance erected on defendant's land,[18] failure to pay for goods bought on credit, is not conversion,[19] or refusal to surrender property to the owner without production of a receipt which defendant had given therefor to the owner's bailee is not,[20] and a rescission of a trade for fraud and taking back of the goods given in trade two days before putting the other party in statu quo is at most a technical conversion.[21]

Consent of the owner is a defense.[22] Wrongful dealing with goods rightfully in possession may constitute a conversion.[23]

4. Barker v. Boyd, 24 Ky. L. R. 1389, 71 S. W. 528. But see McDowell County Com'rs v. Nichols, 131 N. C. 501.

5. Code Civ. Proc. § 480 as to joint judgment debtors allows contribution in case of judgment for tort and the statute has been held constitutional—City of Ft. Scott v. Kansas City, Ft. S. & M. R. Co. (Kan.) 72 Pac. 238.

6. The legal remedy given by Rev. St. 1899, § 4504 does not exclude a suit in equity—Dysart v. Crow, 170 Mo. 275. The requirements of a statutory proceeding need not be observed if plaintiff elects to sue in equity—City of Ft. Scott v. Kansas City, Ft. S. & M. R. Co. (Kan.) 72 Pac. 238.

7. A claim by a tenant in common for contribution may be adjudicated in a partition suit—McClintock v. Fontaine, 119 Fed. 448.

8. A surety who has paid his contributive share need not be joined.—Dysart v. Crow, 170 Mo. 275.

9. The administrator of a deceased surety need not first resort to a mortgage defective in having been made to the surety after his death—Norwood v. Washington, 136 Ala. 657.

10. The elements of conversion are (1) property and right of possession in plaintiff (2) conversion of the property by defendant to his own use—Boulden v. Gough (Del.) 54 Atl. 693. Agents who take goods in transit to a third party in payment of a claim of their principal against the shipper are not liable for a conversion of the proceeds by the consignee, they never having had possession of the goods or been in privity with one who had—Williams v. Fethers, 115 Wis. 314.

11. Smith v. Boyle (Neb.) 92 N. W. 1018.

12. Radway v. Duffy, 79 App. Div. (N. Y.) 116.

13. Bartley v. Rogers, 104 Ill. App. 164.

14. Zion v. De Jonge, 115 N. Y. St. Rep. 491.

15. London, Paris & American Bank v. Aronstein (C. C. A.) 117 Fed. 601.

16. State v. Omaha Nat. Bank (Neb.) 93 N. W. 319.

17. Stoneman v. Lyons (R. I.) 54 Atl. 46.

18. McCarthy v. Murphy (Wis.) 96 N. W. 531.

19. Carlson v. Jordan (Neb.) 93 N. W. 1130.

20. Arsene v. La Fermina, 38 Misc. (N. Y.) 776.

21. Wilcox v. Morten (Mich.) 92 N. W. 777.

22. Carlson v. Jordan (Neb.) 93 N. W. 1130. Where the owner consents that an injured animal be killed, he has no right of action if it is sold to a third person instead—Kansas City, M. & B. R. Co. v. Wagand, 134 Ala. 388. A remark by plaintiff that he "might as well swallow" his loss does not waive a conversion accomplished by obtaining property under false pretences—Rogers v. Dutton, 182 Mass. 187.

23. **Bailee:** Allowing third person to take goods under pretended lien—Dixon v. Owens, 21 Pa. Super. Ct. 376. Selling property to pay bailee's claim against bailor—Keiner v. Folsom, 113 N. Y. St. Rep. 1099. Trover will not lie for conversion of money entrusted to defendant to expend for plaintiff's use—Larson v. Dawson, 24 R. I. 317. **Factor:** A factor selling in good faith goods to which his principal has no title is liable in conversion—Johnson v. Martin,

Demand is necessary where defendant's possession was originally lawful,[24] but not where there has been actual wrongful conversion,[25] or where delivery is impossible.[26]

§ 2. *Remedies and procedure.*—The action is barred in three years in California.[27]

The action is transitory.[28]

A special property in plaintiff is sufficient.[29] Where plaintiff sells the property pending suit he may continue the action for the benefit of his vendee.[30] A statutory seller's lien on chattels gives no right to sue assignees of the buyer for conversion.[31]

The sufficiency of the complaint or declaration,[32] the admissibility of evidence,[33] and the sufficiency thereof are treated in the notes.[34]

The measure of damages is the value of the property at the time of conversion, with interest.[35] Punitive damages are allowed where plaintiff's rights were willfully disregarded.[36]

87 Minn. 370; Flannery v. Harley (Ga.) 43 S. E. 765. **Carrier:** Misdelivery of goods is a conversion—Security Trust Co. v. Wells, Fargo & Co. Exp., 81 App. Div. (N. Y.) 426. But mere delay in forwarding is not —Spalding v. Chicago, B. & Q. R. Co. (Mo. App.) 73 S. W. 274. **Pledgee:** Any dealing with a pledge inconsistent with the pledgor's rights renders the pledgee liable in conversion—Schaaf v. Fries, 90 Mo. App. 111. Purchase of property by the pledgee at an unauthorized sale is not a conversion—Winchester v. Joslyn (Colo.) 72 Pac. 1079. **Warehouseman:** Misdelivery by warehouseman is a conversion—Brink's Chicago City Exp. Co. v. Hendricks, 104 Ill. App. 154; Wheeler & W. Mfg. Co. v. Brookfield, 68 N. J. Law, 478. **Trustee:** Conversion by trustee—Canfield v. Canfield (C. C. A.) 118 Fed. 1; Loetscher v. Dillon (Iowa) 93 N. W. 98; Hart's Estate, 203 Pa. 488.

24. Sehnert v. Koenig, 99 Ill. App. 513; J. L. Mott Iron Works v. Reilly, 115 N. Y. St. Rep. 323; Temple Co. v. Penn Mut. Life Ins. Co. (N. J. Sup.) 54 Atl. 295.

25. Gross v. Scheel (Neb.) 93 N. W. 418.

26. Freehill v. Hueni, 103 Ill. App. 118.

27. Lowe v. Ozmun, 137 Cal. 257, 70 Pac. 87.

28. Kryn v. Kahn (N. J. Sup.) 54 Atl. 870.

29. Sheriff holding under attachment—Rochester Lumber Co. v. Locke (N. H.) 54 Atl. 705.

30. McElmurray v. Harris (Ga.) 43 S. E. 987.

31. Thornton v. Dwight Mfg. Co. (Ala.) 34 So. 187.

32. Complaint held to sufficiently describe property (mine tailings)—Stanley v. Sierra Nevada Silver Min. Co., 118 Fed. 931; (logs) Eastern Mfg. Co. v. Camden Lumber Co., 96 Me. 537. Averment that defendant converted the property to his own use is not a mere conclusion of law—Lowe v. Ozmun, 137 Cal. 257, 70 Pac. 87. Averment of plaintiff's title held sufficient—Lowe v. Ozmun, 137 Cal. 257, 70 Pac. 87; Stanley v. Sierra Nevada Silver Min. Co., 118 Fed. 931; Northness v. Hillestad, 87 Minn. 304. **Variance:** If defendant's answer justifies under an instrument as a chattel mortgage he cannot later assert it to be a conditional sale—Bower v. Bower, 97 Mo. App. 674.

33. Evidence that defendant was indebted to plaintiff improper—Barrett v. Bruffee, 182 Mass. 229. Lavish expenditure by alleged embezzler and decrease of employer's profits may be shown—Adams v. Elseffer (Mich.) 92 N. W. 772. **Admissibility of evidence:** Tax deeds to land from which timber was cut admissible for plaintiff—Anderson v. Besser (Mich.) 91 N. W. 737.

34. Where plaintiff has once sold the property to defendant the burden is on him to show title—Gam v. Cordrey (Del.) 53 Atl. 334. Evidence insufficient. Two witnesses against one as to demand—Blumenthal v. Lewy, 82 App. Div. (N. Y.) 535. Evidence sufficient—Flour City Nat. Bank v. Boyer (Minn.) 94 N. W. 557. As to plaintiff's ownership—Guernsey v. Fulmer (Kan.) 71 Pac. 578; Arsene v. La Fermina, 38 Misc. (N. Y.) 776; Jordan v. Coulter (Wash.) 70 Pac. 257. As to value of property—Liebman v. Abramson, 38 Misc. (N. Y.) 807. As to the propriety of directing a verdict—Wallace v. Mallory, 117 Ga. 161; Rogers v. Dutton, 182 Mass. 187. Testimony that property was "sold" to defendant sufficiently shows assumption of ownership by him—Woods v. Rose, 135 Ala. 297.

35. Janeway v. Burton, 201 Ill. 78; Daugherty v. Lady (Tex. Civ. App.) 73 S. W. 837; Midville, S. & R. B. R. Co. v. Bruhl (Ga.) 43 S. E. 717; Washburn v. Dannenber (Ga.) 44 S. E. 97. In case of conversion of coal by a carrier the value at destination is the measure of damages—Blackmer v. Cleveland, C., C. & St. L. Ry. Co. (Mo. App.) 73 S. W. 913. In case of conversion of a house, the value of the materials—Lynch v. White (Tex. Civ. App.) 73 S. W. 834; Anderson v. Besser (Mich.) 91 N. W. 737. If other remedies are waived by bringing trover the measure of damages in trover applies though greater damages might be recovered in another action—Id. The price a third person agreed to pay is no evidence of value—J. L. Mott Iron Works v. Reilly, 115 N. Y. St. Rep. 323. Attorney's fees are not recoverable—Lee v. McDonnell (Tex. Civ. App.) 72 S. W. 612.

36. Blackmer v. Cleveland, C., C. & St. L. Ry. Co. (Mo. App.) 73 S. W. 913.

CONVERSION IN EQUITY.

§ 1. *Definition and nature of doctrine.*—The doctrine of equitable conversion by a direction to sell in a will is applied mainly for the purpose of determining succession,[37] and for the purposes of the will only.[38]

§ 2. *How effected. By will.*—A devise to executors to sell,[39] or to sell or lease,[40] or invest the proceeds of the sale for distributive purposes operates as an equitable conversion of the realty into personalty,[41] from the time of the testator's death,[42] except where the sale is postponed till after termination of a life estate devised when it will operate from the time of the sale,[43] but to so operate, the direction to sell must be imperative,[44] but after actual conversion by a sale under a discretionary power the proceeds descend as personalty.[45] A direction to sell remainder after termination of a life estate, if the beneficiaries refuse to take the realty, is an equitable conversion thereof as to the beneficiaries.[46] That a conversion was intended may be implied from the terms of the will.[47] There is no conversion where the purpose of the conversion failed.[48]

By conveyance or contract.—Vendor's interest after contract of sale will be considered as personalty for the purpose of administering his estate.[49]

By operation of law; judicial sales of property of those not sui juris.—A conversion is not effected by the sale of realty by the representatives of insane persons[50] or infants.[51]

§ 3. *Reconversion.*—A reconversion of lands ordered sold by testator may be effected by the beneficiaries electing to take the realty,[52] but to so operate all must join in the election.[53] The election may be shown by acts in pais.[54] The discharge of the executor without the exercise of the power of sale will constitute an election to take the realty,[55] but his mere delay will not operate as a reconversion.[56]

37. It cannot authorize an administrator with will annexed to exercise the power of sale under the will without leave of court—McElroy v. McElroy (Tenn.) 73 S. W. 105. By directing the conversion of realty into personalty the property will descend according to law, and the widow excluded by the terms of the will will take her distributive share under the statute—Hutchings v. Davis, 68 Ohio St. 160.

38. A direction of sale for the purpose of paying gifts to legatees and the proceeds of the sale cannot be considered personalty for the benefit of the husband as heir of the testatrix—James v. Hanks, 202 Ill. 114.

39. Scott v. Douglas, 39 Misc. (N. Y.) 555; Weeter's Estate, 21 Pa. Super. Ct. 241; Schlereth v. Schlereth, 73 App. Div. (N. Y.) 283; Wyeth v. Sorchan, 38 Misc. (N. Y.) 173; Garvey v. United States Fidelity & Guaranty Co., 77 App. Div. (N. Y.) 391; Lee v. Baird, 132 N. C. 755; Hutchings v. Davis, 68 Ohio St. 160.

40. Russell v. Hilton, 37 Misc. (N. Y.) 642.

41. Boland v. Tiernay, 118 Iowa, 59; Rauch's Estate, 21 Pa. Super. Ct. 60; Bates v. Spooner, 75 Conn. 501.

42. Chick v. Ives (Neb.) 90 N. W. 751; Walker v. Killian, 62 S. C. 482; Becker v. Chester, 115 Wis. 90. Though the will directed a sale at such time that the trustees should determine the estate could be sold to the best advantage—Bates v. Spooner, 75 Conn. 501.

43. In re Hammond's Estate, 74 App. Div. (N. Y.) 547.

44. Bedford v. Bedford (Tenn.) 75 S. W. 1017. Will construed and direction to sell held imperative—Russell v. Hilton, 80 App. Div. (N. Y.) 178. A direction to sell "all or any part" of the realty devised is a discretionary power—Condit v. Bigalow (N. J. Ch.) 54 Atl. 160. Power to sell or mortgage if in their [the executors'] judgment it was necessary will not operate as a conversion—Carberry v. Ennis, 72 App. Div. (N. Y.) 489; Sauerbier's Estate, 202 Pa. 187.

45. In re McKay, 75 App. Div. (N. Y.) 78.

46. Weeter's Estate, 21 Pa. Super. Ct. 241.

47. Becker v. Chester, 115 Wis. 90; Lynch v. Spicer (W. Va.) 44 S. E. 255. As a direction to invest the property and pay over when the heir shall have reached a certain age—Mendel v. Levis, 40 Misc. (N. Y.) 271; Chick v. Ives (Neb.) 90 N. W. 751. Will construed and held not to work an implied conversion—Sauerbier's Estate, 202 Pa. 187.

48. As where testator devised more than half of the proceeds of the estate to a charitable use since under Laws 1860 the devise of one-half is valid and the remaining half descends as though no will had been made—Jones v. Kelly, 170 N. Y. 401.

49. Clapp v. Tower, 11 N. D. 556.

50. In re Reeve, 38 Misc. (N. Y.) 409.

51. Major v. Hunt, 64 S. C. 97.

52. Rauch's Estate, 21 Pa. Super. Ct. 60; Condit v. Bigalow (N. J. Ch.) 54 Atl. 160; Trask v. Sturges, 170 N. Y. 482.

53. Rauch's Estate, 21 Pa. Super. Ct. 60; Scott v. Douglas, 39 Misc. (N. Y.) 555; McWilliams v. Gough (Wis.) 93 N. W. 550.

54. Rauch's Estate, 21 Pa. Super. Ct. 60.

55. Boland v. Tiernay, 118 Iowa, 59.

56. Rauch's Estate, 21 Pa. Super. Ct. 60.

There is no reconversion of a share of the proceeds from partition sale because payment is postponed until after death of the life tenant which happened after the death of the co-tenant.[57]

§ 4. *Effect of conversion.*—Where the will works an equitable conversion, the heirs take no interest in the realty as such.[58] The beneficiary takes free from any lien acquired against the property after the conversion.[59]

CONVICTS.

This article treats only of the status and rights of convicts.[60] A convict has such a status that he may recover for a tort,[61] is competent to testify as a witness,[62] may be tried for crime,[63] but an officer having charge of one sentenced to a term of imprisonment may not deliver him to an officer of another jurisdiction to be tried for another offense.[64]

COPYRIGHTS.

§ 1. *By whom, for what and how obtainable.*[65]—Only citizens or residents are entitled to the protection of the copyright laws.[66]

What subject of copyright.—Pictorial illustrations in colors though not for a mechanical end and though drawn from life,[67] and though made from a series of metal plates,[68] or a series of photographs arranged for a machine to produce a panoramic effect,[69] or a colored photograph of natural scenery may be copyrighted.[70]

Telegraphic market quotations or results of races or games cannot be copyrighted as literary property.[71] To be the subject of copyright a dramatic production must tend to promote the arts and sciences.[72]

§ 2. *Character and extent of protection; infringements; licenses.*—The statute requiring that the copyrighted book must be printed from type set in the United States or from plates made therefrom does not apply to a book copyrighted before the passage of the act.[73] Only the original matter in a new edition of a book is protected by the copyright thereon.[74]

57. In re Reeve, 38 Misc. (N. Y.) 409.

58. Chick v. Ives (Neb.) 90 N. W. 751. And the fee does not vest in the persons entitled to the proceeds of the sale—Walker v. Killian, 62 S. C. 482.

59. As a lien of judgment acquired after the direction for sale by will—Weeter's Estate, 21 Pa. Super. Ct. 241.

60. Place of imprisonment see "Criminal Procedure."

Effect of conviction for crime on credibility of witness see "Witnesses."

Penal institutions see "Charitable and Correctional Institutions."

Pardon of convicts see "Pardon and Parol."

61. Injuries inflicted by a lessee of convict labor—San Antonio & A. P. Ry. Co. v. Gonzales (Tex. Civ. App.) 72 S. W. 213.

(Note.) In New York a convict for life is civilly dead (Graham v. Adams, 2 Johns. Cas. 408; Freeman v. Frank, 10 Abb. Pr. 370; Platner v. Sherwood, 6 Johns. Ch. 118; overruling Troup v. Wood, 4 Johns. Ch. 228), but not for purpose of descent and administration —Avery v. Everett, 110 N. Y. 317; Matter of Zeph, 50 Hun 523; Matter of Stephani, 75 Hun, 188.

62. Dixon v. State (Ga.) 42 S. E. 357.

63. If convicted his term will commence on completion of that then being served—Clifford v. Dryden (Wash.) 72 Pac. 96.

64. In re Jennings, 118 Fed. 479.

65. Uncorroborated testimony of the author held sufficient to show mailing two copies to librarian—Patterson v. J. S. Ogilvie Pub. Co., 119 Fed. 451.

66. Evidence held sufficient to show author's residence—Patterson v. J. S. Ogilvie Pub. Co., 119 Fed. 451.

67. As chromolithographic advertisements of a circus. U. S. Rev. Stat. § 4952 as amended 18 Stat. at Large 78, 79, c. 301—Bierstein v. Donaldson Lithographing Co., 188 U. S. 239, 47 Law. Ed. 460; reversing 104 Fed. (C. C. A.) 993.

68. U. S. Rev. Stat. § 4956—Hills & Co. v. Austrich, 120 Fed. 862.

69. Rev. St. § 4952—Edison v. Lubin (C. C. A.) 122 Fed. 240; reversing 119 Fed. 993.

70. Cleland v. Thayer (C. C. A.) 121 Fed. 71.

71. National Tel. News Co. v. W. U. Tel. Co., 119 Fed. 294.

72. Dramatic production held immoral in its tendencies and not copyrightable, and not infringed even if copyrightable—Barnes v. Miner, 122 Fed. 480.

73. U. S. Rev. St. § 4956 as amended March 3, 1891—Patterson v. J. S. Ogilvie Pub. Co., 119 Fed. 451.

74. Kipling v. G. P. Putnam's Sons (C. C. A.) 120 Fed. 631.

The publication of a work without the notice of copyright is an abandonment of the copyright,[75] but a publication by the licensee without the notice through inadvertence is not an abandonment by the author,[76] nor is a sale of the plates of a copyrighted book under execution against the author.[77] A loss of copyright is not effected by the publication of the book under a short title.[78]

Ignorance of copyright is not an excuse for publishing a copyrighted work.[79] The use of authorities cited in a copyrighted book for reference purposes in the preparation of another book is not an infringement of the copyright,[80] nor is the reproduction of pictures made from a copyrighted photograph of a painting an infringement of the latter.[81] There is nothing in the statute prohibitive of selling unbound volumes of a copyrighted book by the licensee and of the purchaser binding and selling the same.[82] An author who has pirated a large part of his copyrighted work has no standing in a court of equity to protect his work against piracy.[83]

§ 3. *Remedies and procedure.*—The forfeiture of plates, etc., because of unlawful sale of a copyrighted article, cannot be enforced by replevin.[84] The statute limiting the time in which to sue for penalty or forfeiture under the copyright laws does not apply to a bill for injunction against infringement.[85] In a bill for infringement of a copyrighted book by a corporation claiming ownership, it is unnecessary to allege the names of the persons engaged in the preparation of the work,[86] but it must allege that the titles of the copyrighted books were recorded by the librarian of congress.[87] A preliminary injunction restraining further publication of the infringement may be granted.[88]

CORONERS.

Fees of coroners are regulated by statute.[89] The inquest is not admissible in a civil action to show cause of death.[90] The coroner is liable in damages to the relatives of a decedent for needless mutilation of the body.[91]

75. As the exhibition of a painting by the artist in a foreign country for several months—Werckmeister v. American Lithographic Co., 117 Fed. 360. "Copyright, 1902, published by Hills & Co., Ltd., London, England," is a sufficient notice of copyright—Hills & Co. v. Austrich, 120 Fed. 862. A series of photographs to be used in a machine to produce panoramic effect is sufficiently marked by attaching a plate bearing the copyright notice at one end—Edison v. Lubin (C. C. A.) 122 Fed. 240.

76. American Press Ass'n v. Daily Story Pub. Co. (C. C. A.) 120 Fed. 766.

77, 78. Patterson v. J. S. Ogilvie Pub. Co., 119 Fed. 451.

79. American Press Ass'n v. Daily Story Pub. Co. (C. C. A.) 120 Fed. 766.

80. Edward Thompson Co. v. American Law Book Co. (C. C. A.) 122 Fed. 922.

81. Champney v. Haag, 121 Fed. 944.

82. The contract between the owner of a copyright and his licensee is not binding between the latter and his vendee—Kipling v. G. P. Putnam's Sons (C. C. A.) 120 Fed. 631.

83. Edward Thompson Co. v. American Law Book Co. (C. C. A.) 122 Fed. 922.

84. U. S. Rev. St. § 4965—Rinehart v. Smith, 121 Fed. 148.

85. Patterson v. J. S. Ogilvie Pub. Co., 119 Fed. 451.

86. Bill held to sufficiently allege proprietorship and unfair use—Edward Thompson Co. v. American Law Book Co., 119 Fed. 217.

87. Edward Thompson Co. v. American Law Book Co., 119 Fed. 217.

88. Sufficiency of showing to warrant issuance—Chicago Directory Co. v. United States Directory Co., 122 Fed. 189. If on motion for the injunction defendant fails to overcome plaintiff's prima facie showing of an infringement the injunction will issue—Trow Directory Printing & Bookbinding Co. v. United States Directory Co., 122 Fed. 191.

89. In Georgia, he is entitled to $10 for every inquest unless his fees exceed $1,500 per year. If he summons the jury for an inquest himself he is not entitled to fees therefor—Davis v. Bibb County, 116 Ga. 23.

90. Cox v. Royal Tribe, 42 Or. 365, 71 Pac. 73. But it is admissible in a prosecution for murder—State v. Baptiste, 108 La. 234.

91. Palenzke v. Bruning, 98 Ill. App. 644.

CORPORATIONS.[1]

DONALD J. KISER.

§ 1. **Definition and Nature of a Corporation.**

§ 2. **Classification of Corporations.**

§ 3. **Creation, Name and Existence of Corporations and Amendment, Extension and Revival of Charters.**—Place of Incorporation; Record of Articles of Incorporation; Purposes; Organization as Fraudulent Conveyance; Alteration of Charters; Proof of Incorporation.

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F. Personal Liability of Stockholders for Debts of Corporation and Remedies.—What Law Governs; Statutory Provisions; For What Debts Liable; Who Liable; Exhaustion of Remedy Against Corporation; Procedure.

G. Rights and Remedies of Creditors Against Directors and Other Officers.—Debts Contracted before Organization; Special Charter Liabilities; Misappropriation of Funds; Excessive Debts; Loans to Stockholders; Wrongfully Paid Dividends; Failure to File Reports.

§ 1. *Definition and nature of a corporation.*[2]—A corporation has an existence as a distinct legal entity apart from its stockholders,[3] but where it is seeking equitable relief its rights depend upon the equities of the stockholders.[4]

A private corporation is a person within the meaning of a statute authorizing quo warranto proceedings by the attorney general in the name of the state, in case any person unlawfully holds or exercises a franchise.[5]

A charter is a legislative grant, and in case of doubt, is to be construed most strongly against the grantee, and not against the state.[6]

§ 2. *Classification of corporations.*—The nature and character of a corporation is to be determined solely from its articles,[7] as when the question is whether a corporation is a manufacturing one whose stockholders are subject to a constitutional liability for its debts.[8]

Public corporations.—A cemetery association is a public and not a private corporation.[9] Water companies execute services of a public nature, and as such are subject to regulation as to rates.[10] The owner of a steamboat is not a quasi public corporation where it has received no special privileges or benefits from the state.[11] Where a corporation has received the right of eminent domain it becomes subject to public regulations as to the use of its property or products.[12]

1. This article treats generally of domestic private corporations. "Foreign Corporations" is made the subject of a later article. Taxation of corporate property will be discussed in the article "Taxes." Consult for questions peculiar to the nature of corporations for particular purposes, "Banking and Finance," "Building and Loan Associations," "Charities," "Fraternal and Mutual Benefit Associations," "Insurance Companies," "Mines and Minerals," "Railroads," "Street Railways," "Telegraphs and Telephones," "Warehousing and Deposits," "Waters and Watercourses."

2. A corporation is a body, or artificial person, consisting of one or more individuals, or sometimes of individuals and other corporations, created by law, and invested by the law with certain legal capacities, as the capacity of succession, and the capacity to sue and be sued, to make contracts, to take, hold and convey property, to commit crimes and do other acts, however numerous its members may be, like a single individual.

A corporation, therefore, when it consists of more than one member, as is now almost universally the case, may be regarded according as the one view or the other may be necessary, either as a legal body or entity, in which the existence of the natural persons who compose it is merged, or as a collection or association of natural persons, vested with the capacity of existing and acting as a body —Clark & Marshall, Corporations, Vol. I, § 1.

3. Taylor v. Com. (Ky.) 75 S. W. 244, so regarded when proceeding at law or asserting a title to property—Home Fire Ins. Co. v. Barber (Neb.) 93 N. W. 1024.

4. Home Fire Ins. Co. v. Barber (Neb.) 93 N. W. 1024.

5. Rev. Sts. 1898, § 3466—State ex rel. Vilter Mfg. Co. v. Railroad Co. (Wis.) 92 N. W. 546. Ballinger's Ann. Codes and St. § 5780—State v. Seattle Gas and Electric Co., 28 Wash. 488, 68 Pac. 946.

6. Starkweather & Shepley v. Brown (R. I.) 55 Atl. 201.

7. A corporation which from its articles appears to be an ordinary business association, and is incorporated under a statute authorizing the formation of corporations for pecuniary profits (Gen. St. 1894, c. 34, § 2), cannot be shown to be a charitable institution—Craig v. Benedictine Sisters Hospital Ass'n (Minn.) 93 N. W. 669.

8. Articles held to show that a corporation organized for the purchase of capital stock, evidences of indebtedness and assets of an existing corporation and for the purpose of the manufacture and sale of certain articles, is not a corporation organized for the sole purpose of carrying on an exclusive manufacturing business, but is in the class authorized by Gen. Sts. 1894, p. 766, c. 34, tit. 2—In re Receivership of Minnesota Thresher Mfg. Co. (Minn.) 95 N. W. 767; Converse v. Morgan, Id.

9. Davis v. Coventry, 65 Kan. 557, 70 Pac. 583.

10. City of Tampa v. Tampa Waterworks (Fla.) 34 So. 631.

11. Phelps v. Windsor Steamboat Co., 131 N. C. 12.

A charter of a corporation not for purposes within the intendment of a particular statute may, by express reference to such statute, render the corporation subject to the duties and liabilities imposed on corporations of that class.[13] Where a corporation not a manufacturing corporation is by its charter made subject to certain duties with relation to the filing of statements as to its capital stock and property imposed on manufacturing corporations, it may be compelled to file such statements in the office of the city clerk of the city where it was required to have an accounting room or place of business, the provision of the statute requiring the filing in the office of the town clerk in the town where the manufactory is established, or if it has no manufactory, where an office of the corporation is located.[14]

§ 3. *Creation, name, and existence of corporations, and the amendment, extension, and revival of charters. Place of incorporation.*—In Georgia the superior court of the county may grant a charter to a corporation whose principal office is to be located within the county, though it own no property therein and its business is to be carried on elsewhere.[15]

Articles.—The president and directors of a corporation need not affix their official title to their signatures to articles of incorporation.[16]

Filing and record of articles.—Corporate existence begins with compliance with statute as to the filing of the articles of incorporation.[17] By statute, filing articles with the secretary of state as well as record in the county where the corporation is to transact business may be required.[18] Where the statute provides that the certificate of incorporation shall be filed in the office of the secretary of state and a duplicate shall be recorded in the town clerk's office, compliance with the latter provision does not dispense with the necessity of the first.[19]

Stock subscriptions.—There must be valid and binding subscriptions for stock before articles of incorporation are filed.[20]

Purposes.—Where statutes authorize the organization of corporations for particular purposes, the objects of a corporation must be within the intendment of the statute.[21] Where the purposes for which corporations may be organized are specified in separate subdivisions of a chapter of a statute, purposes sepa-

12. Fallsburg Power & Mfg. Co. v. Alexander (Va.) 43 S. E. 194.

13. A charter of a corporation for the purposes of acquiring realty for the maintenance and establishment of a place of recreation, conferring full power to sell and convey "with all the powers and privileges, and subject to all the duties and liabilities set forth in cc. 152, 155 of the Public Statutes and in any acts and amendments thereof in addition thereto" plainly intends that the corporation, though not a manufacturing company, shall be subject to all the provisions which manufacturing companies are made subject to by c. 155, and may be required to file a statement as to the amount of its capital stock, the assessed value of its realty, the value of its personalty and the amount of its debts or liabilities as required by Gen. Laws 1896, c. 180, p. 558, § 11, being the amended form of section 11 of such chapter 155, and on the failure to file such a statement the liability prescribed by the statute may arise, though the section imposing such penalty is penal in character—Starkweather & Shepley v. Brown (R. I.) 55 Atl. 201.

14. Starkweather & Shepley v. Brown (R. I.) 55 Atl. 201.

15. McCandless v. Inland Acid Co., 115 Ga. 968.

16. St. Louis & S. F. R. Co. v. S. W. Telephone & Telegraph Co. (C. C. A.) 121 Fed. 276.

17. Rev. Sts. Mo. § 2492—Ryland v. Hollinger (C. C. A.) 117 Fed. 216. Sand. & Hill. Dig. § 1334 is complied with by filing a copy of the articles of incorporation with the clerk of the county which it has selected as its place of business; filing in every county in which its business extends is not required—St. Louis & S. F. R. Co. v. S. W. Telephone & Telegraph Co. (C. C. A.) 121 Fed. 276.

18. Ky. Sts. §§ 880, 779—Sims v. Com., 71 S. W. 929, 24 Ky. L. R. 1591.

19. Gen. Sts. (Conn.) §§ 1944, 1948—Card v. Moore, 68 App. Div. (N. Y.) 327.

20. Reid v. Paint Co. (Mich.) 94 N. W. 3.

21. A corporation to grow, sell and purchase rice, and other agricultural products is not authorized by Rev. St. art. 642, subd. 27, providing for corporations for the growing, selling and purchasing of seeds, plants, trees and the like, for agricultural and ornamental purposes—Miller v. Tod, 95 Tex. 404.

rately specified cannot be combined.[22] The acts of a secretary of state in filing articles of incorporation will not overcome the obvious intention of the statute,[23] nor does the amendment in other respects, of a statute stipulating the purposes of corporations, after executive officers of the state have sanctioned the organization of corporations combining purposes specified in separate subdivisions, indicate a legislative sanction of the executive construction.[24]

Where a portion of an act, providing for the organization of corporations, is carried forward without change into a subsequent statute, the intention of the legislature as indicated in the original act will control on a question of interpretation of the portion so carried forward.[25]

Corporations organized under the New Jersey Corporation act, L. 1899, p. 473, are limited by the provisions therein, which permit organization of corporations, "for any lawful purpose."[26] A corporation may be organized for the purpose of holding stock in and controlling the operation of other corporations.[27] Statutory authorization of corporations not for pecuniary profit, among which are included cemetery associations, does not authorize the incorporation of a cemetery association from which private profit is to be derived.[28] A corporation cannot, under the Indiana statute, be organized for the generation and sale of electricity together with the manufacture and sale of electrical appliances, apparatus, and supplies.[29] By charter a corporation cannot be allowed to obstruct a public street.[30]

Creation by special statute.[31]—Where a corporation is organized under a special law, it is not relieved from the obligations imposed thereby by the acceptance of a general law.[32] The general corporation act becomes a part of the charter of a corporation by the act of incorporation and a corporation which is organized under an act rendering it subject to regulations of the legislature cannot take advantage of provisions in the charters of corporations whose property it leases rendering the use of such property free from legislative interference.[33]

Acts to be done after incorporation.—Failure to perform acts required to be

22. Construing Act 1871, Gen. Laws 1871, second session, c. 80—Ramsey v. Tod, 95 Tex. 614.

23. Acts of secretaries of state in filing articles including several purposes indicated by the separate subdivisions of Gen. Laws 1871, second session, c. 80, § 5—Ramsey v. Tod, 95 Tex. 614.

24. An amendment to a statute authorizing organization of corporations limiting amendments to corporate charters to purposes germane to the original object of incorporation does not permit an incorporation for purposes enumerated in separate subdivisions of the list of authorized purposes, nor empower corporations to hold such property, as the "purposes" of the corporation shall require. Act 1874, Gen. Laws 1874, c. 97, amending Act 1871, as re-enacted in Rev. St. 1879, Rev. St. 1895, art. 649—Ramsey v. Tod, 95 Tex. 614.

25. Construing Rev. St. 1895, arts. 641-643, originally a portion of Act 1871, Gen. Laws 1871, second session, c. 80, §§ 4-6—Ramsey v. Tod, 95 Tex. 614.

26. United States v. Northern Securities Co., 120 Fed. 721.

27. Rev. Laws 1875, p. 6, § 10, Corporation Act 1896, p. 294, § 51—Dittman v. Distilling Co. of America (N. J. Eq.) 54 Atl. 570.

28. Gen. St. 1894, §§ 2913-2929—Brown v. Maplewood Cemetery Ass'n, 85 Minn. 498.

29. Burns' Rev. Sts. 1901, § 5051—Burke v. Mead, 159 Ind. 252.

30. Circuit court has no power to grant such a charter—City of Richmond v. Smith (Va.) 43 S. E. 345.

31. The title of a special act "To incorporate the Blooming Grove Park Association" is sufficient to authorize the inclusion of a provision that the corporation shall have the right to prevent hunting on its lands—Commonwealth v. Hazen, 20 Pa. Super. Ct. 487.

32. Railroad corporation—Terre Haute & I. R. Co. v. State, 159 Ind. 438.

33. A corporation organized for the purpose of operating, owning and leasing street railroads in Chicago, under 1 Starr & C. Ann. St. (3d. Ed.) p. 1006, Incorporation Act, § 9, cannot, by the leasing of railroad lines from corporations whose charters confer a right to charge a certain fare which the city cannot reduce without their consent, insist on such charter rights. Chicago City Charter, art. 5, § 1; 1 Starr & C. Ann. St. (2d Ed.) pp. 689-715, giving the city power to regulate the amount of fare exacted by street railroads—Chicago Union Traction Co. v. City of Chicago, 199 Ill. 484, 59 L. R. A. 631.

done after the formation of the corporation does not affect its existence if the failure continue for but a short time.[34]

Organization as a fraudulent conveyance.—The organization of a corporation from a partnership, the partnership property having been previously conveyed in part to the wives of the partners, and then the entire property turned over to the corporation in return for stock, evidences a fraudulent conveyance,[35] as does the organization of a new corporation to which the assets of an old corporation are transferred to defeat existing creditors,[36] or the fact that a firm in connection with a heavy creditor, organizes a corporation to which it transfers its assets, the creditor securing one-half interest in the new corporation in return for his debt.[37]

Corporate name.—The fact that a single person becomes the owner of all the stock does not cause the termination of the corporation, unless the purposes for which it is organized have ceased, hence the corporate name may still be used.[38]

Where a corporate name is taken to secure the trade of another by deception and fraud, the use may be restrained.[39]

Amendment, extension, and revival of charters.—Where a statute provides that articles of incorporation may be amended, altered or repealed unless they contain a limitation to the contrary, charters without such limitation are subject to such provision.[40] The existence of a corporation may be extended by amendment of the articles without readopting and refiling the articles as in the case of an original incorporation.[41]

The fact that an act creating a corporation is amended so as to relieve the corporation from the necessity of performing a certain portion of its purposes, and to create a new corporation to perform such portion, does not annul the original corporation.[42] A slight change in the name under which an extension of a corporate charter is granted does not cause a new corporation to result.[43] Where the first certificate of incorporation is void because a sufficient per cent of the capital stock has not been paid in cash, an additional certificate containing the material statements of an original certificate which is filed after proper payment, will operate as an original certificate, though entitled an amended certificate.[44]

Fees imposed for the original organization of corporations cannot be exacted on renewal by amendment of the original articles of a corporation which has terminated by lapse of time,[45] and statutory provisions for renewal fees, though retrospective, do not apply to corporations which have been promptly renewed prior to their passage but there has been a wrongful refusal by the secretary of state to file the amendment.[46]

34. Construing Rev. Sts. Mo. §§ 961, 1283, 1024—Ryland v. Hollinger (C. C. A.) 117 Fed. 216.

35. Metcalf v. Arnold, 132 Ala. 74.

36. Buckwalter v. Whipple, 115 Ga. 484.

37. Colorado Trading & Transfer Co. v. Acres Commission Co. (Colo. App.) 70 Pac. 954.

38. Distilling corporation, which having sold its distilleries continues to own property and keep up its organization, may authorize the use of the corporate name, though it consists merely of the name of a stockholder who has withdrawn and the addition of the word "company"—Geo. T. Stagg Co. v. E. H. Taylor, Jr., & Sons, 68 S. W. 862, 24 Ky. L. R. 495.

39. Imperial Mfg. Co. v. Schwartz, 105 Ill. App. 525.

40. Act 1868, c. 597, incorporating Maine Eclectic Medical Society, Rev. Sts. c. 46, § 23—State v. Bohemier, 96 Me. 257.

41. Code 1897, §§ 1618, 1615—C. Lamb & Sons v. Dobson, 117 Iowa, 124.

42. Terre Haute & I. R. Co. v. State, 159 Ind. 438.

43. On change of name from Orphans' Home to Protestant Orphans' Home, the corporation acting under the new name may transfer land purchased under the old—Palfrey v. Association (La.) 34 So. 600.

44. People ex rel. N. Y., N. H. & H. R. Co. v. Board of Railroad Com'rs, 81 App. Div. (N. Y.) 242.

45. Code, § 1610—C. Lamb & Sons v. Dobson, 117 Iowa, 124.

46. Acts 28th Gen. Assem. c. 56, amending Code 1897, § 1618—C. Lamb & Sons v. Dobson, 117 Iowa, 124.

Proof of incorporation.[47]—The corporate existence of a plaintiff corporation is, in the absence of contrary evidence, sufficiently established by certified copies of the articles of incorporation.[48] A certified copy of a private act of incorporation cannot be introduced in evidence to show the existence and powers of a corporation, but a certified copy of the recorded act must be introduced, the law requiring the charter to be recorded in one of the counties of the state.[49] The mere fact that there is evidence that a writing, purporting to be articles of incorporation, was executed, is insufficient to establish a corporation where there is no evidence that the articles were filed, one-half of the stock subscribed or a board of directors elected.[50]

Evidence, unobjected to, that plaintiff was a corporation, may be sufficient proof of its existence in an action of unlawful detainer, though there was a general denial of all the allegations of the complaint among which was that of corporate existence, but an affirmative defense recognizing such existence was conjunctively set up.[51]

The fact that the statute provides that certified copies of certain instruments shall be considered prima facie evidence of the facts therein stated does not render inadmissible evidence of the de facto existence of the corporation under the name alleged in an information, there being no provision excluding other proof of the corporate existence.[52]

In order to show that a person is one of the incorporators of a corporation, the record of the proceeding to incorporate, together with the issuance of the final certificate, is admissible, as it also is to show dealings, estopping the person from denying the corporate existence.[53]

The minutes or a certified copy of a corporation must be procured as the best evidence of its corporate actions, though they are in a foreign state.[54]

Burden of proof.—The burden of proving nonissuance of a license to transact business is on the person asserting it.[55] A prima facie showing of corporate existence of plaintiff is sufficient, unless such existence is placed in issue.[56] After a corporation sued as such, makes a general appearance, files a demurrer, and answers in its corporate name, plaintiff cannot be charged with the burden of proving its corporate existence though such existence is denied in the answer.[57]

Variance.—The fact that a corporation in its petition wrongfully states the date of its incorporation does not render inadmissible a copy of its charter.[58]

47. Pleading corporate existence, see post, § 10.

48. From secretary of state and register of deeds—Dowagiac Mfg. Co. v. Higginbotham, 15 S. D. 547. Where a denial of a corporation's existence is made in equity on information and belief, it is overcome by a duly certified copy of the charter accompanied by parol evidence—Samuel Bros. & Co. v. Hostetter Co. (C. C. A.) 118 Fed. 257. Corporate existence is sufficiently proven by a certified copy of an amended charter, signed by the state auditor, and evidence of the corporation cashier that the corporation was duly organized and acting thereunder, and that it had been doing business under a previous charter, and had never been dissolved, together with the minutes of the corporation showing a reorganization under the second charter—State Bank of Chicago v. Carr, 130 N. C. 479.

49. Star Loan Ass'n v. Moore (Del. Super.) 55 Atl. 946.

50. Construing Hill's Ann. Laws, §§ 3217-3219, 3221, 3222-3225—Goodale Lumber Co. v. Shaw, 41 Or. 544, 69 Pac. 546.

51. Stanford Land Co. v. Steidle, 28 Wash. 72, 68 Pac. 178.

52. State v. Pittam (Wash.) 72 Pac. 1042.

53. Curtis v. Parker & Co., 136 Ala. 217.

54. Central Elec. Co. v. Sprague Elec. Co. (C. C. A.) 120 Fed. 925.

55. Being a matter of record in a public office—Northrup v. Wills Lumber Co., 65 Kan. 769, 70 Pac. 879.

56. MacMillan Co. v. Stewart (N. J. Sup.) 54 Atl. 240.

57. Perris Irr. Dist. v. Thompson (C. C. A.) 116 Fed. 832.

58. In a petition by the T. & N. O. R. Co. of 1874, a charter incorporating the T. & N. O. R. Co. in 1859 is admissible—Texas & N. O. R. Co. v. Barber (Tex. Civ. App.) 71 S. W. 393.

Proof of corporate seal.—The authenticity of a seal of a private corporation must be established by evidence.[59]

§ 4. *Effect of irregularities in organization, and of failure to incorporate. Stockholder as partner or agent.*—Where the constituent companies from which a consolidated corporation is formed had no legal existence as a corporation, and hence the consolidated company had no such legal existence, one of the stockholders of the illegally formed corporation cannot hold a corporation, which is a majority stockholder therein, liable to him as an agent, in the absence of evidence of any intention to assume such liability, nor can such corporation be held to the liability of a partner inter sese, there being no evidence that a partnership was intended and the rights of the parties must be determined as if both corporations had a legal corporate existence.[60]

De facto corporations—Collateral attack.—A bona fide attempt to organize, accompanied by actual user of the corporate franchise, creates a de facto corporation,[61] and where a corporation is by its articles apparently duly organized and existing under the laws of the state, its charter cannot be collaterally attacked,[62] nor can grounds for forfeiture be so urged.[63] Where the entire business transacted is outside the grant contained in the act under which incorporation is sought to be effected, there is no de facto corporation.[64]

In order to establish a de facto existence of a banking corporation on a prosecution of the cashier for the receipt of a deposit after insolvency, the statute existing at the time of the indictment may be shown though it did not exist at the time when the attempt to organize was made.[65]

Where by statute it has been provided that corporations for certain purposes may be formed and that companies previously incorporated for such purposes may by acceptance of the provisions of the later statute, and filing a certificate with the secretary of state, obtain its privileges, a corporation which continues to carry on the business, but which fails to file the certificate, may be regarded as a de facto corporation.[66] Defects and irregularities in articles of incorporation do not prevent the corporation from being a corporation de facto,[67] as where they are filed by error

59. Reed v. Fleming, 102 Ill. App. 668.

60. Cannon v. Brush Elec. Co., 96 Md. 446.

61. Attempt to organize an irrigation district under the California Irrigation Act, March 7, 1887—Tulare Irr. Dist. v. Shepherd, 185 U. S. 1, 46 Law. Ed. 773. Under the General Incorporation act allowing formation of corporations for any lawful purpose except banking, insurance and real estate brokerage, the operation of railroads and the business of loaning money, a corporation organized for the purpose of promoting the principles of Masonry and erection of a building, providing conveniences therefor, is sufficiently within the statute to have a de facto existence—Lincoln Park Chapter R. A. M. v. Swatek, 105 Ill. App. 604. Evidence held sufficient to show a grant of corporate powers and user—United States Mortg. Co. v. McClure, 42 Or. 190, 70 Pac. 543.

62. Union Pac. R. Co. v. Colorado Postal Tel. Cable Co. (Colo.) 69 Pac. 564; Lincoln Park Chapter R. A. M. v. Swatek, 105 Ill. App. 604; Otoe County Fair & Driving Park Ass'n v. Doman (Mich.) 95 N. W. 327.

63. Nicolai v. Maryland Agricultural & Mechanical Ass'n, 96 Md. 323. Where a corporation asserts a franchise in its defense, the question of whether such franchise is rightfully held and acquired can be raised only in a direct proceeding—Bronson v. Albion Tel. Co. (Neb.) 93 N. W. 201, 60 L. R. A. 426.

64. A grange conducting a mercantile business does not become a de facto corporation by an attempt to incorporate under an act declaring that the trustees of the grange shall be a body corporate with only ordinary powers incidental to all corporations, the enumerated powers being to have a common seal, to sue and be sued, to acquire, hold, improve and lease or sell land and to have a capital stock and to make by-laws—Henry v. Simanton (N. J. Ch.) 54 Atl. 153.

65. State v. Stephens (S. D.) 92 N. W. 420.

66. Bank organized under acts permitting formation of private corporations, there being no authority to create banking corporations, becomes a de facto corporation on receiving deposits. Construing Act Congress July 30, 1886 (24 St. c. 18, § 5); Laws 1887, c. 35, [Comp. Laws, § 2900] c. 172, [Comp. Laws, §§ 3185, 3186]—Mason v. Stevens (S. D.) 92 N. W. 424.

67. Authority and law to incorporate, and attempt in good faith to incorporate

with the wrong officer,[68] but where the articles of incorporation are on their face void, they may be so declared in a collateral proceeding.[69] The existence of a corporation cannot be collaterally attacked because it has failed to do business,[70] or because it is incorporated for purposes not specified by the statute or for more than the number of purposes permitted.[71] Under statutes allowing private parties to inquire into the extent and existence of franchises created by corporate charters, the validity of the charters cannot be disputed.[72]

Where legal formalities regarding incorporation have been complied with, the alleged corporation must be party to a bill seeking the division of its property, though it is asserted that it has no corporate existence and that its stockholders are liable as co-partners.[73]

Estoppel of corporation to deny incorporation.—A de facto corporation cannot assert the fact that it is not legally incorporated as against a purchaser of its bonds for value and without notice,[74] or as against the trust deed securing the bonds.[75] A writing reciting the existence of a corporation made by partners without intent to create a corporation does not prevent one partner from asserting that there was no corporate existence as against those who claim under the other partner.[76]

Estoppel of third persons to deny incorporation.—One who deals with a corporation in its corporate capacity cannot avail himself of its want of legal organization,[77] and a body dealt with as a de facto corporation may recover on contracts entered into with it.[78]

Creditors who become such after an attempted incorporation though the debts are not contracted in the course of corporate business may file a bill to wind up their debtor as a voluntary association.[79]

If an action is begun against a defendant as a corporation, plaintiff cannot

thereunder, issuance of articles of incorporation, certification of record by secretary of state, holding of meetings for election of directors and performance of other corporate acts—Shawnee Commercial & Sav. Bank Co. v. Miller, 24 Ohio Circ. R. 198.

68. Articles were filed with county recorder. St. 1862, p. 110, § 6, provides that the validity of incorporation of a company doing business as a corporation and claiming to so act in good faith, shall not be collaterally attacked—San Diego Gas Co. v. Frame, 137 Cal. 441, 70 Pac. 295.

69. Proceeding by railroad to condemn land—Kinston & C. R. Co. v. Stroud, 132 N. C. 413.

70. De facto corporation (St. 1862, p. 110, § 6)—San Diego Gas Co. v. Frame, 137 Cal. 441, 70 Pac. 295.

71. Question cannot be raised by plea in abatement to an action by the corporation—Marian Bond Co. v. Mexican Coffee & Rubber Co. (Ind.) 65 N. E. 748.

72. Under Act June 19, 1871, P. L. 1360, a bill is not sufficient which alleges that a railroad is in fact a private road on the property of a manufacturing company, which did not furnish accommodations to the public—Windsor Glass Co. v. Carnegie Co., 204 Pa. 459.

73. Lincoln Park Chapter R. A. M. v. Swatek, 105 Ill. App. 604.

74. In defense to an action to recover interest due—Tulare Irr. Dist. v. Shepherd, 185 U. S. 1, 46 Law. Ed. 773.

75. Cannot be asserted that the capital stock of the corporation was not in good faith subscribed for at the time the report of the commissioner was made on which the charter was issued—Gunderson v. Illinois Trust & Sav. Bank, 100 Ill. App. 461.

76. Card v. Moore, 173 N. Y. 598.

77. Otoe County Fair & Driving Park Ass'n v. Doman (Neb.) 95 N. W. 327; Crete Bldg. & Loan Ass'n v. Patz (Neb.) 95 N. W. 793. A borrowing member of a building and loan association is estopped to assert the irregularity of its organization or its lack of power to make loans and carry on the business of the association—Deitch v. Staub (C. C. A.) 115 Fed. 309. Where a corporation begins business before its full required amount of capital stock is paid up, one to whom it sells goods after the amount is properly paid in, cannot question the legal existence of the corporation to defeat an action to recover the price. Attempt to defeat the right to maintain action in the federal court as a citizen of Mississippi—W. L. Wells Co. v. Avon Mills, 118 Fed. 190. Those who have executed a mortgage to a corporation whose term of corporate existence has expired cannot set up such fact as a defense to the mortgage in the hands of a new corporation to which it has been transferred (Rev. St. 1898, §§ 1764, 2024, subsec. 21)—Citizens' Bank v. Jones (Wis.) 94 N. W. 329.

78. Riemann v. Tyroler & V. Verein, 104 Ill. App. 413.

79. Henry v. Simanton (N. J. Ch.) 54 Atl. 153.

deny its corporate existence,[80] and where a judgment is obtained against a defendant as a corporation, a bill in equity will not lie for the purpose of imposing an individual liability on the defendant's members, it appearing that it was not a corporation but a partnership,[81] and the fact that the firm defended against the action as a corporation without showing that they were a partnership is not such a fraud as to charge them individually with a judgment.[82]

Quo warranto proceedings by the state.—A corporation is within the meaning of the term, "person," in a statute allowing an information, in the nature of quo warranto, if any person unlawfully exercise any public office or franchise.[83] Where the powers of a corporation are exercised, the state may determine the existence of such corporation and its right to exercise the powers asserted under the laws for the establishment of corporations.[84] Only the state may object to failure to observe provisions for the filing of certified copies of the articles of incorporation, election of officers, opening of an office, and payment of stock.[85]

Equity jurisdiction.—Whether a company which claims to be incorporated has been legally organized may be ascertained by scire facias or an information in the nature of a quo warranto at law, but where there is a corporation de facto, there is no ground for chancery interposition.[86]

§ 5. *Promotion of corporations; acts prior to incorporation; incorporation of partnerships, etc.*[87] *Acting as corporation before incorporation.*—In the absence of statute where persons assume to act as a corporation before such organization is created, they are liable on their contracts as co-partners.[88]

In an action in a foreign state to enforce a statutory liability of officers and directors for transaction of business as a corporation without having filed a certificate of complete organization as required by statute in the state of organization, it is not necessary to aver the time the statute was enacted, but it is sufficient to show that it was in force at the time when the liability was created.[89]

Effect of contracts before incorporation.—Before incorporation, the corporation cannot be a party to a contract,[90] and contracts of promoters are not binding on the corporation, unless it receives the benefits thereof or the contract is adopted by it,[91]

80. The terms of the charter as to its principal office become binding—Etowah Milling Co. v. Crenshaw, 116 Ga. 406.

81, 82. Pittsburg Sheet Mfg. Co. v. Beale, 204 Pa. 85.

83. Ballinger's Ann. Codes & Sts. § 5780, subd. 1—State v. Seattle Gas & Elec. Co., 28 Wash. 488, 68 Pac. 946. Rev. Sts. 1898, § 3466 State ex rel. Vilter Mfg. Co. v. Railroad Co. (Wis.) 92 N. W. 546.

84. State v. New Orleans Debenture Redemption Co., 107 La. 562.

85. Rev. St. Mo. §§ 961, 1084, 1283—Ryland v. Hollinger (C. C. A.) 117 Fed. 216.

86. Lincoln Park Chapter R. A. M. v. Swatek, 105 Ill. App. 604. Where a bill seeks to have an attempted corporation declared void or its property taken away from it, and its stockholders treated as partners, it cannot deprive the bill of its character as a collateral attack on a de facto corporation by designating the efforts to acquire corporate existence as pretended—Terry v. Chicago Packing & Provision Co., 105 Ill. App. 663.

87. Those who represent the prospective members of a corporation in the purchase of real estate, secure most of the subscriptions to the capital stock of the corporation, get up the prospectus and hire others to assist in procuring subscriptions, and participate in the doing of everything that is done in the creation and building up of the business enterprise, are promoters of the corporation, bound to the exercise of good faith toward investors—Goodwin v. Wilbur, 104 Ill. App. 45.

88, 89. Worthington v. Griesser, 77 App. Div. (N. Y.) 203.

90. Where a recovery is sought on an offer made to a corporation before the completion of its organization, it must be pleaded either that the corporation accepted such offer after its organization or entered into another contract according to its terms—Holyoke Envelope Co. v. United States Envelope Co. (Mass.) 65 N. E. 54. Evidence held sufficient to go to the jury on the question of whether a contract was entered into before the completion of the proceedings for incorporation—Consumers Ice Co. v. E. Webster Son Co., 79 App. Div. (N. Y.) 350.

91. Contract by promoter of a bank for the purchase of a burglar proof safe and vault door—Bank of Forest v. Orgill Bros. & Co. (Miss.) 34 So. 325. It is not a defense to an action on a note that it was entered into as a liability of a corporation to be organized and that plaintiff had neglected to carry out an agreement by which he

after ratification the promoters are no longer personally liable.[92] A corporation cannot recover on a subscription for expenses to be incurred prior to its organization, unless it has become entitled thereto by assignment, succession, or otherwise.[93] If a corporation act on the negotiations of promoters, evidence of their acts may be shown as against the corporation in so far as they would be competent against the promoters.[94] Promoters of a corporation are not personally liable on a contract which they make for the corporation, though they fail to bind it.[95] Though it has never chosen officers, the corporation is not prevented from having possession of property relieving its corporators from liability for a personal judgment, in an action for possession.[96] After the corporation has come into existence, the stockholders or promoters are not liable on its contracts either individually or as partners.[97] In an action on such a contract if it is alleged that the articles were signed on or about a certain day, the allegation will be construed to mean on or before.[98]

Where one organizing a corporation conveys to it property subject to a vendor's lien and receives in return a mere interest in the land as a stockholder, it will be inferred that it was the intention that primary liability for the debts against the property should follow the property, especially where the promoter as president of the corporation in making a statement of its assets and liabilities includes such debts therein.[99]

Fraud of promoters.—Those who become stockholders may rely on the good faith of the promoters and may assume that they have not dealt with the organization in such manner as to derive personal gain.[1] Promoters are liable to subscribers to corporate stock for their fraudulent acts in procuring subscriptions.[2] The remedy is not restricted to the corporation.[3] They are bound not to conceal, from those whom they seek to interest in the proposed corporation, any fact which materially affects the value of the property.[4] Statutory provisions against the issue of any stock or certificate of stock except in return for money, labor, or property to its par value actually delivered does not prevent equitable relief against promoters defrauding the corporation, though sought by persons who have sub-

was to secure payment from the corporation unless it is alleged that the assumption of the note by the corporation was on consideration and plaintiff had knowledge thereof —Bohn Mfg. Co. v. Reif (Wis.) 93 N. W. 466.

92. Esper v. Miller (Mich.) 91 N. W. 613.

93. Subscription to a fund to be used in taking out certain patents—Arnold Monophase Electric Co. v. Chew, 21 Pa. Super. Ct. 407.

94. Raegener v. Brockway, 58 App. Div. (N. Y.) 166.

95. Durgin v. Smith (Mich.) 94 N. W. 1044.

96. Grand Rapids School Furniture Co. v. Grand Hotel & Opera House Co. (Wyo.) 70 Pac. 838.

97. In an action to hold incorporators liable as partners on a note which the corporation had indorsed, it must be alleged that the indorsement was before the issue of a certificate by the secretary of state—Ryland v. Hollinger (C. C. A.) 117 Fed. 216.

98. See for construction of pleading as to the allegation of indorsement, prior to the issuance of a certificate—Ryland v. Hollinger (C. C. A.) 117 Fed. 216.

99. Fox v. Robbins (Tex. Civ. App.) 70 S. W. 597.

1. Shawnee Commercial & Savings Bank Co. v. Miller, 24 Ohio Cir. R. 198.

2. Hayden v. Green (Kan.) 71 Pac. 236. Subscribers may rescind a stock subscription and recover their subscriptions, sue in equity for a rescission or for an accounting, and charge the promoter as trustee of the profits fraudulently obtained by him—Second Nat. Bank v. Greenville Screw-Point Steel Fence Post Co., 23 Ohio Cir. R. 274. Evidence held to show misrepresentations by the promoters of a corporation as to stock subscriptions by other parties and as to the value of certain abstract books which were to form the entire capital of the new corporation—Hess v. Draffen (Mo. App.) 74 S. W. 440.

3. Where the promoters of a corporation make misrepresentations as to the value of certain property, which is to be the capital of the corporation, for the purpose of inducing the making of stock subscriptions, the subscribers to the stock have a cause of action for deceit, and the fraud is not one on the corporation of which it alone may take advantage—Hess v. Draffen (Mo. App.) 74 S. W. 440.

4. Goodwin v. Wilbur, 104 Ill. App. 45.

scribed for stock for less than par.[5] Where a false subscription list enables the perpetration of fraud, the loss which naturally results therefrom is the measure of damages. If the stock has no market value, there having been no sales, the assets and liabilities of the corporation may be resorted to in determining the damages.[6]

Dealings with corporation.—The corporation may pay its promoters for services in procuring sales of stock.[7] Promoters who own the entire stock of a corporation may subscribe for an additional issue of stock and pay for it by the transfer to the corporation of property which they have previously purchased.[8] The promoters are not liable to subsequent purchasers of stock as standing in a fiduciary relation if at the time they purchased the property all the stock was owned by them though some was in the name of their agents or employes.[9] If stock is illegally voted to promoters, its value when it is sought to be recovered by the corporation should be regarded as of the time it acquired a recognized market value and not as of the time the first sale was made. The promoters may be charged with interest from the time such value is acquired though an action by the receiver to enforce the liability was temporarily suspended, if defendants not being parties were not prevented from surrendering stock or paying in its value.[10] Actions by a receiver against the promoters of a corporation to recover sums due on stock which it is alleged they obtained wrongfully at the time it was organized are not affected by a sale of the realty of the corporation under a mortgage and its purchase by a new company which gave its stock for the stock and bonds of the old.[11]

Secret profits.—Promoters stand in a trust relation toward the stockholders of a corporation from the time at which they begin to act in its organization, and must make as full a disclosure to the managers of the company and the subscribers to its stock as required of other agents for the purchase of property.[12] A person may form a corporation to which he may sell his property though he thereby makes a profit, there being no false representation,[13] but in case of misrepresentation, the promoter is liable to other stockholders as a trustee,[14] though a stockholder who takes an active interest in securing other stockholders is not liable jointly with the promoter on a mere showing of facts causing a suspicion of his implication to arise.[15] Promoters of a corporation cannot be allowed a secret profit on property purchased by them, which they turn over to the corporation in payment of their stock subscriptions.[16] The organizers of a corporation to consolidate other corporations who own its entire stock do not stand in a trust relation

5. Rev. St. 1898, §§ 1751, 1753, 1773, and 4436—Pietsch v. Krause (Wis.) 93 N. W. 9.

6. Goodwin v. Wilbur, 104 Ill. App. 45.

7. Ross v. Sayler, 104 Ill. App. 19.

8. Transfer by promoters of a corporation organized for the purpose of consolidating breweries or brewing properties which they have previously purchased, valid—Tompkins v. Sperry, Jones & Co. (Md.) 54 Atl. 254.

9. Tompkins v. Sperry, Jones & Co. (Md.) 54 Atl. 254.

10. East Tenn. Land Co. v. Leeson, 183 Mass. 37; Same v. Hopewell, Id.

11. Central Trust Co. v. Land Co., 116 Fed. 743; Schumacher v. Same, Id.

12. Promoters held accountable to a corporation for profits obtained in the sale of furniture and fixtures to it at an exorbitant price—Shawnee Commercial & Savings Bank Co. v. Miller, 24 Ohio Cir. R. 198.

13. Second Nat. Bank v. Greenville Screw-Point Steel Fence Post Co., 23 Ohio Cir. R. 274.

14. Purchase of a patent right for $3,000, sale thereof to the corporation for $15,000, on representations that that was the lowest for which it could be obtained from the inventor, and that the promoter was making no profit other than such as should accrue to the stockholder—Second Nat. Bank v. Greenville Screw-Point Steel Fence Post Co., 23 Ohio Cir. R. 274.

15. Second Nat. Bank v. Greenville Screw-Point Steel Fence Post Co., 23 Ohio Cir. R. 274.

16. They may be compelled to account to creditors of the corporation or the corporation for the difference between the purchase price of the property and the sum for which they turned it in—Central Trust Co. v. Land Co., 116 Fed. 743; Schumacher v. Same, Id.

toward it in their purchase of the corporate properties which are to be consolrdated, and if they exchange such properties for stock and bonds of the new corporation in excess of the amount fixed by the original consolidation agreement, they cannot be compelled by the corporation's receiver to account for such excess.[17]

Creditors who seek to hold the organizers of a corporation liable for the difference between the value of property which they transferred to it and the stated value of the shares which they received in exchange must show a fraudulent intent as to them, and an action on the faith of a belief that the stock so issued was fully paid.[18]

Incorporation of partnership.—On incorporation of a partnership for the purpose of carrying on business, it will be presumed that the rights held by the partnership have been assigned to the corporation, if the corporation is so treated.[19]

§ 6. *Citizenship and residence or domicile of corporations.*[20]—The charter and not the actual management of the company will determine the location of its principal office.[21] A corporation does not become a nonresident by reason of the fact that its active place of business is outside the state for certain seasons of the year, nor does such fact cause it to violate a statutory requirement that articles of incorporation state the city, town, or locality in which is the corporation's particular place of business.[22]

A corporation created and organized under federal laws is a domestic corporation in the state in which it transacts business.[23]

§ 7. *Powers of corporations. A. In general.*—Whatever may be fairly and reasonably regarded as incidental to or consequential on those things which the legislature has authorized ought not, unless expressly prohibited, be held by judicial construction to be ultra vires.[24] Enumeration of powers does not prevent a corporation from exercising powers incidental to its substantial purposes.[25] Persons dealing with the corporation are bound to take notice of its charter powers.[26] Irregular acts of a corporation which are within its general powers, if not illegal, immoral or against public policy, are merely voidable and subject to ratification by the stockholders.[27]

17. On an arrangement by the promoter of a corporation to purchase another corporation, the object being to consolidate it with other corporate properties into a new corporation, the contract to be inoperative in case certain specified properties were not secured to go into the combination, if on failure of the combination the promoter purchases the property individually, he does not hold it in a trust relation for the consolidated corporation if there is no agreement that the purchase was on its behalf—Tompkins v. Sperry, Jones & Co. (Md.) 54 Atl. 254.

18. Taylor v. Walker, 117 Fed. 737.

19. Assignment of lease held by partnership will be presumed in suit by corporation thereon—B. Roth Tool Co. v. Champ Spring Co., 93 Mo. App. 530.

20. Venue of actions, see post, § 10; see also article "Foreign Corporations." Citizenship for purpose of federal jurisdiction, see "Jurisdiction;" "Removal of Causes."

The settled doctrine is that a corporation, for the purposes for which it may be considered a citizen, resident, or inhabitant, is a citizen, resident, or inhabitant of the country or state by or under whose laws it was created or organized, and that it cannot be a citizen, resident, or inhabitant of any other country or state; and that it can make no difference whatever, in the application of this doctrine, that the members or stockholders of the corporation are citizens and residents of some other country or state than that to whose laws it owes its existence, or that the corporation is engaged in business in some other country or state with its express or implied consent—Clark & Marshall, Corporations, Vol. I, p. 352.

21. For the purpose of establishing the place of bringing a suit in Georgia against a railroad company for injuries occasioned in a foreign state—Atlanta, K. & N. R. Co. v. Wilson (Ga.) 42 S. E. 356.

22. Hastings v. Anacortes Packing Co., 29 Wash. 224, 69 Pac. 776.

23. So held in a proceeding to enforce a transfer tax against national bank stock—In re Cushing's Estate, 40 Misc. (N. Y.) 505.

24. Dittman v. Distilling Co. of America (N. J. Eq.) 54 Atl. 570.

25. A church society may take a legacy charged with payment of an annuity—Sherman v. American Congregational Ass'n (C. C. A.) 113 Fed. 609.

26. Chicago Union Traction Co. v. City of Chicago, 199 Ill. 484, 59 L. R. A. 631.

27. Hatch v. Mining Co., 25 Utah, 405, 71 Pac. 865.

Quasi public corporations can exercise no powers not expressly conferred by statute, or necessarily implied, for the purpose of carrying out powers expressly granted.[28] Rights to use or interfere with a highway are to be regarded as a special franchise and are not to be derived from a general franchise to exercise corporate powers.[29] A company incorporated to transport natural gas is not entitled to maintain a telegraph or telephone line along its right of way as a necessity in carrying on the purposes of its corporation.[30] The fact that the corporation is authorized to make public exhibitions does not allow it to obstruct city streets.[31] The conduct of a relief society is not ultra vires a railroad corporation.[32]

(§ 7) *B. Power to take and hold property.*—A deed to a corporation which has power to hold real estate for any purpose passes the title of the grantor.[33] Statutes which define the powers of a corporation within the limits of its title to realty do not confer a title on it.[34] An authority to hold property free from taxation to a certain amount limits not only the amount of property taxable but the amount which may be held.[35] Under a power to construct, keep, and operate railroad lines, roads already constructed may be purchased.[36]

A statutory limitation on the period of holding real property, except such as necessary to the corporate business, does not apply to a building but partially occupied by the corporation.[37] A corporation with power to purchase realty may take a lease for a term in excess of its corporate life and though the aggregate rental exceeds its authorized indebtedness.[38]

(§ 7) *C. Power to transfer or incumber property and franchises.*—A corporation while solvent and a going concern holds its property like an individual free from the touch of its general creditors, and may dispose of the same as it deems best subject to the provisions of its charter and those other restraints on the conveyance of property which the law imposes alike on corporations and individuals.[39] Persons not creditors cannot complain of the sale by the corporation of its property to another corporation.[40] Where a corporation has power to use the streets for poles and wires for the operation of a street railroad, it cannot transfer such right to one desiring to use it for electric lighting.[41] Where a corporation is prevented from using certain property by the fact that it has no right to carry on the business to which it is adapted, it may transfer such property free from its disability.[42]

Power to lease.—Where the corporation has power to sell its property, it may lease for the purpose of use in an incidental business.[43] A railroad may lease superfluous property to a public warehouse company.[44] The lease may be for such a long term of years as to virtually effect a transfer of the fee.[45]

28. A corporation organized under general statutes to supply water to a municipality and its inhabitants cannot make a sale of its property and franchise to another corporation or execute a lease covering the term of its existence, notwithstanding the city consents—New Albany Waterworks v. Louisville Banking Co. (C. C. A.) 122 Fed. 776.

29. Right to operate a street railway—People ex rel. Metropolitan St. R. Co. v. State Board of Tax Com'rs, 174 N. Y. 417.

30. Woods v. Greensboro Natural Gas Co., 204 Pa. 606.

31. City of Richmond v. Smith (Va.) 43 S. E. 345.

32. State ex rel. Sheets v. Railway Co. (Ohio) 67 N. E. 93.

33. Springer v. Chicago Real Estate L. & T. Co., 102 Ill. App. 294.

34. Construing Sts. 1870, c. 110, § 2 and Sts. 1896, c. 299 in proceedings to secure the removal of buildings on public lands—Attorney General v. Vineyard Grove Co., 181 Mass. 507.

35. Appeal of Eliot, 74 Conn. 586.

36. Recital of such a power in a corporate mortgage does not invalidate it—City of Lincoln v. Lincoln St. Ry. Co. (Neb.) 93 N. W. 766.

37. Const. art. 265—State v. Warehouse Co., 109 La. 64.

38. Brown v. Schleier (C. C. A.) 118 Fed. 981.

39. New Hampshire Sav. Bank v. Richey (C. C. A.) 121 Fed. 956.

40. Goodwin v. Lumber Co., 109 La. 1050.

41. City of Carthage v. Carthage Light Co., 97 Mo. App. 20.

42-44. State v. Warehouse Co., 109 La. 64.

A power existing in a corporation under its charter or the general act governing corporations to lease the property may be exercised as other general powers.[46]

Pledge of credit.—A corporation may pledge its credit for the purpose of enabling one to whom it has sold goods to continue business and thereby make payment.[47] Where a company has power to raise money by its notes when authorized by the board of directors as required by a by-law, the transaction is not rendered ultra vires by the fact that, to the holder of its paper for money loaned, the company appeared to be an accommodation indorser.[48]

(§ 7) *D. Powers with respect to contracts.*—The contracts of a corporation incident to its existence are subject to the dissolution of the corporate existence or the determination of the special franchises by limitation, by judicial decree or by repeal.[49] An implied contract may be binding on a corporation.[50] A note may be given for an existing debt, though, at the time the note is given, the indebtedness of the corporation exceeds that permitted it by its articles of incorporation.[51]

Restraint of trade and violation of public policy.[52]—A contract by stockholders to maintain a person for a stated length of time as cashier of the bank is not against public policy where not shown to have been entered into in bad faith and against the interests of the bank.[53] Where a corporation's employe transferred an equitable interest in certain of his stock to the corporation, he may, without entering into a contract in restraint of trade, agree not to engage in a competing business for ten years or disclose the secret processes used by the corporation in its business.[54]

Particular contracts.[55]—A corporation cannot become a partner,[56] though it may contract to share the profits of contracts.[57] A corporation may contract to pay an employe a percentage of the profits.[58] A manufacturing and trading corporation cannot become an accommodation indorser.[59] A lumber company may by its salesmen enter into a bond securing the performance of a contract by one to whom it sells lumber.[60] A mercantile corporation may purchase a claim against a third person secured by a lien if in good faith and for its own protection.[61] The

45. Dickinson v. Traction Co. (C. C. A.) 119 Fed. 871.

46. Vote of majority of the stockholders or board of directors—Dickinson v. Traction Co., 114 Fed. 232.

47. See post, § 16-C for validity of corporate bonds and mortgages and rights incident thereto.

Hess v. Sloane, 66 App. Div. (N. Y.) 522.

48. Beacon Trust Co. v. Souther (Mass.) 67 N. E. 345.

49. Contracts relating to loans, supplies, royalties and services—Manning v. Telephone Co., 18 App. D. C. 191.

50. Lowe v. Ring, 115 Wis. 575.

51. Marshall Field Co. v. Oren Ruffcorn Co., 117 Iowa, 157.

52. See generally articles "Contracts;" "Combinations and Monopolies."

53. Bonta v. Gridley, 77 App. Div. (N. Y.) 33.

54. S. Jarvis Adams Co. v. Knapp (C. C. A.) 121 Fed. 34.

55. A contract by a trust company to issue certificates of deposit transferring to another trust company as trustee, real estate mortgages, stocks, bonds and tax certificates as security, which the receiving company agreed to rate and hold at their actual worth according to its best judgment, certify on each certificate of deposit that it was so secured and discharge all the duties imposed on it, is not a contract of guaranty by the receiving company of the actual worth of the security and on that account ultra vires a loan, trust and guaranty company—Smith v. Bank of New England (N. H.) 54 Atl. 385.

56. Geurinck v. Alcott, 66 Ohio St. 94.

57. L. J. Mestier & Co. v. A. Chevalier Pavement Co., 108 La. 562. Contract between a corporation leasing an opera house and one who agrees to manage the same is not a partnership contract and ultra vires, though the manager receives a percentage of the profits in addition to a fixed salary and in the event of his removal by the corporation is to receive only his interest in the profits—Markowitz v. Greenwall Theatrical Circuit Co. (Tex. Civ. App.) 75 S. W. 74.

58. Not a division of cumulated profits belonging to the stockholders. Corp. Act, § 47—Bennett v. Millville Imp. Co., 67 N. J. Law, 320.

59. Preston v. Northwestern Cereal Co. (Neb.) 93 N. W. 136.

60. Where there is a custom to do so, a plea of ultra vires to an action on the bond cannot be sustained—Central Lumber Co. v. Kelter, 201 Ill. 503.

61. Mahoney v. Butte Hardware Co., 27 Mont. 463, 71 Pac. 674.

fact that goods purchased may not be applicable to use in the articles manufactured by the corporation does not of necessity render the purchase ultra vires.[62] A corporation having power to manufacture fertilizers cannot engage in the purchase and sale of a fertilizer manufactured by other persons, and, a contract for the purchase thereof being ultra vires, the corporation's notes given in connection therewith are void.[63] The fact that the corporation leases a building to be used as a hotel for a rental established in part by a percentage of the income does not cause it to engage in the hotel business.[64] The issuance of a certificate of deposit for borrowed money does not show that the corporation is engaged in the banking business.[65]

Mode of execution of contract.[66]—The stockholders cannot convey or encumber the corporate property in their own name.[67] An action will not lie against the corporation on a contract under seal executed by an individual.[68] The unintentional omission of the officer's official designation is not material where the officer having authority signs his name with that of the corporation.[69] A letter signed by a person as secretary of corporation is prima facie evidence of a contract expressed therein.[70] The fact that a corporation's manager mentions the corporation's name and then his own in beginning a telephone conversation justifies a belief that dealings are with the corporation.[71] Consent of a corporation to an infringement on its franchise cannot be established by a paper signed by the vice-president alone and without the corporate seal.[72] Where the question as to whether letters were written by the president on behalf of the corporation is controverted, it may be shown that the company's name was signed to some of them without the president's knowledge.[73]

Necessity of seal.—Where not required by statute, the corporate seal is not essential to the validity of a contract.[74] The affixing of the seal is prima facie showing that the act is of the corporation.[75] It does not supply want of the corporate signature.[76]

Commercial paper.[77]—Where a note is signed in the corporation's name "by" certain persons who are its officers, the corporation and officers as individuals are

62. Chicago Pneumatic Tool Co. v. H. W. Johns Mfg. Co., 101 Ill. App. 349.

63. Richmond Guano Co. v. Farmers' Cotton Seed Oil Mill & Ginnery, 119 Fed. 709.

64. Nantasket Beach Steamboat Co. v. Shea, 182 Mass. 147; Same v. Hinckel Brewing Co., Id.; Same v. Preston, Id.

65. Rendering directors liable to the holder of the certificate as having exceeded their powers—Dietrich v. Rothenberger (Ky.) 75 S. W. 271.

66. See post, § 15 K-M, for representation of corporation by officers and agents in general.—An assignment of a note and mortgage executed by the fourth vice-president of a corporation, attested by the corporate seal, is prima facie the assignment of the corporation, and the burden of proof of the contrary is on the person attacking it—Wilson v. Neu (Neb.) 95 N. W. 502. Evidence held sufficient to go to the jury as to the sufficiency of a transfer of a chattel mortgage by a corporation to plaintiff—Clem v. Wise, 133 Ala. 403. A letter ratifying its agent's signature to a bond for the completion of the contract is admissible to show execution of the contract by the corporation—Central Lumber Co. v. Kelter, 201 Ill. 503.

67. Home Fire Ins. Co. v. Barber (Neb.) 93 N. W. 1024.

68. Congress Construction Co. v. Brewing Co., 182 Mass. 355.

69. St. Clair v. Rutledge, 115 Wis. 583.

70. Employment of attorneys—Union Surety & Guaranty Co. v. Tenney, 102 Ill. App. 95.

71. Sutter v. Moore Inv. Co., 30 Wash. 333, 70 Pac. 746.

72. Agreement to allow a railroad company to cross a street railroad's tracks—Ballston Terminal R. Co. v. Railway Co., 76 App. Div. (N. Y.) 184.

73. Sigel-Campion Live Stock Commission Co. v. McMurphy (Kan.) 71 Pac. 256.

74. St. Clair v. Rutledge, 115 Wis. 583.

75. Assignment executed by the president and attested by the secretary—Roth v. Continental Wire Co., 94 Mo. App. 236.

76. Execution of a deed—Hutchins v. Barre Water Co., 74 Vt. 36.

77. A telegram in response to a request of the president of a corporation for authority to draw a draft which authorizes the recipient to draw for feed bills due "on all cattle in which we placed you in charge" shows that the agency is for the corporation and not for the president individually—White City State Bank v. Bank, 90 Mo. App. 395.

bound, the promise being that "we the undersigned promise to pay."[78] Where the officer signs and follows his name with the word "president" and the style of the corporation, it must be shown that he acted for the corporation in order that the note be not regarded as his individually,[79] but the signature of a note by the corporation "per" certain persons as general manager and as secretary does not render the officers personally liable, notwithstanding in the body of the note are the words "I or we promise" and the word "per" applies to both officers.[80] The execution of a note by a corporation is not sufficiently proved by evidence that the corporate signature was affixed by a person who was president, and that the president and secretary's name followed that of the corporation, but there was no showing of authority to execute the note in question or of a holding out of the president and secretary as possessing such authority, nor was it shown that any consideration passed to the corporation.[81] Where with authority, a draft is drawn on the treasurer of a corporation in favor of a third person for a debt due him from the corporation, it operates as a note of the corporation.[82]

In an action against a corporation on its indorsement of a note executed by its president, evidence of the genuineness of the maker's signature is competent, and after a showing of the genuineness of the maker's signature and of the authority of the officer to indorse and of the giving of value by plaintiff, he is to be regarded as holder in the due course of business.[83]

Conveyances.—Though the statutes require that a corporate conveyance must be by an agent appointed for such purpose, the conveyance must run in the name of the corporation.[84] Proof of authority of individuals who have made acknowledgments representing themselves as officers, may be required in proceedings in which the conveyances are involved.[85] A waiver of a right to forfeit interests in real property need not be under the corporate seal and signed by the president and secretary.[86] A contract to convey land of a corporation conditioned for the execution of a deed by the corporation on payment of the purchase price does not transfer the title relieving the corporation from taxation.[87]

(§ 7) *E. Power to take and hold stock.*—Where there is no statutory enablement, a corporation cannot subscribe to the capital stock of another.[88]

In Washington a corporation, foreign or domestic, cannot own and vote stock in another corporation.[89] In New Jersey, a corporation organized for the purpose of holding stock and controlling the management of other corporations is to be regarded as for a lawful purpose.[90]

Under the New Jersey corporation act, a corporation may purchase and hold its own shares,[91] unless it thereby prevents itself from paying its debts in full.[92]

78. Nunnemacher v. Poss (Wis.) 92 N. W. 375.

79. Reed v. Fleming, 102 Ill. App. 668.

80. Williams v. Harris, 198 Ill. 501.

81. Gould v. W. J. Gould & Co. (Mich.) 96 N. W. 576.

82. National Fire Ins. Co. v. Eastern Bldg. & Loan Ass'n (Neb.) 91 N. W. 482.

83. Under the common law and Negotiable Instrument Law, §§ 50, 91, 98, L. 1897, c. 612, pp. 727, 732, 733—Karsch v. Pottier & Stymus Mfg. & Imp. Co., 81 N. Y. Supp. 782.

84. Vt. Sts., § 2212—Hutchins v. Barre Water Co., 74 Vt. 36.

85. Conveyance of toll road franchise—Lyons & E. P. Toll Road Co. v. People, 29 Colo. 434, 68 Pac. 275.

86. Not being a conveyance—St. Clair v. Rutledge, 115 Wis. 583.

87. Hutchins v. Barre Water Co., 74 Vt. 36.

88. Nebraska Shirt Co. v. Horton (Neb.) 93 N. W. 225.

89. Corp. Act 1896, § 51; 1 Hill's Ann. St. & Codes, Wash. § 1506—Coler v. Tacoma Ry. & Power Co. (N. J. Sup.) 54 Atl. 413. The lower court held in this case [(N. J. Ch.) 53 Atl. 680] that the power of a New Jersey corporation to hold and vote stock in a Washington corporation would be presumed.

90. Rev. Laws 1875, p. 6, § 10, Corp. Act 1896, p. 294, § 51—Dittman v. Distilling Co. (N. J. Ch.) 54 Atl. 570.

91. Corp. Act 1896, § 20, subd. 4, § 1—Berger v. United States Steel Corp., 63 N. J. Eq. 809.

92. Oliver v. Rahway Ice Co. (N. J. Ch.) 54 Atl. 460.

Where a corporation obtains, by its charter, the right to dispose of its property and to dissolve its corporate existence, it has power to accept stock in another corporation in payment of the purchase price provided the transaction is bona fide,[93] and though the statute under which a corporation is formed prohibits the purchase of stocks, bonds, and securities, unless specially authorized, since the implied power to wind up the affairs of the corporation and dispose of its property authorizes a sale for stock in another corporation.[94]

If the corporation has power to deal in the stock and bonds of other corporations, it may promote a new corporation of which it is to hold a large proportion of the stock for the purpose of increasing its business and profits,[95] and it is not material that the stock held be issued as full paid.[96] Under a power to purchase stock of other corporations dealing in the same commodities, a corporation may organize and hold the stock of corporations in other states for the purpose of selling its products to them.[97]

A solvent corporation may purchase stock from its retiring president for the purpose of reissuing it to the president who shall be elected.[98]

§ 8. *Effect of ultra vires and illegal transactions.*—An abuse of corporate power cannot be asserted by the corporation or its assignee for creditors.[99] The right to acquire realty cannot be collaterally attacked.[1] The question of whether the powers conferred on a corporation by its charter or certificate of organization are being exercised in such a manner as to create a monopoly can be determined only on quo warranto by the attorney general.[2] Creditors cannot assert ultra vires, unless it operates to fraudulently divert corporate assets from their benefit.[3] One not a party cannot assert that a contract is ultra vires.[4] Though a partnership between a corporation and an individual may be illegal, the corporation must, on the death of the individual, be allowed to maintain such action as might be maintained by a surviving partner.[5] A corporation may make a valid lease of property which may have been acquired by it in excess of its powers.[6] Where recovery is sought on a corporation's contract, shareholders who intervene asserting its invalidity cannot show that the compensation received thereunder was insufficient.[7]

Estoppel to assert ultra vires.—If money or property has been received by the corporation, it cannot assert that the contract under which it took was ultra vires,[8]

93, 94. Construing Code West Virginia, 1899, c. 52, §§ 3, 4 and holding that the prohibition therein contained against the purchase of stocks did not apply in case of a bona fide sale terminating the existence of a corporation—Metcalf v. American School Furniture Co., 122 Fed. 115.

95. The directors being given authority to exercise the powers of the corporation cannot be enjoined from so doing on the ground of ultra vires or possible loss—Rubino v. Pressed Steel Car Co. (N. J. Ch.) 53 Atl. 1050.

96. Corporation, for $550,000, may take stock to the value of $800,000—Rubino v. Pressed Steel Car Co. (N. J. Ch.) 53 Atl. 1050.

97. Dittman v. Distilling Co. (N. J. Ch.) 54 Atl. 570.

98. Joseph v. Raff, 82 App. Div. (N. Y.) 47.

99. Ross v. Sayler, 104 Ill. App. 19.

1. In a proceeding to enforce a debt—Advance Thresher Co. v. Rockafellow (S. D.) 93 N. W. 652. The question of whether a corporation authorized to hold real estate for certain purposes has exceeded its powers, can be raised only in a proceeding instituted by the state—Springer v. Chicago Real Estate Loan & Trust Co., 202 Ill. 17.

2. Dittman v. Distilling Co. (N. J. Ch.) 54 Atl. 570.

3. Force v. Age-Herald Co., 136 Ala. 271.

4. State Ins. Co. v. Farmers' Mut. Ins. Co. (Neb.) 90 N. W. 997.

5. Willey v. Crocker-Woolworth Nat. Bank (Cal.) 72 Pac. 832.

6. May recover on a contract of guaranty of the rent—Nantasket Beach Steamboat Co. v. Shea, 182 Mass. 147.

7. Smith v. Bank of New England (N. H.) 54 Atl. 385.

8. Rehberg v. Tontine Surety Co. (Mich.) 91 N. W. 132. Though the purchase of goods is ultra vires, if they are retained, the money paid cannot be recovered—Graton & K. Mfg. Co. v. Redelsheimer, 28 Wash. 370, 68 Pac. 879. Where a corporation has actually enjoyed the use of money, it cannot contend that the note given for it, and the transactions leading up to its borrowing, were not pursuant to the by-laws—St. Joseph's Polish Catholic Ben. Soc. v. St. Hedwig's Church (Del.) 53 Atl. 353. In an action on a note a corporation cannot contend that it had no power to purchase tobacco, where it is de-

or where third persons have acquired rights without notice,[9] or the party has lost valuable rights,[10] and in general, where a contract has been fully performed by the other party, it cannot defend on the ground of ultra vires in the fact that the contract is merely in excess of its powers.[11] Stockholders may be estopped with the corporation.[12] If a corporation which has entered into an ultra vires contract has received no benefit therefrom, it is not estopped from repudiating it by mere neglect.[13]

Conversely.—Those who have received the benefit of a contract with a corporation cannot assert that it was ultra vires.[14] A mortgagor to a corporation cannot contend that the act of the corporation in taking the mortgage was ultra vires.[15] Where a judgment creditor of a corporation's officers sells property held by him in trust on execution and purchases the same, he cannot assert the corporation's inability to hold property as against its claim to such property.[16] Where the assignors of a claim and the corporation's assignee sue jointly, the defendant cannot object that the taking of the assignment was ultra vires the corporation.[17]

Pleading and procedure.—Ultra vires is a matter of defense and the complaint need not show power to enter into a contract,[18] the defense is in the nature of a confession and avoidance,[19] and must be specially pleaded.[20] It may be raised by a demurrer in an action against the corporation on a contract.[21] Where ultra vires

fended that the note had been discharged by the purchase of tobacco for the corporation, and that such tobacco was received by the corporation—Louisville Tobacco Warehouse Co. v. Stewart, 24 Ky. L. R. 934, 70 S. W. 285. A corporation which has assumed to act as trustee cannot assert as against claims of those entitled to the trust funds that it had no power to so act—Central R. & Banking Co. v. Farmers' Loan & Trust Co. (C. C. A.) 114 Fed. 263.

9. Bear Valley Land Co. v. Savings & Trust Co., 117 Fed. 941.

10. Agreement for settlement of a claim for personal injuries, in consideration of the life employment as a railroad flagman, which was not objected to until after the claim was barred by limitations—Usher v. New York Cent. & H. R. R. Co., 76 App. Div. (N. Y.) 422.

11. Owyhee Land & Irr. Co. v. Tautphas (C. C. A.) 121 Fed. 343; Chenoweth v. Pacific Exp. Co., 93 Mo. App. 185. A building and loan association cannot avoid payment of shares which it has agreed to mature on the ground that its contract was ultra vires, if the subscriber to the shares has paid in full the sum stipulated—Field v. Eastern Bldg. & Loan Ass'n, 117 Iowa, 185; Eastern Bldg. & Loan Ass'n v. Williamson, 189 U. S. 122.

12. Where title to corporate property and the possession thereof is passed to the grantee on a contract of sale, the corporation is estopped from seeking a rescission and a stockholder standing in its shoes is likewise estopped, the ground for rescission being asserted ultra vires—Metcalf v. American School Furniture Co., 122 Fed. 115. Stockholders who have authorized the issuance of bonds and stock at a discount in payment of cost of construction to a contractor cannot afterward assert that the contract was unjust—Wells v. Northern Trust Co., 195 Ill. 288.

13. Subscription to the stock of another corporation—Nebraska Shirt Co. v. Horton (Neb.) 93 N. W. 225.

14. Joint contract of corporation to furnish paving blocks—Booth Bros. & H. I. Granite Co. v. Baird, 83 App. Div. (N. Y.) 495. One who has made a note cannot defend an action by a corporation thereon on the ground of ultra vires in its purchase—Black v. First Nat. Bank, 96 Md. 399. If a national bank has completed a sub-contract which was assigned to it, the original contractor or owner cannot assert that such completion was ultra vires—Security Nat. Bank v. St. Croix Power Co. (Wis.) 94 N. W. 74. Where a corporation has made valuable business improvements on property transferred to it, a party to the agreement for the transfer cannot state that the corporation did not need the property in its business—Coleridge Creamery Co. v. Jenkins (Neb.) 92 N. W. 123.

15. Building association—Bay City Bldg. & Loan Ass'n v. Broad, 136 Cal. 525, 69 Pac. 225.

16. Scott v. Farmers' & M. Nat. Bank (Tex.) 75 S. W. 7.

17. The county cannot raise such objection in an action against it under Ky. St. § 1241a, providing compensation for the protection of property against a mob, since it would not be prejudiced by the judgment in favor of the corporation—Hopkins County v. St. Bernard Coal Co., 24 Ky. L. R. 942, 70 S. W. 289.

18. United States Mortg. Co. v. McClure, 42 Or. 190, 70 Pac. 543.

19. Lewis v. Clyde Steamship Co., 131 N. C. 652.

20. Salvage contract—Lewis v. Clyde S. S. Co., 132 N. C. 904. Contract of suretyship—Hess v. W. & J. Sloane, 173 N. Y. 616. Indorsement of a note—Karsch v. Pottier & S. Mfg. & Imp. Co., 82 App. Div. (N. Y.) 230.

21. Markowitz v. Greenwall Theatrical Circuit Co. (Tex. Civ. App.) 75 S. W. 74.

is pleaded as against an original plaintiff, it need not be repleaded against an intervenor unless he is harmed by the omission so to do.[22]

Equity may have jurisdiction of a bill for discovery and to recover the sum paid on a contract with a corporation alleged to be fraudulent and ultra vires.[23]

§ 9. *Torts, penalties, and crimes.*—A corporation is liable for malice of its servants in the performance of acts within the scope of their duties and authority, though not when they are engaged about their own business.[24] There is no distinction between the liability of a corporation and of an individual for negligence causing death.[25] Where the servants or agents of a corporation are engaged in work authorized solely by the charter of the corporation, the corporation is liable for their negligence.[26] A corporation organized for the purpose of giving a fair may be liable for the negligent construction of seats by an exhibitor.[27]

A relief department organized by a railroad company and supported by contributions from the employes cannot be regarded as charitable, exempting the corporation from liability for maltreatment by physicians and surgeons in case it has exercised due care in their selection,[28] but the doctrine of respondeat superior cannot nevertheless be applied unless evidence shows want of care in selection of the surgeon, and the servant injured by malpractice has no recourse against his employer.[29] Where the secretary of a corporation wrongfully places money to its credit and then applies such deposit to his individual indebtedness, the corporation, if it has no knowledge of the fact of the deposit and receives no benefit therefrom, is not liable to the owner except for such sum as remains deposited to its credit when it receives notice,[30] and the fact that the corporation allowed the deposit to remain to its credit does not show a ratification of the secretary's act so as to render it liable for the entire sum.[31]

22. Laidlaw v. Pacific Bank, 137 Cal. 392, 70 Pac. 277.

23. Sufficient to allege that stockholders have conspired to transact an unlawful business in violation of its charter and that by fraudulent representations, complainant had been induced to pay money to it, that on discovery of fraud, he had ceased to pay under the contract and that defendant was insolvent—Bale v. Michigan Tontine Inv. Co. (Mich.) 93 N. W. 1071.

(Note) After examination of the authorities, Clark & Marshall in their work on Private Corporations, Vol. I, p. 620, lay down the following general rules:

Though there is some conflict in the decisions as to the liability of a corporation for the torts of its officers and agents, the following propositions are supported by the weight of authority: (1) As a general rule a corporation is liable, like a natural person, for torts of its officers or agents within the scope, or apparent scope of their authority.

(2) It is liable for a tort so committed, although it involves a specific intent or malice, for the intent or malice of its officers or agents may be imputed to it.

(3) It is liable for exemplary damages, in a proper case, for the torts of its managing officers or officer, or for torts of subordinate agents authorized or ratified by them.

(4) It is liable, according to the weight of authority, although the tort may have been committed in the course of an ultra vires business or transaction, if such business or transaction was authorized by its stockholders or managing officers.

(5) It is not liable for torts of an agent not within the scope, or apparent scope, of his authority, unless it has ratified the same.

(6) Most courts hold that it is not liable as for a tort for acts clearly authorized by its charter, if the grant of authority was constitutional, and the act was done without negligence and in good faith.

(7) According to the weight of authority, a corporation organized exclusively for the purpose of a public charity is not liable to a patient or other person receiving the benefit of the charity for the torts of its agents, unless it has been negligent in selecting or retaining them.

24. Liability of corporation for trespass—Waters v. West Chicago St. R. Co., 101 Ill. App. 265. Railroad corporation is liable for the act of an employe in locking a person into an empty car and causing his arrest, such act being done at the direction of a station agent having charge of the property in the cars of the company—Texas & P. Ry. Co. v. Parker (Tex. Civ. App.) 68 S. W. 831. May be liable in a statutory action for insulting words uttered or published by an agent acting within the scope of his employment and in the course of its business—Sun Life Assur. Co. v. Bailey (Va.) 44 S. E. 692.

25. Himrod Coal Co. v. Clark, 197 Ill. 514.

26. Chicago & G. T. Ry. Co. v. Hart, 104 Ill. App. 57.

27. Texas State Fair v. Marti (Tex. Civ. App.) 69 S. W. 432.

28, 29. Haggerty v. St. Louis, K. & N. W. R. Co. (Mo. App.) 74 S. W. 456.

30, 31. Glendale Inv. Ass'n v. Harvey Land Co., 114 Wis. 408.

Personal liability of officers or receiver for torts.—The receiver of a corporation is not liable for a death caused by his negligence, though by statute an action for wrongful death is authorized.[32] Employment by the directors of persons for a specific purpose does not render them personally liable for his negligent acts.[33] The general manager of a corporation which publishes a paper who is authorized to control its policy may be individually responsible for a libel, though not one who is merely an officer without control.[34]

Priority of judgment for negligence.—A judgment against a water company based on its negligence in failing to supply water for fire purposes, which recites that it is for the tortious injury and damage done plaintiff by the negligence of defendant, is prior to a mortgage.[35]

Penalties.—A statutory limitation as to the time within which action for a penalty or forfeiture based on the statute shall be brought does not affect actions against directors or stockholders of a corporation to recover a penalty or forfeiture imposed or to enforce a liability created by law.[36]

If a corporation desires to object that a statutory proceeding to recover a penalty for failure to file an annual report is on the relation of the circuit attorney instead of the city within which the corporation is located, it must raise such objection by demurrer or answer;[37] and the proceeding should be by the state on relation of the city.[38] It is not a defense that a secretary of state has notified the prosecuting officers of the corporation's default in the filing of the report,[39] and it need not be alleged that blanks for the annual report have been mailed to the corporation.[40]

Crimes.—A corporation may be indicted for obstructing a highway.[41] Statutory provisions punishing the assumption of a corporate name by an unincorporated person, or the assumption of a false name by a corporation for the purpose of soliciting business are not violated by the mere assumption of a corporate name.[42]

Where conspiracy to commit an act injurious to trade or commerce is made an offense, a combination to depreciate the value of the capital stock of a corporation which is listed on the stock exchange is such a conspiracy.[43]

Embezzlement by officers.—The president of a corporation is not relieved from liability as for embezzlement on use of its assets in an unlawful payment of dividends to himself and others, though the payment of such dividends was concurred in by all the stockholders.[44] It must be shown that all the directors, or at least a majority of them, together with the defendant, if he voted, acted with knowledge that the act was illegal, and that they each acted with a fraudulent purpose of converting to their own use and to the use of each other respectively, the money of the corporation, since mere guilty knowledge in the defendant in receiving the dividends, if it was honestly voted would not render him guilty.[45]

32. Rev. St. § 3017—Parker v. Dupree (Tex. Civ. App.) 67 S. W. 185.

33. Employment to give a fireworks exhibition on grounds of a corporation—Bianki v. Greater American Exposition Co. (Neb.) 92 N. W. 615.

34. Danville Press Co. v. Harrison, 99 Ill. App. 244.

35. Being within the terms of Code North Carolina, § 1255 which gives such priority to judgment for torts—Guardian Trust & Deposit Co. v. Greensboro Water Supply Co., 115 Fed. 184.

36. Code Civ. Proc. Mont. tit. 2, §§ 554, 515—Davis v. Mills (C. C. A.) 121 Fed. 703.

37, 38. Rev. St. 1899, §§ 1013, 1017, 1021—State v. Missouri Exploration & Land Co., 97 Mo. App. 226.

39, 40. Rev. St. 1899, § 1015, provides that failure to receive blanks shall not be regarded as an excuse—State v. Missouri Exploration & Land Co., 97 Mo. App. 226.

41. State v. White, 96 Mo. App. 34.

42. Imperial Mfg. Co. v. Schwartz, 105 Ill. App. 525.

43. People v. Goslin, 171 N. Y. 627.

44. The corporation having a separate legal existence from that of the stockholders, it cannot be urged that it was impossible for the stockholders to steal their own property—Taylor v. Commonwealth, 25 Ky. L. R. 374, 75 S. W. 244.

An indictment for embezzlement under the Kentucky statute does not charge two offenses, though it alleges that while defendant was acting in the capacity of president and director, he did, with "intent to willfully injure and defraud the company and said persons, embezzle said money."[46] A civil liability imposed on directors for the wrongful declaration of dividends does not prevent the prosecution of the corporate officers for embezzlement in the wrongful payment of such dividends to themselves from the assets of the corporation.[47] The same is true of a penalty by way of fine on directors violating provisions of the statute relating to corporations.[48] On a prosecution of the president of a corporation for embezzlement in the sanction and receipt of dividends at a time when the corporation was insolvent, it must be shown that at the time such dividends were declared and paid there were no funds legally applicable to their payment, and the acts were with the fraudulent purpose of converting the money of the corporation to the use of the officers.[49] To determine the question of insolvency, proof of the corporation's resources and assets at the time laid in the indictment, together with the course and nature of its business and the extent of its liabilities, is admissible,[50] and the payment of dividends and sums at about the same time to the directors and stockholders, and the actual condition of the company at such times may be shown, also corporate transactions in which the stockholders bought coupons in the name of various syndicates, on the security of which they borrowed money from the corporation, but the jury should be instructed to regard such evidence as going solely to the question of motive.[51] The belief of defendant and the board of directors as to the propriety of voting the dividends is admissible, together with evidence that it was based on the advice of counsel.[52] It cannot be shown that similar other companies divided the funds mentioned among their stockholders.[53] The fraudulent acts of defendant's co-directors must be submitted to the jury.[54] The court in its instructions should define the fraudulent appropriation of funds.[55]

Procedure in prosecutions.—On a prosecution of a corporation the state need not show legal incorporation, though the allegation of corporate existence is a mere naming of defendant if defendant appear and plead.[56] An instruction in a proceeding for the mutilation and falsification of corporation books may set out an entire statute if the charge against defendant is in other portions of the instructions precisely stated.[57] On an indictment for mutilation of corporate records, the fact that defendant is charged to have altered and caused to have altered does not render the indictment bad as stating two offenses or failing to state who it was that defendant caused to perpetrate the alteration.[58]

§ 10. *Actions by and against corporations.*[59] *Right to sue in corporate name.*

45. Taylor v. Commonwealth, 25 Ky. L. R. 374, 75 S. W. 244.

46. Ky. St. 1899, § 1202—Taylor v. Commonwealth, 25 Ky. L. R. 374, 75 S. W. 244. The ownership is not material further than it must be charged and shown to have belonged either to the corporation of which defendant was an officer or agent, or to some person who had entrusted its possession to that corporation—Id.

47. Ky. St. 1899, § 548, not exclusive—Taylor v. Commonwealth, 25 Ky. L. R. 374, 75 S. W. 244.

48. Ky. St. 1899, § 550, not exclusive—Taylor v. Commonwealth, 25 Ky. L. R. 374, 75 S. W. 244.

49-54. Taylor v. Commonwealth, 25 Ky. L. R. 374, 75 S. W. 244

55. The jury should have been told that by fraudulent conversion was meant the deceitful intent of appropriation of the property of the corporation without the right and without a belief of right, and a fraudulent intent is the intent to effect such appropriation—Taylor v. Commonwealth, 25 Ky. L. R. 374, 75 S. W. 244.

56. State v. Glucose Sugar Refining Co., 117 Iowa, 524.

57. Pen. Code, par. 881—Qualey v. Territory (Ariz.) 68 Pac. 546.

58. Indictment held good which charged that defendant did "alter, mutilate and falsify and cause to be altered, mutilated and falsified, a book in writing"—Qualey v. Territory (Ariz.) 68 Pac. 546.

59. Actions against foreign corporations are treated in article "Foreign Corporations." In this section it has been attempted to

—A corporation cannot as such file and sign a bill in chancery but must act through the intervention of agents.[60] After cessation of business and death of a portion of the stockholders, an attorney representing a majority of the stock may sue in the corporate name.[61] Though the president of a corporation owns all but two shares of its capital stock, the corporation may, after his death, sue to vacate a decree of foreclosure obtained against it, without joining his administrator and heirs or its directors and trustees.[62] The corporation may sue in a name slightly variant from that under which it enters into a contract,[63] but if the question as to variance is raised, the identity of the suing and the contracting party is in issue.[64]

Jurisdiction.—An action seeking a discovery and the repayment of money obtained by fraud may be maintained in equity.[65] Actions to compel an accounting by a former treasurer of a corporation may be brought in equity as may an action to charge a bank as trustee of corporate funds which with knowledge of their ownership it has permitted to be wrongfully withdrawn and converted.[66]

Venue.[67]—Statutes relating to service of process do not affect the jurisdiction authorized at common law of actions against corporations.[68] Where the principal relief sought is equitable, the venue is governed by the rules with regard to equity cases, though there is also a claim for damages which is subject to a different rule.[69] Where the statute provides that action may be begun in any county where the corporation has an agency or representative, action may be brought in the county of the residence of the president, he performing his official acts therein,[70] though the president's official acts are few,[71] or though by private understanding, the other officers were to do all the work.[72] Where it is provided that a person may sue in the county in which he carries on his regular business, though other than the county of his residence, a corporation's president may be regarded as engaged in business in the county of its general office, though he receives no salary for his attention to such business.[73] The fact that a charter provides where the principal place of business shall be does not prevent an action being brought in the county where the president and assistant auditor have offices, unless there is evidence that the principal place of business is established elsewhere.[74] If the corporation agree to discharge an obligation in a county other than that of its principal place of business, it waives the right to have a suit for the appointment of a receiver brought in the latter county.[75]

Where it is sought to enjoin the directors of a corporation from disposing of

group merely questions of procedure of general nature and where the procedure was apparently dependent on the peculiar relief sought it has been treated in connection with the substantive law governing such relief.

60. Jockish v. Deutscher Krieger Verein, 98 Ill. App. 9.

61. San Diego Gas Co. v. Frame, 137 Cal. 441, 70 Pac. 295.

62. Fox v. Robbins (Tex. Civ. App.) 70 S. W. 597.

63, 64. Riemann v. Tyroler & V. Verein, 104 Ill. App. 413.

65. Bill against the corporation, its directors and stockholders, alleged a conspiracy by the stockholders to transact an unlawful business and fraudulent representations inducing complainant to pay money to it—Edwards v. Michigan Tontine Inv. Co. (Mich.) 92 N. W. 491.

66. Hunter v. Robbins, 117 Fed. 920.

67. Domicile of corporation. See ante, § 6.

68. A common law rule requiring suit against a corporation to be in the county where its property is located or where it transacts a substantial part of its business, is not affected by act July 9, 1901, P. L. 614—Park Bros. & Co. v. Oil City Boiler Works, 204 Pa. 453.

69. Petition for an injunction must be brought in the county of the corporation's principal office. Construing Civ. Code, § 1900—Etowah Milling Co. v. Crenshaw, 116 Ga. 406.

70-72. Rev. St. 1895, art. 1194, § 23—Sharp v. Damon Mound Oil Co. (Tex. Civ. App.) 72 S. W. 1043.

73. Code, art. 75, § 135—Cromwell v. Willis, 96 Md. 260.

74. It does not matter that a railroad has no track in such county—Boyd v. Blue Ridge Ry. Co., 65 S. C. 326.

75. Rev. St. art. 1488—Wills Point Mercantile Co. v. Southern Rock Island Plow Co. (Tex. Civ. App.) 71 S. W. 292.

76. Moneuse v. Riley, 40 Misc. (N. Y.) 110.

its property or carrying on its business, the proceedings should be brought in a court of general jurisdiction at its domicile.[76] An action against a railroad corporation for an injury resulting from a defective track is based on an act of commission and is not based on a passive act or act of omission, for which the corporation should be sued at its domicile, and may be brought in the county in which the accident occurred.[77]

Parties.—If the holder of land subject to a vendor's lien conveys it to a corporation of which he holds all the stock except two shares, and of which he is president, his executors and heirs need not be joined in an action to foreclose the lien.[78]

Process.—Jurisdiction of a corporation cannot be obtained by service on its secretary and president as individuals.[79] If the suit is on a claim in favor of the agent which he has assigned to plaintiff, service on the agent is not good.[80] In Kansas, service may be had on an assistant secretary whose duties in fact make him a local secretary.[81] In New York, service is not good on a president, after his resignation, though there is no successor.[82] A notice of garnishment delivered to the state superintendent of insurance together with a summons to the company to appear as garnishee is sufficient service.[83] The official capacity of a person as secretary and general manager of a corporation cannot be inferred for the purpose of supporting a service of process by the fact that he did not state that he did not possess such capacity at or after the time process was served.[84] Where after a transfer of railroad property, a former ticket agent of the old is retained by the new owner, service on him is not good as against the old corporation if he no longer represent it in any way,[85] and provisions that the consolidation of railroad companies shall leave all the rights of creditors unimpaired do not make the new corporation agent of the old for the purpose of receiving service.[86]

Where a statute provides various classes on whom service of process against a corporation may be made, absence of the first mentioned class is necessary to the validity of service on the second class.[87] Alternative service may be made in case of absence from the county though not from the state.[88]

Under other statutes service on an officer of lesser rank is authorized by a statement in the return that the president or other chief officer was not found. Where a successor has not been elected, service may be had on an officer after his resignation, if by the by-laws his term of office continues until the election and qualification of a successor.[89]

Return.[90]—The return of service should show affirmatively facts establishing service within some of the modes prescribed by statute.[91] The return of a sum-

77. Culpepper v. Arkansas Southern R. Co. (La.) 34 So. 761.

78. Fox v. Robbins (Tex. Civ. App.) 70 S. W. 597.

79. Kirkpatrick Const. Co. v. Central Elec. Co., 159 Ind. 639. A citation of a certain person as president of a certain corporation is not a citation service of which confers jurisdiction on the corporation itself—Butler v. Holmes (Tex. Civ. App.) 68 S. W. 52.

80. White House Mountain Gold Min. Co. v. Powell (Colo.) 70 Pac. 679.

81. Civ. Code, § 68—Colorado Debenture Corp. v. Lombard Inv. Co. (Kan.) 71 Pac. 584.

82. Code Civ. Proc. § 431, requires service on a general officer, director or managing agent—Yorkville Bank v. Zeltner Brew. Co., 80 App. Div. (N. Y.) 578.

83. Reid v. Mercurio, 91 Mo. App. 673.

84. Scott v. Stockholders' Oil Co., 120 Fed. 698.

85, 86. Thomson v. McMorran Milling Co. (Mich.) 94 N. W. 188.

87. The officer's return must show such absence affirmatively (Rev. St. § 1019)—Drew Lumber Co. v. Walter (Fla.) 34 So. 244.

88. Rev. St. § 1019—Florida Cent. & P. R. Co. v. Luffman (Fla.) 33 So. 710.

89. Civ. Code, § 68—Colorado Debenture Corp. v. Lombard Inv. Co. (Kan.) 71 Pac. 584.

90. See for approval of a return of service as in conformity with Rev. St. § 5044—Parker v. Van Dorn Iron Works, 23 Ohio Circ. R. 444.

91. Park Bros. & Co. v. Oil City Boiler Works, 204 Pa. 453. Where the statutes provide that service may be had by leaving a copy with the person in charge of any business office of the corporation in case the

mons as served on a corporation's agent must show information other than the mere statement of the person on whom it was served that he was the corporation's agent.[92]

Defective service of process may be waived by voluntary appearance.[93] A defective service of process may be set aside on rule without a plea in abatement.[94]

Appearance.—A corporation sued under a name by which it is no longer doing business may on its special appearance file an affidavit of defense though such affidavit must show the use by the corporation of a different name and the necessary facts.[95]

The rule that a corporation represents its stockholders in the defense of all suits which involve corporate rights or functions applies only where the matter litigated is a corporate matter as distinct from a right which pertains only to one as the owner and holder of particular shares.[96]

Pleading corporate existence.[97]—Under statutory provisions in certain states, corporate existence need not be proven unless there is a verified answer which contains an affirmative allegation that the plaintiff or defendant as the case may be is not a corporation.[98] Failure to allege that a statutory certificate has been procured by the corporation before commencing business does not render its petition demurrable.[99] An allegation that plaintiff is a corporation is sufficient.[1] A showing that plaintiff was a corporation may be by amendment to the petition.[2]

A complaint need not allege that defendant is a corporation in order to bind it, if it is made a party by its proper name.[3] The fact that a complaint does not allege defendant's incorporation cannot be reached by a general demurrer.[4]

To take advantage of special statutes of incorporation, they must be pleaded.[5]

A slight variance between the name of a corporation as alleged in a pleading and as set out in an exhibit, on which the action is based, is immaterial.[6]

president or chief officer cannot be found, but that the absence of such officer must be expressed in the return, such statement in the return is jurisdictional in case service is not on the chief officers (Rev. St. §§ 995, 996)—Rixke v. Western Union Tel Co., 96 Mo. App. 406.

92. White House Mountain Gold Min. Co. v. Powell (Colo.) 70 Pac. 679.

93. Burlington & M. R. R. Co. v. Burch (Colo. App.) 69 Pac. 6. After service of a citation on the traveling passenger agent of a railroad company, any defect will be regarded as waived, where the attorney for a co-defendant, having possession of the citation, secures a continuance, stating that he would either appear for the railroad or have someone else do so at the next term—Texas & P. Ry. Co. v. McCarty (Tex. Civ. App.) 69 S. W. 229. Though service is on a corporate officer as individual if such individual's attorney acknowledge service of a notice to take depositions which specifies the action to be against the corporation, as "attorney for defendant" and subsequently consents to a continuance of the case, the corporation is bound by his assent to such continuance—Kirkpatrick Const. Co. v. Central Elec. Co., 159 Ind. 639.

94. Park Bros. & Co. v. Oil City Boiler Works, 204 Pa. 453.

95. Montello Brick Co. v. Pullman's Palace Car Co. (Del.) 54 Atl. 687.

96. A stockholder is not made a party by representation by the fact that the corporation is made a defendant to a suit to enjoin the voting of his shares for directors—Taylor & Co. v. Southern Pac. Co., 122 Fed. 147.

97. Evidence of corporate existence. See ante, § 3.

98. Crocker v. Muller, 40 Misc. (N. Y.) 685. Proof of the de facto existence of a corporation is unnecessary, where in the pleadings the corporation is admitted to be such—Grand Rapids School Furniture Co. v. Grand Hotel & Opera House Co. (Wyo.) 72 Pac. 687.

99. Laws Spec. Sess. 1898, c. 10—Northrup v. A. G. Wills Lumber Co., 65 Kan. 769, 70 Pac. 879.

1. Boston Base Ball Ass'n v. Brooklyn Base Ball Club, 37 Misc. (N. Y.) 521. An allegation that a plaintiff is a private corporation is sufficient to bring it within a statutory provision dispensing with proof of corporate existence, and the omission of the word "duly" if desired to be taken advantage of must be raised by special exception or a special plea of nul tiel corporation (Rev. St. 1895, art. 1186)—Bury v. Mitchell (Tex. Civ. App.) 74 S. W. 341.

2. Petition filed in the name of Adas Yeshurun Society—Adas Yeshurun Soc. v. Fish (Ga.) 43 S. E. 715.

3. Butterfield v. Graves, 138 Cal. 155, 71 Pac. 510.

4. Sly v. Palo Alto Gold Min. Co., 28 Wash. 485, 68 Pac. 871.

5. Norris v. Lake Drummond Canal & Water Co., 132 N. C. 182.

6. Action for breach of a covenant in a deed alleging a conveyance to have been made to the Owensboro Falls of Rough and Green River R. Co., and a deed showing that the grantee was the Owensboro Falls of Rough & Green River Branch Railroad Co.—

Denial of existence.—The corporate existence or capacity of a plaintiff to sue is not put in issue by a general denial.[7] The corporate existence of a plaintiff is sufficiently denied by an answer denying that plaintiff was a corporation incorporated under the laws of the state, and that if it were so incorporated it would be governed by the laws of the state.[8] Where defendant's answer in abatement attacking the power of plaintiff to act as a corporation is not sustained, leave to answer further may be refused in the discretion of the court.[9]

Verification of pleadings.—Where a corporation seeks to have an injunction dissolved on denial of the grounds contained in an answer, such answer must be sworn to.[10]

Pleading corporate liability.[11]—In pleading liability of a corporation for the acts of a surgeon employed in a relief department, it is not necessary for the plaintiff to set out all the regulations of the relief department in order to show an obligation on the part of defendant to furnish skillful surgical attendance to injured members; it is sufficient to aver that such obligation existed.[12] Where a count in a declaration alleges that a corporation is indebted to plaintiff, a recovery may be had under such count based on an estoppel of the corporation to assert that the contract on which the indebtedness arose was executed by the corporation's agent as an individual.[13]

An allegation that defendant made and executed an instrument to plaintiff, which by reason of the manner in which such instrument is addressed amounts inferentially to an allegation that a concern named therein is the same as plaintiff, is sufficient after answer.[14]

Variance.—On an issue as to defendant's right to receive certain money from a corporation, evidence as to amount of salaries paid the officers is immaterial.[15] Where a pleading bases a right to recovery on a loan of money, there is a fatal variance between it and proof that the money was paid on a stock assessment.[16]

Defenses.—In an action by a corporation to recover money loaned, the defendant cannot show that the money alleged to have been loaned was really the individual property of plaintiff's treasurer and another.[17]

Arrest of officers.—Officers of a corporation made defendant in trover, who are not parties, cannot be committed to jail.[18]

Mandamus.—Where a duty is especially imposed by law on a corporation, mandamus will lie to enforce it.[19] So a railroad company may be compelled by such remedy to restore a highway, which it has crossed, to a safe condition or to such a

Chicago, St. L. & N. O. R. Co. v. Wilson (Ky.) 76 S. W. 138.

7. Chamberlain Banking House v. Kemper, etc., Dry Goods Co. (Neb.) 92 N. W. 175. After a filing of a plea of general issue and payment, verified by the president, the existence of defendant as a corporation is admitted—Bennett v. Millville Imp. Co., 67 N. J. Law, 320.

8. State Ins. Co. v. Farmers' Mut. Ins. Co. (Neb.) 90 N. W. 997.

9. United States Mortg. Co. v. McClure, 42 Or. 190, 70 Pac. 543.

10. Chancery Practice Rule 32, Code, p. 1209, requires the verification of an answer in such cases generally—Niehaus v. Cooke, 134 Ala. 223.

11. It must be averred that agency for the corporation existed at the time of the transaction complained of. It is not sufficient to aver agency generally—Pratt Land & Imp. Co. v. McClain, 135 Ala. 452.

12. Haggerty v. St. Louis, K. & N. W. R. Co. (Mo. App.) 74 S. W. 456.

13. Congress Const. Co. v. Worcester Brew. Co., 182 Mass. 355.

14. An order for a safe on which the complaint was based directed "Herring-Hall-Marvin Co., La Grande, Ore. April 1, 1901, Hall Safe and Lock Works, San Francisco." sufficiently indicates that the two concerns named were identical—Herring-Hall-Marvin Co. v. Smith (Or.) 72 Pac. 704.

15. Groh v. Groh, 80 App. Div. (N. Y.) 85.

16. Stanton v. Baird Lumber Co., 132 Ala. 635.

17. St. James Co. v. Security Trust & Life Ins. Co., 81 N. Y. Supp. 739.

18. Hall & B. Woodworking Mach. Co. v. Barnes, 115 Ga. 945.

19. State v. New Orleans Gas Light Co., 108 La. 67.

state as to permit its free use,[20] or to compel a telephone company to supply a customer with service.[21] Mandamus will not lie to compel the restoration of a train service where the discretion of determining accommodations is placed by the statute in the directors of the railroad, but a board of railroad commissioners may determine the reasonableness of their action and enforce its determination by mandamus.[22] Mandamus will not issue to compel the treasurer to apply a certain fund in his possession to the payment of a judgment.[23]

§ 11. *Legislative control over corporations.*—Where the charter gives the corporation the right to increase its bond issue for purposes incidental to the business, and to purchase its capital stock for retirement, preferred stockholders do not occupy a contract relation guaranteeing that the issues of different classes of stock and of stock and bonds shall remain of fixed proportions, and therefore legislative authorization of the issuance of bonds to retire stock applicable generally to corporations does not impair the obligation of contracts,[24] especially where the general incorporation statute reserves the power in the legislature to alter, suspend, or repeal all charters.[25] Such a statute does not impair the vested rights of stockholders if its only effect is to alter the manner in which an existing right may be effectuated.[26] Where it is provided that, after the dividends declared on stock of a private corporation shall amount to the full sum invested, the legislature may regulate the charges of the corporation so that no more than a certain sum shall be divided on the capital employed, the earnings of the corporation cannot be held as capital and though the charges are not regulated, surplus profits may, notwithstanding, be exacted by the state.[27]

§ 12. *How corporations may be dissolved; forfeiture of charter; effect of dissolution; winding up under statutory provisions.*—A corporation is not dissolved by the fact that one person becomes the owner of all the stock,[28] and the fact that one is a sole creditor and stockholder of a corporation does not allow him to deal with its property without consideration of its existence.[29]

Nonuser.—Where a corporation is chartered for the purpose of holding exhibitions and for the general promotion of agricultural interests, it is not dissolved by the mere fact that it fails to hold exhibitions.[30]

Failure to pay bonus tax.—A provision that after two years' default in the payment of a bonus tax such default shall constitute a forfeiture of the charter deprives the corporation of a legal existence on default in payment though during the two years such existence may be regained by payment of the tax.[31]

Dissolution by consent of stockholders or directors.—The stockholders cannot dissolve the corporation, where it is created by special act and no method of dissolution provided, so as to exempt it from existing liabilities.[32] Where the advisa-

20. Chicago, I. & L. Ry. Co. v. State, 158 Ind. 189. So where a railroad has been using a street for its track—Town of Mason v. Railroad Co., 51 W. Va. 183.

21. State v. Kinloch Tel. Co., 93 Mo. App. 349; Mahan v. Michigan Tel. Co. (Mich.) 93 N. W. 629.

22. Laws 1890, c. 565—People v. Brooklyn Heights R. Co., 172 N. Y. 90.

23. The only allegation of possession was that the treasurer was in possession, unless the fund had been expended in an unauthorized way—Minchener v. Carroll, 135 Ala. 409.

24, 25. C. H. Venner Co. v. United States Steel Corp., 116 Fed. 1012.

26. Act March 28, 1902—Berger v. United States Steel Corp., 63 N. J. Eq. 809.

27. Local Laws 1847, p. 82, §§ 23, 24, 35—Terre Haute & I. R. Co. v. State, 159 Ind. 438.

28. Geo. T. Stagg Co. v. E. H. Taylor, Jr. & Sons, 24 Ky. L. R. 495, 68 S. W. 862.

29. Watson v. Bonfils (C. C. A.) 116 Fed. 157.

30. Acts 1867, c. 128; Acts 1870, c. 89; Acts 1890, c. 73—Nicolai v. Maryland Agricultural & Mechanical Ass'n. 96 Md. 323.

31. Acts Assem. 1898, p. 1173, c. 504; Poe's Supp. Code, Pub. Gen. Laws, art. 81, §§ 88f, 88i—Cleaveland v. Mullin (Md.) 54 Atl. 665.

32. It is said to be doubtful whether the corporation may be terminated for any purpose before the day fixed by the charter on resolution of a mere majority of the stockholders—Economy Bldg. & Loan Ass'n v. Paris Ice Mfg. Co., 24 Ky. L. R. 107, 68 S. W. 21.

bility of dissolution is by statute left to the determination of the board of directors, their discretion cannot be interfered with by equity and dissolution enjoined by a minority stockholder.[33] Where dissolution is permitted on consent in writing of the owners of a majority of the stock, dissolution is not permitted on the mere vote of a majority of the stockholders in favor thereof and action of the directors pursuant thereto; there must also be a publication of notice of dissolution if required by statute and the mere fact that the stockholder was present at the meeting at which it was voted to dissolve, does not release the corporation from liability to him.[34] Where it is alleged that a surrender of a corporate franchise was effected by the action or nonaction of stockholders, it may be shown what was the intention of another corporation which held a majority of the stock.[35]

Insolvency.—A corporation is not dissolved by the mere fact of insolvency incapacitating it to continue its business,[36] nor can minority stockholders have a dissolution of a corporation in the absence of a statute on the mere ground that it is insolvent and that its business is being carried on at a loss.[37] The officers of a corporation may ask for its dissolution and the appointment of a receiver, where its stock and assets are insufficient to pay its debts or where the interests of the stockholders require it.[38] A federal bankruptcy law does not supersede state insolvency laws as to a corporation engaged principally in mining.[39]

Forfeiture of charter and franchises in judicial proceedings by the state.—In New York, the attorney general may institute proceedings for the dissolution of an insolvent savings loan and building association on the report of the superintendent of banking without a relator.[40] The corporate existence of a banking institution or a savings, loan, and building association, cannot be determined by an action in the name of the people, unless for some reason, distinctly stated, it has forfeited the right to exist conferred on it by its incorporation.[41] If the attorney general is not authorized to bring quo warranto proceedings but the right is vested in the county attorney, a waiver of objection on the part of the respondent cannot be taken advantage of by the attorney general, and the bill is properly dismissed on the merits where there is no showing that it was brought by the prosecuting attorney, or authorized by him, or any court, or the governor of the state.[42] An act for the prevention of the formation of monopolies which is unconstitutional does not become a part of the charter contract causing its violation to effect a forfeiture, if the charter itself did not require the company not to do the acts inhibited by the statute.[43]

Receivership.—If creditors and other parties in interest are satisfied, the state cannot have a receiver though the corporation's affairs have been prematurely or irregularly settled.[44] The fact that a corporation violates its corporate powers does

33. General Corp. Act of New Jersey—Windmuller v. Standard Distilling & Distributing Co., 114 Fed. 491.

34. Economy Bldg. & Loan Ass'n v. Paris Ice Mfg. Co., 24 Ky. L. R. 107, 68 S. W. 21.

35. Manchester St. R. Co. v. Williams, 71 N. H. 312.

36. Ready v. Smith, 170 Mo. 163.

37. Worth Mfg. Co. v. Bingham (C. C. A.) 116 Fed. 785.

38. Code Civ. Proc. §§ 2419, 2423—Zeltner v. Henry Zeltner Brew. Co., 174 N. Y. 247.

39. R. H. Herron Co. v. Superior Ct., 136 Cal. 279, 68 Pac. 814.

40. New York Banking Law, § 18; Code Civ. Proc. §§ 1785, 1786, 1808—People v. Manhattan Real Estate & Loan Co., 74 App. Div. (N. Y.) 535.

41. A complaint which states that the expenses of defendant during the past year have exceeded its income, that it has made contracts which are claimed to be improvident, that if a particular claim is valid, then the corporation is insolvent, and that a superintendent of the banking department has certified to the attorney general that it is unsafe and inexpedient for defendant to continue business, is insufficient—People v. Manhattan Real Estate & Loan Co., 175 N. Y. 133.

42. Ballinger's Ann. Codes & St. § 5781—State v. Seattle Gas & Elec. Co., 28 Wash. 488, 70 Pac. 114.

43. Rev. St. 1895, art. 5313; Anti-Trust Law 1895—State v. Shippers' Compress & Warehouse Co. (Tex. Civ. App.) 67 S. W. 1049.

not authorize the appointment of a receiver.[45] Where a statute authorizes a receiver for a corporation having no official empowered to hold its assets, resignation of the officers of an insolvent corporation for the express purpose of placing it within the intention of such statute will be ineffective.[46] Where by statute appointment of a corporate receiver is authorized in case of dissolution, insolvency or danger thereof, or forfeiture of the corporate rights and in other cases where receivers have theretofore been appointed by the usages of courts of equity, a receiver may be appointed, where the corporate property has been destroyed by fire, to take charge of such as is left and receive the insurance money, the corporation not being in active operation, and its capital stock being equally divided between contending factions.[47]

Where the receiver is vested with corporate assets, he has power to take steps to vacate an invalid judgment against the corporation.[48] An order allowing receivers to be made parties to a stockholder's action against corporate directors, but denying the right to seek to impose any individual liability or representative liability, does not prevent the setting up of a cause of action against the directors for negligent management and the seeking of annulment of a release made by the receivers to the directors and their compulsion to account to the receivers, also that the receivers collect the same for the plaintiff or that plaintiff be authorized to collect it individually.[49]

Creditors cannot assert, as against a former receiver of a corporation, mismanagement and conversion of the corporate assets, such right existing in the subsequent receiver alone.[50]

An attorney employed to resist the appointment of a receiver may be paid from funds realized on sale by the receiver, though he is also counsel for the general manager of the corporation.[51]

Procedure and jurisdiction.—Charter provisions as to notice of meetings tending toward dissolution are mandatory.[52] Where efforts of minority stockholders to secure a sale of the corporate property and the distribution of its assets would be unavailing for the reason that a vote of the majority stockholders cannot be obtained, not on account of their unwillingness, but on account of their lack of interest in the affairs of the corporation, the minority stockholders may maintain a bill in equity to secure a distribution of its assets.[53] The grounds for dissolution must be specifically alleged.[54] An order to show cause in a proceeding for voluntary dissolution of a corporation may be amended nunc pro tunc by insertion of the

44. State v. New Orleans Debenture Redemption Co., 107 La. 562.

45. In a proceeding to enjoin a lease of water works property, a receiver cannot be appointed, no fraud or mismanagement being shown—New Albany Waterworks v. Louisville Banking Co. (C. C. A.) 122 Fed. 776.

46. Code Civ. Proc. § 1810, subd. 3—Zeltner v. Henry Zeltner Brew. Co., 174 N. Y. 247.

47. Rev. St., subds. 5, 6, § 4329—Gibbs v. Morgan (Idaho) 72 Pac. 733.

48. Yorkville Bank v. Henry Zeltner Brew. Co., 80 App. Div. (N. Y.) 578.

49. Craig v. James, 80 App. Div. (N. Y.) 16.

50. Boyd v. Mutual Fire Ass'n (Wis.) 90 N. W. 1086.

51. Commonwealth v. Penn. Germania Bldg. & Loan Ass'n, 204 Pa. 29.

52. Davies v. Monroe Water Works & Light Co., 107 La. 145.

53. Bill to secure the sale of land of a town-site company organized during boom times, the purposes of which had become impossible, whose stockholders had abandoned it, and whose property was being sold yearly to pay taxes—Noble v. Gadsden Land & Imp. Co., 133 Ala. 250.

54. A bill which seeks the termination of a corporation on the ground that the original corporators are all deceased except complainant, should specifically show that no additional members have been admitted who have kept up the organization and it is not sufficient to aver that no successors have been named and no vacancies filled—Nicolai v. Maryland Agricultural & Mechanical Ass'n, 96 Md. 323. Where the members seek the dissolution of a corporation, complainant's interest and the facts of insolvency must be specifically alleged—Polk v. Mutual Reserve Fund Life Ass'n, 119 Fed. 491.

return day named in the copy of the order served on a creditor, the creditor having entered a general appearance on such day and then on discovering that the return day was omitted from the original order moved to dismiss.[55]

Where an order of distribution is reversed on appeal, and certain unpreferred creditors are allowed to share in a particular fund, the order of distribution will be stayed below in order to allow another creditor of the same class opportunity to appeal, leave having been previously denied him though he had excepted to the receiver's report.[56]

Effect of dissolution.—Though the corporate existence has expired by the termination of its charter and of the time for settling its affairs, the assets may be collected by the stockholders or their representatives.[57] Under the Kentucky statute, a corporation continues to exist for the purpose of being sued until its debts are paid.[58]

Notwithstanding a decree in a state court declaring a corporation dissolved and appointing receivers, a federal court may have jurisdiction of a creditor's petition to have the corporation adjudged a bankrupt.[59] After a corporation has been dissolved on insolvency and it has no corporate existence, one recovering a judgment against it cannot examine a third party under supplementary proceedings.[60]

An execution obtained pending voluntary dissolution of a corporation will not be dissolved, but where corporate property has been placed in the hands of a permanent receiver, it cannot be sold on an execution issued without leave of court.[61] A corporation pending such dissolution may move to vacate the execution and restrain a sale though its receiver is not a party to the motion.[62]

Where a person is served with process as president of a corporation, he may show that the corporation has been dissolved and is not liable to suit.[63]

Continuance and winding up under statutory provisions.[64]—Where by statute, after the termination of a corporation by limitation, the directors become trustees to wind up its affairs, one director may maintain an action in equity to remove the rest and for the appointment of a receiver, if his bill disclose that the trustees have denied liability on notes which they have given to the company and which are a part of their assets and are making no effort to collect them.[65] Statutes providing that trustees on dissolution shall be trustees for the creditors and stockholders with power to collect the assets and make settlement with the creditors, and division among the stockholders apply only to dissolution proceedings under the same statute.[66] After the expiration of a period for the filing of objections to claims filed, those who have filed claims are to be regarded as creditors who are entitled to object to illegal claims.[67]

55. Code Civ. Proc. §§ 723, 724—In re Quo Vadis Amusement Co., 81 N. Y. Supp. 394.

56. People v. American Loan & Trust Co., 39 Misc. (N. Y.) 647.

57. Connecticut Mut. Life Ins. Co. v. Dunscomb, 108 Tenn. 724.

58. Economy Bldg. & Loan Ass'n v. Paris Ice Mfg. Co., 24 Ky. L. R. 107, 68 S. W. 21.

59. Proceeding under Code of Maryland, art. 23, does not prevent a proceeding under the national bankruptcy act—In re Storck Lumber Co., 114 Fed. 360.

60. Assessment life insurance companies incorporated and dissolved under laws of Illinois—In re Stewart, 40 Misc. (N. Y.) 32.

61, 62. Fox v. Union Turnpike Co., 37 Misc. (N. Y.) 308.

63. Economy Bldg. & Loan Ass'n v. Paris Ice Mfg. Co., 24 Ky. L. R. 107, 68 S. W. 21.

64. Facts held not to show grounds for winding up a land and improvement corporation under Acts Extra Sess. 1901, p. 326, c. 298, permitting the winding up in chancery of a corporation, the purpose of which has failed, the management of which has been abandoned or which has become insolvent or the assets of which are being consumed without benefit or probable benefit to the stockholders—Radford West End Land Co. v. Cowan (Va.) 44 S. E. 753.

65. Buckley v. Anderson (Ala.) 34 So. 238.

66. 1 Ball. Ann. Codes & St. §§ 4274, 4275—New York Nat. Exch. Bank v. Metropolitan Sav. Bank, 28 Wash. 553, 68 Pac. 905.

67. Proceedings to wind up—Olmstead v. Vance & Jones Co., 196 Ill. 236.

§ 13. *Succession of corporations; reorganization; consolidation.*[68]—There must be legal authority before corporations can consolidate.[69] Where the charter any by-laws of a corporation and the statute under which it was created vest in the stockholders a right of sale of the corporate properties, and discontinuance of the corporate existence, such power may be exercised by them pursuant to laws of the state to which the corporation owes life.[70] A transfer of the property of a domestic corporation to a foreign corporation except the franchises of its being a corporation, the foreign corporation to issue paid up stock to stockholders of the domestic corporation or to make a cash payment of less than the face value thereof to stockholders refusing to accept such paid up stock operates as a dissolution and may be carried out only by proceedings under the statute governing dissolution.[71]

Organization of new corporation.—Persons are not prevented from organizing a corporation by the fact that they are stockholders in another and the latter corporation may sell its property to the new corporation or the promoter thereof before the corporation is completed,[72] so, the stockholders and officers of a corporation may make an agreement with others whereby a new corporation is formed which takes all the assets of the old and makes payment by issuing its stock to the stockholders of the old.[73] In such case, a new corporation will be regarded as holding the assets of the old in trust for the creditors of the old.[74]

Where a corporation surrenders its property to another corporation and its stockholders surrender its stocks and bonds, which are canceled and replaced by stock and bonds of the new corporation, the transaction is to be regarded as a consolidation.[75]

Rights of stockholders.—Minority stockholders cannot have an agreement, by which a consolidation has been effected, set aside or enjoined unless wrong and injury is clearly shown to have been done them or the corporation.[76]

If a consolidation is effected without authority, wrongfully, or without the consent of the stockholders or under a right acquired after the stockholder has subscribed to his stock, a dissenting stockholder may recover the value of his shares, but if the corporation is organized under a statute authorizing the consolidation of corporations it receives the statute as part of the subscription contract, and the nonassenting stockholder is not entitled to cash payment for his shares.[77] The stockholder cannot object to a properly effected consolidation though he cannot be forced into the new corporation without his consent,[78] and the mere fact of consolidation does not give him the right to have the corporate assets converted into

68. See article "Combinations and Monopolies" for illegality of consolidation and other agreements between corporations as creating monopolies or violating "anti-trust" statutes.

69. Overstreet v. Citizens' Bank (Okl.) 72 Pac. 379.

70. Majority stockholders held to have power to transfer corporate property to another corporation under Code W. Va. 1899, c. 53, §§ 56, 59—Metcalf v. American School Furniture Co., 122 Fed. 115.

71. Coler v. Tacoma Ry. & Power Co. (N. J. Law) 54 Atl. 413.

72. Goodwin v. Bodcaw Lumber Co., 109 La. 1050.

73, 74. Such an arrangement may be disturbed by the creditors of the old corporation, only as far as necessary to secure their claims—Wilson v. Aeolian Co., 64 App. Div. (N. Y.) 337.

75. Rendering the new corporation liable for the debts of the old—Shadford v. Detroit Y. & A. A. Ry. (Mich.) 89 N. W. 960.

76. Evidence held insufficient to show fraud and conspiracy on the part of the directors authorizing an annulment of the consolidation—Dickinson v. Consolidated Traction Co., 114 Fed. 232. A showing that a new company has been organized which has set apart a portion of its stock to be exchanged for the stock of an old company, and that a large majority of the shareholders of the old corporation consent to the exchange, does not show a fraudulent intent on the part of the old company to dispose of all its property which justifies an injunction—Odlin v. Bingham Copper & Gold Min. Co. (N. J. Law) 51 Atl. 925.

77. Mayfield v. Alton Ry. Gas & Electric Co., 198 Ill. 528.

78, 79. Mayfield v. Alton Ry., Gas & Electric Co., 100 Ill. App. 614.

money, but such right is not acquired by the stockholder until the corporation reaches the winding up stage.[79] Delivery of stock to a committee to be exchanged for stock in the new corporation transfers it such a title as will permit a subsequent purchaser in good faith from the committee to hold it free from equities in favor of the original holder.[80] A mere pledgee who has not become a registered stockholder, though the shares were assigned in blank by the registered owner, is not entitled to participation in, or notification of, proceedings to effect a consolidation of the corporation with another.[81] An agreement between the directors of constituent corporations in proceedings towards a consolidation that matters left unadjusted should be adjusted pursuant to a memorandum of agreement which had been entered into by the holders of more than a majority of the stock of the constituent corporations is binding on stockholders who signed the consolidation agreement as directors.[82]

Where there is an arrangement by which capital stock of an old corporation is taken in return for a similar number of shares of the capital of a new corporation with double the amount of the capital stock, there is no confiscation of the value of the shares so turned in, unless the remainder of the new company's stock is not subscribed in good faith and does not equal the par value of that stock which is taken over.[83] An agreement to exchange stock for stock in a consolidated company may be valid, though the number of corporations consolidated have not a capacity equal to that originally contemplated.[84]

Where on consolidation of corporations into a holding company the holding company issues collateral trust bonds under a plan for securing working capital for all constituent companies, the stockholders of one of the constituent companies cannot object to a pledge of the constituent company's bonds as collateral for the collateral trust bonds of the holding company part of the proceeds of which the constituent company has received as working capital. The constituent company is properly charged with a portion of the expense of securing the loan by the holding company and the question of usury cannot be raised before the repayment of the debt.[85]

Where a corporation which has acquired the property of other corporations is in its turn merged into a holding corporation its stockholders cannot, in a suit against the holding corporation, assert that there was a misappropriation or diversion in the amount paid for one of its constituent properties, it not being shown that there was any fraud or breach of trust on the part of its directors for the benefit of the holding company or its directors.[86]

Where a street railroad leases its property at a specified rental based on a percentage of its value, such lease is not a fraud on minority stockholders as a limitation of annual dividends. It will be presumed that the directors acted in good

80. Jewell v. McIntyre, 62 App. Div. (N. Y.) 396.

81. Where, on consolidation of corporations it is agreed that the portion of the stock assigned to one of the constituent companies should be applied, first to the payment of its floating indebtedness, and then apportioned among the stockholders, and the stock is delivered to an agent of the constituent company for such purpose, the new corporation is not liable to a pledgee of the stock of the old company who is not a stockholder of record, for a conversion of the stock to which his pledgor would be entitled under the consolidation agreement, and such distribution of the shares of the consolidated company is not a violation of the provision in stock certificates of the constituent company that they were transferable on the books only on surrender of the certificates—Cleveland City Ry. Co. v. First Nat. Bank (Ohio) 67 N. E. 1075.

82. Cleveland City Ry. Co. v. First Nat. Bank (Ohio) 67 N. E. 1075.

83. Mayfield v. Alton Ry., Gas & Electric Co., 198 Ill. 528.

84. Jewell v. McIntyre, 62 App. Div. (N. Y.) 396.

85, 86. Dittman v. Distilling Co. of America (N. J. Eq.) 54 Atl. 570.

faith.[87] Where a lessee is operating the franchise of two street railroad corporations, a stockholder in a lessor company has no right of action against the city arising from an ordinance requiring the giving of transfers and such ordinance cannot be set up in connection with a bill alleging an infringement of the contract rights of the lessor under its franchise.[88]

On the consolidation of corporations the directors of a constitutent corporation may agree that the company shall come in free from debt, and that enough of the stock apportioned to one of the companies shall be sold to pay its indebtedness and the remainder distributed among the preferred and common stockholders in proportion to the relative value of such stock.[89]

If a corporation absorb another, its stockholders cannot avail themselves of the relief existing in favor of the members of the corporation which is illegally absorbed.[90]

Rights of bondholders.—A bondholder who has joined other bondholders in a plan of reorganization pursuant to which the property was sold in foreclosure and the bonds and matured coupons were used in payment of the sale price is not entitled to the benefits of the agreement until he has placed himself on the same footing as other parties thereto, if before depositing his bonds he detached the matured coupons and secured their payment from the proceeds of the sale, and until he has restored such payment cannot have the bonds of the company formed on reorganization which under the agreement were to be delivered to those joining therein.[91]

Subsequent bond issues.—Where there is an agreement by the stockholders of two corporations to dispose of the surplus of a bond issue on consolidation, the validity of the transaction cannot be questioned save by dissenting stockholders or creditors of the estate.[92] On consolidation, an agreement that there should be a bond issue to take up the debts of one of the corporations, and that any surplus should be divided among the stockholders of the two corporations, is based on a good consideration, the distribution of the surplus being regarded as a portion of the purchase money. The right to the surplus does not pass to a transferee of the stock, being an individual right of the stockholder. It is not affected by the fact that the mortgage makes no mention thereof. The surplus contemplated is the excess of the amount of the issue over the bonds outstanding, and it will not be held to include the market appreciation of the collateral bonds.[93]

Effect on existing rights.—Though a new corporation succeeds to the rights of an old corporation, it may be subject to statutes which are retroactive in effect as to the old corporation.[94] On consolidation of street railroad corporations, the new corporation succeeds to all the rights of the constituent corporation as to consents of abutting owners to the construction of the road.[95] Where the corporation acquires the property and franchises of another, a transfer of land to the latter will pass title to the former.[96]

The fact that one has been enjoined from manufacturing an article, patent to which was owned by the corporation, will not excuse his failure to furnish such

87. Ninety-nine year lease at 7 per cent. rental—Wormsor v. St. Ry. Co., 73 App. Div. (N. Y.) 626.

88. Elkins v. City of Chicago, 119 Fed. 957.

89. Cleveland City Ry. Co. v. First Nat. Bank (Ohio) 67 N. E. 1075.

90. Continental Nat. Building & Loan Ass'n v. Miller (Fla.) 33 So. 404.

91. Fuller v. Venable (C. C. A.) 118 Fed. 543.

92. Read v. Citizens' St. R. Co. (Tenn.) 75 S. W. 1056.

93. Read v. Citizens' St. R. Co. (Tenn.) 75 S. W. 1056.

94. Mileage book act, Laws 1895, c. 1027—Minor v. Railroad Co., 171 N. Y. 566.

95. Adee v. Nassau Electric R. Co., 65 App. Div. (N. Y.) 529.

96. Railroad companies—Smith v. Railroad Co., 72 S. W. 1088, 24 Ky. L. R. 2040.

articles under an agreement of sale, if prior to the entry of the decree, he has acquired control of the complainant corporation by purchase of its stock.[97]

Where after an action is begun on a policy within a year as provided by the contract with an insurance company, the company effects a consolidation with another company, the action does not abate as not having been brought within the year, though the consolidation is after such time has expired.[98] An amendment making the consolidated company defendant, and dismissing as to the original defendant, is proper.[99]

Assumption of liabilities.—A corporation on being merged in another corporation which assumes its obligations has no further liability for future transactions and can create no new obligations.[1] The relation of corporations having such mutual interests that one is in reality a branch of the other is a sufficient consideration for an assumption by one of the liabilities of the other.[2]

Where the transfer of the property of one corporation to another is on consideration of the assumption of the transferror's contracts, the transferee becomes liable thereon.[3] If certain debts are enumerated, the liability is only to the extent thereof.[4] If the facts warrant a finding that a new corporation is a mere continuation of an old it is liable for the debts thereof.[5] The insolvency of one of the former corporations affords no defense as against a proceeding to recover a debt due from it against the new corporation.[6]

A street railroad corporation which purchases the franchise of another takes subject to the duties of such a corporation and may be compelled to discharge them by mandamus, but the transferring corporation is thereafter not subject to such remedy.[7]

A railroad company is not chargeable on the contracts or for the torts of a corporation to which it succeeds in title unless it has assumed such liability or is chargeable therewith by law, though statutes provide that corporations using the franchise of another corporation shall be subject to the burdens that are imposed by such franchise.[8] Where the property of a railroad company has been transferred to another after an injury, a complaint against the two companies is not demurrable

97. McElroy v. American Rubber Tire Co. (C. C. A.) 122 Fed. 441.

98. Franklin Life Ins. Co. v. Hickson, 197 Ill. 117.

99. Construing Hurd's Rev. St. 1899, p. 444 c. 32, pp. 56, 65; Practice Act, par. 24—Franklin Life Ins. Co. v. Hickson, 197 Ill. 117.

1. City of New York v. Railroad Co., 77 App. Div. (N. Y.) 367.

2. Kendall v. Klapperthal Co., 202 Pa. 396.

3. Rehberg v. Tontine Surety Co. (Mich.) 91 N. W. 132. Evidence held insufficient to show an agreement by a corporation which received the assets to pay its debts—Central Electric Co. v. Sprague Electric Co. (C. C. A.) 120 Fed. 925.

4. Not liable for a bank check issued eight months prior to the sale and not enumerated in the list, no fraud being alleged or shown—Anderson v. Mining Co. (Idaho) 72 Pac. 671.

5. Evidence held sufficient to establish such a finding—Douglas Printing Co. v. Over (Neb.) 95 N. W. 656. The fact that one who is the general manager and owner of a large part of the stock becomes the general manager of another corporation with which the first is consolidated does not render the new corporation liable for the debts of the old, though it purchases nearly all the stock and property of the former—Crissey v. Cook (Kan.) 72 Pac. 541. Where a corporation which has procured the property of other corporations by purchase, transfers all such property together with its own to a new company, such company will not be regarded as a reorganization or consolidation of the old authorizing its substitution as defendant in a suit originally brought against the old corporation—Sartison v. Railroad Co., 103 Ill. App. 507.

6. It cannot be contended that since the original debtor was insolvent, the creditor was not injured by the consolidation—Shadford v. Railway (Mich.) 89 N. W. 960.

7. Comp. Laws 1897, § 6448—Township of Grosse Pointe v. Railway (Mich.) 90 N. W. 42.

8. Under Civ. Code, § 1863, a railroad company operating a line of another company is not liable for damages resulting from a breach of a contract entered into by such company—Seaboard Air-Line Ry. v. Leader, 115 Ga. 702.

on the ground that the judgment could be enforced as against the transferee only to the extent of the transferror's property.[9]

On a merger of street car companies into a new corporation, which assumes the obligations of the corporations merged, municipal assessments which were distinct against the property of several corporations become a single lien attaching to the new corporation's property as a whole, but such lien does not become a prior lien as against a mortgage on the property of one of the constituent railroad companies and as to property covered by the mortgage; the original priorities must be observed.[10] On a lease subject to all debts and liabilities, the lessee is not liable for previously accruing license fees.[11]

A creditor may bring an action at law against a purchasing corporation which on taking the assets of another has agreed to pay its debts.[12]

Estoppel to assert defenses.—One holding a judgment for accrued dividends, who enters into a reorganization of the corporation, cannot assert his judgment against the assets of the new corporation to the prejudice of other creditors.[13] After consolidation, the resulting corporation cannot contend that the act was illegal as against a creditor of one of the former corporations so long as it receives and retains all the property of the constituent corporations.[14]

Rights of creditors to follow assets of old corporation.—A corporation which takes the assets of and continues the business of another corporation, as its successor, is liable to a plaintiff in an action pending against the second corporation to the extent of the property which it receives.[15] A creditor of the former corporation may follow the assets, though some of the stockholders in the new corporation were not aware of his claim.[16] The right to follow such assets is not removed by a statute which furnishes a remedy in favor of creditors against corporate officers who have transferred its property to themselves or others.[17]

Agreements to pay dividends.—An agreement by a corporation which purchased another corporation to pay fixed sums to those stockholders of the latter corporation who exchanged their stock for its stock, such sum to be paid in a fixed amount semi-annually, is invalid as an agreement to pay the dividends whether the profits were earned or not, and a purchaser of certificates of indebtedness issued under such agreement which contain a reference thereto acquires no greater rights than the original holders, though the certificates are negotiable in form and acquires no greater rights on the ground of estoppel by the fact that the issuing corporation takes the originals from him and issues new ones directly to him.[18]

Determination of legality of consolidation.—The legality of merger of corporations cannot be determined in an injunction proceeding,[19] and the exercise of powers conferred by the corporate charter will not be enjoined on the ground that their effect will be to create a monopoly.[20] A dissenting stockholder cannot object

9. Citizens' St. R. Co. v. Shepherd, 29 Ind. App. 412.

10. City of Lincoln v. Lincoln St. Railway Co. (Neb.) 93 N. W. 766.

11. Lease of a street railroad—City of New York v. Railroad Co., 77 App. Div. (N. Y.) 379.

12. Central Electric Co. v. Sprague Electric Co. (C. C. A.) 120 Fed. 925.

13. Farmers' Loan & Trust Co. v. Central R. & Banking Co., 120 Fed. 1006; Central Trust Co. v. Same, Id.

14. Shadford v. Detroit Y. & A. A. Ry. (Mich.) 89 N. W. 960.

15. Berthold v. Holladay-Klotz Land & Lumber Co., 91 Mo. App. 233.

16. Wilson v. Aeolian Co., 64 App. Div. (N. Y.) 337.

17. Rev. Sts. 1899, § 1338—Berthold v. Holladay-Klotz Land & Lumber Co., 91 Mo. App. 233.

18. National Salt Co. v. Ingraham (C. C. A.) 122 Fed. 40.

19. Injunction to restrain street railway company from constructing a road on the ground of lack of consent of the property owners—Adee v. Nassau St. Elect. R. Co., 65 App. Div. (N. Y.) 529.

20. Power to hold stock of and control other corporations—Dittman v. Distilling Co. (N. J. Eq.) 54 Atl. 570.

to a transfer of property of the corporation on the ground that it is a violation of the Federal Anti-Trust Act of 1890, since the only party entitled to maintain a bill in equity for injunctive relief for violating its provisions is the United States attorney at the instance of the attorney general,[21] and a state court of equity will not take jurisdiction of suit by a stockholder for relief on the ground that the purpose of a corporation was unlawful as being for the creation of a monopoly if the corporation is merely exercising powers conferred by its charter to hold stock of other corporations, since such question must be raised in quo warranto proceedings by the state.[22]

In a proceeding to dissolve a holding company and to obtain relief against a constituent company, a ground of relief solely against the constituent company cannot be set up without making the bill multifarious.[23] Where a bill is based on supposed illegality of management of the company and there is a prayer for its dissolution and the repayment to complainants of the amounts paid for their stock, an amended bill seeking specific performance of a contract to pay dividends, based on the valid continuous existence and management of the corporation as a going corporation, is inconsistent with the relief originally sought.[24]

§ 14. *Stock and membership. A. Membership in corporations in general.*—The relation of the stockholder is personal, analogous otherwise than technically to that of a partner.[25] Corporations organized for gain have no power of expulsion or forfeiture, unless granted by their charter or by general municipal laws.[26] The stockholder is not entitled to surrender his stock and withdraw its value prior to winding up of the corporation, unless the corporation consent.[27] The fact that a city becomes a member of a mutual insurance company does not amount to an extension of a municipality's credit to the corporation within the constitutional provision.[28] One who holds a large share of the stock of a corporation has an insurable interest in the corporation's property.[29]

Where the original stockholders have transferred all their stock to a holding company, they cannot deal with the property of the corporation and their acts as stockholders are void.[30]

(§ 14) *B. Capital stock and shares of stock. Nature of capital stock and shares of stock.*[31]—The fact that the property of a corporation is almost entirely realty does not alter the character of its stock as personalty.[32]

The situs of shares of corporate stock for the purpose of determining their liability to execution is the state of incorporation, and they are not subject to execution in a state where the corporation is doing business unless such corporations are made domestic for the purpose of suit.[33] The property of a corporation is not con-

21. Metcalf v. American School Furniture Co., 122 Fed. 115.

22. Dittman v. Distilling Co. of America (N. J. Eq.) 54 Atl. 570.

23. Amendment seeking to add a claim that complainants as preferred stockholders of the constituent company under the certificate of incorporation are entitled to receive a stated dividend payable quarterly from the net profits arising from the business of the company, that any profits applicable to such dividends have been accumulated but have not been paid and praying for payment—Dittman v. Distilling Co. of America (N. J. Eq.) 54 Atl. 570.

24. Such amendment cannot be permitted at the hearing—Dittman v. Distilling Co. of America (N. J. Eq.) 54 Atl. 570.

25. Barrett v. King, 181 Mass. 476.

26. Purdy v. Bankers' Life Ass'n of Des Moines (Mo. App.) 74 S. W. 486.

27. Mayfield v. Alton Ry., Gas & Electric Co., 100 Ill. App. 614.

28. Const. art. 1, par. 19—French v. City of Millville, 67 N. J. Law, 349.

29. Crawford v. Aachen & M. Fire Ins. Co., 100 Ill. App. 454. (See generally article "Insurance.")

30. Bauernschmidt v. Bauernschmidt (Md.) 54 Atl. 637; Baltimore Trust & Guaranty Co. v. Same, Id.

31. See articles Creditor's Suit, Attachment, Execution, Garnishment for rights of creditors of stockholders as against corporate stock, the corporation not being involved in contractual relation.

32. Champollion v. Corbin, 71 N. H. 78.

33. Caffery v. Choctaw Coal & Min. Co., 95 Mo. App. 174; Daniel v. Gold Hill Min. Co., 28 Wash. 411, 68 Pac. 884.

veyed by a transfer of its stock no matter in what form the certificates are sold and assigned.[34]

Issue of stock, and payment therefor.—A corporation may, by its acts, be estopped to deny that a person is a stockholder though the issue of the stock is not entirely in compliance with statute.[35] The fact of an omission of a subscriber's name from a certificate of incorporation as evidencing an intention not to accept him as a stockholder is overcome by a demand for payment after incorporation.[36]

Holders of stock as collateral, who surrender the stock certificate on default in payment of the debt, are not to be regarded, until the issue of a new certificate in their names, as stockholders, entitled as such to demand under a statute, a statement of the assets and liabilities of the corporation.[37]

Where creditors or stockholders are not injured, the corporation may fix its own price for the sale of its stock.[38]

Where stock is exchanged for municipal aid bonds which are void, a contractor to whom the bonds are conveyed in lieu of stock due him under a construction contract is entitled to such stock, and this right may be asserted by his assignees, and in an action against the corporation by the assignees to compel the issue of stock to them, the corporation is not entitled to have interest payments made by the municipality on the void bonds brought into court. Complainants' right to relief is not affected by any notice which they may have had of the void character of the bonds, there being no bad faith.[39] The municipality, the original holders of the bonds, and stockholders of the corporation, are not necessary parties.[40]

A corporate creditor is bound by an agreement to apply a certain portion of a new issue of stock on his debt if a third person takes the remainder of such stock.[41]

Where stock is issued to a creditor to secure a debt, it cannot be set off as against the debt though the mere fact that the creditor in taking stock did not regard it as of value or intend to take it as stock does not prevent its being set off.[42]

Watered or fictitiously paid-up stock.—As against creditors, payment of stock subscriptions must be in money or its equivalent.[43] Under the statutes of certain states, paid-up corporate stock cannot be issued for less than its par value.[44] Payment by an uncertified check on a bank is not a payment in cash.[45] Though a stat-

34. Albany Mill Co. v. Huff Bros., 24 Ky. L. R. 2037, 72 S. W. 820.

35. By vote of two thirds of the members it was agreed to issue the additional share to the buyer, who signed the articles of incorporation as a stockholder at request of the president and thereafter met with the other members as a stockholder, with full knowledge and consent of the officers, though nothing was paid and the company did not issue or offer to deliver the shares sold—Gowdy Gas Well, Oil & Mineral Water Co. v. Pattison (Ind. App.) 64 N. E. 485.

36. Woods Motor Vehicle Co. v. Brady, 39 Misc. (N. Y.) 79.

37. Not regarded as stockholders of record under stock corporation law § 52, imposing a penalty for failure to make such statement—Pray v. Todd, 71 App. Div. (N. Y.) 391.

38. Ross v. Sayler, 104 Ill. App. 19.

39, 40. Citienzs' Sav. & Loan Ass'n v Belleville & S. I. R. Co. (C. C. A.) 117 Fed. 109.

41, 42. Reid v. Detroit Ideal Paint Co. (Mich.) 94 N. W. 3.

43. Fraudulent as to the corporation and stockholders who have paid up in full to receive the chemical formula of purported value in full payment of stock shares transferred to a third person—Dean v. Baldwin, 99 Ill. App. 582.

(Note) Where there is no charter, statutory, or constitutional provision requiring that stock shall be paid for at its par value, and where no rights of other stockholders are violated, and there is no fraud as against creditors, there is nothing whatever to render it either illegal or ultra vires for a corporation to issue its stock as full-paid upon payment of less than its par value. Such a transaction is perfectly valid as between the parties if all the stockholders consent, and the corporation cannot afterwards repudiate the agreement and compel payment of the difference between the par value of the stock and what it has agreed upon as payment in full—Clark & Marshall, Corporations, Vol. II, p. 1198; citing Scovill v. Thayer, 105 U. S. 143.

44. Coler v. Tacoma Ry. & Power Co. (N. J. Law) 54 Atl. 413.

45. Laws 1890, p. 1082, c. 565, § 2—People v. Board of Railroad Com'rs, 81 App. Div. (N. Y.) 242.

ute provides that stock subscriptions must be paid in money or labor, a note secured by a paid-up insurance policy may be accepted.[46] Actual payment of a portion of the capital stock as a condition precedent to doing business may be in property or labor, where by statute stock is authorized to be issued in consideration of money, labor, or property estimated at its true money value.[47] There must be a parity between the value of property conveyed in exchange for stock and the value of the stock.[48] A mining corporation has power to purchase property for its use, by the issuance of shares equal in their par valuation to the price at which it is agreed the purchase is to be made if not in excess of the authorized capital,[49] and a conveyance of mining property to a mining corporation in exchange for its capital stock is on a valuable consideration.[50] Where the statute prohibits the issue of stock in exchange for anything but money or property purchased for the benefit of the corporation, an issue of stock to be used as a bonus on a sale of the corporation's bonds at par may be enjoined though even with the bonus the bonds are not worth more than par.[51]

As between the parties, the value placed by the corporation on stock with which it purchases property is conclusive though not as against creditors.[52]

An intent to defraud need not exist to render the acceptance of merchandise in payment of stock subscriptions at an over estimated value fraudulent as to creditors.[53] A general allegation that certain defendants entered into conspiracy with the directors to acquire the entire capital stock of a corporation for a sum much less than its actual value is insufficient to support an action to set aside an issuance of capital stock to them.[54]

Assessments upon stockholders after payment in full.—Statutes providing that assessments may be made on stock not to exceed the amount at which the shares were originally limited does not prohibit the making of a contract by the stockholders for additional assessments.[55]

Amount of capital stock, and increase or reduction thereof.—Where there is no statutory or charter provision, the corporation may deal as it pleases with its own stock,[56] but a contract between a corporation and a portion of its stockholders to buy back stock at a specified advance at the end of a specified period is void as to creditors.[57] An issuance of stock to pay for property purchased by a corporation is not a fictitious increase.[58]

A statutory right of a stockholder to purchase at par a pro rata share of an additional issue cannot be restricted by the other stockholders.[59] A right to purchase a new issue of stock must be exercised within a reasonable time.[60]

46. Ky. St. § 568—Clarke v. Lexington Stove Works, 24 Ky. L. R. 1755, 72 S. W. 286; Clark v. Lexington Stove Works, 24 Ky. L. R. 2247, 73 S. W. 788.

47. The 20% required by Rev. St. 1898, § 1773, may be so paid under § 1753 as amended by laws 1899, c. 193—La Crosse Brown Harvester Co. v. Goddard, 114 Wis. 610.

48. Code, 1876, § 1805—Montgomery Iron Works v. Capital City Ins. Co. (Ala.) 34 So. 210.

49. Code, c. 53, § 24—Bank v. Belington Coal & Coke Co., 51 W. Va. 60.

50. Mill's Ann. St. §§ 490, 582—Homestead Min. Co. v. Reynolds, 30 Colo. 330, 70 Pac. 422.

51. Kraft v. Griffon Co., 82 App. Div. (N. Y.) 29.

52. Coler v. Tacoma Ry. & Power Co., 64 N. J. Eq. 117.

53. L. M. Rumsey Mfg. Co. v. Kaime (Mo.) 73 S. W. 470.

54. Insurance Press v. Montauk Fire Detecting Wire Co., 82 N. Y. Supp. 104.

55. Blue Mountain Forest Ass'n v. Borrowe, 71 N. H. 69.

56. It may make a contract to re-purchase its shares on a certain contingency—Fremont Carriage Mfg. Co. v. Thomsen (Neb.) 91 N. W. 376.

57. On winding up, the stockholders cannot assert such a contract—Olmstead v. Vance & Jones Co., 196 Ill. 236.

58. Not rendered void by Const. Wash. art. 12, § 6—Coler v. Tacoma Ry. & Power Co., 64 N. J. Eq. 117.

59. A vote of holders of two-thirds of the stock at a regular meeting, requiring payment of a premium for additional stock issued under Comp. Laws, § 7038, subd. 4—

If stockholders have transferred a portion of their stock to the corporation to be used as assets, or their stock has in other ways been taken back into the treasury, they have no rights based thereon to share in an issue of additional stock, though such stock has been reported by the corporate officers as unissued stock. One stockholder entitled to a proportion of additional stock issued cannot maintain an action against another stockholder on the ground that he has received more than his share, without showing a demand for the proportion due plaintiff, especially where it appears that more than sufficient remained to satisfy his claim after the allotment to defendant, and it must be shown that the right to the excess had not been purchased from other shareholders or otherwise obtained.[61]

Where new stock to the amount of accumulated surplus earnings is distributed among the original stockholders if certain of the shares are held subject to a life estate, the new shares are to be regarded as capital and not income, as between the life tenant and remaindermen.[62]

Preferred or guarantied stock; interest-bearing stock; special stock.—A subsequent statute authorizing the retirement of preferred stock on certain conditions is a repeal of a prior statute allowing capital stock to be reduced by purchase without limitation as to the financial condition of the company.[63]

Where preferred stock has been issued in violation of the charter powers though with the consent of all persons in interest, its redemption cannot be compelled by mandamus.[64] One who accepts preferred stock cannot contend that the extent of its issue was based on an overvaluation of the corporate assets or of the paid up capital stock, but is limited to a showing of a shrinkage in the assets after its issuance.[65]

A plan for the retirement of preferred stock in the absence of fraud or bad faith is not a subject of judicial control, and the court cannot say that a less expensive plan might be successfully adopted.[66] An act allowing preferred stock to be retired from the proceeds of a bond issue authorized at a regularly called meeting with the consent of two-thirds of each class of stockholders must be strictly followed.[67] In proceedings under such act, the directors must state how many shares they propose to retire though failure to acquire such number will not render the scheme ineffectual.[68] Where holders of preferred stock are given an option to accept bonds in lieu thereof, they are not deprived of any vested right by the purchase and retirement of other preferred shares, but the offer to purchase preferred stock for retirement must be made to all stockholders.[69] The power to issue bonds for such purpose is expressly given by statute in certain states.[70] Where a corporation has paid four quarterly dividends amounting to more than the minimum fixed in the statute, it may take advantage of a statute allowing a corporation which has issued preferred stock entitling the holder to dividends in excess of the specified amount per annum to retire such stock by the issue of

Hammond v. Edison Illuminating Co. (Mich.) 90 N. W. 1040.

60, 61. Crosby v. Stratton (Colo. App.) 68 Pac. 130.

62. Chester v. Buffalo Car Mfg. Co., 70 App. Div. (N. Y.) 443.

63. N. J. Corp. Acts March 28, 1902 and 1896—Hodge v. United States Steel Corp., 64 N. J. Eq. 90.

64. State v. Ferracute Mach. Co. (N. J. Sup.) 52 Atl. 231.

65. As against a scheme to retire the preferred stock under a statute giving such power to a corporation provided its assets are of sufficient value (N. J. Corp. Act March 28, 1902)—Hodge v. United States Steel Corp., 64 N. J. Eq. 90.

66. Berger v. United States Steel Corp., 63 N. J. Eq. 809.

67. Act March 28, 1902 supplementing Corp. Act 1896, §§ 27-29—Berger v. United States Steel Corp., 63 N. J. Eq. 809.

68, 69. Berger v. United States Steel Corp., 63 N. J. Eq. 809.

70. N. J. Corp. Act 1896, §§ 27, 29—Berger v. United States Steel Corp., 63 N. J. Eq. 809.

bonds if it shall have paid dividends continuously at such rate for at least one year previous.[71] One who may seek an injunction against a retirement of preferred stock by a bond issue must be the owner of shares standing in his name on the corporate books at the time of filing the bill.[72] His motive in asking an injunction is not material if the relief is alleged to be based on injury to his property rights.[73]

A purchaser of preferred stock is bound by his transferror's assent to a plan for the retirement of a portion of such stock issue.[74]

A corporation may substitute noncumulative for cumulative dividend preferred stock if the amendment by which it is effected is expressly provided to operate only on those preferred stockholders who assent. An amendment to the by-laws and certificate of incorporation which provides that, as to preferred stockholders who consent to the arrangement, dividends shall thereafter be noncumulative, and which provides that funding certificates to the amount of the dividends in arrears shall be issued to those stockholders who consent to the arrangement, such certificates to bear interest payable out of the net profits in priority to any dividends on the capital stock, is not unlawful as to the nonassenting stockholders, as providing for an unequal distribution of the surplus earnings among the preferred stockholders, since the directors will be bound when they set aside a sum equal to the interest due on the certificate to set aside a proportionate sum for the nonassenting stockholders. Common stockholders cannot object since they are benefited by the scheme by the fact that it accelerates their chances of participation in dividends. The substitution cannot be enjoined by a nonassenting preferred stockholder, since, if after the confirmation of the agreement an attempt is made to pay dividends in violation of his right, he can by an appropriate proceeding assert his legal right to a proportionate share.[75]

Issue and cancellation of certificates of stock; lost certificates.—It is sufficient to establish the loss on mandamus for the issuance of a duplicate stock certificate after ten years. After the lapse of such time claim by third persons cannot be made to lost certificates.[76] To support a statutory proceeding to compel the issue of a new certificate of stock, there must be a refusal on the part of the corporation shown. On return of the order to show cause why a certificate should not be issued, proof should be taken by the court. On granting an order to issue a new certificate, either the order to show cause or a notice should be published after the order is granted but before the certificate is delivered.[77] Where a stockholder seeks the cancellation of stock which was alleged to have been fraudulently issued, he must allege the facts showing fraud.[78] An action cannot be brought in equity after the expiration of ten years from the time of

71. United States Steel Corporation by the payment of quarterly dividends at the rate of 1¾ per cent. for four successive quarters is entitled to take advantage of New Jersey Corporation Act March 28, 1902—Hodge v. United States Steel Corp. (N. J. Sup.) 54 Atl. 1. (Court below held that five such dividends must have been paid—53 Atl. 601).

72. Hodge v. United States Steel Corp., 64 N. J. Eq. 90.

73. Hodge v. United States Steel Corp., 64 N. J. Eq. 111.

74. The transferee cannot from his ownership have a preliminary injunction—Hodge v. United States Steel Corp., 64 N. J. Eq. 90.

75. Wilcox v. Trenton Potteries Co. (N. J. Ch.) 53 Atl. 474.

76. The particulars of the loss need not be shown—State v. Southern Mineral & Land Imp. Co., 108 La. 24.

77. Laws 1892, c. 688, §§ 50, 51—In re Coats, 75 App. Div. (N. Y.) 469.

78. On a bill for the cancellation of stock seeking also the recovery of dividends paid thereon, and an injunction against the voting thereof on the ground that the stock was issued in consideration of fictitious patent rights, it must be alleged that the right to operate under the patent was known to defendants to be of no value when the stock was issued, and that the corporation did not operate under the patents or exercise the exclusive rights which it acquired—Kimbell v. Chicago Hydraulic Press Brick Co. (C. C. A) 119 Fed. 102.

issue, there being no concealment of the circumstances attending the transaction which fully appeared of record on the minutes of the corporation,[79] nor after six years,[80] nor after three years where the stock has been transferred and the real owners are not made parties until five years.[81]

Rights and liabilities arising out of the issue of fictitious certificates of stock.—One who takes stock of a corporation issued for the purpose of enabling certain directors to secure a majority of the capital stock and control the corporation acquires no rights, he having knowledge. On determination of the invalidity of such stock, a court of equity should require the issue to be returned and canceled, and the consideration paid restored to the purchaser.[82] Where it is sought to set aside such a stock issue, the fact that evidence is received concerning an alleged taking of a patent by one of the directors in his own name does not amount to a voluntary submission of an issue with regard thereto, supporting a decree requiring the directors to assign the patent to the corporation, the issue not being raised by the pleadings or such relief being sought.[83] One who by his false representations has secured an overissue of stock cannot assert an estoppel on the part of another stockholder who in reliance on such representations has voted for the issue.[84]

(§ 14) *C. Subscriptions to capital stock, and other agreements to take stock. Nature and formation of contracts of subscription.*—Stock subscriptions may be by parol.[85] Recognition by the corporation of the subscriber's rights is not essential where there is an agreement before incorporation, to take stock.[86] As between the corporation and stockholders, a formal contract of subscription is not necessary but a contract may be implied by the acceptance of stock issued to a person.[87] If there is an intention to subscribe, a subscription is sufficiently indicated by a signature to the articles of association to which is affixed the words "250 shares."[88] Where a subscriber takes newly issued stock, his liability does not depend on his knowledge of the filing of the provisions for the increase of stock.[89]

Subscription rights in a proposed corporation may be sold, title passing at the completion of the sale and not by operation of law.[90]

Where subscriptions and offers to subscribe to stock are not made in contemplation of a grant of a charter or in contemplation of incorporation under a general law, but are based on a theory that there is in existence a created subsisting body corporate capable of entering into contract with subscribers to its stock, such contracts do not become binding when the corporation actually comes into legal existence.[91]

Withdrawal, release, and discharge of subscribers.—The validity and binding effect of a stock subscription is not affected by failure of the subscriber to pay the

79. Kimbell v. Chicago Hydraulic Press Brick Co. (C. C. A.) 119 Fed. 102.

80. Action by the corporation or stockholders—Calivada Colonization Co. v. Hays, 119 Fed. 202.

81. Commonwealth v. Reading Traction Co., 204 Pa. 151.

82. Issuance by two of the directors authorized at a board meeting at which they were a majority—Luther v. C. J. Luther Co. (Wis.) 94 N. W. 69.

83. Luther v. C. J. Luther Co. (Wis.) 94 N. W. 69.

84. Haskell v. Read (Neb.) 93 N. W. 997.

85. Somerset Nat. Banking Co.'s Receiver v. Adams, 24 Ky. L. R. 2083, 72 S. W. 1125; Manchester St. Ry. v. Williams, 71 N. H. 312.

86. Manchester St. Ry. v. Williams, 71 N. H. 312.

87. Parkhurst v. Mexican S. E. R. Co., 102 Ill. App. 507.

88. Dupee v. Chicago Horse Shoe Co. (C. C. A.) 117 Fed. 40.

89. Reid v. Detroit Ideal Paint Co. (Mich.) 94 N. W. 3.

90. Manchester St. Ry. v. Williams, 71 N. H. 312.

91. Subscriptions to the capital stock of a corporation before it has paid the bonus tax required by Poe's Supp., Code Pub. Gen. Laws, art. 81, § 88—Cleaveland v. Mullin, 96 Md. 598.

whole or part thereof, unless payment is expressly required by the charter.[92] After the corporation has become insolvent, there cannot be a rescission of a subscription to its stock.[93] A stock subscription cannot be canceled by mere direction on the part of the corporation to its agent to return the stock, and a subsequent indorsement of the certificate as canceled at a meeting of the directors of which the subscriber had no notice, and such action constitutes a conversion for which the measure of damages is the difference between the par and market value less the amount due thereon.[94]

Where the purposes of the organization are materially changed without the knowledge of the subscribers or without their ratification or consent, the subscriptions are not binding.[95]

Subscription of full or specified amount of the capital stock.—If a certain amount of capital stock is to be subscribed before a contract of subscription shall become binding, valid and enforceable subscriptions are intended. It is not sufficient that persons known to be insolvent be accepted as subscribers.[96] Where after a small portion of the stock originally contemplated is subscribed for, the number of shares is very largely increased and the par value largely reduced, the charter being subsequently changed in accordance, the additional issue will be regarded as original and not increased stock, and a subscriber for a number of the increased issue is not liable to creditors unless the entire amount is subscribed for.[97] An assessment may be made on the shares issued though less than the nominal capital, if in excess of the stipulated first issue.[98]

Though payment of a per cent of the capital stock may be a condition precedent to the transaction of business, it is not to the organization of the corporation and the collection of subscriptions to the capital stock, the charter having been granted.[99]

Subscriptions upon conditions precedent.—The rights of subscribers become fixed by the completion of subscriptions and the grant of a charter.[1]

If a bonus tax is by statute made a condition precedent to the exercise of corporate powers, an offer to subscribe to stock though accepted is not binding on the corporation where the tax has not been paid and a subsequent payment of the tax does not render the subscription binding.[2]

Subscribers to the stock of a corporation who enter into their contracts with the understanding that the president is to take a certain number of shares are

92. Nicholson-Watson Shoe & Clothing Co. v. Urquhart (Tex. Civ. App.) 75 S. W. 45.

93. Deppen v. German-American Title Co., 24 Ky. L. R. 1110, 70 S. W. 868.

94. Rev. St. 1895, art. 668, requires that thirty days' notice in writing must be served on the stockholder before stock can be forfeited for neglect to pay an installment—Nicholson-Watson Shoe & Clothing Co. v. Urquhart (Tex. Civ. App.) 75 S. W. 45.

95. West End Real Estate Co. v. Nash, 51 W. Va. 341. Prospectus stating object to acquire patents and rights to certain specified metal turning machines, certificate stating object to be to "make, contract for the manufacture or purchase of, buy, use, sell, lease, rent, or mortgage, of mechanical or other apparatus, machinery and implements for metal turning machines, and in general to do a manufacturing business"—Stern v. McKee, 70 App. Div. (N. Y.) 142.

96. Chicago Bldg. & Mfg. Co. v. Browning, 19 Pa. Super. Ct. 355.

97. Original provision for 200 $5 shares and after issue of 11 shares an increase to 250,000 of $1 each—Gettysburg Nat. Bank v. Brown, 95 Md. 367. (See note to this case in 93 Am. St. Rep. 339; for an exhaustive treatment of the liability to corporations of subscribers to their capital stock.)

98. Nominal capital 50,000 shares, first issue 25,000 shares with power to increase capital, and actual issue of 37,000 shares—Anglo-American Land, Mortg. & Agency Co. v. Dyer, 181 Mass. 593.

99. Corporation chartered by the superior court—McCandless v. Inland Acid Co., 115 Ga. 968.

1. Stock need not have been issued in order to render the subscription rights property rights, assignable and carrying with them the right to participate in the management of the corporation—Manchester St. Ry. v. Williams, 71 N. H. 312.

2. Acts Assem. 1898, p. 1173, c. 504, § 11—Poe's Supp. Code Pub. Gen. Laws, art. 81, § 88f—Cleaveland v. Mullin, 96 Md. 598.

not bound in case he fails to do so and has never had an intention to do so but has the stock issued to another.[3] Though subscribers are to select a committeeman to investigate the workings of similar corporations, and are not to be bound until his favorable report, they do not become jointly liable. A time limited for the payment of subscriptions does not begin to run until the final report of the committeeman. The measure of damages for failure to appoint such committeeman to a plaintiff who was to erect certain buildings and machinery for the intended corporation, is the value of the opportunity to present its arguments.[4]

Fraud in procuring subscriptions.—Where stock is sold by means of false representations, the subscription may be rescinded and the amount paid recovered,[5] though the stock was worth the amount paid.[6] The representations need not be made with intent to deceive but are sufficient if materially false and rightfully relied on by the subscriber. They need not have been relied on absolutely but they must have been of influence.[7] Where there has been fraud on the part of promoters, confirmation of stock subscriptions must be by deliberate act with full knowledge of the fraud and of the rights intended to be waived.[8]

A purchaser of stock who has relied on an official statutory statement of the secretary may bring an action for deceit if damaged by false statements therein, though the statement which had been filed was not yet published and distributed.[9]

A proceeding may be brought in equity against the directors of a corporation for damages for misrepresentations leading to the purchase of stock, where it appears that an action at law would necessitate a delay by reason whereof the amount and time when plaintiff would realize anything is problematical and uncertain. In such an action the receivers of the corporation need not be joined as defendants, and the cause of action does not abate on the death of the purchaser of the stock.[10] Directors guilty of false representations in the sale of stock are not necessary parties to an action against the corporation to secure the rescission of the stock subscriptions and recover the money paid.[11]

3. Byers Bros. v. Maxwell (Tex. Civ. App.) 73 S. W. 437.

4. Certain land was to be furnished within ten days from the date of the subscription contract—Chicago Bldg. & Mfg. Co. v. Browning, 19 Pa. Super. Ct. 355.

5. Evidence held sufficient to show false representations inducing the sale of mining stock—Morrison v. Snow (Utah) 72 Pac. 924. Evidence held sufficient to show fraud authorizing the avoidance of a contract to subscribe for capital stock—Queen City Printing & Paper Co. v. McAden, 131 N. C. 178. Evidence held sufficient to show that a purchase of corporate stock was induced by fraud, there being a representation that it was worth above par when in fact the corporation was insolvent—Deppen v. German-American Title Co., 24 Ky. L. R. 1110, 70 S. W. 868. Evidence held to show misrepresentations of facts as to the stage of completion of negotiations for the consolidation of corporations inducing plaintiff to subscribe to stock of the new corporation to be formed—Mack v. Latta, 83 App. Div. (N. Y.) 242. Where a conveyance of property is secured in consideration of the issue of stock falsely represented to be full paid and nonassessable, the contract may be rescinded—Coolidge v. Rhodes, 199 Ill. 24. Where promoters have an option on land which the corporation is being organized to purchase a stock subscriber is not bound if such fact is concealed from him—West End Real Estate Co. v. Nash, 51 W. Va. 341.

6. Mack v. Latta, 83 App. Div. (N. Y.) 242.

7. Byers Bros. v. Maxwell (Tex. Civ. App.) 73 S. W. 437.

8. West End Real Estate Co. v. Nash, 51 W. Va. 341.

9. Statement to the state auditor of the assets and liabilities of a fire insurance company—Warfield v. Clark, 118 Iowa, 69.

10. Action in equity may be brought against the directors of a savings and loan association whose articles of incorporation provide that funds should be invested in first mortgages, who invest in second mortgages, and by false statements secure plaintiff's testatrix to become a purchaser of prepaid stock—Squiers v. Thompson, 73 App. Div. (N. Y.) 552.

11. They are improper parties if it is not sought to recover against them, where it is not charged that they received any individual benefit, and it is not alleged that the stock was worthless or of less value than it would have been, had the representations been true, and where they are joined with the corporation a demurrer by them as individual defendants should be sustained—Mack v. Latta, 83 App. Div. (N. Y.) 242.

An action for damages should not also seek relief in favor of the corporation.[12]

Where notes are sued on which were given in payment of a stock issue, made for the purpose of enabling a corporation to pay its debts, and the defense is on the ground that the assets of the corporation were misrepresented, the question of whether the corporation's affairs were involved should not be submitted to the jury if it is conceded.[13]

Payments on subscriptions.—Liability on a subscription to stock is not affected by the market value of the stock.[14]

A record kept by a corporation showing the date of delivery of bonds in payment of stock is the best evidence as to the date when stock subscriptions were paid.[15] Where the records are destroyed, other evidence is admissible.[16]

If in payment of a stock subscription, the subscriber turns over securities to the corporate agent, and the agent by mismanagement of such securities allows them to be lost, the stockholder will be entitled to credit.[17]

Where notes secured by mortgage are given in payment of subscriptions to capital stock, defenses justifying a rescission of the subscription contract may be urged as against a proceeding to enforce the notes and mortgage, though the corporation has assigned for benefits of creditors, if the purchaser is not shown to have had knowledge of the fraud inducing a purchase before the time of the assignment.[18] An answer alleging that the consideration of a note was corporate stock of no value which defendant had by fraud been induced to buy may be regarded as a plea of total failure of consideration.[19]

(§ 14) *D. Calls or assessments on unpaid subscriptions.*—The necessity or advisability of a call on stockholders for the amount of their subscription lies entirely in the control of the directors.[20] The necessity of an assessment is not a subject of an inquiry in an action thereon where the power of assessment as to the unpaid portions of shares is vested in the directors.[21] If the power to make calls is vested in the directors under the terms of the subscription, the directors may be divested of their discretion by the legislature if the period of time within which payment is to be made is not shortened.[22]

Who liable.—Stock bearing on its face a provision that the holder shall be liable to assessment for expenditures is liable though in the hands of a member taking the shares as a gift.[23] Where it appears from the stock certificate that it is subject to future calls, and after becoming a stockholder a transferee

12. In an action by subscribers to stock against a corporation and its promoters, causes of action are improperly joined where it is sought to recover damages from false representations; that the corporation have judgment for money which the promoters subscribed, but did not pay in for their stock; and that there be an injunction against the sale of plaintiff's stock for the payment of an assessment—Pietsch v. Krause (Wis.) 93 N. W. 9.

13. Byers Bros. v. Maxwell (Tex. Civ. App.) 73 S. W. 437.

14. Measure, as between the subscriber and the corporation, is the amount of the subscription of the stock at its par value less the amount paid thereon—Dean v. Baldwin, 99 Ill. App. 582.

15. Louisville & N. R. Co. v. Hart County (Ky.) 75 S. W. 288.

16. If the corporate books have been destroyed, parol evidence is admissible to show circumstances attending a surrender of stock as bearing on the question of whether certain notes in issue were given in payment for stock or as part of a collateral transaction—Thistlethwaite v. Pierce, 30 Ind. App. 642.

17. A note secured by a paid up policy, was turned over and lost in the hands of an irresponsible person—Clarke v. Lexington Stove Works, 24 Ky. L. R. 1755, 72 S. W. 286; Clark v. Lexington Stove Works, 24 Ky. L. R. 2247, 73 S. W. 788.

18. Deppen v. German-American Title Co., 24 Ky. L. R. 1110, 70 S. W. 868.

19. Taft v. Myerscough, 197 Ill. 600.

20. Fitzgerald's Estate v. Union Sav. Bank (Neb.) 90 N. W. 994.

21. Anglo-American Land, Mortg. & Agency Co. v. Dyer, 181 Mass. 593.

22. West v. Topeka Sav. Bank (Kan.) 72 Pac. 252.

23. Blue Mountain Forest Ass'n v. Borrowe, 71 N. H. 69.

pays several calls, there is an implied promise on his part to pay future calls.[24] Under the English statute, a subscriber's authorization of the signature of his name on the memorandum of the association may render him liable for calls or assessments by the directors on the unpaid portion of his shares.[25]

Validity.—Statutory provisions must be strictly followed in order to render an assessment valid.[26] A stock assessment may be good, though the directors of a mining corporation have not filed their oath as provided by statute, where they have taken and subscribed to it.[27] Stock assessments cannot be made at a meeting of the directors, at which only a portion were present and the remainder had not been notified.[28]

Estoppel to object.—A stockholder who by reason of his official position is charged with the duty to see that stock assessments are properly made and collected cannot object to the irregularity of an assessment after his stock is sold thereunder.[29] Payment of increased assessments without objection, and the acceptance of a stock certificate in consideration thereof may operate as an estoppel to assert that such assessments were illegal.[30]

Forfeiture.—Stock may be forfeited for nonpayment of assessments, though there is no by-law making such provision, and though the resolution declaring forfeiture is general in its terms and applies to all defaulted stock. Where the statute prescribes the method in which stock shall be forfeited, such method must be pursued with some strictness, but in the absence of such provision as to details, it is only required that the method adopted shall be reasonable and just.[31]

Defenses.—An agreement to pay an assessment at a pro rata share of the existing indebtedness is not a bar to the collection of further assessments where the money paid thereon is returned to the subscriber by the directors on being informed that the compromise is ultra vires, nor is a retiring allowance by the directors.[32] The stockholder's answer may assert that the call is unnecessary.[33]

Though corporations are prohibited from issuing stock for less than its par value, the stockholder is not liable for more than the price he agreed to pay, if stock is issued to him as fully paid at an agreed price less than par.[34]

Limitations[35] begin to run from the time the calls are due and payable.[36] If the law fixes the time at which the subscription was to become due, limitations begin to run after default at such times.[37] Limitations as to the right to make calls on unpaid subscriptions begin at the time of suspension of business of the

24. Sigua Iron Co. v. Brown, 171 N. Y. 188.

25. 19 & 20 Vict. c. 47, § 7, provides that memorandum shall bind the member of the company to the same extent as it would if each member had signed his name thereto, and that all money payable by any member under the regulations of the company should be deemed to be a debt due from him to the company—Anglo-American Land, Mortg. & Agency Co. v. Dyer, 181 Mass. 593.

26. Corcoran v. Sonora Min. & Mill. Co. (Idaho) 71 Pac. 127.

27. Rev. St. 1898, § 317—Hatch v. Lucky Bill Min. Co., 25 Utah, 405, 71 Pac. 865.

28. Invalid where made by but four of the seven directors—Hatch v. Lucky Bill Min. Co., 25 Utah, 405, 71 Pac. 865.

29. The president, director and business manager of a mining corporation, cannot object to such a sale, where he knows that it was the custom to levy assessments, though a majority of the stock was not present at the meetings and though a portion of previous assessments had not been collected—Hatch v. Lucky Bill Min. Co., 25 Utah, 405, 71 Pac. 865.

30. Boll v. Camp (Iowa) 92 N. W. 703.

31. Crissey v. Cook (Kan.) 72 Pac. 541.

32. Anglo-American Land, Mortg. & Agency Co. v. Dyer, 181 Mass. 593.

33. West v. Topeka Sav. Bank (Kan.) 72 Pac. 252.

34. Construing laws 1892, c. 688, § 42—Thompson v. Knight, 74 App. Div. (N. Y.) 316.

35. Suit may be brought on a call within six years from the date of a subscription within six years after the date of the call—Athens Car & Coach Co. v. Elsbree, 19 Pa. Super. Ct. 618. Where a contract is not in writing, actions are barred in three years under Code, 1897, § 2920—Gold v. Paynter (Va.) 44 S. E. 920.

36. Gold v. Paynter (Va.) 44 S. E. 920.

37, 38. West v. Topeka Sav. Bank (Kan.) 72 Pac. 252.

corporation leaving debts unpaid, but do not run as against a subscription so long as the corporation is a going concern until a call has been made.[38]

Pleading.—Where a foreign corporation seeks to recover an assessment on its shares, it need not show the terms of a statute and plan of arrangement referred to in its articles.[39] A complaint in an action to recover an assessment need not state when the stock was subscribed and the statutory proportion paid in; it is sufficient to allege that the capital had been subscribed and the per cent paid.[40] It need not allege that the assessments were equal and uniform; it is sufficient that it state that a per cent named was assessed on each and every share.[41] It is sufficient to allege that defendant had due personal service and notice of the calls of assessments and that they were made pursuant to the by-laws of the company, and such allegation sufficiently alleges that the assessment was made and notice given pursuant to the by-laws.[42]

(§ 14) *E. Transfer of shares. The right to transfer shares.*—It may be, by by-law, provided that stock shall not be sold without first offering it for sale to the corporation directors, and such a by-law if not prohibited by statute is not contrary to public policy,[43] and it applies to a purchase by an agent in his own name on behalf of an undisclosed principal.[44] The corporation cannot assert that a transfer without the consent of its board of directors is invalid, where the transferee has been recognized as a stockholder by election as a director.[45]

Effect of transfers.—A stock certificate is not a negotiable instrument and the holder must show as against the true owner that he took without notice and for value.[46] The fact that it is transferred in blank on its back does not render it such if on its face it is transferable only on the books of the company on surrender of the certificate.[47] The rule that a purchaser of stock for value will be protected as against the latent equities of one who indorses in blank does not protect one purchasing at a sale in bankruptcy stock which has been listed as the bankrupt's, though in fact held by him only to deliver to another as collateral, of which facts the purchaser has notice.[48] The assignee of stock, who has knowledge of defenses against the original holders, takes subject thereto.[49] He is not chargeable with knowledge possessed by his assignor estopping him from asserting negligence of the directors causing depreciation in the stock's value.[50] One who

39. Anglo-American Land, Mortg. & Agency Co. v. Dyer, 181 Mass. 593.

40. Under Rev. St. 1898, § 1773, making a condition precedent to the doing of business the subscription of one half of the capital stock and payment in of 20%—La Crosse Brown Harvester Co. v. Goddard, 114 Wis. 610.

41, 42. La Crosse Brown Harvester Co. v. Goddard, 114 Wis. 610.

43. Such a by-law authorizes a refusal of the corporation to transfer stock sold in violation thereof—Barrett v. King, 181 Mass. 476.

44. Barrett v. King, 181 Mass. 476.

45. None of the parties can assert that a transfer of the stock of a saving bank is void where a stockholder, being offered an office as bank commissioner, was compelled to part with his stock in order that he might be eligible and hence caused it to be transferred to his wife who consented to receive it and become a director and the bank also consented, recognized her as a director and accepted her note indorsed by her husband in reduction of his indebtedness. The wife could not thereafter repudiate her note nor could the husband's administrators claim the stock nor the bank deny its transfer and claim a lien based on such denial—Just v. State Sav. Bank (Mich.) 94 N. W. 200.

46. Where a transferee of stock was a witness at a proceeding in which it was sought to recover the shares from her assignor, and has knowledge of the issues involved, the judgment roll may be introduced on interpleader by the corporation as bearing on the question of good faith, the judgment having been entered after the transfer, though the decision was rendered before—Printing Tel. News Co. v. Brantingham, 77 App. Div. (N. Y.) 280.

47. Farmers' Bank v. Diebold Safe & Lock Co., 66 Ohio St. 367.

48. Goodwin v. Hampton Transp. Co. (Mich.) 94 N. W. 729.

49. He may be estopped to assert that sale of mining stock to pay assessments was void—Hatch v. Lucky Bill Min. Co., 25 Utah, 405, 71 Pac. 865.

50. Bank stock—Warren v. Robison, 25 Utah, 205, 70 Pac. 989.

executes a power of attorney to transfer a stock certificate, though the name of the transferee and date is left blank, cannot assert ownership against one purchasing from an apparent owner in good faith.[51]

Lien of corporation on shares.—A subsequent agreement for a lien cannot be asserted against a pledgee without notice.[52] Where after an arrangement that salary advances should be made to superintendent to be reimbursed from dividends on his stock, it was agreed that notes should be given by superintendent for further advances, the further payments create a lien on the superintendent's stock superior to the lien of a pledgee of the stock.[53]

Mode of transferring shares; registration.—Where a certificate is indorsed in blank as to date and name of transferee, the holder may sell by a delivery and transfer,[54] and the rights of third parties need not be inquired into.[55] The transferee has a right to conveyance on the stock books as against the transferror and to have new certificates issued to him.[56] As between the parties or those claiming under them, a formal transfer of the stock on the stock book, or the issuance of certificates to the transferee is not necessary though it may be provided by statute that corporate stock shall be transferred on the books as prescribed in the by-laws.[57] Statutory provisions that transfers of stock by indorsement and delivery are good only as between the parties until entry on the corporation books are not for the purpose of protecting creditors of stockholders, and an unentered written transfer of a stock certificate accompanied by transfer of the certificate for security takes precedence of a subsequent attachment by a creditor of the transferror.[58] Assent of the beneficiaries of an assignment to the transfer of corporate stock will be presumed in order to support an unentered assignment as against a creditor of the transferror who garnishees the corporation.[59]

Under the Kentucky statute, a sale of stock is not completed until transferred on the corporate books, though it is the intention of the sellers to have the transfer made on payment.[60]

Forged and unauthorized transfers, and transfers in breach of trust.—Where stock certificates have been placed in the power of the corporation's cashier to issue, the corporation is liable for their value to one to whom the cashier fraudulently conveys them in payment of his personal debt, though the stock recited that it was transferable only on the books of the corporation.[61] Where the assignor of a certificate of stock in blank recovers it by fraud and pledges it for his own debt to one who does not make inquiry or attempt to secure a transfer on the stock books, the first assignee, if not culpably negligent, will be regarded as the owner against the second.[62]

Refusal of corporation to recognize and register transfers.—Transfer of corporate stock cannot be compelled by mandamus except in case of a judicial sale.[63]

51. Shattuck v. American Cement Co., 205 Pa. 197.

52. Just v. State Sav. Bank (Mich.) 94 N. W. 200.

53. Comp. Laws, § 7052 provides that the corporation shall have a lien on the stock of its members for debts due it from them—Russell Wheel & Foundry Co. v. Hammond (Mich.) 89 N. W. 590.

54. Shattuck v. American Cement Co., 205 Pa. 197.

55. Clews v. Friedman, 182 Mass. 555.

56. Though the transferror has died—Culp v Mulvane (Kan.) 71 Pac. 273.

57. Culp v. Mulvane (Kan.) 71 Pac. 273.

58. Rev. St. § 2611—Mapleton Bank v. Standrod (Idaho) 71 Pac. 119.

59. South Texas Nat. Bank v. Texas & L. Lumber Co. (Tex. Civ. App.) 70 S. W. 768.

60. Ky. St. 1899, § 545—Albany Mill Co. v. Huff Bros., 24 Ky. L. R. 2037, 72 S. W. 820.

61. A bank's president signed blank certificates of the bank's stock which were left in the charge of the cashier, who fraudulently filled out one of such certificates to himself, countersigned it and pledged it as security for a loan to one without knowledge—Havens v. Bank of Tarboro, 132 N. C. 214.

62. Farmers' Bank v. Diebold Safe & Lock Co., 66 Ohio St. 367.

63. Where an order has been granted to a trustee to sell corporate stock, mandamus will not lie to compel the corporation to

On a refusal of the seller and the corporation's agents to recognize a sale and permit a transfer on the company's books, an action in equity may be brought for the joint object of preventing a disposition of the shares by the seller and to compel the corporation to make a transfer on its books, and to receive the buyer as a shareholder. In such action the seller and the corporation may be joined as defendants.[64] If the seller was a pledgee, and the action is against the pledgor and the corporation, proof of execution of the written transfer made by the pledgee must be made before it is admissible in evidence, though the validity of the transfer is controverted without either admission or denial of its existence.[65]

A purchaser of stock from a subscriber who has not received a certificate may have a mandatory injunction to secure the delivery of a certificate of the stock purchased by him from the original holder, though by statute it is provided that the transfer of corporate stock shall be by delivery of the certificate and registry of transfer.[66]

An executor may have shares of stock owned by his decedent transferred by the corporation to him as executor, and he cannot be denied by reason of by-laws giving the corporation an option to refuse transfer if the owner is indebted to the corporation, and requiring the transfer to be by instrument executed by the transferror and transferee. A refusal to transfer in such case may be regarded as a conversion and the value recovered by an action at law.[67] Before the transferee of a stock subscription can compel the issuance of certificates, he must, in case the statute provides that transfers to be valid must be entered on the company's books, show either an entry of the transfer in such manner or a duty on the part of the corporation to make such an entry.[68]

Contracts for the sale of shares.[69]—The corporation is not liable for the return of a portion of the purchase price of shares of its stock, which have been sold by their holders on rescission of the sale by the seller, though the corporate name has been signed to the contract by its secretary and vice-president who were sellers. Nor is the corporation liable for fraudulent representations by the sellers.[70]

A contract for the sale of stock in a corporation to be formed with a capital of a certain sum is not complied with by a tender of stock in a corporation organized with less capital.[71] A contract to deliver three-fifths of the capital stock of a corporation is not complied with by delivery of a less amount though it was all which the seller owned, and the contract also called for a sale of the seller's entire stock.[72] A definite contract to transfer to plaintiff's intestate a designated number of shares of stock cannot be defended against by the fact that plaintiff's intestate was connected with a stock pool as a member or trustee, or that he was an officer of the company, or that there was an over-issue of the stock.[73] Where stock

transfer stock to the trustee—Terrell v. Georgia R. & Banking Co., 115 Ga. 104.

64, 65. Thornton v. Martin, 116 Ga. 115.

66. Where before full payment and receipt of stock certificate, a subscriber transfers his interest and then pays up the amount remaining due, the purchaser is entitled to mandamus to compel issuance of stock certificate to him though contrary to the direction of the seller (Code, § 844)—Scherk v. Montgomery (Miss.) 33 So. 507.

67. London, Paris & American Bank v. Aronstein (C. C. A.) 117 Fed. 601.

68. Ballinger's Ann. Codes & St. § 4261—Lacaff v. Dutch Miller Min. Co., 31 Wash. 566, 72 Pac. 112.

69. Evidence held sufficient to show a sale of stock held in trust for the seller—Merrill v. Beat (Wis.) 92 N. W. 555. See for sufficiency of complaint in an action to rescind a contract for the sale of stock on the ground of fraud—Gutheil v. Goodrich (Ind.) 66 N. E. 446.

70. Home Elec. Light & Power Co. v. Collins (Ind. App.) 66 N. E. 780.

71. Faulkner v. Robinson (Tex. Civ. App.) 70 S. W. 990.

72. Dady v. O'Rourke, 172 N. Y. 447.

73. Cary v. Leszynsky (Mass.) 67 N. E. 637.

is transferred in consideration of payment of an assessment and of future assessments, the seller cannot assert the illegality of the assessment as against the buyer's rights to dividends.[74] On a refusal to take shares bargained for, the seller is entitled to the purchase price, and his measure of damages is not the difference in the market value.[75]

Where an owner of stock allows it to be sold as the property of another, the proceeds may be applied to the personal debt of the seller to the purchaser, there being no evidence that the seller was under a legal or moral obligation to use the money for any specified purpose, though there was a plan that by the sale the interests of the corporation should be benefited.[76]

Where more than enough shares of corporate stock remains unsold to satisfy one claiming to be the owner of a certain number of shares, such person cannot have an injunction against the sale of other shares.[77]

The transferee of stock may have the benefit of a guarantee made by another corporation that such stock should realize a certain amount, on the affairs of the corporation by which it was issued being wound up, but where payment is made on the guarantee to the seller in good faith, action cannot be maintained against the guarantor but only against the seller.[78]

Where with other relief injunction is sought against a sale of stock, a jury trial cannot be had.[79]

Pledge or mortgage of shares.—A pledgee for value without notice is not affected by a bank's by-law prohibiting the transfer of its stock without consent of its directors in case the holder is in the bank's debt, nor is he affected by an agreement that the bank should have a lien on the stock for the holder's indebtedness. If the corporation has notice of the pledge, it cannot assert claims subsequently arising as against the pledgee, and notice is sufficient without a demand for transfer of the stock on the books.[80] The purchaser from a pledgee, of stock which has been given to the pledgor as a broker, indorsed with blank assignments and power of transfer, may hold such stock as against the original owner.[81]

Gift of shares.—Where a stockholder is in fact the owner of the entire property of the corporation and apparently issues and cancels stock certificates as he pleases, he does not by the mere fact that he places his wife's name in his stock certificates as joint tenant vest her with title as having made a valid gift, where by his subsequent dealings, it appears that he never surrendered dominion over the shares.[82]

(§ 14) *F. Miscellaneous rights of stockholders. The right to dividends.*—Dividends belong to the owners of stock at the time of declaration, but declared dividends do not go with the stock unless there is an understanding to such effect.[83] Where interest on stock is payable in stock, an assignee of the stock is entitled to the stock due.[84] Where the owners of the entire stock of the corporation agree that

74. Boll v. Camp (Iowa) 92 N. W. 703.

75. Reynolds v. Callender, 19 Pa. Super. Ct. 610.

76. Loetscher v. Dillon (Iowa) 93 N. W. 98.

77. Quin v. Havenor (Wis.) 94 N. W. 642.

78. Bacon v. Grossmann, 71 App. Div. (N. Y.) 574.

79. A proceeding to set aside a contract for the sale of stock alleged to have been procured on false representations for an injunction to prevent the purchaser from disposing of such stock, and for a decree that the certificates be delivered up for cancellation, and that the corporation be directed to re-issue the stock to plaintiff, is purely equitable in nature, so that a jury trial cannot be awarded—Morrison v. Snow (Utah) 72 Pac. 924.

80. Just v. State Sav. Bank (Mich.) 94 N. W. 200.

81. Shattuck v. American Cement Co., 205 Pa. 197.

82. Bauernschmidt v. Bauernschmidt (Md.) 54 Atl. 637.

83. Groh v. Groh, 80 App. Div. (N. Y.) 85; Houser v. Richardson, 90 Mo. App. 134.

84. Louisville & N. R. Co. v. Hart County (Ky.) 75 S. W. 288.

certain dividends shall be paid, one to whom a portion of the stock is sold before distribution of the dividends cannot object to the informal manner of declaration.[85]

Where a county is a stockholder it may be estopped by the action of its sinking fund commissioners from contending that stock dividends did not stop the running of interest which the corporation was required to allow to stockholders from the time of paying for stock to the time of making the first cash dividends.[86]

Cash dividends go to the life tenant and stock dividends to the remainderman, but a cash dividend is not made a stock dividend within this rule by the fact that on the same day that it was declared, an issue of stock was authorized and the amount of the cash dividend equaled the subscription price of the additional stock to which the shareholder was entitled to subscribe.[87]

Right to inspect the books and papers of the corporation.[88]—An act conferring a limited right of inspection incident to corporate elections does not by its re-enactment in a general corporation act extend an unqualified right of inspection to stockholders.[89] A stockholder may be granted the right to inspect by-laws and resolutions, having similar effect, of a corporation, no ulterior purpose being shown or prospect of abuse of the corporation's rights.[90] The right of stockholders to examine corporate books extends to fire insurance companies, but an application by one seeking to gain control of a corporation for the purpose of wrecking it, or by a third person secretly acting for him, is properly denied.[91] The stockholder should not be granted a mandamus for the purpose of securing inspection of the books and papers except in emergency and for necessary pur-

85. Evidence held to show an agreement between the members of a family owning the entire stock of a corporation that a certain sum should be distributed as dividends —Groh v. Groh, 80 App. Div. (N. Y.) 85.

86. The county acquiesced in several cash payments based on the theory that interest had stopped—Louisville & N. R. Co. v. Hart County (Ky.) 75 S. W. 288.

87. Lyman v. Pratt, 183 Mass. 58.

(Note) When a person is entitled to the income and profits of shares of stock for life or for a term of years, under a will or gift, there is a conflict of opinion as to his right to dividends. The following summary may be given:

(1) He is not entitled to share in the profits of the corporation before a dividend is declared.

(2) He is not entitled to dividends declared before the testator's death.

(3) He is entitled to dividends declared after the testator's death, if declared out of profits earned since his death.

(4) Some courts hold that he is entitled to dividends declared after the testator's death, though declared out of profits earned and accumulated by the corporation before his death; but the rule is otherwise in several states.

(5) He is not entitled to dividends declared out of the capital, or funds representing capital.

(6) He is entitled to dividends out of profits payable in bonds or certificates of indebtedness.

(7) He is not entitled to the right to subscribe for new shares on an increase of the capital stock, nor to the proceeds of a sale of such privilege.

(8) In some states it is held that he is entitled to a stock dividend if he would be entitled to the same dividend if payable in cash, but the rule in other states is to the contrary.

(9) On his death, his personal representative is entitled to a dividend declared during his lifetime, and it has been held that he is entitled to a dividend declared after his death out of profits earned during his lifetime.

Clark & Marshall, Corporations, Vol. II, p. 1614.

88. See Discovery for proceedings against corporations and officers for the purpose of obtaining information as to corporate affairs before action is begun or for the purpose of preparing for trial.

89. A statute under the title "An act to prevent fraudulent elections in incorporated companies and to facilitate proceedings against them" remains subject to the limitation imposed by the title, though re-enacted in a revision under the title "An act concerning corporations" and though general in language, does not entitle the stockholder to an absolute right to mandamus or confer on him a greater than his common law right—State v. National Biscuit Co. (N. J. Sup.) 54 Atl. 241.

90. In re Coats, 75 App. Div. (N. Y.) 567.

91. Application by a stenographer for an inspection of the books of an insurance company, alleging that he owned a fourth of the entire corporate stock, and that because of reports showing a decrease in surplus and an increase in losses, he had become alarmed as to the safety of his investments —In re Coats, 73 App. Div. (N. Y.) 178.

poses.[92] It should not be granted to compel the exhibition of corporate books to the executors of a stockholder where it is sought with the evident purpose of injuring the corporate business.[93] Since by examination of the officers under a subpoena the value of corporate stock may be determined for the purposes of estimating a transfer tax, mandamus will not lie to compel an exhibition of the corporate books to the executors.[94] Under the New Jersey corporation act, one seeking mandamus for the examination of stock and transfer books must show that his right grows out of his position as a stockholder.[95]

An order granting an inspection should be limited as to the place and duration of the investigation.[96] An order to produce books and papers of a corporation before a referee does not authorize an inspection if it is granted in connection with an order to the secretary to appear for examination, but authorizes simply the production for the purposes of examination to enable the secretary to refresh his memory, and such order need not comply with statutory provisions for the inspection of corporate books.[97]

Remote and speculative damages cannot be recovered for a refusal of the president to permit an inspection of the corporate books by a stockholder, if the president has not acted in bad faith.[98]

Penalties for refusal of inspection.—A corporation does not incur three penalties for three refusals to permit inspection of the books, where the party seeking to recover desired to use the books for one occasion but repeated his request for two or three consecutive days, and made the demand three times, twice of the secretary and once of the president.[99]

Contracts and conveyances between a corporation and its stockholders.—If the stock of a corporation has been deposited with one of its officers to be used for the interests of the corporation, he may transfer part of it to a stockholder as a reimbursement for services and loss in the interest of the corporation.[1] Where it is desired to rescind a sale of stock purchased by the corporation, the corporation cannot tender back the stock after it has incumbered its property but must pay the value of the stock at the time of transfer.[2] After a transfer of stock to the corporation for use as general assets, the transferring stockholders cannot maintain action for conversion of the stock by other stockholders since they no longer have an individual right to any specific shares.[3]

Stockholders are not estopped as against a subsequent mortgagee with notice to assert claims on property which they have sold the corporation, in the absence of a showing of actual consent to the mortgage or of presence at the meeting when it was authorized.[4]

92. Not granted in favor of a stockholder owning 6% of the capital stock, for the purpose of finding out if the corporation had been properly managed, where considerable loss would result from the examination, and transactions questioned by the stockholder were explained by the directors—In re Colwell, 76 App. Div. (N. Y.) 615. A stockholder is not entitled to mandamus compelling it to submit its books and papers to his inspection, merely that he may ascertain the names and residence of the stockholders to consult with them regarding the management of the company—In re Latimer, 75 App. Div. 522, 12 N. Y. Ann. Cas. 9.

93. In re Kennedy, 75 App. Div. (N. Y.) 188.

94. Subpoena would issue from the public treasurer—In re Kennedy, 75 App. Div. (N. Y.) 188.

95. Gen. Corp. Act, § 33—State v. National Biscuit Co. (N. J. Sup.) 54 Atl. 241.

96. In re Coats, 73 App. Div. (N. Y.) 178.

97. Code Civ. Proc. §§ 803-809, 872, subd. 7—Mauthey v. Wyoming County Co-Op. Fire Ins. Co., 76 App. Div. (N. Y.) 579.

98. Bourdette v. Sieward, 107 La. 258.

99. Action to recover penalty under Stock Corporation Law, laws 1892, p. 1840, c. 688, § 53—Cox v. Paul, 175 N. Y. 328.

1. Playa de Oro Min. Co. v. Gage, 172 N. Y. 630.

2. Oliver v. Rahway Ice Co. (N. J. Ch.) 54 Atl. 460.

3. Crosby v. Stratton (Colo. App.) 68 Pac. 130.

Actions by stockholders to enforce individual rights.—The mere fact that persons are stockholders will not permit them to intervene in a suit against the corporation unless on a well defined ground to defend their own interests.[5] A plaintiff may establish his rights as a stockholder under a complaint which shows that he is a member of the corporation defendant, and a stockholder, and that his membership is denied, though the main purpose of the complaint is for an injunction. It is sufficient to allege that plaintiff owns a share of the stock without saying the manner in which it was received or acquired.[6]

Remedies of stockholders for injuries to the corporation.—Equity has power to award an injunction in favor of a stockholder and at the same time compel an accounting from the directors on the theory of gross negligence, wrong doing, or waste,[7] though a minority stockholder cannot object to an exercise by the majority of their legal powers in the absence of fraud or attempt to exceed legal authority,[8] but may have equitable relief against management of the corporation sacrificing his interest;[9] hence, minority stockholders cannot object to an act of the majority, which is within their powers ratifying a resolution directing the president and secretary to make a sale of the good will and property of the corporation, providing that such acts were clear of fraud and with the intention in good faith to wind up the affairs of the corporation. A general charge of conspiracy to stifle competition in trade will not warrant relief, the sale itself being valid, a subsequent intention to act in restraint of trade being collateral, and a dissenting stockholder cannot have a reconveyance decreed and a further decree that the directors and the grantee company pay all damages sustained, there being no actual fraud.[10] They cannot secure the annulment of a lease of corporate property approved by the majority stockholders, without showing of fraud or injury to the welfare of the corporation,[11] or have the intervention of equity to restrain the managing directors in expenditures unless not shown to be ultra vires or in the pursuance of a fraudulent scheme.[12]

A majority stockholder does not occupy a trust relation toward minority stockholders if he does not actually control the affairs of the corporation to their prejudice, and may purchase the corporate property at a judicial sale, in the absence of actual fraud,[13] but where a controlling interest in a corporation is acquired by a promise to pay stockholders a certain sum per annum on each share, a proposition by a succeeding corporation which acquires such controlling inter-

4. Martin v. Eagle Develop. Co., 41 Or. 448, 69 Pac. 216.

5. Gunderson v. Illinois T. & S. Bank, 100 Ill. App. 461.

6. Gowdy Gas Well, Oil & Mineral Water Co. v. Patterson, 29 Ind. App. 261.

7. Moneuse v. Riley, 40 Misc. (N. Y.) 110.

8. Metcalf v. American School Furniture Co., 122 Fed. 115; Coss v. Herring, 24 Ohio Circ. R. 36.

9. As where the corporation occupies the same offices with the competing corporation and employs the same agents, the two corporations being controlled by the same parties—Jacobus v. American Mineral Water Mach. Co., 38 Misc. (N. Y.) 371. Showing held sufficient to oust control of directors where a portion of the assets of the corporation were sold at a loss of over two million dollars and there was no action to set the sale aside, though there were unquestionable grounds therefor under the laws of the state where it was made—Watkins v. North American Land & Timber Co., 107 La. 107. The mere fact that a director acts for two corporations in a transaction, does not of itself allow a stockholder an injunction, though it may cast the burden of showing good faith on the directors—Robotham v. Prudential Ins. Co. (N. J. Ch.) 53 Atl. 842. Evidence held insufficient to show a misappropriation of capital stock of a corporation by other corporations—Pittsburg, C., C. & St. L. R. Co. v. Dodd, 24 Ky. L. R. 2057, 72 S. W. 822.

10. Metcalf v. American School Furniture Co., 122 Fed. 115.

11. Dickinson v. Consolidated Traction Co. (C. C. A.) 119 Fed. 871. Facts held not to show that the price charged by a corporation for the use of its plant by another corporation which held the majority of its stock was unfair or unreasonable—Cannon v. Brush Elec. Co., 96 Md. 446.

12. Taylor v. Southern Pac. Co., 122 Fed. 147.

13. Rothchild v. Memphis & C. R. Co. (C. C. A.) 113 Fed. 476.

est, to vote it to rescind the agreement, may be restrained on the suit of a minority stockholder.[14] The stockholder who joins with other stockholders in the sale of the entire stock and property of the corporation may be required to account to other stockholders for an additional sum which he obtained through a secret arrangement with the purchaser, or if the sum may be definitely determined without an accounting, a stockholder may sue in assumpsit to recover his share as money had and received to his use.[15] An action for damages from a conspiracy of majority holders to depreciate the value of the stock and sacrifice the property may be maintained for the injury by the corporation, its receiver or any stockholder, after proper demand, in behalf of the corporation and for its benefit. The damages recoverable are the full value of the property and franchises prior to the acts producing insolvency less the sum which the property brought on foreclosure sale.[16]

Laches.—The stockholder must act promptly on discovery of the fraud.[17]

Who may assert rights.—In order that a stockholder may intervene as such in foreclosure proceedings, he must clearly show his status as a stockholder.[18]

Unless such mismanagement has affected his interests, one who becomes a stockholder has no right of action for prior mismanagement, and has no right of action if he acquire his interest through the wrongdoer's mismanagement.[19]

One whose stock has been sold under an assessment is not entitled to bring an action as a stockholder based on the negligence of the directors in necessitating such an assessment, since the cause of action exists in favor of the corporation for the misconduct of the directors and may be prosecuted only by the stockholder in case of the refusal of the corporation or where the wrongdoers are in control.[20]

Where right of action is solely in corporation.—A secret profit derived from the directors upon a sale of the property of the corporation does not allow a dissenting stockholder to rescind the sale in equity, the remedy being an accounting between the directors and the corporation. The same is true of an objection to the transfer on the ground of want of consideration.[21] A minority stockholder is not entitled to bring an action for damages for a conspiracy to depreciate the value of the stock and sacrifice the property of the corporation, since the cause of action therefor accrues to the corporation.[22]

14. On the ground of fraud against a minority stockholder and as showing that the majority stockholders were opposed to the interests of the corporation—McLeary v. Erie Telegraph & Telephone Co., 38 Misc. (N. Y.) 3.

15. Synnott v. Cummings, 116 Fed. 40.

16. Niles v. New York Cent. & H. R. R. Co. (N. Y.) 68 N. E. 142.

17. Delay for 11 years before seeking to enforce a stockholder's rights is fatal—Atlantic Trust Co. v. New York City Suburban Water Co., 75 App. Div. (N. Y.) 354.

18. Proof that stock had been issued petitioner but that it had been transferred as collateral security and in subsequent transactions one of the certificates had passed into the hands of a third person who claimed to be the lawful holder and the whereabouts of the other was undisclosed, is insufficient, though it is asserted that the certificates had been unlawfully diverted by the assignee—Atlantic Trust Co. v. New York City Suburban Water Co., 75 App. Div. (N. Y.) 354.

19. Home Fire Ins. Co. v. Barber (Neb.) 93 N. W. 1024. An allegation that before any of the alleged or pretended sales or transfers of property referred to, plaintiff owned a large amount of the stock of a corporation, is a sufficient allegation that plaintiff's interest was acquired before the fraudulent transaction—Tevis v. Hammersmith (Ind. App.) 66 N. E. 912.

20. Hanna v. People's Nat. Bank, 76 App. Div. (N. Y.) 224.

21. An averment in a bill charging receipt of secret profits which appears to be merely an act of the directors in furtherance of an unlawful conspiracy and not the basis for an accounting between the directors and the corporation, will not sustain a bill primarily brought for a rescission as entitling complainant to an accounting—Metcalf v. American School Furniture Co., 122 Fed. 115.

22. Conspiracy was alleged to divert and reduce the earnings of a railroad so that it should be unable to pay the interest on its bonds and a foreclosure sale justified—Niles v. New York Cent. & H. R. R. Co. (N. Y.) 68 N. E. 142.

Procedure.—Proceedings to enjoin directors from a breach of trust may be brought by a nonresident stockholder in a federal court, though the stockholders who are residents of the state of incorporation defray part of the expenses, and he is acting in harmony with them.[23] Where it is sought to set aside a sale by the directors because of lesion against moiety, it need not be alleged that there was a purchaser ready at the greater value, but it is merely necessary to set out the difference between the price and the value.[24] Where a stockholder seeks to compel an accounting by the president of a corporation as to funds obtained by him, the decree should not direct that payment should be made to the stockholder in proportion to his holdings of the amount of capital stock.[25]

Necessity of seeking corporate action.—An action by a stockholder for the benefit of the corporation cannot be maintained without a demand on and refusal of the board of directors to bring the suit, unless it is shown that such demand would have been useless.[26] The mere fact that a corporation has been enjoined to take an action does not authorize a proceeding by a stockholder.[27] A shareholder cannot bring an action against the directors for mismanagement after the company is in the hands of a receiver without showing an application to the receiver or to the board of directors for the institution of such a proceeding.[28]

Equity rule 94 of the Federal courts, requiring the effort of a stockholder suing in his own right, to obtain action by the directors or stockholders of the corporation, to be set out with particularity in the petition, makes such efforts jurisdictional unless there is an allegation and proof that they would have been futile, and if the question comes up on final hearing, the truth of the allegations must be determined from the evidence.[29] A mere allegation of a friendly applica-

23. Collusion is shown in the sense of equity rule 94, it appearing that the controlling majority in the corporation is opposed to the object sought by the bill, and demand on the directors for action to that end would be useless—New Albany Waterworks v. Louisville Banking Co. (C. C. A.) 122 Fed. 776.

24. Watkins v. North American Land & Timber Co., 107 La. 107.

25. Chicago Macaroni Mfg. Co. v. Boggiano, 202 Ill. 312.

26. Suit by stockholders to set aside a judgment on a note given by the directors to a director—Ide v. Bascomb (Colo. App.) 72 Pac. 62. Complaint held to show sufficient facts excusing an attempt to obtain action through the corporation in a proceeding to enjoin a disposition of corporate property—Tevis v. Hammersmith (Ind. App.) 66 N. E. 79. A complaint in an action against the officers and directors of a corporation to secure an accounting held to show that a demand on the corporation to bring the action would have been useless—Miller v. Barlow, 78 App. Div. (N. Y.) 331. Equity Rule 94—Dickinson v. Consolidated Traction Co., 114 Fed. 232. Complaint by minority stockholders seeking the appointment of a receiver and winding up of the corporation, held to sufficiently charge gross negligence in the management of the business on the part of the corporate directors and a majority of the stockholders and also that a request of the directors to remedy the wrongs would be futile—Klugh v. Coronaca Mill Co. (S. C.) 44 S. E. 566. In order that a stockholder may enjoin the corporation from paying taxes, it must be shown that he has applied to the president and treasurer of the corporation to take steps to render unnecessary such payment—Stewart v. Washington & A. S. S. Co., 187 U. S. 466. An averment that a stockholder addressed a letter to the directors of the corporation requesting them to call a meeting of the directors and stockholders for the purpose of redeeming corporate property which had been on foreclosure, in the absence of a showing that such letter ever reached the directors, or that it contained anything calling the directors' attention to the facts on which relief was sought, does not show a sufficient demand for corporate action to allow a bill by minority stockholders to have a foreclosure sale set aside—Johns v. McLester (Ala.) 34 So. 174.

27. A stockholder cannot enjoin a sale under a mortgage, though the corporation has been enjoined from preventing such sale on the mere ground that the mortgage is ultra vires, where there is no showing of collusion between the directors and the plaintiff in the injunction suit against the corporation or refusal of the directors to dissolve the injunction—Smith v. Bulkley (Colo. App.) 70 Pac. 958.

28. Coble v. Beall, 130 N. C. 533.

29. A bill by minority stockholders attacking the validity of a purchase by the managing officers of a corporation of the property owned by them, and making the former owners of the property defendants, is within the operation of Equity Rule 94—Worth Mfg. Co. v. Bingham (C. C. A.) 116 Fed. 785. As is an action by a minority stockholder in the federal court to set aside a lease executed by the directors and ap-

tion to the directors not to proceed with an act, together with an unsubstantiated allegation that the directors own the majority of the stock, is not sufficient to excuse the allegations required by the rule or to support them if made.[30] A demand on the resident managing agent is not sufficient to comply with the rule, mere distance of the directors' residence from that of the plaintiff being relied on as an excuse for failure to attempt to secure action by the corporation or directors.[31]

Where the directors have refused to protect the interests of the corporation in litigation, intervention of the shareholders for such purpose may be allowed in the discretion of the trial court.[32]

Where a majority of the directors are defendants, they need not be asked to sue in the name of the corporation.[33] There is a sufficient showing to entitle minority stockholders to sue to enforce a contract with another corporation, where it is alleged that the majority stockholders, who are the same in both corporations, as were also the officers and directors, would not sue although requested, and if a third corporation is involved under the same contract and would be liable on the same conditions, the minority stockholders may maintain suit against it, also, though the officers and directors mentioned are not implicated.[34] The fact that one of the directors was a business associate of defendant and that another was an employe of another defendant, there being twelve directors, does not do away with the necessity of a demand for action by them.[35]

Appointment of receiver.—A majority of the stockholders may secure a receiver.[36] A minority may have a receiver only in an extreme case.[37] The right to appointment is a question for the court. It should not be denied because it will entail great cost and expense.[38] A receiver will be appointed only in case of actual wrong, injustice, and injury in the management of the business.[39] The

proved by the majority of the stockholders at a duly called meeting, whether the invalidity of the lease is alleged to be on the ground of fraud or ultra vires—Dickinson v. Consolidated Traction Co., 114 Fed. 232.

30. Suit to set aside a lease by the directors of a corporation as ultra vires, detrimental to the stockholder's interests and the result of fraud and conspiracy of the directors—Dickinson v. Consolidated Traction Co., 114 Fed. 232.

31. Stewart v. Washington & A. S. S. Co., 187 U. S. 466.

32. Gunderson v. Illinois T. & S. Bank, 100 Ill. App. 461.

33. Appleton v. American Malting Co. (N. J. Sup.) 54 Atl. 454.

34. Pittsburg, C., C. & St. L. R. Co. v. Dodd, 24 Ky. L. R. 2057, 72 S. W. 822.

35. Siegman v. Maloney (N. J. Law) 54 Atl. 405.

36. Posner v. Southern Exhaust & Blow Pipe Co., 109 La. 658.

37. Continental Nat. Bldg. & Loan Ass'n v. Miller (Fla.) 33 So. 404. On a mere question of mismanagement, a receiver will not be appointed at the instance of the holders of a small minority of the stock—Callaway v. Powhatan Imp. Co., 95 Md. 177.

38. Davies v. Monroe Water Works & Light Co., 107 La. 145.

39. Gross mismanagement of officers and directors is ground—Posner v. Southern Exhaust & Blow Pipe Co., 109 La. 658. Rights of stockholders and creditors being injured by mismanagement or waste of the corporate property by the directors is ground—Davies v. Monroe Water Works & Light Co., 107 La. 145. A receiver and an injunction should not be granted at the suit of a minority stockholder on the ground of mismanagement and insolvency where it appears that the losses were due to general business conditions, that under the same management it had previously been prosperous, its property was worth double its liabilities, and the creditors and majority stockholders oppose the appointment and also that an action which was alleged to have been fraudulent was pursuant to an unanimous vote of the stockholders present at a called meeting—Worth Mfg. Co. v. Bingham (C. C. A.) 116 Fed. 785. Complaint seeking a receiver of a telephone company on the ground of mismanagement held sufficient—Fernald v. Spokane & British Columbia Telephone & Telegraph Co., 31 Wash. 672, 72 Pac. 462. Receivers of an insurance company may be appointed without request of the managers at the instance of a stockholder, where it has fraudulently ceased doing business, has no income, and is paying large salaries—Treat v. Pennsylvania Mut. Life Ins. Co., 203 Pa. 21. Violation of the charter rights of minority share-holders by the majority is ground—Davies v. Monroe Water Works & Light Co., 107 La. 145. A receiver should not be appointed on a bill by a minority stockholder alleging that he has been by fraudulent misrepresentations induced to vote in favor of a contract greatly in favor of the majority stockholders and detrimental to the corporation—Devine v. Frankford Steel & Forging Co., 205 Pa. 114.

creation and investment of a surplus fund is not ground for the appointment of a receiver, if applicant has not made an objection and effort to secure the distribution of the funds before suit, or if he has acquiesced in the investment.[40]

Insolvency alone without fraud or gross mismanagement will not authorize the appointment of a receiver at the instance of a minority stockholder.[41] A receiver cannot be appointed where it appears that the corporation is transacting a successful business, and plaintiff's rights as a stockholder are in dispute.[42] Resignation of the directors pending an action does not authorize the appointment of a receiver under a statutory provision allowing such appointment in an action by a stockholder to preserve the corporate assets, there being no officer with power to hold such assets.[43]

If a complaint by a stockholder, after alleging a fraudulent disposition of the corporate property, prays judgment for possession of the property or for its value and for an accounting, a demurrer presents no question as to the right to appoint a receiver.[44]

§ 15. *Management of corporations. A. Control of a corporation by the stockholders or members; power of the majority.*—The stockholders may agree in the by-laws that a majority action of the shareholders shall be binding on the corporation and on them.[45] The majority stockholders have no power to directly overrule or control the action of a majority of the board of directors acting within the discretionary powers entrusted to them as agents of the corporation; such control must be exercised by the methods pointed out by the by-laws or charter of the statute under which it is organized.[46]

(§ 15) *B. Dealings between a corporation and its stockholders.*—The corporate officers must not show partiality in conferring benefits on certain shareholders to the prejudice of the shareholders in general or of the corporation.[47] An agreement between the corporation and a large stockholder to compensate him for certain services in placing the corporation on a paying basis is valid, as is a vote in fulfillment thereof to confer on him five per cent of such earnings as in the future should become applicable to the payment of dividends.[48]

(§ 15) *C. By-laws.*—The members in their constitutent character at a general meeting of the corporation should enact the by-laws in the absence of charter provisions to the contrary.[49] Directors cannot by by-law be given the exclusive power to alter or amend the by-laws though it may be provided that alterations and amendments shall be proposed to and sanctioned by two-thirds' vote of the board.[50] The by-laws of a corporation duly enacted and containing no provisions contrary to the charter or the laws of the land are binding on its members and presumed to be known to them,[51] but are not binding on third persons who have no notice thereof.[52]

40. Posner v. Southern Exhaust & Blow Pipe Co., 109 La. 658.

41. Worth Mfg. Co. v. Bingham (C. C. A.) 116 Fed. 785.

42. Comp. Laws, § 5015, making the grounds for an appointment of a receiver insolvency, or immediate danger thereof, dissolution, or forfeiture of corporate rights—Kelly v. Fargo Mercantile Co. (S. D.) 91 N. W. 350.

43. Code Civ. Proc. § 1810, subd. 3—Zeltner v. Henry Zeltner Brew. Co., 79 App. Div. (N. Y.) 136.

44. Tevis v. Hammersmith (Ind. App.) 66 N. E. 912.

45. Hodge v. United States Steel Corp. (N. J. Law) 54 Atl. 1.

46. Gold Bluff Mining & Lumber Corp. v. Whitlock (Conn.) 55 Atl. 174.

47. Davies v. Monroe Waterworks & Light Co., 107 La. 145.

48. Dupignac v. Burnstrom, 76 App. Div. (N. Y.) 105.

49, 50. Alters v. Journeymen Bricklayers Protective Ass'n, 19 Pa. Super. Ct. 272.

51. Purdy v. Bankers' Life Ass'n (Mo. App.) 74 S. W. 486.

52. A lender is not affected by a by-law requiring corporate notes to be countersigned by the treasurer and approved by two members of the executive committee—Lyn-

A book containing printed by-laws which the president of a corporation testifies is the only evidence of the by-laws thereof, there being no set of by-laws copied into the minutes of the corporation, which he has ever discovered on examination, may be admitted in evidence as showing the by-laws, where such books have been used and recognized generally by the members.[53]

Resolutions of a corporation, not incorporated in the by-laws, may be revocable at any time.[54]

(§ 15) *D. Corporate meetings and elections. Notice.*—Defects in notices of meetings are waived by presence or representation of stockholders thereat,[55] such as insufficient particularity as to the business to be transacted.[56] The same rule applies to directors' meetings.[57]

Evidence as to meetings.—The proceedings of a stockholders' meeting may be shown by the evidence of a witness who was present.[58]

Elections.—A majority of the corporation's stock is necessary to an election in the absence of other provision.[59] A meeting for the election of officers cannot be adjourned by a declaration of one of the officers.[60] Failure to file a report of election as required by statute justifies the conclusion that no election has been made.[61] Production of the list of stockholders may be essential to a valid election.[62]

Where such inquiry is essential to a proceeding before it, the court may inquire into the validity of an election of corporate officers and directors.[63] On a bill for an accounting and to enjoin one acting as president and director from exercising powers as such, the right of defendant to the office may be determined by a court of equity, bill being brought by the stockholder on behalf of the corporation.[64]

(§ 15) *E. The right to vote.*—Unless otherwise provided by the organic law of the corporation, the right of a stockholder to vote on his stock at all meetings of the shareholders is a right inherent to the ownership of shares and as such is a property right.[65] The holder of stock may vote it before he has paid it in full.[66]

don Sav. Bank v. International Co. (Vt.) 54 Atl. 191.

53. Star Loan Ass'n v. Moore (Del. Super.) 55 Atl. 946.

54. Resolution that only citizens may be trustees—Sorrentino v. Ciletti, 75 App. Div. (N. Y.) 507.

55. Tompkins v. Sperry, Jones & Co., 96 Md. 560.

56. Synnott v. Cumberland Bldg. Loan Ass'n (C. C. A.) 117 Fed. 379. Insufficient particularity in a call for a special meeting, in stating the purpose to be to amend the by-laws by changing the date of the annual meeting, is not a sufficient ground for an injunction against stockholders voting to elect additional directors before the next annual meeting or making any change in the by-laws without having given legal notice to the stockholders, since an insufficiency of notice would not prevent the making of the proposed change, all the stockholders being present and voting, and since a proper notice of another meeting may be given after the hearing on injunction proceedings. Gen. St. 1902, § 3366—Gold Bluff Mining & Lumber Corp. v. Whitlock (Conn.) 55 Atl. 174.

57. Where the directors are all present at a meeting at which a mortgage is authorized, such presence obviates the necessity of a previous notice, though the president is absent but the mortgage is executed by him—Wolf & Bro. v. Erwin & Wood Co. (Ark.) 75 S. W. 722.

58. Especially where the minute book is lost—Blanton v. Kentucky Distilleries & Warehouse Co., 120 Fed. 318.

59. Haskell v. Read (Neb.) 93 N. W. 997.

60. The validity of an election cannot be affected in such manner—Chicago Macaroni Mfg. Co. v. Boggiano, 202 Ill. 312.

61. Provision for report annually within 30 days after election. P. L. 1896, c. 185, §§ 43, 12—Appleton v. American Malting Co. (N. J. L.) 54 Atl. 454.

62. A new election of directors will be ordered, where the production of the books showing the names of stockholders was required by petitioners, but defendant directors who were re-elected did not understand that their production was insisted on until after the election was held. (Proceedings under Corporation Act, § 42. P. L. 1896, p. 291) —In re Jersey City Paper Co. (N. J. L.) 55 Atl. 280.

63. Haskell v. Read (Neb.) 93 N. W. 997.

64. Chicago Macaroni Mfg. Co. v. Boggiano, 202 Ill. 312.

65. Talbot J. Taylor & Co. v. Southern Pac. Co., 122 Fed. 147.

66. Haskell v. Read (Neb.) 93 N. W. 997.

Directors who own stock may vote at stockholders' meetings.[67] A corporation cannot make arrangements for elections of officers in such manner as to deprive stockholders of votes for each share of stock held by them.[68] A stockholder may vote on measures in which he has personal interests adverse to other stockholders, since he is not to be regarded as a trustee for the other stockholders, so a corporation holding the common stock of another corporation may vote it in favor of dissolution of such corporation though it has guaranteed payment of dividends on the preferred stock of such corporation so long as it should exist.[69]

Injunction against voting of stock.—In order that the right of shareholders to vote be denied, it must be on the ground that shares have been illegally issued or that the holder is incapacitated by law, public policy will be offended or that property rights of minority holders will be thereby so seriously placed in jeopardy as to justify a court of equity in allowing the minority to be placed in control.[70] Where there is an attempt to vote shares issued in excess of the authorized capital stock, it may be enjoined by a stockholder, and the shares, if issued without consideration, canceled.[71] A corporation which owns the stock of another corporation is a necessary party to a proceeding for an injunction to prevent the voting of the shares of stock held by it at an election for directors.[72]

Where the stock stands in the name of an individual, though beneficially owned by a corporation, the fact that such individual files an affidavit in the case does not amount to an appearance in behalf of the beneficial owner, the affidavit being filed apparently and presumably at the instance of defendant.[73] A stockholder is not made a party by representation by the fact that the corporation is a party to a suit to enjoin the voting of the stock held by him for the election of directors, though such stockholder is a corporation whose directors and officers constitute a majority of the directors and officers of both companies.[74] The proceeding will not be restrained in order to allow the owner of the stock to be impleaded in a forum having jurisdiction over it, since to continue the stay order for such purpose would be in effect to dispose of the litigation.[75]

Cumulative voting.—Where by statute cumulative voting of stock is authorized, the court cannot control the manner in which the stockholder causes his shares to be voted or examine his motives.[76] Where a corporation organized before a statute preventing cumulative voting has acquired benefits thereunder by obtaining new franchises, its members may vote cumulatively for directors.[77]

Pledged stock.—Where stock has been pledged, the pledgor retains the right to vote until foreclosure, as a general rule, and a voting of pledged shares by the pledgee against the rights of the pledgor may be enjoined, though in conducting the election, the officers of the corporation may rely on the corporate books.[78]

Stock held by trustee.—Where stock of a railroad has been deposited with a trustee and the depositor reserves the right to vote it, the depositor may secure a proxy from the trustee to vote the stock for a merger, though in case the merger

67. Hodge v. United States Steel Corp. (N. J. L.) 54 Atl. 1.

68. Burns' Rev. St. 1901, § 3425—State ex rel. Ross v. Anderson (Ind. App.) 67 N. E. 207.

69. Windmuller v. Standard Distilling & Distributing Co., 114 Fed. 491.

70. Talbot J. Taylor & Co. v. Southern Pac. Co., 122 Fed. 147.

71. Haskell v. Read (Neb.) 93 N. W. 997.

72, 73. Talbot J. Taylor & Co. v. Southern Pac. Co., 122 Fed. 147.

74. Talbot J. Taylor & Co. v. Southern Pac. Co., 122 Fed. 147.

75. Talbot J. Taylor & Co. v. Southern Pac. Co., 122 Fed. 147.

76. 1 Starr & C. Ann. Sts. 1896, p. 990, c. 32, § 3—Chicago Macaroni Mfg. Co. v. Boggiano, 202 Ill. 312.

77. Literary institute incorporated before the right conferred by constitution 1874, art. 16, § 4—Commonwealth v. Flannery, 203 Pa. 28.

78. Haskell v. Read (Neb.) 93 N. W. 997.

is effected, the trustee will receive back not the original stock, but stock in the consolidated company.[79]

Proxies.—Where before attempting to repudiate the action of a proxy a stockholder allows a year to elapse, his laches prevents him from relief.[80]

Voting trusts.—The establishment of a voting trust is analogous to the giving of proxies. It is, under the law of New Jersey, prima facie unlawful but may be rendered lawful by the circumstances. An arrangement, however, by which majority stockholders exclude themselves irrevocably from the management of the corporation for a fixed period is against public policy and may be abrogated by the other stockholders, who are entitled to the right to have the individual judgment of all the stockholders exercised.[81] If consent to a trust agreement is procured in such a manner as to deprive those entering into it of an opportunity for deliberation and by means of a threatened forfeiture of all rights, it is to be construed strongly against the donees of the power and such donees cannot assert that a deed poll evidencing the terms of the trust has become binding on the stockholders through acquiescence, where such donees have made no expenditures or entered into obligations entailing a loss on them should the trust be abrogated, nor can such acquiescence be asserted as against transferees of the stockholders.[82] In case the trust power makes no provision for the conduct of the trustee, he will be bound to vote in accordance with the expressed wishes of the cestui que trust.[83]

(§ 15) *F. Appointment and election of officers.*—Though the law provides that trustees of a corporation must be stockholders, three incorporators who are the only stockholders cannot be presumed to be the trustees.[84]

Until judicial determination of a dispute as to the right to occupy an office, the incumbent will not be dispossessed, if he is in possession and performing the duties under a bona fide claim of right.[85]

Tenure of officers.—Directors hold over until the election and qualification of successors,[86] but where, for the sake of perpetuating themselves in office, the directors and officers of a corporation refuse to give notice of a stockholders' meeting and secure an injunction against the holding of a meeting by the stockholders, the stockholders may on a cross bill secure an order for an election to be had at a stockholders' meeting held under the control of a master in chancery appointed for such purpose.[87] Where annual elections are required by statute, the articles of incorporation cannot provide for indeterminate terms of office.[88] Where the stock-

79. Pennsylvania R. Co. v. Pennsylvania Co. for Ins. on Lives & Granting Annuities, 205 Pa. 219.

80. A stockholder must exercise the most active diligence in repudiating the act of his proxy—Synnott v. Cumberland Bldg. Loan Ass'n (C. C. A.) 117 Fed. 379.

81. In the case of a corporation composed of American and English stockholders, the American stockholders of which have been pledged that they shall stand on an equal footing with the foreign stockholders and whose directors are Americans, the American stockholders may object to a voting trust formed by the foreign stockholders which confers on the trustees the power of voting the stock for fifty years, such power being irrevocable save by vote of three-fourths of the foreign stock, thus allowing the trustees by the control of one-seventh of the entire stock to vote three-fifths thereof and depriving the American directors and stockholders of the benefit of the judgment of about one-half of the stockholders of the corporation—Warren v. Pim (N. J. Eq.) 55 Atl. 66.

82. Warren v. Pim (N. J. Eq.) 55 Atl. 66.

83. The donees are not authorized to make an arrangement whereby their powers will become irrevocable and not subject to control for a term of fifty years—Warren v. Pim (N. J. Eq.) 55 Atl. 66.

84. Grand Rapids School Furniture Co. v. Grand Hotel & Opera House Co. (Wyo.) 72 Pac. 687.

85. Standard Gold Min. Co. v. Byers, 31 Wash. 100, 71 Pac. 766.

86. Hatch v. Mining Co., 25 Utah, 405, 71 Pac. 865.

87. Bartlett v. Gates, 118 Fed. 66; Gates v. Bartlett, Id.

88. Under Burns Rev. St. §§ 3425, 5051, 5054, 5055, a corporation cannot by its articles provide that certain persons shall act as directors, until they are incapacitated, resign or die, and that a certain person shall

holders may by by-laws fix the time when directors shall be annually chosen, may alter or repeal by-laws previously adopted, and may appoint more than three directors, the stockholders may, at a special meeting, amend the by-laws so as to increase the number of directors from three to five, and on the adoption of such amendment have the additional directors immediately appointed, and such an action does not infringe the statutory requirement that directors shall be chosen annually, nor is the choice the filling of a vacancy resting in the power of the directors.[89]

Resignation and removal.—Acceptance of an officer's resignation is not essential to give it effect.[90] One who after his election as trustee resigns cannot be declared a trustee.[91] When the resignation of a corporation's president is demanded, he is entitled to insist that his stock be purchased.[92] There is a presumption that a member and officer has knowledge that under the by-laws of the corporation the board of directors may discharge an officer for cause, and in an action by a vice-president for his salary, he cannot secure a review of the action of the board of directors in discharging him for cause.[93]

(§ 15) *G. Salary or other compensation of officers.*—A contract to pay a director or officer of a corporation will not be implied as against the corporation.[94] For ordinary services an officer is not entitled to compensation unless so provided by the board of directors, though he may recover for services not incidental to the office,[95] as where performed at the request of other officers,[96] so on an action on a contract of employment as vice-president, plaintiff may show that he was intended to perform additional services.[97] An officer cannot have compensation for extra services after he has been notified not to render them.[98] It is not in the power of directors to fix their own salaries, and in case of an attempt to do so they can be allowed only the true value of their services, which they must establish.[99] A resolution increasing an officer's salary carried only with the aid of his vote is invalid, so if the president takes part in the proceedings and his vote is essential, a larger salary or bonus in addition to salary cannot be voted to him.[1] A salary illegally paid a director or officer, is to be treated as a fund from which a dividend may be declared.[2] If the officer waive a salary, he cannot afterward claim it on the ground that another officer has violated a similar agreement.[3] Voluntary acceptance of a sum as salary for several years may prevent the claim of a greater sum as due for such period.[4] One incorporator may recover for his services, though the incor-

be vice-president and bookkeeper until the happening of the same contingencies or until she ceases to be a stockholder—State ex rel. Ross v. Anderson (Ind. App.) 67 N. E. 207.

89. Gen. St. 1902, § 3366—Gold Bluff Mining & Lumber Corp. v. Whitlock (Conn.) 55 Atl. 174.

90. Zeltner v. Henry Zeltner Brewing Co., 79 App. Div. (N. Y.) 136.

91. Sorrentino v. Ciletti, 75 App. Div. (N. Y.) 507.

92. Joseph v. Raff, 82 App. Div. (N. Y.) 47.

93. Discharge on account of having disposed of all his stock—Selley v. American Lubricator Co. (Iowa) 93 N. W. 590.

94. Alston Mfg. Co. v. Squair, 105 Ill. App. 238.

95. Chicago Macaroni Mfg. Co. v. Boggiano, 202 Ill. 312. President not entitled. Code 1899, c. 53, § 53—Maxon's Adm'x v. Maxon-Miller Co. (W. Va.) 44 S. E. 131. Evidence held insufficient to show an implied promise to pay vice-president of an insurance company for services outside of his regular duties—Stout v. Security Trust & Life Ins. Co., 81 N. Y. Supp. 708.

96. Baines v. Coos Bay Nav. Co., 41 Or. 135, 68 Pac. 397.

97. The by-laws provided that the board of directors might fix the compensation for its officers and employes' services—Selley v. American Lubricator Co. (Iowa) 93 N. W. 590.

98. Chicago Macaroni Mfg. Co. v. Boggiano, 202 Ill. 312.

99. Facts held insufficient to warrant a salary of $96 a week in addition to a salary of $5,000 a year to the manager of a wall paper concern and $5,000 a year to the president, vice-president and secretary of the same—Davis v. Thomas A. Davis Co., 63 N. J. Eq. 572.

1, 2. Adams v. Burke, 102 Ill. App. 148.

3. Ryan v. Pacific Axle Co., 136 Cal. xx., 68 Pac. 498.

4. Home Fire Ins. Co. v. Barber (Neb.) 93 N. W. 1024.

porators have entered into a mutual agreement whereby an unissued portion of the company's stock should be divided among them, in consideration of their respective services to each other;[5] but where two persons equally interested in the stock of a corporation, and holding its entire stock, devote their entire time to business, neither is entitled to compensation, each withdrawing equal sums.[6]

Where an officer is to give his individual attention to the business of the company, he cannot recover salary during a time when, by illness, he is prevented from performing his duties.[7] A business man who undertakes to make the affairs of a corporation his business and to give it his full time does not absolutely exclude himself from everything else.[8]

Officers who do not live at the principal office of the corporation are not entitled to traveling expenses.[9]

Where an officer is acting as officer of a corporation and also as a trustee for its creditors and the funds of the corporation and of the trust are mingled with consent of those interested, he may apply the common fund to the payment of his salaries in both capacities.[10]

(§ 15) *H. How directors must act; directors' meetings.*—Directors cannot act by proxy.[11] A directors' meeting at which but one director is present who votes the proxy of another director and his own vote will not warrant the authorization of the executor of a trust deed where such authorization must be at a regular meeting and by a majority of the directors.[12]

Where the entire board of directors act, though informally, it cannot be contended that they acted merely as individuals,[13] so if there is assent of all the directors, the corporation may execute a written contract without a formal vote or written entry.[14]

A directors' meeting is not regularly called where there is no notice to or effort to notify one of the directors.[15]

An action by a board of directors cannot be shown by a declaration of the president nor will such a declaration made at a meeting of the corporate trustees show an estoppel as against the corporation.[16]

(§ 15) *I. Power of corporations to act through stockholders.*—Two stockholders who have actual management of affairs of corporation may, with the ratification of the corporation, make a valid compromise of a claim.[17]

(§ 15) *J. Powers of the directors or trustees.*—In the absence of express authority and such a course of dealing as clearly implies authority to do the controverted act, the corporation can be bound only by its board of directors. The power of making or refusing to make contracts on behalf of the corporation rests prima facie in the board of directors.[18] The resignation of a corporation's president

5. Wiltbank v. Automatic Amusement Mach. Co. (N. J. L.) 54 Atl. 558.

6. Chicago Macaroni Mfg. Co. v. Boggiano, 202 Ill. 312.

7. Raley v. Victor Co., 86 Minn. 438.

8. Acts of a corporate president in regard to private investments in acting as administrator of a relative's estate and on the board of directors of a bank held not to support a counterclaim against his action for salary—Johnson v. Stoughton Wagon Co. (Wis.) 95 N. W. 394.

9. Davies v. Monroe Waterworks & Light Co., 107 La. 145.

10. Rocky Mountain Oil Co. v. Phillips, 29 Colo. 268, 68 Pac. 269.

11. Director's wife has no power to represent him—State v. Perkins, 90 Mo. App. 603.

12. First Nat. Bank v. East Omaha Box Co. (Neb.) 90 N. W. 223.

13. Three or four trustees purchased land, the fourth having knowledge of the purchase—Anderson v. Wallace Mfg. Co., 30 Wash. 147, 70 Pac. 247.

14. Indiana Bermudez Asphalt Co. v. Robinson, 29 Ind. App. 59.

15. State v. Perkins, 90 Mo. App. 603.

16. Childs v. Ponder (Ga.) 43 S. E. 986.

17. W. F. Taylor Co. v. Baines Grocery Co. (Tex. Civ. App.) 72 S. W. 260.

18. Rev. St. § 3248, requires the corporate power, business and control of a corporation to be exercised primarily by its board of di-

may be secured by the directors and they have the power, if the corporation is not insolvent, to pay him his back salary, purchase his stock, and give him an additional sum as liquidated damages in consideration of the resignation. Neither the corporation nor those who become creditors may rescind such a transaction on its insolvency.[19]

(§ 15) *K. Powers of other officers and agents than the directors or trustees.* —The presumption is that acts done by a corporate officer in the scope of his duties are binding.[20] Where there is no express or implied power to its officers to contract, the corporation can contract only by authority of its directors.[21] An agreement by a corporation to pay the debts of another corporation which it had absorbed cannot be shown by the statements of its officers,[22] unless the corporation has knowledge thereof.[23] Without special authority, corporate officers cannot execute accommodation paper in the name of the corporation.[24] Authority to perform a specific act carries with it authority to do those things necessary to effect it.[25]

The president does not ex officio have authority to contract, though to confer such power positive act of the directors is not indispensable, and the fact that he generally acts as a general agent is of weight in determining his authority.[26] Where acting within the authority conferred by the by-laws, the action of a corporation's president is conclusive until revoked by the directors.[27] Where the management of corporate affairs is placed in his hands, he may execute a release of a contract which he has entered into.[28] He may employ experts in connection with litigation,[29] or a physician to attend on employe, hurt in the course of his work through the negligence of the corporation.[30] The power to mortgage the corporate property is not incidental to his office,[31] and a deed of trust executed without authority may be avoided by creditors.[32] Authority to execute a mortgage does not confer authority to create liens in addition thereto.[33] There is a presumption that the president and secretary of a corporation have authority to execute a chattel mortgage.[34]

rectors—Bradford Belting Co. v. Gibson, 68 Ohio St. 442.

19. Joseph v. Raff, 82 App. Div. (N. Y.) 47.

20. Chicago Pneumatic Tool Co. v. H. W. Johns Mfg. Co., 101 Ill. App. 349.

21. St. Clair v. Rutledge, 115 Wis. 583.

22. Central Elec. Co. v. Sprague Elec. Co. (C. C. A.) 120 Fed. 925.

23. Where by foreclosure a corporation becomes the owner of the property of another corporation, it may be bound by a promise of its president to pay advances made by the old corporation to one of its selling agents if it has knowledge that the liability for advances was assumed, derived from persons other than the president—Curtis v. Natalie Anthracite Coal Co., 39 Misc. (N. Y.) 586.

24. Pelton v. Spider Lake Saw Mill & Lumber Co. (Wis.) 94 N. W. 293. The question of the purpose of the indorsement by a corporation's officer after maturity of a note is for the jury—Lyndon Sav. Bank v. International Co. (Vt.) 54 Atl. 191. Evidence held to show that a signature was as accommodation indorser not rendering the corporation liable—Preston v. North Western Cereal Co. (Neb.) 93 N. W. 136. Evidence held to show that the proceeds of a note on which a corporation was an accommodation indorser, were used for its benefit, rendering it liable —Orvis v. H. H. Warner & Co., 75 App. Div. (N. Y.) 463.

25. Authority to sell property carries right to employ broker—Henderson v. Raymond Syndicate (Mass.) 67 N. E. 427; Hartford & N. Y. Transp. Co. v. Plymer (C. C. A.) 120 Fed. 624.

26. St. Clair v. Rutledge, 115 Wis. 583.

27. Act of the president of a mercantile corporation in joining in a petition for involuntary bankruptcy is conclusive under a bill conferring the management of the business on the president and authorizing him to fix the time of credit and to adjust and settle all claims—In re Winston, 122 Fed. 187.

28. Louisville & N. R. Co. v. Dickey, 24 Ky. L. R. 1710, 72 S. W. 332.

29. A sub-way company may employ an expert in a litigation whereby a telephone company seeks to restrain an action under an ordinance requiring it to place its wires in the sub-way—Rosewater v. Glen Telephone Co., 81 App. Div. (N. Y.) 275.

30. President and general manager of mining corporation—Evans v. Marion Min. Co. (Mo.) 75 S. W. 178.

31, 32. State v. Perkins, 90 Mo. App. 603.

33. Bangor & P. Ry. Co. v. American Bangor Slate Co., 203 Pa. 6.

34. Burkamp v. Healey, 24 Ky. L. R. 1926, 72 S. W. 759.

If sale of mining property by a mining corporation is prohibited by statute, unless authorized by a vote of two-thirds of the entire body of stockholders, an offer to sell made by the president and a promise to obtain consent of stockholders, which is accepted by the purchaser, confers no equitable title to the right to extract ore from the mine.[35]

The grantor of a deed cannot, as against an assignment for creditors, make a sufficient delivery to himself as president of a corporation, in the absence of any knowledge of other officers of the corporation, or of any persons except himself and his wife.[36]

The vice-president cannot without authorization of the directors execute a valid assignment for the benefit of creditors.[37] He may, in good faith, waive a citation of the corporation, unless an interested party, such as agent for plaintiff.[38] He may rent a building for storage of property belonging to the department of which he is the manager,[39] or may employ a physician to render services to an employe,[40] or an attorney for the corporation where he is acting as president after resignation of that officer.[41]

The secretary of a corporation cannot release, sell, or convey its property in the absence of authority, express or implied, and with no authorization or ratification by its board of directors.[42] He has no implied authority to satisfy a judgment on real estate for anything but a money payment.[43] His act in certifying that a resolution has been passed by the directors may be binding on the corporation if he has been allowed to manage the corporation business.[44] Before a note indorsed by the corporation's secretary may be admitted in an action against it, authority of the secretary to execute the indorsement must be established,[45] but on a showing of such authority the burden of showing the contrary is on the corporation.[46] Where there is a custom to such effect, indorsement by the secretary and treasurer may be regarded as the corporation's indorsement.[47]

The treasurer who has been entrusted with the actual management of financial affairs, and has attended to all the business of the corporation after it ceased active operation, may bind it by the extension of a note.[48] A vote to issue bonds for the improvement of corporate property to a specified sum may authorize the execution of a receipt and promise to repay a sum received and used by the treasurer for that purpose.[49] The mere fact that a person is treasurer of a corporation does not give him authority to bind it for debts which it has not contracted.[50]

The cashier of a bank cannot take an acknowledgment of a mortgage to se-

35. Anaconda Copper Min. Co. v. Heinze. 27 Mont. 161, 69 Pac. 909.

36. Taylor v. Seiter, 199 Ill. 555.

37. Such an assignment will not cut off the lien of an execution on a judgment entered on the same day—Lesher v. Friedman, 99 Ill. App. 42.

38. As where a vendor's lien is sought to be enforced against land not worth more than the lien—Fox v. Robbins (Tex. Civ. App.) 70 S. W. 597.

39. Drew v. Billings-Drew Co. (Mich.) 92 N. W. 774.

40. Hasler v. Ozark Land & Lumber Co. (Mo.) 74 S. W. 465.

41. Appearance by an attorney so employed is binding on the corporation—Fernald v. Spokane & British Telephone & Telegraph Co., 31 Wash. 672, 72 Pac. 462.

42. California Wine Makers Corp. v. Sciaroni (Cal.) 72 Pac. 990.

43. Good Hope Bldg. Ass'n v. Amweg, 22 Pa. Super. Ct. 145.

44. Certification of resolution for the execution of a bond and assignment of assets as security—Hutchison v. Rock Hill Real Estate & Loan Co., 65 S. C. 45.

45. Karsch v. Pottiere & Stymus Mfg. & Imp. Co., 82 App. Div. (N. Y.) 230. Evidence held sufficient to show authority of the secretary of a coal corporation to endorse commercial paper—People's Sav. Bank v. Hine (Mich.) 91 N. W. 130.

46. Karsch v. Pottiere & Stymus Mfg. & Imp. Co., 82 App. Div. (N. Y.) 230.

47. Black v. First Nat. Bank, 96 Md. 399.

48. Franklin Sav. Bank v. Cochrane, 182 Mass. 586.

49. Jacobs v. German Workingman's Ass'n, 183 Mass. 3.

50. Rider & Driver Pub. Co. v. Roughrider Horseshoe Co., 82 N. Y. Supp. 765.

cure the bank in which he was a stockholder,[51] nor can a stockholder in a building and loan association take an acknowledgment of a mortgage to it, though the mere fact that the notary is an officer or director without being a stockholder in the corporation does not disqualify him.[52]

Business managers, salesmen, etc.—An officer who is a general manager may make the ordinary or incident contracts without there having been a formal vote of the directors.[53] His contracts may, by the by-laws, be made subject to the approval of the executive committee and not binding without such approval.[54] A custom to allow officers and managing agents to act with regard to certain matters may render their acts binding if such as are within the limits of the corporation's powers.[55] Where the treasurer and manager has control of the corporation, he may without special authority employ a person to assist in securing new capital for the business.[56] Where a corporation is not organized for such purpose, its managing officer cannot bind it by subscription for the stock of another corporation, and one who desires to take advantage of such subscription must show authorization or ratification.[57] The manager of a corporation organized for the purpose of raising cattle and acquiring property necessary therefor has no authority to execute a note in the name of the corporation unless specially authorized.[58] nor does the fact that he has been authorized to purchase property authorize him to execute an agreement that payment should be deferred and the debt should bear interest greater than the legal rate.[59] The manager of a beet sugar corporation has power to indemnify a grower against loss on condition of his taking care of the crop.[60] An officer of a corporation authorized to make a sale to a customer on credit may pledge the corporation's credit to enable him to continue business and borrow money for such purpose, it being the only way in which he had to pay for the goods.[61] A corporation is not bound by the promise of its traveling salesman to pay commissions to a third person.[62] Authority of a corporation superintendent to indorse a check cannot be inferred from his actions as general manager, and the fact that he has countersigned checks drawn in payment for material, nor from the mere fact of possession.[63] The superintendent of an express company has no authority to make a contract in settlement of a messenger's claim for injury against a railroad company.[64] The general manager of a corporation may bind it by employment of a surgeon to attend an injured employe to whom it is liable,[65] but authority of a superintendent to hire and discharge employes does not give him such right.[66]

Evidence of authority.[67]—Where in an action to recover money borrowed by the corporation's vice-president he claimed to have borrowed only under an implied

51. First Nat. Bank v. Citizens State Bank (Wyo.) 70 Pac. 726; Wilson v. Griess (Neb.) 90 N. W. 866.

52. Ogden Bldg. & Loan Ass'n v. Mensch, 196 Ill. 554.

53. Lowe v. Ring, 115 Wis. 575.

54. Skene v. Union Casualty & Surety Co., 91 Mo. App. 120.

55. Woodward v. Nelligan, 19 App. D. C. 550.

56. Whitman v. Koted Silk Underwear Co., 38 Misc. (N. Y.) 796.

57. W. L. Wells Co. v. Avon Mills, 118 Fed. 190.

58, 59. Sanford Cattle Co. v. Williams (Colo. App.) 71 Pac. 889.

60. Constantine v. Kalamazoo Beet Sugar Co. (Mich.) 93 N. W. 1088.

61. Hess v. W. & J. Sloane, 173 N. Y. 616.

62. Jones v. Keeler, 41 Misc. (N. Y.) 221.

63. Jackson Paper Mfg. Co. v. Commercial Nat. Bank, 199 Ill. 151, 59 L. R. A. 657.

64. In order that the messenger should not sue the railroad company, the superintendent agreed that he should be paid a certain sum monthly during his life, but though the payments were continued for several years, the messenger could not maintain an action, the agreement by the company having been regarded as gratuitous and the superintendent having made no other similar agreement—Chenoweth v. Pacific Exp. Co., 93 Mo. App. 185.

65. Lithgow Mfg. Co. v. Samuel, 24 Ky. L. R. 1590, 71 S. W. 906.

66. King v. Forbes Lithograph Mfg. Co. (Mass.) 67 N. E. 330.

67. On an issue as to the assignment of a chattel mortgage by a corporation, the minutes of the directors' meeting authorizing

authority, evidence that there was only special authority was properly excluded, the only question being whether under a resolution conferring general power to manage the corporation's property he had authority to borrow money to pay taxes.[68]

(§ 15) *L. Apparent authority of officers and agents, and estoppel, of the corporation and of others.*—Where innocent third persons are concerned, authority may be inferred at times from the custom of dealing.[69] The fact of execution of a contract may be considered as bearing on the question of implied authority.[70] To show implied authority, parol evidence of occurrences at meetings of the board of directors not shown in the minutes may be introduced.[71] The fact that a person is acting as an officer de facto of a corporation will not validate a mortgage, where he has acted fraudulently as against the creditors of the corporation and the corporation itself and the mortgagee participates in such fraud.[72] The signing of certificates to the resolutions of the board of directors of a corporation, being within the scope of the secretary's employment, is binding on the corporation though they were unauthorized and fraudulent.[73]

Statements of representatives as to authority.—A statement by the secretary of a corporation that the corporation would not perform a contract, and that he was authorized by the directors and stockholders to so state, will not bind the corporation without other showing as to his authority. The rule as to the agency of a corporate officer for the corporation is the same as in the case of natural persons, and the mere fact that the officer represented himself to be empowered to act for the corporation does not place the burden of disproving authority upon the corporation.[74]

Implied permission to act.—Where there is a neglect of corporate meetings, and the president is apparently permitted to carry on the business, authority from the directors to do so may be presumed.[75] If the secretary and treasurer of a corporation is allowed complete control over its assets, his fraud cannot be asserted as against bona fide holders.[76] If the corporation alleges that a note sued on was executed by its officer as a part of a fraudulent conspiracy with plaintiff, it is an admission of the officer's authority to execute a note and prevents the assertion of the defense, also set up, of want of authority.[77] Wrongful acts in other matters do not relieve the corporation from liability for acts of an agent in the scope of his authority.[78]

the president to make a transfer, the corporate by-laws and parol evidence of the president as to the transfer are admissible—Clem v. Wise, 133 Ala. 403. The evidence of a former president of a corporation may be admissible to show what a person's duties were as general manager, he having testified that they had not been fixed by resolution—Clarke v. Lexington Stove Works, 24 Ky. L. R. 1755, 72 S. W. 286; Clark v. Lexington Stove Works, 24 Ky. L. R. 2247, 73 S. W. 788. Evidence consisting of letters of a general manager and reference to him as such in the records and articles of the corporation, may be sufficient to take his authority as agent to the jury—Clarke v. Lexington Stove Works, 24 Ky. L. R. 1755, 72 S. W. 286; Clark v. Lexington Stove Works, 24 Ky. L. R. 2247, 73 S. W. 788. Facts held to show an employment by the president individually in the purchase of stock—Butcher v. Harvie Drug Co., 79 App. Div. (N. Y.) 631. Evidence held sufficient to show an apparent authority to extend time granted to remove timber from the corporate lands—St. Clair v. Rutledge, 115 Wis. 583. Evidence held to show authority on the part of president and secretary to enter into a contract retaining an attorney—Union Surety & Guaranty Co. v. Tenney, 200 Ill. 349. Evidence held sufficient for the submission to the jury on the question of the authority of a corporation's superintendent to contract with a broker for the sale of a vessel owned by the corporation—Hartford & New York Transp. Co. v. Plymer (C. C. A.) 120 Fed. 624.

68. St. James Co. v. Security Trust & Life Ins. Co., 81 N. Y. Supp. 739.

69, 70, 71. Smith v. Bank of New England (N. H.) 54 Atl. 385.

72. Lamb v. McIntire (Mass.) 67 N. E. 320.

73. Hutchison v. Rock Hill Real Estate & Loan Co., 65 S. C. 45.

74. Bradford Belting Co. v. Gibson, 68 Ohio St. 442.

75. St. Clair v. Rutledge, 115 Wis. 583.

76. Hutchison v. Rock Hill Real Estate & Loan Co., 65 S. C. 45.

77. Baines v. Coos Bay Nav. Co, 41 Or. 135, 68 Pac. 397.

Acceptance of benefits.—Where a corporation accepts the benefits of a bond, it is bound by the representations of its president leading up to the execution thereof.[79] Where money is received by the officers and stockholders of the corporation with the knowledge and consent of all members, a formal authorization of the loan is not necessary.[80] Though a contract may be fraudulent as to the corporation, if it has been fully executed by the parties and the corporation has acted by its directors with full knowledge of what they were doing, it is bound thereby.[81]

Estoppel by individual acts.—The fact that a corporation's secretary and treasurer agrees to act as assignee of a bankrupt does not estop the corporation from joining in proceedings to have the bankrupt declared an involuntary bankrupt, the secretary having acted as an individual, and it not being within the scope of his ordinary duties.[82] A corporation cannot be made liable for services rendered another corporation by the fact that the bill is rendered to its treasurer, and he states that the persons who held stock in defendant company would not allow such bill to remain unpaid.[83] Money passing through the hands of a corporation on ultra vires transactions from which the corporation acquired no benefit cannot be recovered from it on the ground that such transactions are gambling ones or are personal to the corporation's officer and with the knowledge of the corporation.[84]

Duty of third persons to take notice of powers.—A person dealing with a corporation through its officers is bound to take notice of the limitations of power prescribed by the charter.[85] Where a check to a corporation is indorsed by the corporation's superintendent as such, the bank is bound to ascertain the extent of the agent's authority.[86] One who contracts with a corporate president who assumes to act for the corporation must take notice of the extent of his powers.[87] By-laws limiting the powers of officers are not conclusive as against persons dealing with them unless there is proof of knowledge or notice.[88] Where a person deals with a corporate officer in regard to business within the scope of the corporation's business, and of which he is in usual charge, such person is warranted in assuming authority.[89] Where an officer of a corporation has been put in control of its affairs and permitted to manage and conduct its business, his authority to bind the corporation will be inferred from the authority thus conferred on him, and the corporation is held for his acts to a person acting without notice that he has exceeded his authority.[90]

Allowing other party to act.—A beet sugar corporation may be estopped to assert want of authority of its manager to guaranty beet growers against loss, where a beet grower hearing that such indemnity has been promised others refuses to proceed with his crop unless he is indemnified.[91] Where a corporation has executed a

78. A corporation is liable to bona fide holders of checks drawn by its agent, though such agent has been an embezzler, where it is not shown that the proceeds of the checks have been lost to the corporation, or that the holder had knowledge that the money was being unlawfully converted to the use of the agent—Stotts City Bank v. T. A. Miller Lumber Co. (Mo.) 74 S. W. 472.

79. Representations of a president as to the habits of a cashier referring to his application for indemnity bonds are binding on the bank—Warren Deposit Bank v. Fidelity & Deposit Co. (Ky.) 74 S. W. 1111.

80. Burke v. Sidra Bay Co. (Wis.) 92 N. W. 568.

81. Ross v. Sayler, 104 Ill. App. 19.

82. In re Winston, 122 Fed. 187.

83. Rider & Driver Pub. Co. v. Rough Rider Horseshoe Co., 84 App. Div. (N. Y.) 283.

84. Money passing into the hands of a corporation as the result of an agreement of its manager to make option contracts in lard in the name of the member of another corporation whose money was used in the transaction—Clark v. Parker (Mich.) 91 N. W. 134.

85. Sturdevant Bros. & Co. v. Farmers' & M. Bank (Neb.) 95 N. W. 819.

86. Jackson Paper Mfg. Co. v. Commercial Nat. Bank, 199 Ill. 151, 59 L. R. A. 657.

87. St. Clair v. Rutledge, 115 Wis. 583.

88. Rosenbaum v. Gilliam (Mo.) 74 S. W. 507.

89. St. Clair v. Rutledge, 115 Wis. 583.

90. Corporation held bound by the acts of managing officer in employing a patent solicitor to file applications for patents—Rosenbaum v. Gilliam (Mo.) 74 S. W. 507.

91. Constantine v. Kalamazoo Beet Sugar Co. (Mich.) 93 N. W. 1088.

quitclaim deed to land and its officers and stockholders know of the execution and do not question the authority, it is estopped on acquiring a superior title from asserting such title as against the grantor who has made valuable improvements as a consideration for the transfer.[92] After an agreement whereby the general manager of a corporation is to pay all its expenses, those who deal with him under the agreement are not entitled to share on a sale by a receiver of the assets of the corporation.[93] Where, after execution of a deed, the grantee makes improvements called for in the contract, the stockholders and officers of the corporation having knowledge of the transaction cannot repudiate the deed several years later.[94]

Acquiescence in similar acts.—Where the president is allowed to exercise particular powers, the corporation may be estopped from denying his possession thereof.[95] The fact that an officer has previously performed similar acts without objection may be evidence of his authority therefor, though such authority cannot be specifically gathered from the records of the corporation.[96] Authorization of a contract within the powers of the corporation may be shown by the general manner in which the directors permitted the president and treasurer to act for it.[97]

(§ 15) *M. Ratification of unauthorized acts.*—If the acts of a representative are accepted by the corporation or acquiesced in by it, they become binding.[98] An assignee for creditors stands in no better position than the corporation.[99] Subsequent knowledge and assent may take the place of prior authority.[1] There can be no implied ratification in the absence of knowledge.[2] Where with knowledge of a contract, the corporation accepts and retains benefits thereunder, it amounts to a ratification.[3] Nonobjection to a contract may tend to show ratification.[4] A ratification of a sale by the directors of a corporation amounts to a ratification of the em-

92. West Seattle Land & Imp. Co. v. Novelty Mill Co., 31 Wash. 435, 72 Pac. 69.

93. Commonwealth v. Pennsylvania Germania Bldg. & Loan Ass'n, 204 Pa. 29.

94. Conclusive presumption of authority of officer arises—West Seattle Land & Imp. Co. v. Novelty Mill Co., 31 Wash. 435, 72 Pac. 69.

95. St. Clair v. Rutledge, 115 Wis. 583.

96. Act of the general manager of a townsite company in signing a petition for municipal improvements as required by Gen. St. 1901, § 730—Kansas City v. Cullinan, 65 Kan. 68, 68 Pac. 1099.

97. Smith v. Bank of New England (N. H.) 54 Atl. 385.

98. Acts of president—Bennett v. Millville Imp. Co., 67 N. J. Law, 320. Majority stockholder—Dupignac v. Bernstrom, 37 Misc. (N. Y.) 677. The ratification by the directors of the modification of a contract by the president, may be implied from their subsequent actions—Taylor Gas Producer Co. v. Wood, 119 Fed. 966.

99. Ross v. Sayler, 104 Ill. App. 19.

1. Smith v. Bank of New England (N. H.) 54 Atl. 385. Sale of stock of goods by a director owning half of the stock, and acting as general manager, and secretary made with knowledge of his wife who was a stockholder, the bill of sale being signed by the sole other director, who owned one-fifth of the stock—Magowan v. Groneweg (S. D.) 91 N. W. 335. Evidence held to show consent to the delivery of a deed on immediate payment of less than the sum of future payment agreed on—Ruble Combination Gold Min. Co. v. Princess Alice Gold Min. Co. (Colo.) 71 Pac. 1121. A corporation may by proper action of its directors or stockholders ratify a void trust deed or ratification may result from acquiescence by the stockholders with complete knowledge—First Nat. Bank v. East Omaha Box Co. (Neb.) 90 N. W. 223.

2. Mortgage of corporate property—First Nat. Bank v. Kirkby (Fla.) 32 So. 881. Evidence held sufficient to show actual or constructive knowledge of the directors of the execution by the president and treasurer of a contract for the issuance of certificates of deposit—Smith v. Bank of New England (N. H.) 54 Atl. 385.

3. Sale of water rights—Washington Irr. Co. v. Krutz (C. C. A.) 119 Fed. 279. Contract by a president for the furnishing of a switch track—Michigan Cent. R. Co. v. Chicago, K. & S. Ry. Co. (Mich.) 93 N. W. 882. After a toll road company has complied with the contract to free an adjoining owner from payment of tolls in consideration of his closing a certain road, the authority of the person entering into the contract for the toll road cannot be questioned—Great Western Turnpike Co. v. Shafer, 172 N. Y. 662. Guaranty of notes by president of a corporation having power to own, transfer and guarantee notes and mortgages—Hunt v. Northwestern Mortg. Trust Co. (S. D.) 92 N. W. 23. Agreement of president to a general lien for advances—Mathews v. Hardt, 79 App. Div. (N. Y.) 570. Where all the stockholders but the holders of two shares agree to the conveyance of land by the corporation, and the purchase price is received by the stockholders, the deed cannot be thereafter disaffirmed—Wentworth v. Braun, 78 App. Div. (N. Y.) 634.

4. Salem Iron Co. v. Commonwealth Iron Co. (C. C. A.) 119 Fed. 593.

ployment of a broker incidental thereto.[5] If the corporation desires to repudiate contracts made by its president, it must reject them entirely.[6] A vote of the corporate directors that all notes representing advances and not exceeding a certain amount be thereby ratified and approved is a ratification of a note executed by its president and indorsed by him with the corporate name, the money received having gone into the business and being fully disclosed by the books of the corporation, three members of the directorate and officers of the corporation knowing of the transaction, and it not being contended that the acts of the officers were fraudulent.[7] The vote acted as a ratification also on the ground that the directors must be held, as between the parties, to have acted with full knowledge as to the special matter as to which they were voting.[8]

(§ 15) *N. Notice to or knowledge of officers or agents as notice to or knowledge of corporation.*—Information to an officer or agent of a corporation is notice to the corporation,[9] but notice must be to the officers or agents who have power to act thereon or to persons whose duty it is to impart the information to such officers or agents.[10] Where two corporations in their dealings with each other are both represented by the same person, who is president of both, knowledge obtained as president of one will be notice to the other.[11]

Where the officer acquired knowledge in his individual affairs, the corporation is not chargeable with notice thereby, nor is it chargeable with knowledge when it is dealing with its officer as a stranger,[12] or where the officer is acting adversely to it,[13] or in his own interest.[14] The knowledge of a director of his own unauthorized act is not binding on the corporation as notice.[15]

Knowledge gained in transactions not connected with the one under consideration is not imputable to the corporation.[16]

(§ 15) *O. Admissions, declarations, and representations of officers and agents.*—As against a corporation, the admissions of its agents are not admissible unless in

5. Henderson v. Raymond Syndicate (Mass.) 67 N. E. 427.

6. Contract for sale and re-purchase of stock—Fremont Carriage Mfg. Co. v. Thomsen (Neb.) 91 N. W. 376.

7. Beacon Trust Co. v. Souther (Mass.) 67 N. E. 345.

8. Beacon Trust Co. v. Souther (Mass.) 67 N. E. 345.

9. Waters v. West Chicago St. R. Co., 101 Ill. App. 265. Allegation that an accident was caused by the fact that defendant's president removed a part of a machine, and that such fact was known to the company through its president, is a sufficient averment of notice—Houston Biscuit Co. v. Dial, 135 Ala. 168. Bank is chargeable with notice of pledge of its stock by the fact that the pledgee shows the certificate to the president in order to find out whether it had been regularly issued, and the bank's lien for a loan subsequently made to the pledgor of the stock, is subordinate to the lien of the pledgee—Curtice v. Crawford County Bank (C. C. A.) 118 Fed. 390.

10. Nehawka Bank v. Ingersoll (Neb.) 89 N. W. 618. Notice to a traveling salesman of a corporation of the dissolution of a partnership is not notice to the corporation, where the salesman is not allowed to extend credit or required to report the membership of firms with which the corporation deals—Neal v. Smith (C. C. A.) 116 Fed. 20. Where an indemnity bond for the president as an employe of a bank stipulates that the employer will not continue the employe in employment after he has committed a default, a surety is not released by the knowledge of a minority of board of directors or of the vice-president—Fidelity & Deposit Co. v. Courtney, 186 U. S. 342, 46 Law. Ed. 1193.

11. Knowledge that the capital stock of one corporation which borrows from another has been paid in property at an exaggerated value prevents the lending corporation from insisting later that the par value of such stock be paid in—Berry v. Rood, 168 Mo. 316.

12. People's Bank v. Exchange Bank, 116 Ga. 820.

13. As where the president indorses drafts payable to himself to the corporation in order that the drawers may realize upon it—Levy & C. Mule Co. v. Kauffman (C. C. A.) 114 Fed. 170.

14. Metcalf v. Draper, 98 Ill. App. 399.

15. Act of director and manager in giving a note in the corporate name—Sanford Cattle Co. v. Williams (Colo. App.) 71 Pac. 889.

16. Knowledge of an agreement executed by the president without authority while acting with regard to distinct transactions—Bangor & P. R. Co. v. American Bangor Slate Co., 203 Pa. 6. A corporation is not charged with knowledge acquired by its president while acting as attorney for other parties in regard to the execution of a mortgage afterwards assigned to the corporation—Tate v. Security Trust Co., 63 N. J. Eq. 559.

the line of their duty.[17] Declarations and admissions by stockholders and officers are not binding on the corporation unless made while acting for the corporation in connection with the transactions.[18] If the acceptance of official bonds is entirely entrusted to the board of directors, the president's statements do not affect the liability of sureties on a cashier's bond.[19] The corporation is not bound by statements of its agent with regard to the sale of stock owned by himself.[20] Admissions of a president or superintendent of a corporation made after an answer has been filed in an action against it are not admissible as against the corporation.[21] A letter is properly admitted in evidence as shown to have been authorized by a corporation, where it appears that it was dictated by the general manager to the stenographer of the corporation who was also its secretary, and she wrote and signed it as she did other letters sent by the manager.[22]

(§ 15) *P. Delegation of authority by directors.*—Where under an incomplete sale of the entire corporate stock to one person, such person is given the entire management of the corporate affairs by the board of directors, the corporation is bound by his acts within the corporate powers.[23]

(§ 15) *Q. Personal liability of officers and agents.*—Where a transaction is within the corporate powers, directors are not personally liable thereon, though at other times and with other persons they may have done business not authorized by the charter.[24] They may be personally liable for their ultra vires acts, if a waste of the corporate property results.[25] Mere payment of a valid demand in an unauthorized way does not render the directors liable for a depreciation of funds unless there is special damage.[26]

The president of a corporation does not become personally liable by defending an action against it, and is not liable on a judgment against the corporation for negligence, if no personal negligence is charged and he was not a party.[27]

Where a corporation's president executes a note in its name by himself as presi-

17. Admissible: Reports of persons superintending work performed by a corporation, made to the corporation, are admissible to show the condition of the work—Lipscomb v. South Bound R. Co., 65 S. C. 148. Declarations of a fire insurance agent concerning commissions from the company itself may be binding on it—Ulysses Elgin Butter Co. v. Hartford Fire Ins. Co., 20 Pa. Super. Ct. 384. The admissions of an adjuster are binding on an insurance company if made while he is examining the extent of the loss—Sisk v. American Cent. Fire Ins. Co., 95 Mo. App. 695. A letter of a manager of a corporation concerning a compromise of a claim for a broker's commission where from the evidence it appeared that the corporation had left the entire charge of its business to the manager dictating the letter—Henderson v. Raymond Syndicate (Mass.) 67 N. E. 427.

Not admissible: Statement by railroad official that appliances used were bad, the official not having control over the equipment or management of such appliances—Hayzel v. Columbia R. Co., 19 App. D. C. 359. Statement by the officers and stockholders of a corporation, which had sold a machine, as to its working, such persons having nothing to do with the operation of the machine—Haynie-Campbell Co. v. Preston Creamery Ass'n (Iowa) 93 N. W. 297. Statement after the transaction in issue—Harper v. Western Union Tel. Co., 92 Mo. App. 304. A letter from the vice-president of a bank to the indorser of a note, where not written in his official capacity or on bank stationery—Utica City Nat. Bank v. Tallman, 172 N. Y. 642.

18. Statements in regard to the existence of a debt—Stanton v. Baird Lumber Co., 132 Ala. 635. Declarations with corporation's general manager as to the cause of an action made shortly after its occurrence—Momence Stone Co. v. Groves, 197 Ill. 88.

19. Ida County Sav. Bank v. Seidensticker (Iowa) 92 N. W. 862.

20. Though the person dealing with the agent thought that he should have accurate information from his capacity—Western Realty & Inv. Co. v. Haase, 75 Conn. 436.

21. Such admissions are only admissible as part of the res gestae—McEntyre v. Levi Cotton Mills, 132 N. C. 598.

22. Henderson v. Raymond Syndicate (Mass.) 67 N. E. 427.

23. Where the directors of a mill company turn its management over to an individual pending the completion of a transfer of the corporate stock, the corporation and not the individual is liable for contracts incident to his management—Albany Mill Co. v. Huff, 24 Ky. L. R. 2037, 72 S. W. 820.

24. Dietrich v. Rothenberger (Ky.) 75 S. W. 271.

25. Dietrich v. Rothenberger (Ky.) 75 S. W. 271. Use of corporate assets of an insurance company to purchase a mutual insurance company which is without assets or good will—Gilbert v. Finch, 173 N. Y. 455.

26. Manhattan Fire Ins. Co. v. Fox, 74 App. Div. (N. Y.) 271.

dent in order to conceal the fact that he is purchasing stock in his own name, he becomes personally liable on such note and the corporation signing is not bound.[28]

(§ 15) *R. Liability of officers for mismanagement.*[29]—Where a corporation is a majority stockholder in another corporation, the directors of the controlling corporation are answerable only for fraud or for such gross negligence in the management as amounts to fraud.[30] Asquiescence by the board of directors in the acts of a secretary in a transfer of the corporate assets is not fraudulent as to the rights of stockholders unless the directors have notice of such facts as may be reasonably expected to furnish the basis for a successful attack on the transfers.[31]

Where a corporation sells certificates of membership providing that a certain portion of the collections made thereon shall be used for current expenses, and for such other expenses as the directors might direct, the directors are not entitled to use such receipts in the payment of dividends, the corporation being insolvent.[32]

By statute, a director may sue the officers and other directors of a corporation for an accounting, and the corporation need not be made a plaintiff though properly joined as defendant. Other persons given the right to sue by the section and general creditors need not be joined.[33] Where the corporation treasurer sues one who preceded him in office for an accounting as to the corporate funds, the corporation is not such an indispensable party that it must be joined, though its joinder would oust the jurisdiction of a federal court.[34]

Statutes making directors jointly and severally liable for money wrongfully appropriated by them do not impose a penal liability.[35]

The directors of a corporation are not trustees of a trust, so as to be estopped from pleading limitations when sued for acts of administration, for which they have been subject at all times to an action at law, and where the action is originally brought to wind up the corporation, an officer who is plaintiff may set up the statute of limitations in case of an amendment which charges him with misfeasance in office.[36]

Where the receivers of an insolvent corporation have, with the approval of the court, released its officers from all claims, a stockholder cannot maintain an action against them for negligence and breach of trust.[37]

(§ 15) *S. Dealings between a corporation and the directors or other officers, and personal interest in transactions.*—Transactions between corporate directors and the corporation are subject to judicial scrutiny.[38] A director or officer of a corporation is not precluded from entering into contracts with it for his personal benefit, where the rights of the corporation are fully protected.[39] The trustees

27. Tilley v. Coykendall, 172 N. Y. 587.

28. Wheeler v. Mineral Farm Consol. Min. Co. (Colo.) 71 Pac. 1101.

29. Evidence held not to show mismanagement on the part of a corporate president as to the collection of debts, and allowance of overdrafts—Johnson v. Stoughton Wagon Co. (Wis.) 95 N. W. 394. Evidence held insufficient to charge the president of a corporation with negligence in regard to the diversion of corporate funds by the secretary—Id.

30. Evidence held insufficient to show fraudulent mismanagement of a controlling corporation in the conduct of electric lighting companies—Cannon v. Brush Elec. Co., 96 Md. 446.

31. Hutchison v. Rock Hill Real Estate & Loan Co., 65 S. C. 45.

32. Taylor v. Commonwealth (Ky.) 75 S. W. 244.

33. Code Civ. Proc. §§ 447, 488, 1782—Miller v. Barlow, 78 App. Div. (N. Y.) 331.

34. Equity rule 47—Hunter v. Robbins, 117 Fed. 920.

35. Const. art. 12, § 3—Winchester v. Howard, 136 Cal. 432, 69 Pac. 77.

36. Boyd v. Mutual Fire Ass'n (Wis.) 94 N. W. 171.

37. Craig v. James, 71 App. Div. (N. Y.) 238.

38. Davis v. Thomas A. Davis Co., 63 N. J. Eq. 572.

39. A director is bound by an agreement to execute to the corporation a lease of property in which he has an interest under a contract with the owner for a conveyance—Veeder v. Horstmann, 85 App. Div. (N. Y.) 154.

of a corporation may contract with the president for the use and manufacture of inventions made by him, he not voting upon the resolution.[40] The manager of a mining company may by an offer to use certain of its shares which he owns for the benefit of the corporation, which offer is accepted by corporate resolution, make a valid gift to the company rendering the manager liable for the misuse of funds derived from the sale of new certificates of stock issued to him representing the subject matter of the gift.[41]

An issuance of stock by a corporation to its president is valid in the absence of a fraudulent intent or concealment of facts from subsequent stockholders, though it is made in consideration of services performed by the president in securing options and contracts on property turned over to the corporation.[42] A loan may be made by a director to his corporation.[43] A corporation may transfer its assets to its directors who are indorsers of notes of another corporation to reimburse them for payments made thereon, which have been beneficial to the first corporation.[44] Notes of a corporation cannot be pledged by its officers or directors to secure personal debts of the president.[45]

Secret profits.—Officers of corporations cannot accept secret profits.[46] Where the directors of a corporation negotiate a transfer of the corporate stock from the stockholders through themselves to another corporation, the fact that after the agreement is completed they enter into an arrangement with the new corporation whereby they are to continue as directors therein in consideration of certain of its stock and funds gives the stockholders of the former corporation no rights in such consideration, there being no evidence that it was secretly contemplated at the time of the first arrangement. Since there was no fiduciary relation there must have been actual misrepresentation, and the burden of proof of fraud is on those asserting it.[47] The stockholders of a corporation are not entitled to share in commissions earned by a manager of a department on individual sales, though he has given drafts on the corporation in settlement where he has paid such drafts by his personal checks.[48]

Where directors act adversely to the stockholders in the contract, the contract is illegal, and openness of actions by directors adverse to the stockholders' interests does not validate them.[49] If a director sell its property, it being insolvent, he cannot apply the proceeds to a corporate debt for which he is a surety, but he may apply them to the payment of a creditor for whose indemnification he has signed a bond and protected the corporate property.[50]

Where a director has sold stock to the corporation he acting at the meeting

40. The royalty fixed being fair, the stockholders cannot attack the contract as fraudulent—Burden v. Burden Iron Co., 39 Misc. (N. Y.) 559.

41. Wheeler v. Mineral Farm Consol. Min. Co. (Colo.) 71 Pac. 1101.

42. The president used a portion of the stock to interest other persons than the company, and retained a small portion for himself—Calivada Colonization Co. v. Hays, 119 Fed. 202.

43. Off v. Jack, 104 Ill. App. 655.

44. Kendall v. Klapperthal Co., 202 Pa. 596.

45. El Capitan Land & Cattle Co. v. Boston-Kansas City Cattle Loan Co., 65 Kan. 359, 69 Pac. 332.

46. Where a corporation's manager sells its entire capital stock he cannot be allowed to retain a secret compensation from the buyer—Barbar v. Martin (Neb.) 93 N. W. 722.

47. Walsh v. Goulden (Mich.) 90 N. W. 406.

48. Adams v. Burke, 201 Ill. 395.

49. Contract by the directors of an irrigation company to furnish water to the members of an association to which the directors belong—Goodell v. Verdugo Canon Water Co., 138 Cal. 308, 71 Pac. 354. An agreement on a sale of street railroad properties by which the purchasing company agrees to operate its line for a specified space of time to land owned by the directors of the selling company is void, it being for the benefit of the directors, nor does such agreement confer a vendor's lien—Scott v. Farmers' & Merchants' Nat. Bank (Tex.) 75 S. W. 7.

50. Graham v. Carr, 130 N. C. 271.

at which it was authorized, the sale, though not binding as to price, may be enforced on the basis of the actual value of stock.[51]

Purchase of corporate property.—Where an officer of a corporation buys its property and pays for it in part with the corporate stock at an exaggerated value, the conveyance may be set aside.[52] Though a corporate president is not formally authorized to purchase subscription rights to stock of another corporation, he is, if he purchased at the direction of the corporation, estopped from denying that he purchased as the corporation's agent, and the title passes to the corporation, and the fact that he advances the purchase money from his own funds and takes receipts in his own name does not show conclusively that he purchased individually.[53] A subsequent vote of the directors authorizing the corporation to acquire a controlling interest in the new corporation does not affect the title previously acquired.[54] A purchaser from the officer acquires no rights against the corporation, though the contract to acquire the subscription rights was ultra vires, against public policy and unlawful, and if the purchase was void as to the corporation, title vested in the officer individually.[55] Where a trustee has been appointed by the stockholders and directors of an insolvent corporation, it may, if it act in good faith, sell the bonds and capital stock belonging to the corporation, to a director.[56]

Where the president of a corporation secures title to land in consideration of acts to be performed by the corporation, he will be regarded to hold such land as a trustee, unless there is a showing of a valid authorization in him to take title.[57]

Compromise of claims.—Where a director compromises claims against a corporation, he is entitled to credit for the sums paid and not for their face,[58] and though he uses his own funds in the purchase of claims he cannot take advantage of reductions which he secures.[59]

Mortgages by corporate officers to one of their number to secure a fictitious indebtedness will be set aside though also executed ostensibly to secure other creditors who are not shown to have ever relied on them or demanded their execution.[60] A director may take a mortgage from the corporation as security, the corporation not being insolvent.[61]

Purchases of property at judicial sales or after title passes from corporation.[62] —A purchase, by a director in good faith, of property which has passed from the corporation, does not inure to the benefit of the corporation.[63] The fact that a director holding land of the corporation in trust for his security makes a sale out of which he is subsequently to realize a profit does not of itself make the sale voidable if it is approved by the directors after a complete disclosure of the facts and is for full value, and he may, after a bona fide sale, control the land for the

51. Oliver v. Rahway Ice Co. (N. J. Eq.) 54 Atl. 460.

52. Purchase by secretary and treasurer—Miller v. Brown (Neb.) 95 N. W. 797.

53-55. Manchester St. Ry. Co. v. Williams, 71 N. H. 312.

56. Graham v. Carr, 130 N. C. 271.

57. Property conveyed to the president and promoter of a street railroad in consideration of the extension of the line to the land of the grantor—Scott v. Farmers' & Merchants' Nat. Bank (Tex.) 75 S. W. 7.

58. Fishel v. Goddard (Colo.) 69 Pac. 607.

59. Kroegher v. Calivada Colonization Co. 119 Fed. 641; Calivada Colonizaton Co. v. Kroegher, Id.

60. Macklem v. Fales (Mich.) 89 N. W. 581.

61. Mechanics' Bldg. & Sav. Ass'n, No. 2, 202 Pa. 589.

62. Evidence held sufficient to show that a director purchased the property of a corporation on mortgage sale, at less than its actual value, rendering him chargeable with subsequent profits—Fishel v. Goddard (Colo.) 69 Pac. 607.

63. Purchase of a forfeited mining claim from a relocator—McDermott Min. Co. v. McDermott, 27 Mont. 143, 69 Pac. 715.

purchaser and take part of the profits of ensuing sales.[64] Where a director has acquired title to corporate land in a fair and legitimate manner, the fact that the land is greater in extent than is known by all the parties at the time of transfer does not render the sale fraudulent.[65]

The mere fact that one who joins with others in the purchase of a corporation's note which is secured by mortgage is a director of the corporation does not render his subsequent purchase of the property at a fair foreclosure sale fraudulent.[66]

It is held that a director who purchases property of the corporation at a mortgage sale may be responsible to judgment creditors for any difference between the value of the property and the amount paid,[67] and the fact that he acquires title to mortgaged property through foreclosure entitles him only to repayment of his actual outlay with interest.[68] A corporation is not estopped from denying the validity of the director's claim to the excess by actions showing an intent to recognize it.[69]

Where two corporations have entered into a contract to acquire the title to the property of one, the president of one corporation cannot acquire title to the property of the other at a trustee's sale, it being a mere scheme in pursuance of the contract.[70] An action at law in favor of a corporation will lie to recover a large salary which the president, as majority stockholder, has induced the directors to vote to him.[71] Where there are but two stockholders of actual interest in the corporation, though there are three nominal stockholders who are also directors, the actual stockholder holding a minority of the stock may share in a sum voted to the majority stockholder as salary, the votes being taken at meetings in the absence of the minority stockholder.[72]

Compensation secured for services not rendered for corporation.—Where a trustee, being a corporation, names its president as receiver, he need not account to it for fees received, if the by-laws of the company in fixing the president's duties do not state that he shall act as a receiver. He is not prevented from acting by a by-law providing that no trusteeship or receivership shall be accepted by the president without the approval of the executive committee, since such by-law is to be regarded merely as a precaution against the binding of the corporation.[73]

The mere nomination of the president as receiver does not furnish a consideration for an agreement by him to pay the trust company the compensation received by him in such capacity, and a resolution of the trust company directing its counsel to ask that a certain person named be appointed as a receiver seeks the appointment of such person as an individual, though he is also president of the trust company.[74] If it is sought to recover such compensation on the ground of an alleged agreement that the corporation would foreclose the deed

64. The director implicated did not vote at the meeting at which the offer of sale was accepted and the price obtained was a fair valuation—Tenison v. Patton, 95 Tex. 284.

65. Tenison v. Patton, 95 Tex. 284.

66. Ready v. Smith, 170 Mo. 163.

67. The amount realized on subsequent sale of the property may be shown as tending to fix its value, and for this purpose, the director may be questioned as to what was the amount realized on the resale as shown by his books—Fishel v. Goddard (Colo.) 69 Pac. 607.

68. Kroegher v. Calivada Colonization Co., 119 Fed. 641; Calivada Colonization Co. v. Kroegher, Id.

69. Kroegher v. Calivada Colonization Co., 119 Fed. 641; Calivada Colonization Co. v. Kroegher, Id.

70. Scott v. Farmers' & Merchants' Nat. Bank (Tex.) 75 S. W. 7.

71. Adams v. Burke, 102 Ill. App. 148.

72. Adams v. Burke, 201 Ill. 395.

73. Citizens' Trust & Deposit Co. v. Tompkins (Md.) 54 Atl. 617.

74. Citizens' Trust & Deposit Co. v. Tompkins (Md.) 54 Atl. 617.

of trust without charge provided the president was appointed receiver, he agreeing to pay the corporation such compensation as he was allowed for so acting, it must be alleged that at the time the corporation relinquished its right it had the right to make a foreclosure sale, and also that the corporation had made such sale and had not made any charge or received any compensation therefor.[75]

After a corporation has sold property of which it is in charge, the fact that one of its officers agrees to superintend the use thereof does not show a contract to act against the best interests of the corporation, and the officer cannot afterward question such a contract, if the corporation does not object.[76]

Use of patents.—The corporation may be entitled to profits made by its president and general manager on an invention made by him and manufactured by the corporation.[77] Where a corporation has been infringing a patent, its executive officers by a transfer of their stock and purchase of the patent acquire no rights allowing their assignee to compel the corporation to pay the profits resulting from the infringement.[78]

Ratification of dealings.—Stockholders may, at a regularly called meeting, ratify a contract in which a director is interested and which is voidable at the option of the corporation, and in case they have notice of the directors' interests they are chargeable with proper inquiry as to the extent thereof.[79]

Mere silence for two years with knowledge of an illegal contract by the directors is not a ratification, nor can such a contract be ratified by a subsequent board of directors, the majority of which is the same as that which first authorized it.[80] Where the directors have entered into a contract illegal as for their own benefit, the fact that the corporation has taken other steps against other parties in recognition of the contract does not estop it and its stockholders from setting up the illegality, nor does estoppel result from the fact that the wrongdoing directors allow expenditures to be made on the faith of the contract.[81] Where mortgages are invalid, a subsequent reference to them as being due in a new mortgage does not show an intention to validate them.[82] Where directors have sold the corporation's stock under such circumstances that they cannot enforce the full price, a payment on account to the corporation may be applied to an implied promise to pay what the stock was in reality worth.[83]

Repudiation.—Where the contract is illegal, the motive of subsequent directors in repudiating it is immaterial as far as the other party is concerned.[84]

Remedies in case of wrongful transactions.—Creditors are not entitled in the first instance to reach profits gained by a director in fraud of the corporation, the right of action being in the corporation. Mere contract creditors cannot reach equitable assets in the hands of a director. A creditor cannot recover a profit

75. Citizens' Trust & Deposit Co. v. Tompkins (Md.) 54 Atl. 617.

76. Sale of a patent for the manufacture of a brake beam and contract to superintend the manufacture of brake beams and purchase supplies on the best terms possible, the machinery used in the manufacture remaining in the building of the corporation and the business being distinct—Pungs v. American Brake Beam Co., 200 Ill. 306.

77. Corporation was held entitled to an accounting where, without knowledge of the directors, the president secured the manufacture of an article patented by him by the corporation, and after adding a certain percentage to the actual cost of production as profit sold them to himself under an assumed name and placed them on the market at a higher figure—D. M. Steward Mfg. Co. v. Steward (Tenn.) 70 S. W. 808; Montague v. Same, Id.

78. New York Grape Sugar Co. v. Buffalo Grape Sugar Co., 24 Fed. 604.

79. Hodge v. Steel Corp. (N. J. L.) 54 Atl. 1.

80. Oliver v. Ice Co. (N. J. Eq.) 54 Atl. 460.

81. Goodell v. Water Co., 138 Cal. 308, 71 Pac. 354.

82, 83. Oliver v. Ice Co. (N. J. Eq.) 54 Atl. 460.

84. Goodell v. Water Co., 138 Cal. 308, 71 Pac. 354.

made by the director in the purchase of property in which the corporation was equitably interested, in the absence of a showing that the corporation ratified the act so as to render it valid as to him or that there was fraud and collusion.[85] The cause of action is barred if not brought within twelve years from the happening of the facts on which it accrued, there being no concealment or nonresidence.[86]

Where it is sought to reach the profits gained by a director from a purchase of the corporation's property in foreclosure proceedings, the corporation is a necessary party.[87]

Where the directors are sued jointly for a conversion of the goods of a corporation, and one director is admitted, by the answer in which he joins, to be solely interested in the goods, judgment may be rendered against him alone. In such an action, it is not necessary that the judgment show a finding as to what the goods were worth at the time of sale, if there is no showing that the value found was as of any other day.[88]

In a proceeding to charge a director with profits gained by him from a purchase of the corporation property at a mortgage sale, a supplemental complaint and an original complaint will be read together in determining whether it was alleged that, at the time the director purchased, the debt was in existence.[89] Evidence must conform to the pleadings.[90]

§ 16. *Rights and remedies of creditors of corporations. A. The relation of creditors—Assets as a trust fund.*—Though by statute in New Jersey an equal and pro rata distribution of the assets in an insolvent corporation among its creditors is secured, such equality between the creditors is not based on a trust theory such as is adopted in the federal jurisdictions.[91] In New Jersey apart from the direct effect of statutes, an insolvent corporation has the same dominion over its assets, and its creditors have the same power to reach those assets, as in case of an insolvent natural person.[92] In Washington, the assets of an insolvent corporation being regarded as a trust fund, an attachment levied the day before the appointment of a receiver may be set aside.[93]

(§ 16) *B. Rights and remedies of creditors against the corporation.*[94]—One holding a cause of action for tort arising before the corporation was declared insolvent, but reduced to judgment thereafter, may share on an equality with other creditors.[95] Under an agreement to advance money to a corporation so long as a certain branch of the business should be continued, the advances may be declared due at a reasonable time after the cessation of the business.[96]

85-87. Ready v. Smith, 170 Mo. 163.

88, 89. Fishel v. Goddard (Colo.) 69 Pac. 607.

90. Where it is pleaded that the contract was illegal on account of adverse interest, evidence as to whether the irrigation company had less water than required by its needs and could not make further development is immaterial—Goodell v. Water Co., 138 Cal. 308, 71 Pac. 354.

91, 92. Gallagher v. Asphalt Co. of America (N. J. Eq.) 55 Atl. 259.

(Note) According to the great weight of authority, the relation between a corporation and its creditors is simply that of debtor and creditor. A corporation, although insolvent, holds its property as an insolvent natural person does, and its assets are not a trust fund for the benefit of creditors in any proper sense. If they can be said to be a trust fund in any sense, it is only in the sense that they cannot be distributed among or withdrawn by the stockholders, or conveyed or given away without consideration, leaving creditors unpaid, and in the sense that, when the corporation has been dissolved or gone into the hands of a receiver, its assets will be distributed, subject to valid liens thereon, for the equal benefit of all the creditors—Clark & Marshall, Corporations, Vol. III, p. 2319.

93. Washington Liquor Co. v. Cafe Co., 28 Wash. 176, 68 Pac. 444.

94. Priority of judgment for tort, see ante, § 9.

95. Corp. Act, §§ 75-77, 86; Pub. Laws 1896—Lehigh & W. Coal Co. v. Transportation Co., 63 N. J. Eq. 107.

96. Five years is a reasonable time; the election is sufficiently shown by the begin-

Compromise of claims.—Where it is asserted that a creditor had agreed to accept a new issue of stock in lieu of a portion of his claim, it cannot be shown that, subsequent to such agreement, the corporation was in bad financial condition, nor can the creditor be allowed to testify that if he had thought the stock was issued as a witness testified, he would not have kept it.[97]

Preferences.—The wages of a superintendent are not within the intendment of a statute giving preference to the wage claims of employes or operatives of insolvent corporations.[98] A formal assignment made after insolvency effectuating a previous oral assignment made during insolvency does not create a preference.[99] Payments made to a corporation under mistake as to indebtedness, which are not kept separately, do not become entitled to preference over other corporate debts.[1] One who advances money to a corporation for a specific use and deposits it with a trust company, he to be repaid by the receipt of a certain rebate on each specific piece of certain property purchased under the agreement, is in the position of a general creditor.[2]

Where a corporation is in the habit of drawing against shipments of goods and disposing of the drafts, the purchaser being given credit for the amount of the invoice, it does not create the relation of creditor of the corporation in the purchaser of a draft, making the delivery of such draft after insolvency a preference.[3] Where the transfer of assets of an insolvent corporation to a creditor is an invalid preference, the preferred creditor may participate in such assets with other creditors on the transfer being held invalid.[4] A creditor having a lien on a specific portion of the corporate property who brings an action to secure the application of the general property to its debts is not entitled to preference in the funds obtained if the specific property on which he has a lien has not been or is to be segregated, and such suit brought in behalf of all the creditors does not entitle the one bringing it to a preference.[5]

Right to reach dividends wrongfully paid.—Under statutory provisions making stockholders liable for stock refunded to them before payment of debts for which it is liable, stockholders of insolvent corporations are liable to creditors for the amount that dividends have reduced the capital stock.[6] Where rents of corporate property are distributed in the form of a dividend among stockholders, they are not impressed with a trust or lien in favor of general creditors, neither insolvency nor a fraudulent purpose being shown.[7] In a proceeding to compel payment of a certain sum from the net earnings of a corporation before distribution among the stockholders, the stockholders who claim the right to an immediate distribution are necessary parties.[8] The cause of action to reach dividends improperly paid stockholders given by statute in some states does not accrue, until executions against the corporation have been returned nulla bona.[9]

ning of an action and the lender is entitled to interest from the date of the election only —Burke v. Sidra Bay Co. (Wis.) 92 N. W. 568.

97. Reid v. Paint Co. (Mich.) 94 N. W. 3.

98. Rev. Sts. 1899, § 1006—Pullis Bros. Iron Co. v. Boemler, 91 Mo. App. 85.

99. Corp. Laws, § 48, Laws 1892, c. 688—In re Rogers Const. Co., 79 App. Div. (N. Y.) 419.

1. Lacy v. Association, 132 N. C. 131.

2. Miller v. Barlow, 78 App. Div. (N. Y.) 331.

3. Hodson v. Karr, 96 Md. 475.

4. National Wall Paper Co. v. Bank (Neb.) 93 N. W. 1004.

5. Moore v. Drug Co., 135 Ala. 287.

6. Comp. Laws 1897, § 7057—American Steel & Wire Co. v. Eddy (Mich.) 89 N. W. 952.

7. New Hampshire Sav. Bank v. Richey (C. C. A.) 121 Fed. 956.

8. Dupignac v. Bernstrom, 37 Misc. (N. Y.) 677.

9. Limitations against a bill in equity under Rev. St. Me. 1857, c. 46, § 34, do not begin to run until such time—Bowker v. Hill, 115 Fed. 528.

Fraudulent conveyances.[10]—On a bill to set aside a deed as fraudulent to corporate creditors, objection cannot be made that the deed was not duly authorized by the directors or executed by the proper officers.[11]

Mortgage as fraudulent conveyance.—The fact that a corporation is insolvent or financially embarrassed does not prevent it from mortgaging its property in good faith to secure extension of a prior debt, and for further money to be used in its business if it is yet a going concern.[12] A mortgage which operates to secure two stockholders the repayment of the purchase price of their stock is invalid to creditors and other stockholders,[13] but the corporation may execute a mortgage to secure the payment for land conveyed to it or of money expended for its benefit.[14] The statutory prohibition of the transfer of property in contemplation of insolvency does not affect a mortgage for an actual presently passing consideration, though possible insolvency may have been in the minds of the parties, but such a mortgage is void in so far as it attempts to secure pre-existing debts.[15]

Liens on corporate property.—Under a statutory provision giving a lien to laborers and materialmen on the realty and personalty of a corporation, treasury bonds secured by mortgage on its property are not to be regarded as personalty.[16] Such a lien does not extend to the property of a corporation deposited in a warehouse, the warehouse receipts for which have been transferred as collateral security for money borrowed by the corporation.[17] A lien may be had under a statute in favor of corporate employes, though the petition and notice is insufficient to sustain a mechanic's lien.[18] Where a statute conferring a lien for labor on corporate property does not require the notice to describe the corporate property, the corporate earnings may be applied to the payment of the lien.[19] A laborer may have priority of lien for wages accruing after levy of an execution against the corporation, where it appears that it was for the judgment creditors' interest as well as that of the corporation that the corporate business be continued.[20] Attorney's fees may be allowed in such a proceeding where they are allowed in mechanic's liens and the mechanic's lien statute is made applicable to proceedings under the statute conferring the lien on the corporate property.[21] A laborer's lien may be valid against an insolvent corporation though sworn to and filed after proceedings to wind up the corporation have been begun, and may be protected by filing a petition in such proceedings within the statutory period.[22] Where it is sought to enforce a lien on corporate property, the stockholders and non-lien-holding creditors are not necessary parties.[23] If the debt is adjudged no lien, the decree is appealable.[24]

Attachment and execution.—By statute, corporate property may be made subject to attachment on mesne process and execution.[25] Where the corporation is

10. On an issue of the overvaluation of a partnership property transferred to a corporation, evidence of the amount of sales of the partnership during its existence is admissible to determine the value of the good will—White Corbin & Co. v. Jones, 79 App. Div. (N. Y.) 373, 12 N. Y. Ann Cas. 277.

11. Swentzel v. Investment Co., 168 Mo. 272.

12. Coler v. Allen (C. C. A.) 114 Fed. 609.

13, 14. Reed v. Specialty Co., 64 N. J. Eq. 231.

15. Laws 1896, p. 298, § 64—Reed v. Specialty Co., 64 N. J. Eq. 231.

16. Code 1887, § 2485—Millhiser Mfg. Co. v. Mills Co. (Va.) 44 S. E. 760.

17. Millhiser Mfg. Co. v. Mills Co. (Va.) 44 S. E. 760.

18. A notice is sufficient if it set forth the date of the employment, the name of the corporation and the amount of the lien. Burns' Rev. Sts. 1901, §§ 7248, 7249—Forrest v. Corey, 29 Ind. App. 159.

19, 20. Forrest v. Corey, 29 Ind. App. 159.

21. Burns' Rev. St. 1901, § 7253—Forrest v. Corey, 29 Ind. App. 159.

22. Kahle v. Oil Co., 51 W. Va. 313.

23. Godchaux v. Morris (C. C. A.) 121 Fed. 482.

24. Kahle v. Oil Co., 51 W. Va. 313.

insolvent, an attachment by one creditor may be set aside on a subsequent proceeding to wind up the corporation.[26] Where a corporation is engaged in public or quasi public service, its property incident to such service is not subject to sale on execution unless it is so provided by statute.[27]

Suits to wind up and dissolve.—Under the New Jersey statute defining the persons authorized to maintain a proceeding under the insolvent corporation act, the word "creditor" will be regarded as including all persons so related to the corporation and its assets as to be entitled to a share of what is divided among creditors.[28] The fact that a federal court has taken jurisdiction of an action by a creditor against the corporation, and placed the assets in the hands of a receiver, will not prevent the maintenance in a court of New Jersey of a proceeding, under a New Jersey statute, to enjoin the corporation from the exercise of its franchise, since the proceeding is not pecuniary in its nature so as to include any of the matters of which the federal court has taken jurisdiction on the ground of the diversity of citizenship.[29] Under certain statutes, proceedings provided for the benefit of creditors for the enforcement as against the directors, trustees, officers, or stockholders on account of any liability created by law, the action when once begun by a creditor is no longer subject to his control, and cannot be dismissed without the consent of all creditors who appear and prosecute.[30]

Assignment for benefit of creditors.—The lien of a judgment entered on a judgment note is not displaced by a voluntary assignment executed for such a purpose by the vice-president, who was a majority stockholder, without authority from the directors.[31] An assignee for creditors of a corporation may acquire a good title, though the deed of assignment was not authorized by a vote of the majority of the stock as provided by the articles of incorporation prior to its execution under authority of the board of directors, especially where for four years the stockholders have not questioned the validity of the assignment.[32]

The assignment may be avoided by an action by the creditors to enforce their claims against the corporation where by statute it is provided that any conveyance of the corporation's property shall be void as against prior creditors in case they commence proceedings to enforce their claims within a stated time after the registration of the conveyance. Such action in case the corporate assets are not thereby increased does not confer any lien in behalf of the creditors as against the corporation's receiver.[33]

Insolvency proceedings.—The corporation is not insolvent by reason of the mere fact that it cannot pay its obligations in cash as they become due, where it is not yet a fully going concern and the returns of its business have not yet matured, though their amount is greatly in excess of its liabilities.[34] Holders of

25. Rev. St. 1883, c. 46, § 20—Poor v. Chapin, 97 Me. 295.

26. Washington Liquor Co. v. Cafe Co., 28 Wash. 176, 68 Pac. 444.

27. Sherman County Irr. & Water Power & Imp. Co. v. Drake (Neb.) 91 N. W. 512.

28. A trust company which has entered into a contract with a corporation to issue certificates secured by stocks and bonds of the corporation, the corporation to pay a certain amount of money annually to the trust company for distribution among the certificate holders, is a creditor entitled to maintain an action under the Insolvent Corporation act (Act 1829, Pub. Laws, p. 58)—Gallagher v. Asphalt Co. (N. J. Ch.) 55 Atl. 259.

29. Bill under Insolvent Corporation act 1829, Pub. Laws, p. 58—Gallagher v. Asphalt Co. (N. J. Ch.) 55 Atl. 259.

30. Action brought under Rev. St. 1898, § 3223, cannot be otherwise dismissed before final judgment—Williams v. Brewster (Wis.) 93 N. W. 479.

31. A judgment note was reduced to a judgment before ratification of the assignment—Friedman v. Lesher, 198 Ill. 21.

32. Blanton v. Kentucky Distilleries & Warehouse Co., 120 Fed. 318.

33. Code, 1883, § 685—Fisher v. Western Carolina Bank (N. C.) 44 S. E. 601.

34. Joseph v. Raff, 82 App. Div. (N. Y.) 47.

a claim against an insolvent corporation may come in at any time before final distribution.[35] Stockholders cannot intervene in insolvency proceedings to set up a defense not available to the corporation.[36] Creditors are entitled to share in the assets of an insolvent corporation in proportion to their respective claims without being parties to a suit against the trustee holding such assets.[37] If provisions for the allowance of attorney's fees on the collection of notes are valid under the law of the state, they may be allowed in a federal court where on insolvency of the corporation, the creditors employ attorneys to prove their claims in a creditors' suit in which actions at law on claims are enjoined.[38]

Receivership on insolvency.—The appointment of a receiver for an insolvent corporation sought by creditors on the ground of misapplication of the assets is within the discretion of the court.[39] If the statute provides that a receiver may be appointed on insolvency, there need be no other prerequisites.[40] The appointment of a receiver is justified by the payment of certain creditors in full after knowledge of the inability to pay all claims of similar rank.[41]

The receiver of a corporation possesses no power or authority beyond the jurisdiction of the court appointing him.[42]

After a receiver has taken control of the assets of an insolvent corporation, no creditor by an action subsequently commenced, or a judgment subsequently obtained, can acquire a superior lien upon such assets.[43] After the appointment of a receiver, the creditor is not entitled to interest on his claim,[44] nor can interest be allowed as between preferred and unpreferred creditors.[45] Though a creditor hold a lien, if such lien is not enforced, but the claim is paid from the general funds on a receivership, he cannot have interest after the appointment.[46] The fact that a charter gives a preference on dissolution to debts which the corporation owes as a trustee does not create a preference for interest thereon.[47]

Where a receiver is defending an action against a corporation, intervention by a stockholder and creditor will not be allowed unless the receiver is acting fraudulently or to the prejudice of interests which he should protect. A mere interest as a stockholder in the corporation will not confer the right.[48] Where a trustee has brought a bill to secure the sale of certificates pledged by the corporation, the receivers will not be required to answer setting up certain facts at the request of a stockholder in case they allege that they have inquired into such facts and found them without foundation.[49]

Creditors who have not appeared before the referee appointed to state a receiver's account are not entitled to notice of filing of his report.[50]

35. People v. American Loan & Trust Co., 39 Misc. (N. Y.) 647.

36. Cumberland Lumber Co. v. Clinton Hill Lumber Co. (N. J. Ch.) 54 Atl. 452.

37. National Wall Paper Co. v. Columbia Nat. Bank (Neb.) 93 N. W. 1004.

38. South Carolina contract—Richmond Guano Co. v. Farmers' Cotton Seed Oil Mill & Ginnery, 119 Fed. 709.

39. The Anvil v. Savery, 116 Ga. 321.

40. 2 Ballinger's Ann. Codes & St. § 5456—New York Nat. Exch. Bank v. Metropolitan Sav. Bank, 28 Wash. 553, 68 Pac. 905.

41. The Anvil v. Savery, 116 Ga. 321.

42. A New York receiver cannot secure control of assets in Pennsylvania as against creditors in such state, though the domestic creditors issue no process, acquire no lien and make no demand for payment out of assets in the hands of the ancillary receiver within the state until after the fund was demanded by the foreign receiver—Frowert v. Blank, 205 Pa. 299.

43. Clark v. Bacorn (C. C. A.) 116 Fed. 617.

44. Though he may have had a lien on the property giving him a priority, but there was no attempt to enforce such lien—Solomons v. American Bldg. & Loan Ass'n, 116 Fed. 676.

45. People v. American Loan & Trust Co., 172 N. Y. 371.

46. Bates v. American Bldg. & Loan Ass'n (C. C. A.) 120 Fed. 1018.

47. People v. American Loan & Trust Co., 70 App. Div. (N. Y.) 579.

48. Hosmer v. Standard Shoe Mach. Co., 39 Misc. (N. Y.) 204.

49. Land Title & Trust Co. v. Asphalt Co., 121 Fed. 192.

50. People v. American Loan & Trust Co., 39 Misc. (N. Y.) 647.

Where the court in an action against the corporation has appointed a receiver for the protection of the property pending litigation, its power over the subject-matter is not exhausted until the objects of the suit have been attained.[51]

Distribution of assets.—A judgment in an action by a receiver showing how much of the debtor's claim should be discharged does not create a preference over other corporate debts.[52] Fees of an attorney acting for a corporation cannot be preferred, where his services did not create any additional assets or were rendered in resisting the appointment of a receiver or matters not in judicial proceedings or not brought to judgment.[53] Costs of an action brought by an insolvent corporation while winding up its affairs are preferred claims.[54] Where a claim is based on a contract void as to all creditors and the objections of certain creditors are sustained, such ruling inures to the benefit of all,[55] though it is held also that where, on objection by unpreferred creditors, certain funds are diverted from the preferred creditors, they may be shared in only by those creditors who have excepted.[56]

The lien of a judgment is not divested by final decree dissolving a corporation, appointing a permanent receiver, and ordering a sale of the realty though the judgment is not referred to in the decree, and the judgment creditor may sell on his judgment, the sale being subject to order of court.[57]

Sales by receiver.—The code provisions authorizing a sale in partition free from lien do not apply to sales on dissolution of the corporation for insolvency.[58] Purchasers at a receiver's sale of corporate property take free from all claims except such as are declared in the decree not to be prejudiced.[59] One purchasing at a receiver's sale with notice of a judgment takes subject to the lien of such judgment on its being declared valid on appeal from a stockholder's action taking it.[60] The receiver must either redeem existing liens or satisfy them or sell subject thereto.[61]

Restraining orders.—No authority to grant a general restraining order exists where there is no authority to appoint a receiver.[62]

Remedies on mismanagement by receiver.—Where a receiver has been removed and a new one appointed, a complaint by the new receiver and certain creditors is bad for a misjoinder, if it state an independent cause of action in favor of the new receiver against the old and also in favor of the creditors against the directors and certain shareholders. Such a proceeding is to be regarded as a creditor's suit authorized for the purpose of winding up an insolvent corporation.[63]

51. Under this principle it was held that where an action had been begun by former owners of water rights controlled by a corporation to enforce specific performance of a contract, whereby on the happening of certain contingencies the title to a canal and appurtenances owned by the corporation should pass to them and vest in a new corporation for their benefit, and in such action such contract had been ordered enforced, a receiver, appointed pending litigation, may be directed to re-take possession of the property after it has been delivered pursuant to the decree to the new corporation if such new corporation has refused to borrow money to discharge indebtedness incurred during the receivership, and has acted adversely to the interests of the owners of the water rights—La Junta & Lamar Canal Co. v. Hess (Colo.) 71 Pac. 415.

52. Lacey v. Clinton Loan Ass'n (N. C.) 43 S. E. 586.

53. People v. American Loan & Trust Co., 70 App. Div. (N. Y.) 579.

54. Ephraim v. Pacific Bank, 136 Cal. 646, 69 Pac. 436.

55. Olmstead v. Vance & Jones Co., 196 Ill. 236.

56. People v. American Loan & Trust Co., 70 App. Div. (N. Y.) 579.

57, 58. In re Coleman, 174 N. Y. 373.

59. Scott v. Farmers & M. Nat. Bank (Tex.) 75 S. W. 7.

60, 61. In re Coleman, 174 N. Y. 373.

62. Zeltner v. Henry Zeltner Brew. Co., 79 App. Div. (N. Y.) 136.

63. Rev. St. 1898, §§ 2316-3228—Boyd v. Mut. Fire Ass'n (Wis.) 90 N. W. 1086.

(§ 16) *C. Rights of corporate mortgagees and bondholders. Generally.*—A mortgage may be of only partial validity.[64] Where a mortgage of corporate property has been executed in part to accomplish a fraudulent purpose, it cannot be enforced for the security of any part of the consideration, if it is impossible to separate the good from the bad.[65] It will be presumed that it is for an amount authorized by the corporate charter.[66] The holders of corporate bonds secured by mortgage may enforce the same though they are issued before its entire capital stock is subscribed for in good faith, and the officers were by statute therefore personally liable for its debts.[67] Assignees of corporate property to secure the corporate bonds are bona fide holders, no bad faith being shown or fraud on the part of the directors of the corporation.[68]

A mortgagee of corporate property should, on a mortgage being declared void on account of fraud, be refunded taxes which he has paid during the time he held record title.[69]

Execution of mortgages and bonds.[70]—The board of directors of a company authorized to loan and borrow money, and to mortgage and otherwise dispose of its property, may execute a bond and assign the assets of the corporation as security.[71] Authority to execute a mortgage may be shown by the corporate records showing an approval of the mortgage at a meeting at which all the stockholders were present,[72] and a mortgage otherwise properly executed is not invalidated by the fact that a resolution authorizing its execution is not shown,[73] nor by the fact of omission of a portion of the corporate name from the signature.[74] Where a corporation has issued bonds secured by mortgage and accepted the benefits, it cannot assert that the mortgage is invalid because the statutory assent of the stockholders was not given,[75] or because the corporate meeting at which it was authorized was held in a foreign state.[76]

Pledge of bonds.—Corporate bonds are not invalidated by the fact that they are pledged instead of being sold to raise money in good faith for corporate purposes, though when authorized it was understood that they were to be sold; and though by statute the issuance of bonds or stock is prohibited except for labor done or money or property actually received, corporate bonds may be pledged to secure an amount less than their face, which has been used in the discharge of the purchase price on machinery which the corporation had taken over to be used in its business, and the bonds are not to be regarded as pledged for antecedent

64. As where only part of the debts secured are enforceable—Reed v. Helois Carbide Specialty Co., 64 N. J. Eq. 231.

65. Lamb v. McIntire (Mass.) 67 N. E. 320.

66. Lincoln v. Lincoln St. Ry. Co. (Neb.) 93 N. W. 766.

67. All the statutory steps had apparently been taken, and Hurd's Rev. St. 1899, p. 438, Corp. Act § 27, makes the article of incorporation prima facie evidence of the facts therein stated—Gunderson v. Illinois Trust & Sav. Bank, 199 Ill. 422.

68. Hutchison v. Rock Hill Real Estate & Loan Co., 65 S. C. 45.

69. Lamb v. McIntire (Mass.) 67 N. E. 320.

70. A corporate mortgage was signed and sealed in the presence of two witnesses and carried to the trustee, who, on its receipt, executed its acceptance in the presence of two witnesses, held, a sufficient delivery—William Firth Co. v. South Carolina Loan & Trust Co. (C. C. A.) 122 Fed. 569. Evidence held sufficient to show that bonds were issued for a consideration which the corporation actually received and were valid—Schultze v. Van Doren (N. J. Ch.) 53 Atl. 815. Mortgage to the amount of $600,000 for money spent in construction is not for a fictitious debt where it is shown that $900,000 was expended—Lincoln v. Lincoln St. Ry. Co. (Neb.) 93 N. W. 766.

71. Act Dec. 1888, pp. 248-250. General incorporation Act Dec. 23, 1886—Hutchison v. Rock Hill Real Estate & Loan Co., 65 S. C. 45.

72. Crossette v. Jordan (Mich.) 92 N. W. 782.

73. Reed v. Helois Carbide Specialty Co., 64 N. J. Eq. 231.

74. It was clearly shown that there was an intention to bind the corporation and the instruments were duly authorized—In re Goldville Mfg. Co., 118 Fed. 892.

75. Atlantic Trust Co. v. Crystal Water Co., 72 App. Div. (N. Y.) 539.

76. Schultze v. Van Doren (N. J. Ch.) 53 Atl. 815.

debts, there being a present consideration.[77] Bonds cannot be pledged for the security of directors.[78]

Lien.—Corporate bonds secured by trust deed are of equal priority, their lien being dated from the time of record of the mortgage.[79] The lien of a mortgage on a corporation's property may be superior to paving assessments except such as were already in existence or in contemplation at the time it was recorded.[80] Those who hold bonds issued on cancellation of stock have a preference to the claims of ordinary stockholders on an assignment for creditors.[81] Where by statute it is provided that, on purchase of a corporation's property under a mortgage sale, the purchaser shall become a new corporation succeeding to the rights and duties of the old corporation which is by the fact, dissolved; after sale under a second mortgage at which the purchaser assumes payment of the first mortgage, the first mortgage bondholders possess a lien inferior to that of a judgment for a subsequent tort of the new company, which judgment by statute is superior to mortgage liens.[82]

Transfer.—Mortgage bonds are negotiable.[83] Bona fide holders are in the position of bona fide holders of notes with regard to defenses available on foreclosure of the mortgages securing them.[84] Where bonds and a mortgage are given to a contractor in payment for construction, the bonds in the hands of a subsequent transferee are not liable to defenses against the contractor arising out of invalid performance.[85]

Bond coupons are negotiable where they contain an absolute promise to pay, and the purchaser before maturity is entitled to payment as therein provided without regard to limitations or conditions in the bonds and mortgage, the mortgage providing that the coupons shall be transferable by delivery.[86]

Exchange of bonds for new issue.—On the issue by a successor corporation of bonds secured by mortgage on the same property which secured a mortgage for the bonds of a preceding corporation, a provision that trustees of the second mortgage should retain a portion of the second bonds to exchange for the first mortgage bonds does not create a trust in favor of the first mortgage bondholders, and their right to an exchange may be lost by laches.[87]

Enforcement.—Where a mortgage securing corporate bonds provides that it shall mature on default in payment of interest, the option to declare the mortgage due need not be exercised by all the bondholders.[88] If the trustee wrongfully

77. Contruing Const. S. C. art. 9, § 10—William Firth Co. v. South Carolina Loan & Trust Co. (C. C. A.) 122 Fed. 569. Construing South Carolina Constitution—In re Goldville Mfg. Co., 118 Fed. 892.

78. Where the bonds secured by a mortgage on corporate property are not sold, but are directed by the board of directors to be held by the secretary to secure the directors against certain obligations incurred by them on behalf of the corporation, a sale under a power in the mortgage is void, the pledge being void, since there was no one to act for the company, and the resolution was not concurred in by all the stockholders—Scott v. Farmers' & M. Nat. Bank (Tex.) 75 S. W. 7.

See ante, § 15-S. for effect of personal dealings between directors and corporation.

79, 80. Lincoln v. Lincoln St. Ry. Co. (Neb.) 93 N. W. 766.

81. Mechanics' Bldg. & Sav. Ass'n No. 2's Assigned Estate, 202 Pa. 589.

82. Code North Carolina, §§ 697, 698—Guardian Trust & Deposit Co. v. Greensboro Water Supply Co., 115 Fed. 184.

83. Lincoln v. Lincoln St. Ry. Co. (Neb.) 93 N. W. 766.

84. Atlantic Trust Co. v. Crystal Water Co., 72 App. Div. (N. Y.) 539.

85. Wells v. Northern Trust Co., 195 Ill. 288.

86. Haskins v. Albany & H. Ry. & Power Co., 74 App. Div. (N. Y.) 31.

87. The exchange cannot be enforced some eighteen years after the issuance of the second mortgage bonds and after the second mortgage bonds have become of greater value than the first, and the corporation has refused to make further exchange unless paid the difference in the price—Morse v. Chicago & E. I. R. Co., 84 App. Div. (N. Y.) 406.

88. A request by a chairman of a committee representing a majority of the bonds and similar requests by other bondholders is sufficient to show the exercise of an option that

decline to sue to foreclose, one or more of the bondholders may sue individually though it is provided in the mortgage that the trustee shall sue.[89]

If a trustee suing to foreclose a corporate mortgage desires to show that he is entitled to the equities of a bona fide transferee for value of the bonds, he must show that the persons for whom he is trustee were not the original holders, but the burden of proving want of consideration in the holders is on the corporation, since where the bonds are payable to a trustee or bearer, it will be presumed that the holders acquired them in good faith and for value. The same presumptions as to good faith and payment apply against the trustee as against individual bondholders.[90] The trustee should not be allowed compensation for sale where it is made by a receiver.[91] On foreclosure sale, error in granting too short a time for redemption before sale is cured by the fact that sale is not actually made until the lapse of a sufficient time.[92]

Receivership.—Unless mismanagement is clearly shown, a minority of the bondholders of a corporation should not be allowed a receiver on a suit to foreclose where they had delayed a long time before bringing such action, though there had been a default in interest, and during recent years large sums have been expended by the corporation in development.[93] A receiver of a corporation nominated under a power in a trust deed is nevertheless an officer of the court and need not account to the trustee for his fees.[94]

Intervention by the stockholders in proceedings to foreclose a mortgage given to secure corporate bonds is not warranted by general charges that the bonds were received at a large discount.[95] A holder of the bonds and stock of a corporation cannot intervene in insolvency proceedings against a corporation in which receivers have been appointed, for the reason that the answer of the corporation is collusive and void, in order to permit him to set up matters of defense and methods of collecting the assets of the corporation, which he insists will not be adopted by the present receivers though for the interest of the shareholders.[96] The fact that a majority of the certificate holders have united to secure a settlement of their claims will not authorize a minority holder to intervene in insolvency proceedings in which receivers have been appointed on the ground that a committee representing the majority holders is the real party complainant, since his rights would be unaffected by any compromise which they might make. The assets of the corporation are sufficiently protected by the receivership, and as to him any liability of the subscribers to the capital stock would be unaffected by a settlement

the trustee should foreclose on default in interest—Atlantic Trust Co. v. Crystal Water Co., 72 App. Div. (N. Y.) 539.

89. Schultze v. Van Doren (N. J. Ch.) 53 Atl. 815.

90. Evidence held sufficient to show consideration paid by the original transferees—Atlantic Trust Co. v. Crystal Water Co., 72 App. Div. (N. Y.) 539.

91. Where before instituting foreclosure proceedings, the bondholders are required to deposit the amount required for costs, compensation to the trustee and counsel fees, it being understood that such sum should cover the expenses of sale; if the sale is directed to be made by a receiver, a reasonable deduction should be made from the sum deposited before turning it over to the trustee as compensation, but if but one of the bond holders objects the decree will be disturbed only so far as necessary to protect his interest—Girard Life Ins., Annuity & Trust Co. v. Bedford Coal & Iron Co., 20 Pa. Super. Ct. 304.

92. Not prejudicial to allow only ten days before an absolute sale where nearly six months elapse before the sale is confirmed—Wells v. Northern Trust Co., 195 Ill. 288.

93. Evidence held insufficient to warrant the appointment of a receiver against the will of majority of the bondholders—Romare v. Broken Arrow Coal & Min. Co., 114 Fed. 194.

94. Citizens' Trust & Deposit Co. v. Tompkins (Md.) 54 Atl. 617.

95. No names were stated, but merely that the directors agreed with certain capitalists that supplies should be furnished at high rates, and alleging on information and belief that such capitalists were still the owners of the bonds—Gunderson v. Illinois Trust & Sav. Bank, 199 Ill. 422.

96. Land Title & Trust Co. v. Asphalt Co., 114 Fed. 484.

with the majority holders. Neither is the certificate holder entitled to an order instructing the receivers to bring suits to ascertain the liability of the promoters, directors, officers, trustees, etc., of the defendant corporation before the deficiency of the corporate assets is determined.[97]

(§ 16) *D. Officers and stockholders as creditors, etc.*—Stockholders or directors who make advances in good faith stand on the footing of other creditors.[98] An agreement by a corporation with its directors, for the conveyance to them of property to the amount of its notes, which they assumed and on which they are guarantors, is on good consideration and is valid as against other creditors, the corporation being solvent.[99] On conveyance by the directors of an insolvent corporation to a director, in payment of a corporate debt, the director must show the good faith of the transaction and that he did not vote therefor or improperly influence his associates.[1] The directors may execute a mortgage to secure another corporation in which they are stockholders,[2] and they will be protected as to advances made to enable a bona fide purchase from a corporation in which they are also directors.[3] A sale of property of an insolvent corporation made without consideration, by its treasurer to an insolvent firm of which he was a member, is invalid,[4] as is also a collusive judgment creating a preference.[5] Fraud in a mortgage to stockholders is not conclusively shown by the fact that stockholders meet before its execution and pay up their stock subscriptions by giving the corporation credit on accounts against it.[6]

Preferences.—A solvent corporation may prefer a director and an officer as a creditor and such action may be questioned only when the corporation is insolvent,[7] but an insolvent corporation cannot prefer claims of its officers as against other creditors,[8] nor can it dispose of its property to its directors,[9] though in Kansas a transfer on full consideration is valid in the absence of actual fraud.[10] In Indiana a contrary rule is held as to the directors of a private manufacturing corporation, and a preference to them is allowed.[11] Where a director after insolvency of the corporation furnishes it money to continue its opera-

97. Land Title & Trust Co. v. Asphalt Co., 121 Fed. 587.

98. Standard Cotton Seed Oil Co. v. Excelsior Refining Co., 108 La. 74.

99. Swentzel v. Franklin Inv. Co., 168 Mo. 272.

1. Pitman v. Chicago Lead Co., 93 Mo. App. 592.

2. Evidence held to show good faith in the giving of a mortgage to secure indebtedness to corporations in which the mortgagor's directors and stockholders were also stockholders, though at the time the mortgagor corporation was insolvent—Chick v. Fuller (C. C. A.) 114 Fed. 22.

3. Where a corporation's directors advance it money to make a purchase of property, their claims cannot be set aside in favor of other creditors though they were also directors in the corporation of which the purchase was made, if the purchase has been ratified by the sale of the property by the assignee of the corporation for creditors and an incumbrance thereon has been settled—Mechanics' Bldg. & Sav. Ass'n No. 2's Assigned Estate, 202 Pa. 589.

4. Fraudulent as to corporation's creditors and also as transfer in contemplation of insolvency forbidden by Gen. St. p. 919; Corp. Act, § 64—Richardson v. Gerli (N. J. Ch.) 54 Atl. 438.

5. Where certain directors assign a cause of action to a third person to be placed in judgment, and the directors being served as vice-president and secretary allow a default judgment to be taken and the entire corporate property sold to satisfy judgment of less than one-half its value, judgment is fraudulent and void as to other creditors—Portland Consol. Min. Co. v. Rossiter (S. D.) 94 N. W. 702. A judgment on notes executed for the use of a corporate board of directors, at a time when the corporation was insolvent, may be set aside by the receiver of the corporation—Taylor v. Fanning, 87 Minn. 52.

6. Crossette v. Jordan (Mich.) 92 N. W. 782.

7. Wolf v. Erwin & Wood Co. (Ark.) 75 S. W. 722.

8. Shields v. Hobart, 172 Mo. 491; Lamb v. Russell (Miss.) 32 So. 916. Where directors have advanced money to take up the corporation's obligation without agreement for priority, they cannot take a judgment note for their advances—Pangburn v. American Vault, Safe & Lock Co., 205 Pa. 93.

9. Off v. Jack, 104 Ill. App. 655.

10. Webb v. Rockefeller (Kan.) 71 Pac 283.

11. Mortgage to directors sustained—Nappanee Canning Co. v. Reid, 159 Ind. 614, 59 L. R. A. 199.

tion, under an agreement with the directors that he should be protected by a first judgment, such a judgment if confessed is good as to creditors.[12]

Where a statute which authorizes the issuance of preferred cumulative dividend stock provides that it shall be subordinate to the corporate debts, and other liabilities on insolvency, the holders of such stock cannot enforce a mortgage given to secure it to the prejudice of general creditors, especially where the mortgage provides that in case of the dissolution of the corporation, it should be paid after the payment of the debts and liabilities and the corporation was in fact dissolved, even though the promoters might by the postponement be enabled to perpetrate a fraud on the preferred stockholders or though the mortgage was recorded before the claims of the general creditors.[13]

(§ 16) *E. Liability of stockholders on account of unpaid subscriptions, and remedies. Statutory provisions.*[14]—Statutes exempting shareholders from further liability after they have paid up a stated per cent of the par value do not affect creditors whose claims exist prior to the passage of the statute.[15] Where the liability of stockholders is reduced by a subsequent statute, the limitation of a creditor's claim which arose before the passage of the statute begins to run at the time the stockholders default in the payment of their subscriptions under the original contract.[16]

Who are liable.—Under the statutes of Missouri it is not a necessary requisite to title that stocks be transferred on the stock book, and after a recognized transfer by indorsement and delivery, the corporation's creditors cannot recover on an unpaid subscription from the original holder.[17] A stockholder's liability for unpaid subscriptions may be enforced by a creditor without a showing of fraud.[18] The fact that a portion of stock has been taken up from the subscriber and made treasury stock does not relieve him from personal liability as to subsequent creditors to the amount of the subscription unpaid.[19] One who receives stock as a bonus is not within the meaning of a statute imposing liability in favor of creditors on the original subscribers to corporate stock, to the extent of their unpaid subscriptions.[20] One need not be a stockholder at the date of a call in order to render him liable for unpaid stock subscriptions, where with knowledge of the insolvency of the corporation he has transferred the stock to an insolvent person knowing him to be insolvent for the purpose of relieving himself from liability.[21] The stockholder's liability does not cease in case of a forfeiture of stock which is actually void, though it may where there is a merely informal forfeiture which has been acquiesced in by both parties.[22]

Preferred stockholders though by statute exempted from personal liability for corporate debts are not relieved from a statutory liability on receipt of withdrawals from the capital stock.[23]

Fictitiously paid up stock.—One who purchases stock from the corporation at less than its par value without knowledge that it was not originally sold at par

12. Hogsett v. Columbia Iron & Steel Co., 203 Pa. 148.

13. Pub. Laws 1896, p. 283, § 18 as amended by Pub. Laws 1901, p. 245—Black v. Hobart Trust Co. (N. J. Ch.) 53 Atl. 826.

14. Act Feb. 18, 1895, Code, §§ 823, 1282, authorizing a bill in equity to reach unpaid stock subscriptions, does not apply to suits pending at the time of its passage—Henderson v. Hall, 134 Ala. 455.

15, 16. Williams v. Watters (Md.) 54 Atl. 767.

17. Dain Mfg. Co. v. Trumbull Seed Co., 95 Mo. App. 144.

18. Shields v. Hobart (Mo.) 72 S. W. 669.

19. Chrisman-Sawyer Banking Co. v. Independence Wool Mfg. Co. (Mo.) 68 S. W. 1026.

20. Const. Neb. art. 11b, § 4—Seaboard Nat. Bank v. Slater, 117 Fed. 1002.

21. People's Home Sav. Bank v. Rickard (Cal.) 73 Pac. 858.

22. Crissey v. Cook (Kan.) 72 Pac. 541.

23. Comp. Laws 1897, §§ 7073, 7057—American Steel & Wire Co. v. Eddy (Mich.) 89 N. W. 952.

is not liable to creditors for the difference between the amount paid and the par value,[24] and a recital in stock certificates that stock is full paid and nonassessable throws on the creditor the burden of showing that the stock was taken with knowledge that the recital was fraudulent, there being no liability in the case of a bona fide purchaser, such a purchaser having the right to rely on the recital in the certificate.[25]

Where stock has been accepted in payment of stock subscriptions at an excessive valuation, creditors are entitled to relief against the subscriber.[26] Under statutory provisions that stock is not to be issued except for money paid, labor done, or property actually received, a stock subscription cannot be paid in the stock of another corporation unless such stock is disposed of or a direct pecuniary advantage has been received.[27] The burden of showing good faith in payment is on the stockholder.[28] Where stockholders jointly turn over property at a sum in excess of its real value in payment of their subscriptions, they are liable individually for the discrepancy in proportion to the number of shares held by them.[29] On payment in property, the stockholder is liable though both the corporation and the stockholder at the time supposed the value of the stock and the property was equal,[30] but it is held that the transaction must be first impeached for fraud on the corporation.[31]

In determining whether the property of a firm has been overvalued where it is transferred in consideration of an issue of stock, the good will of the firm should be considered, the firm having been merged in the corporation.[32]

Persons to whom a mining corporation transfers its stock in consideration of the transfer of mining locations are not protected under a statute authorizing the issuance of full paid stock for such purposes, if there has been no mineral discovered in such locations.[33] The creditor may be estopped to assert a fictitious valuation.[34]

Estoppel of stockholder.—If a stockholder makes representations that the capital stock has been entirely paid in, he may be liable to persons becoming creditors after the transfer of his stock for unpaid subscriptions.[35] As against an action to recover an assessment on stock, defendant who does not seek to rescind the contract by which he acquired ownership cannot assert that the contract under which he held was void.[36]

24. Stock standing in the name of a trustee—Berry v. Rood, 168 Mo. 316.

25. Garden City Sand Co. v. American Refuse Crematory Co., 105 Ill. App. 342.

26. Evidence held to show that stock in another corporation turned in on a stock subscription was of small value, authorizing creditors to relief—Lester-Haltom v. Bemis Lumber Co. (Ark.) 74 S. W. 518.

27. Construing Texas Const. art. 12, § 6—Lester-Haltom v. Bemis Lumber Co. (Ark.) 74 S. W. 518.

28. Property conveyed in payment at an over valuation—Taylor v. Walker, 117 Fed. 737.

29. McClure v. Paducah Iron Co., 90 Mo. App. 567.

30. Const. art. 12, § 8; Rev. St. 1899, § 962—Berry v. Rood, 168 Mo. 316.

31. To render the holder liable as for unpaid subscriptions—Bank v. Belington Coal & Coke Co., 51 W. Va. 60. Evidence held sufficient to show good faith in the transfer of partnership property to a corporation at an amount in excess of its value—Taylor v. Walker, 117 Fed. 737.

32. White v. Jones, 79 App. Div. 373, 12 N. Y. Ann. Cas. 277.

33. A petition in an action by a creditor to reach the amount unpaid on such stock which asserts that no mineral had been discovered is therefore not demurrable. Construing Mills' Ann. St. §§ 486, 582, 3152; Rev. St. U. S. § 2322—Buck v. Jones (Colo. App.) 70 Pac. 951.

34. One joining in an agreement whereby at the organization of a corporation certain incorporators received fully paid stock in exchange for property which they transferred to the corporation, cannot, on becoming a creditor of the corporation, assert that the property was not equal to the par value of the stock as a ground for holding the incorporators liable for their unpaid subscriptions—Cunningham v. Holley, Mason (C. C. A.) 121 Fed. 720.

35. McBryan v. Universal Elevator Co. (Mich.) 89 N. W. 683.

36. Mt. Forest Ass'n v. Borrowe, 71 N H. 69.

Defenses.—As against an application for an order for an assessment for unpaid subscriptions, stockholders cannot assert that the corporation never became such de jure or de facto, nor that the agreement to incorporate was abandoned and subscription canceled by subscribers, nor can they plead the statute of limitations, nor that the claim against one of the subscribers is barred by a decree of the orphan's court.[37] An agreement by the original creditor to waive the right to enforce liability on subscriptions may constitute a defense.[38]

The fact that creditors have accepted dividends derived from the sale at a fictitious value, of the assets of an insolvent corporation, on stock subscriptions, does not prevent an action by them or in their behalf to recover the actual unpaid balance.[39]

Where stock subscribers, relying on an unauthorized agreement by the president to purchase their stock, pay their subscription notes, a judgment creditor cannot enforce a repayment of the notes, but may only recover the corporate assets, applied to the purchase of the stock.[40]

A statute providing that where it is necessary to resort to a court of chancery to settle and wind up the affairs of the insolvent corporation, the court may, in case it is necessary, direct the trustee, assignee, or receiver to sue at law to recover assessments on stock subscriptions, and which further provides that in such suit at law any defenses which would have been admissible, were the corporation solvent, shall be permitted, confers the right to assert defenses on a stockholder sued in a foreign state by a receiver to enforce an assessment.[41]

Stockholders who have not answered may be entitled to a successful defense by other stockholders.[42]

In actions brought to collect assessments, the stockholders may make a defense based on their status as stockholders, though in insolvency proceedings they cannot interpose any defense that the corporation itself could not set up, and the determination of the debts of the corporation in insolvency proceedings cannot be questioned in proceedings by the receiver to secure an authorization of an assessment on stockholders.[43]

Set-off.—Demands of stockholders against the corporation may be set off in a proceeding in equity by a judgment creditor to reach unpaid stock subscriptions,[44] but the demands must be valid,[45] and if a portion is invalid, the stockholder has the burden of showing the validity of the portion relied on.[46]

37. Cumberland Lumber Co. v. Clinton Hill Lumber & Mfg. Co. (N. J. Ch.) 54 Atl. 450.

38. Where one of the purposes of a corporation is to purchase certain land, and stock subscriptions are made under an agreement with the owner of the land that there should be no personal liability to the stock subscribers for the purchase, such agreement prevents the enforcement by the receiver of the corporation against the subscribers personally of their unpaid stock subscriptions to satisfy the purchase price; though it does not provide for the amount of the capital stock or specify the amount each subscriber would take and though the notes contained an unqualified promise on the part of the corporation to pay, had been assigned to a third person, and not having been made payable at a bank were subject to defenses by the maker (Burns' Rev. St. 1901, § 7517; Horner's Rev. St. 1901, § 5503)—Carnahan v. Campbell, 158 Ind. 226.

39. Berry v. Rood, 168 Mo. 316.

40. Henderson v. Hall, 134 Ala. 455.

41. Act Va. Dec. 22, 1897; Acts 1897, 1898, p. 16, c. 20, may be taken advantage of by stockholders, resident in Maryland, sued by a receiver appointed in Virginia—Williams v. Watters (Md.) 54 Atl. 767.

42. Denial of insolvency in an action to reach unpaid stock subscriptions—Fletcher v. Bank of Lonoke (Ark.) 69 S. W. 580.

43. Cumberland Lumber Co. v. Clinton Hill Lumber & Mfg. Co. (N. J. Ch.) 54 Atl. 450.

44. Shields v. Hobart (Mo.) 72 S. W. 669.

45. Where a corporation having sold its property constituting its actual capital, distributed the purchase money notes as dividends and then renewed them with its own notes indorsed by stockholders, stockholders who have paid in discharge of their liabilities as such indorsers, cannot set off such payments as against their unpaid subscriptions to the capital stock, when a judgment creditor seeks to collect them. Rev. Stat. 1889, § 2773, provides that directors shall

Limitations.[47]—Equity will apply the statute of limitations by analogy to a proceeding to enforce a stockholder's liability.[48] Limitations against the right to recover on stock subscriptions run from the time of assessment.[49] The right of action to enforce unpaid stock on the insolvency of a corporation accrues at the time the corporation is declared insolvent.[50] A statutory limitation applicable to the enforcement of the stockholder's personal liability does not apply to an action for unpaid subscriptions.[51] Under statutes which do away with the necessity of the issuance of an execution against a corporation and its return unsatisfied before an action may be maintained to enforce the liability of stockholders on their subscriptions, the limitation of such an action will begin at the time the creditor has notice that the corporation is insolvent, and such notice will be presumed when the insolvency becomes a matter of general notoriety.[52] Where the members are policy holders, the right to enforce their liability on the policies accrues for the purposes of limitations at the time of appointment of a receiver for a mutual insurance company.[53] Under a statute allowing suits in equity to reach unpaid subscriptions, limitation will run against such an action, though the right to proceed under the general chancery act has not accrued, since the remedies being similar, the rule is that the limitation runs when the right to pursue the earlier remedy accrues.[54] Where the jurisdiction of chancery of proceedings to recover assessments on stock subscriptions after insolvency is removed by statute, a proviso that as to chancery suits pending at the time of passage seeking to recover unpaid stock subscriptions, the limitation shall not run during the time elapsing between the institution of such suit and one month after the order authorizing a common-law action, does not apply in the case of a chancery suit against a corporation by a creditor, where recovery against stockholders was not sought until by an amendment after the passage of the act.[55]

Who may enforce.—Under the Illinois statute allowing suits in equity against stockholders to compel them to pay their pro rata share of the corporate debts to the extent of the unpaid portion of their stock, a simple contract creditor may bring the proceeding.[56] An action to recover unpaid stock subscriptions cannot be maintained by a creditor for his own benefit, but the right is in the receiver for the benefit of all creditors,[57] and neither can the action be brought by an assignee for creditors.[58]

be personally liable to creditors in case they pay dividends diminishing the capital stock —Shields v. Hobart (Mo.) 72 S. W. 669.

46. If there is a showing that a portion of notes on which a stockholder was indorser was unlawfully issued, the stockholder, if he attempts to set off a payment on such liability as indorser as against a judgment creditor's attempt to reach unpaid stock subscriptions, has the burden of showing the portion of the notes given for a legitimate purpose—Shields v. Hobart (Mo.) 72 S. W. 669.

47. Evidence held not to show notice of insolvency causing the statute of limitation to begin to run against an action to enforce liability on stock subscriptions—Lester-Haltom v. Bemis Lumber Co. (Ark.) 74 S. W. 518.

48. Hale v. Coffin (C. C. A.) 120 Fed. 470.

49. Otter View Land Co.'s Receiver v. Bolling's Ex'x, 24 Ky. L. R. 1157, 70 S. W. 834.

50. Boyd v. Mutual Fire Ass'n (Wis.) 90 N. W. 1086.

51. Rev. St. 1899, § 1330, not applicable to the collection of unpaid subscriptions, under section 985—Chrisman-Sawyer Banking Co. v. Independence Wool Mfg. Co., 168 Mo. 634.

52. In Arkansas, action is barred in five years—Lester-Haltom v. Bemis Lumber Co. (Ark.) 74 S. W. 518.

53. Boyd v. Mut. Fire Ass'n (Wis.) 90 N. W. 1086.

54. Limitation of action under Corporation Act, § 25, is not tolled by chancery act, § 49—Parmelee v. Price, 105 Ill. App. 271.

55. Act Va. Dec. 22, 1897, acts 1897, 1898, p. 16, c. 20—Williams v. Watters (Md.) 54 Atl. 767.

56. Corporations act, § 25—Parmelee v. Price, 105 Ill. App. 271.

57. Stock Corp. Law, § 54 as amended by Laws 1901, c. 354, held merely declaratory of the common law—Lang v. Lutz, 39 Misc. (N. Y.) 3.

58. Laws 1892, c. 688, § 54. Case in which stock was issued for less than par as fully paid—Thompson v. Knight, 74 App. Div. (N. Y.) 316.

Exhaustion of remedies against corporation.—Unpaid subscriptions cannot be enforced for the payment of corporate debts until the corporation is insolvent or the remedies against it have been exhausted by the creditors.[59] The liability to the amount of unpaid stock arises only after the return of an execution against the corporation unsatisfied, and limitations do not run in favor of the stockholders until such time.[60] Under some statutes the exhaustion of the corporate assets is not a condition precedent.[61]

Procedure.—Equity cannot take jurisdiction to subject debts due on stock subscriptions to the payment of a judgment on the ground that the capital stock and debts due thereon constitute a trust fund, and an action cannot be brought in equity, though with intent to defraud the corporation, the subscribers have transferred their stock to an irresponsible nonresident.[62]

In a creditor's suit to recover unpaid stock subscriptions on insolvency of a corporation, separate stockholders may be joined as defendants, and the stockholders may be brought in by amendment to a proceeding originally begun against the corporation.[63] An order allowing creditors to come in and give security for costs in order that they may receive the benefit of actions prosecuted by the receiver to enforce the liability of stockholders on subscription may be taken advantage of by creditors who receive their claims by assignment after the order is entered.[64]

Pleading.[65]—A bill against a corporation and certain of its stockholders brought by a judgment creditor to compel the payment of unpaid subscriptions may be changed by an amendment to a common creditor's bill, though the amendment contain allegations of actual fraud in addition to the facts showing constructive fraud originally alleged, the nature of defendant's liability not being changed.[66]

A complaint in an action by a creditor to recover an amount unpaid on the stock of a member of an insolvent corporation is sufficient if it merely allege the ownership of the stock, and the fact of failure of payment.[67] A stock subscription contract should be pleaded in a suit by the receiver to recover the amount unpaid on insolvency of the corporation where it relates to matter other than the times and proportions of the stock subscriptions.[68] Where it is desired to assert a contract making liability contingent, the answer must plead facts showing notice to purchasers of the corporation's obligations of such limitation on the liability.[69] Where it is sought to subject unpaid stock subscriptions of certain stockholders to a judgment, a cross bill does not state a cause of action which asserts as against a co-defendant that he had agreed to hold cross complainant harmless from any liability on the subscription price of stock which he transferred to cross complainant, but does not allege that the cross complainant

59. Fletcher v. Bank of Lonoke (Ark.) 69 S. W. 580.

60. Comp. St. 1887, div. 5, § 457—King v. Pony Gold Min. Co. (Mont.) 72 Pac. 309.

61. Corporations Act, § 25—Parmelee v. Price, 105 Ill. App. 271.

62. The judgment creditor's remedy is by garnishment—Henderson v. Hall, 134 Ala. 455.

63. Comp. Laws 1897, §§ 9760, 9769, 9773—Schaub v. Welded Barrel Co. (Mich.) 90 N. W. 335.

64. Central Trust Co. v. East Tennessee Land Co., 116 Fed. 743.

65. See for construction of a bill as alleging that a corporation was bound by an agreement by the president to cancel stock subscription notes in consideration of payment of their subscriptions, and also to transfer them assets of the corporation—Henderson v. Hall, 134 Ala. 455.

66. Montgomery Iron Works v. Capital City Ins. Co. (Ala.) 34 So. 210.

67. Atlantic Trust Co. v. Osgood, 116 Fed. 1019.

68. Agreement making the times of payment dependent on a contract of land purchase on the fulfillment of which the subscriptions were conditional—Carnahan v. Campbell, 158 Ind. 226.

69. Carnahan v. Campbell, 158 Ind. 226.

was liable for the stock, or that the cross respondent had not paid therefor.[70] An amendment to a petition, seeking to subject unpaid subscriptions to the satisfaction of a judgment, which states that certain of the subscribers have been allowed credits on their notes for services rendered to their corporation, is immaterial.[71]

The burden of proof of insolvency or exhaustion of other remedies is on the creditors.[72] Where it is sought to recover an amount unpaid on a stock subscription, the agreement under which the stock was issued may be shown by parol, and the certificate of stock is admissible to show that it was fully paid.[73]

Remedies in case of receivership.—The receiver may, by direction of the court, sue for the recovery of unpaid subscriptions for the benefit of creditors,[74] and his administration is not complete until he has done so.[75]

A court of equity may compel the payment of unpaid subscriptions, notwithstanding a statutory provision that the directors shall determine the time for payment of deferred instalments.[76] The appointment of a receiver removes the right of the creditor to sue.[77] The receiver cannot sue for the purpose of meeting future corporate obligations, if there is no existing unsatisfied creditor.[78] The receiver cannot be compelled to sue on a disputed claim before he can have an assessment on the stockholders authorized, if there are no assets for such purpose and the stockholders had not asserted the validity of the claim and indemnified him against the expense of the suit.[79]

Injunction against a receiver's proceeding to enforce assessments against particular stockholders will not prevent his instituting actions against other stockholders as directed by the decree appointing him.[80]

Procedure by receiver.—A receiver may bring an action to recover an unpaid stock subscription in a county in which one defendant only resides and which is foreign to the home office of the company.[81] Mere failure to show notice to the stockholders to pay subscriptions before suit will not warrant a judgment for defendant, though if the failure had been raised by answer and an offer to pay made, the liability for costs would have been discharged.[82] Where from the application for an order to authorize an assessment against subscribers to corporate stock, it is shown that certain persons are supposed to be stockholders but that they allege that they are not, the assessment should be directed and the liability of individual subscribers left to be determined by suit if necessary.[83] Where in a branch of insolvency proceedings, a reference has been had and the amount due a director from the corporation determined, the court may, on entry of a decree in the general proceedings granting an assessment on stockholders of the amount of their unpaid subscriptions, have a further reference deducting the amount of the unpaid subscription from the decree in favor of the director.[84]

Scope of assessment.—An allowance for receiver's fees and his counsel fees may be included, together with interest on the corporation's debt, and expenses in actions

70, 71. Henderson v. Hall, 134 Ala. 455.

72. Action to reach unpaid stock subscriptions—Fletcher v. Bank of Lonoke (Ark.) 69 S. W. 580.

73. Cunningham v. Holley (C. C. A.) 121 Fed. 720.

74. Berry v. Rood, 168 Mo. 316.

75. Limited corporation—City Item Co-Op. Printing Co. v. Phoenix Furniture Concern, 108 La. 258.

76. Kroegher v. Calivada Colonization Co. (C. C. A.) 119 Fed. 641.

77. Morgan v. Gibian. 115 Ga. 145.

78. Tichenor v. Williams Block Pavement Co., 116 Ga. 303.

79. Cumberland Lumber Co. v. Clinton Hill Lumber & Mfg. Co. (N. J. Ch.) 54 Atl. 450.

80. Gold v. Paynter (Va.) 44 S. E. 920.

81. Such facts are not ground for plea in abatement—Carnahan v. Campbell, 158 Ind. 226.

82. Berry v. Rood, 168 Mo. 316.

83. Cumberland Lumber Co. v. Clinton Hill Lumber & Mfg. Co. (N. J. Ch.) 54 Atl. 450.

84. Kroegher v. Calivada Colonization Co (C. C. A.) 119 Fed. 641.

brought at the order of court, though costs went to persons whom it is sought to charge as stockholders.[85]

Interest.—Assessments may draw interest, the claim being liquidated by the fact thereof.[86]

The trustee in bankruptcy of a corporation has the sole right to sue to recover unpaid stock subscriptions.[87]

(§ 16) *F. Personal liability of stockholders for debts of the corporation and remedies. What law governs.*[88]—Stockholders' liabilities are governed by the law of the state of incorporation,[89] and where the courts of a corporation's domicile have determined the amount owing by stockholders under the local laws rendering them liable to creditors in excess of their stock, the liabilities will be enforced by the courts of a foreign state as to stockholders in their jurisdiction.[90] The statute of limitations of New York is applicable to an action against a resident stockholder of a Kansas corporation to enforce his liability as created by the laws of Kansas.[91] In Maine it is held that if the same statute of a foreign state which fixes the liability also fixes a limitation, such limitation controls, otherwise where the limitation is only in a general statute of a foreign state.[92] Where the action is in a federal court, it may be sustained on a showing of the existence of the jurisdictional facts requisite under the statutes of the state.[93] The right of a receiver to maintain an action extra-territorially to enforce stockholders' liability in the federal courts on the principles of comity will not be denied for the reason that the stockholders who were also creditors have not been served with process, and have not intervened for the purpose of setting off their debts, where the statute governing the action in the state of incorporation provides that notice may be by publication.[94]

Common-law liability.—There is no common-law liability of stockholders to creditors.[95]

Statutory provisions.[96]—A full liability corporation organized under the business corporation law is controlled by a provision of the stock corporation law which provides that no stockholder shall be personally liable for a debt not payable within a certain time or unless action is brought against the corporation within such time and that no action shall be brought against a stockholder more than two years after he ceases to be one,[97] though see contra.[98] The statutory liability of stockholders for more than the amount of their stock is not intended as a penalty

85. Cumberland Lumber Co. v. Clinton Hill Lumber & Mfg. Co. (N. J. Ch.) 54 Atl. 450.

86. Assessment on stockholders of an insolvent savings bank—May v. Ullrich (Mich.) 92 N. W. 493.

87. 30 Stat. U. S. 565, § 70—Falco v. Kaupisch Creamery Co., 42 Or. 422, 70 Pac. 286.

88. What law governs enforcement of stockholder's liability, see also "Foreign Corporations."

89. McClure v. Paducah Iron Co., 90 Mo. App. 567; Pulsifer v. Greene, 96 Me. 438.

90. Pfaff v. Gruen (Mo. App.) 69 S. W. 405.

91. Code Civ. Proc. N. Y. § 394—Platt v. Hungerford, 116 Fed. 771.

92. Pulsifer v. Greene, 96 Me. 438.

93. Action at law by a creditor against the stockholder of an insolvent corporation—Atlantic Trust Co. v. Osgood, 116 Fed. 1019.

94. Hale v. Calder, 113 Fed. 670.

95. Parkhurst v. Mexican S. E. R. Co., 102 Ill. App. 507.

96. The power to enforce stockholder's liabilities given to assignees and receivers by Laws 1897, c. 341, is not repealed by Laws 1899, c. 272—Somers v. Dawson, 86 Minn. 42. A right of action under Laws 1892, c. 688, § 54, is expressly saved under Laws 1901, c. 354, § 5, and if it be assumed that the effect of such chapter was to repeal section 54, the right of action was preserved by Laws 1892, c. 677, § 31, which provides that the repeal of a law shall not affect existing rights and liabilities—Lancaster v. Knight, 74 App. Div. (N. Y.) 255.

97. Heydecker's Gen. Laws, p. 3502, c. 41, § 6, p. 2920, c. 36, §§ 54, 55, p. 2864, c. 35, § 33—Adams v. Wallace, 81 N. Y. Supp. 848.

98. Action against a stockholder of a full liability corporation organized under Laws 1900, c. 567, § 6, does not fall within the limitation of two years prescribed by the stock corporation law, Laws 1900, c. 564, § 55—Adams v. Slingerland, 39 Misc. (N. Y.) 638.

nor as an asset of the corporation.[99] An amendment of a statute relating to the enforcement of stockholders' liability so as to allow the enforcement of such liability in an additional action if there are parties against whom recovery cannot be had in the first action is applicable to actions pending at the time of its enactment.[1] Where laws relating to the personal liability of stockholders are amended but existing rights are saved, claims due before the enactment of the amendment are enforceable under the statute as it stood prior thereto.[2]

For what debts liable.—A stockholder who has transferred his stock is liable for a sum becoming due under a lease existing at the time of his transfer, though the instalment of rent had not then matured.[3] The liability of a stockholder continues, though notes are renewed after the stockholder sells his stock, or accounts are thereafter closed by note.[4] The contingent liability arising from a corporation's guaranty of payment of a debt does not in itself create a debt rendering the holder a creditor, entitling him to impose individual liability on stockholders.[5] Under statutes rendering a stockholder, who has been unfaithful in the transaction of corporate business, liable for corporate debts, there must be a failure of care which may be attributed to incompetency or lack of business qualifications.[6] The shareholders become liable to the creditors of a corporation when they acquiesce in any arrangement by which property is taken at a fictitious value in payment for corporate stock. Actual fraud is not necessary.[7]

Ultra vires acts.—Where it is provided by statute that an individual liability of stockholders shall secure dues from corporations, ultra vires obligations incurred by the corporation are not included though the corporation itself cannot deny their validity.[8] Where a corporation incurs debts and acts outside of its statutory powers, the members are liable as a partnership.[9]

Liability on failure to file certificates or returns.[10]—A corporate charter is a grant not to a corporate body but to individuals who are named in the act and their successors who are the corporate body which they constitute, and such stockholders may shield themselves under the corporate character and name so long as the corporation observes conditions which are imposed by reference to general statutes, but when they in their corporate character fail to fulfill this duty they may be pursued again as individuals.[11] Though a creditor may have knowledge that the corporation is insolvent, the stockholders may nevertheless be liable individually in case of failure to file a statutory certificate of financial condition, and though the statute provides that notices shall not be necessary after an assignment for

99. Pfaff v. Gruen (Mo. App.) 69 S. W. 405.

1. McNaughton v. Ticknor, 113 Wis. 555.

2. Action at law for his individual benefit, under Laws 1892, p. 1841, c. 688, § 54, may be brought by a creditor whose claim was due before the enactment of laws 1901, p. 971, c. 354, making the creditor's remedy one in equity to enforce contribution—Lang v. Lutz, 83 App. Div. (N. Y.) 534.

3, 4. Hyatt v. Anderson's Trustee, 25 Ky. L. R. 132, 74 S. W. 1094.

5. McHale v. Moore (Kan.) 71 Pac. 522.

6. Evidence held insufficient to show unfaithfulness on the part of stockholders in a warehouse company under Gen. St. 1894, § 2600, subd. 3—Rice v. Madelia Farmers' Warehouse Co., 87 Minn. 398.

7. The measure of damages is the difference between the par value of the shares and the actual value of the property—McClure v. Paducah Iron Co., 90 Mo. App. 567.

8. Const. Kan. art. 12, § 2—Ward v. Joslin, 186 U. S. 142, 46 Law. Ed. 1093.

9. Debts contracted by a grange incorporated under act 1876, 2 Gen. St. p. 1644, in the transaction of a mercantile business—Henry v. Simanton (N. J. Ch.) 54 Atl. 153.

10. Gen. Laws 1896, c. 180, § 17, does not exclude from the operation of chapter 180, a corporation which by the terms of its charter is made subject to the provisions of chapter 155 and any amendment thereto, though chapter 155 has been repealed and 180 substituted for it—Starkweather v. Brown (R. I.) 55 Atl. 324.

11. Where it was intended to incorporate the provisions of Pub. St. 1882, tit. 19, cc. 152, 155, into the charter of a corporation, and such provisions imposed the duty of making returns as to the condition of the corporation on the corporation, the stockholders become liable on default of the corporation in such regard—Starkweather v. Brown (R. I.) 55 Atl. 201.

creditors and the corporation subsequently makes such an assignment.[12] On a proceeding by judgment creditors to enforce a penalty prescribed by statute on stockholders for failure to make returns, the residuary legatee of a stockholder cannot be made a party.[13] Where a contract by the corporation with an individual stockholder has been merged into a subsequent contract with a company of which the stockholder is the manager, the corporation stockholders cannot as against an action to enforce their individual liability for the amount due under the new contract urge as a defense that the individual stockholder had failed to pay for his stock so that no return could be made as required by a statute to relieve stockholders from liability for corporate indebtedness.[14]

Persons liable as stockholders.—Persons who allow stock to be issued to them and make no objection for many years may be regarded as stockholders and liable as such, though the regularity of the issue is subject to contest and they have paid no consideration.[15]

The transfer of stock in good faith to a responsible person releases liability.[16] The burden of proving that the transferee is responsible is on the stockholder,[17] and if to avoid liability he transfers to an insolvent who subsequently transfers to another who is also insolvent, the primary stockholder is not relieved from liability by the fact that he did not know of the insolvency of the last.[18] It may be shown that an assignment of their shares by stockholders was fraudulent and for the purpose of avoiding liability.[19] In case of a fraudulent transfer of stock in an insolvent corporation to an insolvent, for the purpose of escaping liability, a recognition of the transfer by the corporation will not relieve the original holder.[20]

Recognition of a subsequent transferee as a stockholder by the issuance of a new stock certificate and payment of dividends may operate as a waiver of by-laws requiring the transfer to be approved by the board of directors and that the transferee shall sign the by-laws.[21]

Creditors who do not file their claims within the statutory period after stock is assigned, are not aided by the fact that a creditor beginning his proceeding within the statutory limit asked leave to sue for himself and all other creditors, if there was no order allowing such a suit.[22]

Conclusiveness of judgment against corporation.—The fact that a judgment has been obtained against the corporation does not prevent the stockholder, when it is sought to enforce his individual liability, from showing that the obligation of the corporation was ultra vires.[23] In the United States courts it is held that the judgment is conclusive unless impeached for want of jurisdiction or for fraud.[24]

12. Gen. Laws, c. 180, §§ 11, 12—Elsbree v. Burt, 24 R. I. 322.

13. Bill to enforce a penalty imposed by chapter 155 of the Public Statutes of 1882, corresponding to Gen. Laws 1896, c. 180, p. 556—Starkweather v. Brown (R. I.) 55 Atl. 201.

14. Flather v. Economy Slugging Mach. Co., 71 N. H. 398.

15. Hecht v. Phenix Woolen Co., 121 Fed. 188.

16. Parkhurst v. Mexican S. E. R. Co., 102 Ill. App. 507.

17, 18. People's Home Sav. Bank v. Rickard (Cal.) 73 Pac. 858.

19. Lamson v. Hutchings (C. C. A.) 118 Fed. 321.

20, 21. People's Home Sav. Bank v. Rickard (Cal.) 73 Pac. 858.

22. No question of common interest was raised by the first suing creditor and the creditors were not so numerous that they could not have been brought in—Hyatt v. Anderson's Trustee, 25 Ky. L. R. 132, 74 S. W. 1094.

23. Under the Kansas Const. and Laws—Ward v. Joslin, 186 U. S. 142, 46 Law. Ed. 1093.

24. American Nat. Bank v. Supplee (C. C. A.) 115 Fed. 657. A judgment against a corporation fixing its liability as a stockholder in a bank is conclusive on its stockholders, and the power of the corporation to become a subscriber cannot be questioned by one of its stockholders when sued in another jurisdiction to enforce its statutory liability—Martin v. Wilson (C. C. A.) 120 Fed. 202.

In Michigan it is held that a judgment on a note is not conclusive but that the stockholders may show failure of consideration, and the judgment cannot be sustained because another judgment on a different claim for a greater sum might have been obtained.[25]

Exhaustion of remedy against corporation.—Under the Nebraska statute before a stockholder can be proceeded against, the creditor must reduce his demand to a judgment and exhaust the corporate property,[26] and the rule in the federal courts as to general creditors is the same.[27] Before the receiver may enforce the stockholder's liability in Kansas, he must first fix the amount needed to pay the corporate debts, by an action against the corporation and all resident stockholders.[28]

Necessity for a judgment and the return of an execution thereon unsatisfied may be removed if, in a proceeding for the dissolution of the corporation, all creditors are enjoined and restrained by final judgment from instituting and prosecuting any action against the corporation to enforce their claims.[29]

When liability accrues.—Under some statutes the liability on insolvency of the corporation does not become fixed until the enforcement of such liabilty is determined to be necessary and authority given therefor.[30]

Where the statute permits an action to be brought by creditors on dissolution. debts being left unpaid, maturity of the debts is not essential to an action.[31]

Where the liability becomes enforceable on suspension of business, the corporation is regarded as suspended where the business of the corporation has been stopped for a year, winding up has begun and directors' meetings are no longer held.[32] Suspension of business alone is sufficient.[33]

Limitations do not run in favor of stockholders until the deficiency of the corporate assets is determined and proceedings begun to collect such deficiency,[34] though under the Pennsylvania statute, the limitation against an action to enforce the stockholder's liability commences at the time the debt is due from the corporation.[35] The necessary administration of the corporate property while it is winding up its affairs is not a doing business suspending the statute of limitations.[36] The fact that proceedings are pending to administer the property of a corporation under an insolvency law of the state does not prevent the running of limitation against the right of action of creditors in another state to sue to enforce the statutory liabilities of stockholders.[37]

Who may sue.—Statutory provisions that on dissolution of a corporation the trustees shall be trustees for the creditors and stockholders, and shall collect and pay the outstanding debts do not prevent the appointment of a receiver of an existing insolvent corporation, and his authorization to enforce stockholder's liability.[38] The right of a receiver to sue in his own name to enforce a stockholder's liability given by an appointment and leave to sue under the statute of another

25. McBryan v. Universal Elevator Co. (Mich.) 89 N. W. 683.

26, 27. New Hampshire Sav. Bank v. Richey (C. C. A.) 121 Fed. 956.

28. Evans v. Nellis, 187 U. S. 271, 47 Law. Ed. 173.

29. Lang v. Lutz, 83 App. Div. (N. Y.) 534.

30. Hale v. Cushman, 96 Me. 148.

31. McHale v. Moore (Kan.) 71 Pac. 522.

32. Gen. St. 1899, § 1268—Jones v. Slonecker (Kan.) 71 Pac. 573.

33. Platt v. Hungerford, 116 Fed. 771.

34. Hale v. Cushman, 96 Me. 148.

35. Act April 29, 1874, §§ 14, 15; P. L. 73 amended Act April 17, 1876; P. L. 30—Bower v. Cyano Chemical Co., 20 Pa. Super. Ct. 33.

36. Gen. St. 1899, § 1268 provides that the right of action by corporate creditors accrues on suspension of business for a year —Jones v. Slonecker (Kan.) 71 Pac. 573.

37. Federal court applying the Minnesota decisions with regard to local corporations to a New York action and declaring a claim barred which was not brought within six years after insolvency—Hilliker v. Hale (C. C. A.) 117 Fed. 220.

38. 1 Ball. Codes & St. § 4274; 2 Ball. Ann. Codes & St. § 5456—New York Nat. Exch. Bank v. Metropolitan Sav. Bank, 28 Wash. 553, 68 Pac. 905.

state may be recognized in a federal court.[39] Leave of court is not necessary to allow a receiver appointed at the suit of a judgment creditor to enforce a stockholder's liability.[40] The receiver is not authorized to enforce a stockholder's liability, where such liability is, by the statute which creates it, made not a general asset of the corporation, but one recoverable only for the individual benefit of the creditor.[41]

Defenses.[42]—A discharge under the national bankrupt act does not release stockholder's individual liability.[43] The stockholder's liability may be discharged by a payment to the receiver, though the receiver has no power to enforce the same.[44] As against an attempt to enforce a stockholder's individual liability to creditors, an indebtedness due from the corporation cannot be set off,[45] but payment of a note of the corporation may be set up as an equitable defense though the note has not been formally assigned to the stockholder,[46] or an assignment of a judgment against the corporation in favor of a third party for more than the amount due on the stockholder's share.[47]

Pleading.—If in an action by judgment creditor only the judgment and the fact of nonsatisfaction is averred, nil debit is a proper plea.[48] The fact that a similar action is pending must be taken advantage of in an action to enforce stockholder's liability by answer or special demurrer.[49] Though payment has been pleaded as an equitable set-off, an amendment alleging equitable ownership of the debt alleged to be paid is permissible.[50] Where a stockholder desires to controvert the amount of the debts or the time at which they were created in a proceeding to enforce his additional liability, he must answer the creditor's petition and he cannot raise the objections by mere exception to the commissioner's report.[51]

Procedure.—The statutory method of enforcing the liability of stockholders must be followed.[52] On reversal of a proceeding to enforce a stockholder's liability under one section of the statute, the creditor may pursue the remedy offered by another section.[53] In Illinois, the liability of resident stockholders of a foreign corporation which is insolvent cannot be determined on a creditor's bill.[54] Under certain statutes, all stockholders must be made parties though they cannot be

39. Burr v. Smith, 113 Fed. 858.

40. The other creditors need not be brought in nor an allegation made that the suit is for their benefit together with such other creditors as may choose to come in—McBryan v. Universal Elevator Co. (Mich.) 89 N. W. 683.

41. Gen. St. Kan. 1868, §§ 32, 44—Evans v. Nellis, 187 U. S. 271, 47 Law. Ed. 173.

42. Compromise of proceedings to enforce stockholder's liability held not to include liability on stock transferred by him to an insolvent—People's Home Sav. Bank v. Rickard (Cal.) 73 Pac. 858.

43. Liability under Gen. Laws, c. 180—Elsbree v. Burt, 24 R. I. 322.

44. Strauss v. Denny, 95 Md. 690.

45. Minnesota corporation—Burget v. Robinson (C. C. A.) 113 Fed. 669; Hale v. Calder, 113 Fed. 670.

46. Kansas corporation (St. 1883, c. 223, § 14; Rev. Laws, c. 173, § 28)—Sargent v. Stetson, 181 Mass. 371.

47. Evidence held sufficient to show that the assignment was prior to the action—American Freehold Mortg. Co. v. Brower (Miss.) 32 So. 906.

48. Elsbree v. Burt, 24 R. I. 322.

49. Laws 1897, c. 341—Somers v. Dawson, 86 Minn. 42.

50. Action to enforce stockholder's liability in foreign corporation—Rev. Laws, c. 173, § 34—Sargent v. Stetson, 181 Mass. 371.

51. Hyatt v. Anderson's Trustee, 25 Ky. L. R. 132, 74 S. W. 1094.

52. The remedy by motion for an order awarding execution against stockholders and corporations for the collection of corporate judgments cannot be invoked where the record does not show that the liability existed prior to the taking effect of Laws 1898, c. 10, § 14, p. 54, repealing such remedy and providing for a receivership proceedings—Henley v. Stevenson (Kan.) 72 Pac. 518.

53. After reversal of an action under Gen. St. 1889, par. 1192, to charge a stockholder with the amount of the judgment on which an execution has been returned unsatisfied, a creditor may proceed under Gen. St. 1899, par. 1204, allowing a stockholder to be sued on a corporate indebtedness when the corporation has suspended business for more than one year, and the fact that the notes on which the claim is based are placed in judgment against the corporation pending such action, does not prevent a recovery—Thomas v. Remington Paper Co. (Kan.) 73 Pac. 909.

54. Parkhurst v. Mexican S. E. R. Co., 102 Ill. App. 507.

served,[55] but if by statute a stockholder is severally and individually liable he cannot insist that his co-stockholders be joined.[56] In Kansas all stockholders in the jurisdiction of the court must be made parties.[57] In an action in Missouri under the Ohio statutes all stockholders resident in Missouri should be joined.[58]

(§ 16) *G. Rights and remedies of creditors against directors and other officers.*—Receivers of an insolvent corporation will not be directed to enforce liabilities of promoters, officers, and directors until the amount of deficiency has been ascertained on administration of visible assets.[59] Directors are not personally liable for the expenses of a receiver appointed in an action by an insolvent corporation for the purpose of reaching particular property.[60] The trustees in bankruptcy can enforce such remedies against officers and stockholders as accrue to all creditors, or distinct classes, not such as are applicable to particular creditors only.[61]

Liability for debts contracted before record of certificate of organization.—Liabilities imposed on directors and officers for debts contracted in the name of the corporation, before record of certificate of complete organization, extend to debts contracted with them as officers of the corporation de facto. Under such statutes a debt is regarded as made by the officers, if they are in any way connected with it or approve or direct it.[62]

Special charter liabilities.—Where the charter of a corporation makes the directors liable for debts incurred during their tenure of office, an action to enforce such liability may be maintained by one creditor in behalf of all, all directors who are liable must be joined, directors who cannot be personally served must be served by publication, and if the corporation has been dissolved, a receiver who has taken possession of the assets must be made a party defendant.[63]

Liability for misappropriation of funds.—A constitutional provision fixing a liability on directors of corporations for misappropriation of funds is not a denial of equal protection of laws in the meaning of the 14th amendment of the United States constitution.[64] Such a statute is self executing.[65] Where directors by engaging in a business outside the legitimate powers of the corporation waste or lose the corporate assets, they are liable to creditors to the extent of the assets thus lost by them.[66] Where a managing officer of a corporation and its president are shown to have received assets of the corporation, they are liable to account to judgment creditors of the corporation on a creditors' bill.[67] The directors of a corporation cannot be held personally liable by a creditor for the transfer of its assets, unless by his bill it is shown that they have received the proceeds of such assets.[68] The directors of a corporation cannot be held individually liable for mere participation in an ultra vires act without any averment or charge that they individually in any way profited by the act or without a showing of fraud.[69] Damages for waste of corporate property may be recovered by the receiver in an equitable proceeding for an accounting against the directors.[70] A proceeding in equity

55. Rev. St. Ohio, § 3260 amended 1894—Middletown Nat. Bank v. Toledo, A. A. & N. M. Ry. Co., 113 Fed. 587.

56. Pulsifer v. Greene, 96 Me. 438.

57. Action under Laws 1898, c. 10, to collect a judgment against the corporation from the stockholders—Waller v. Hamer, 65 Kan. 168, 69 Pac. 185.

58. Pfaff v. Gruen (Mo. App.) 69 S. W. 405.

59. Land Title & Trust Co. v. Asphalt Co., 121 Fed. 587.

60. Ephraim v. Pacific Bank, 136 Cal. 646, 69 Pac. 436.

61. Bowker v. Hill, 115 Fed. 528.

62. Rev. St. c. 32, § 18—Seymour v. Richardson Fueling Co., 103 Ill. App. 625.

63. Bauer v. Parker, 82 App. Div. (N. Y.) 289.

64. Winchester v. Howard, 136 Cal. 432, 64 Pac. 692, 69 Pac. 77.

65. Const. art. 12, § 3—Winchester v. Howard, 136 Cal. 432, 64 Pac. 692, 69 Pac. 77.

66. Dietrich v. Rothenberger, 25 Ky. L. R. 338, 75 S. W. 271.

67. Benedict v. T. L. V. Land & Cattle Co. (Neb.) 92 N. W. 210.

68, 69. Force v. Age-Herald Co., 136 Ala. 271.

lies at the instance of the receiver for a discovery and accounting, where the directors have acted wrongfully in wasting and misappropriating the corporate property causing it to become apparently insolvent.[71] Causes of action against directors for their fraudulent use of corporate property may be joined by the receiver though their participation and liability is not equal.[72] A money judgment for the amount of debts improperly paid may be rendered on a complaint which seeks the recovery of corporate bonds and stock sold a director or their value.[73]

Where from the articles of incorporation of a mutual insurance company a trust appears in the directors and officers, it will be regarded as an express trust preventing the running of the statute of limitations as against creditors and the personal representatives of the officers and directors are in no more favorable position.[74] An action for wrong-doing of directors is not necessarily begun against them while they are in office.[75]

Where the directors of a corporation have wrongfully made payments to the directors of the second corporation in purchase of such directors' rights in the second corporation, they cannot plead, as against an action against them to recover a balance remaining unsatisfied, a release which the receiver had executed to the directors of such second corporation in compromise of a proceeding which he brought against such directors originally to recover the amount paid by the first directors to them.[76]

Liability for creation of excessive debt.—In order to hold directors personally liable for an excessive debt created, all the conditions under the statute must be established.[77] If the statute make the officers personally liable for debts in excess of capital stock, there is no liability unless such excess exists at the time suit is brought.[78]

Liability for loans to stockholders.[79]—In a proceeding to enforce the personal liability of a director under the Massachusetts statute for debts incurred between the time of a loan to the stockholder and the repayment thereof, a release executed by plaintiff's creditor in assignment proceedings cannot be pleaded as against a default judgment obtained by the creditor against the corporation, and a director is not aided by the fact that he was absent from the state during the action at law, since that is not enough to show that he was prevented from defending by fraud or accident, nor is he aided by the corporation's failure to plead the release. He has no superior equity than the creditor and he cannot collaterally attack the judgment.[80] The liability imposed by such statute is not a debt within the meaning

70, 71, 72. Mabon v. Miller, 81 App. Div. (N. Y.) 10.

73. Payment was from the proceeds of the sale—Graham v. Carr, 130 N. C. 271.

74. Construing Rev. St. 1898, § 2081, subd. 5, defining express trusts—Boyd v. Mutual Fire Ass'n (Wis.) 90 N. W. 1086.

75. Boyd v. Mutual Fire Ass'n (Wis.) 90 N. W. 1086.

76. The release ran to such directors and contained a provision that its execution should not affect any organization of the receiver against any person not named therein—Gilbert v. Finch, 173 N. Y. 455.

77. In a proceeding under Stock Corporation Law, § 24, Laws 1890, p. 1070, c. 564, as amended by Laws 1892, p. 1830, c. 688, which makes directors of a corporation consenting to the creation of an indebtedness not secured by mortgage in excess of its paid up capital stock personally liable, there must be evidence offered at the trial to establish that the indebtedness in excess of the paid up capital stock was not secured by mortgage—Irving Nat. Bank v. Moynihan, 84 App. Div. (N. Y.) 301.

78. No liability arises where, before action is brought, assignees for creditors of the corporation have, by the payment of dividends, reduced the debts to an amount less than the capital stock—Flint v. Boston Woven Hose & Rubber Co., 183 Mass. 114.

79. Evidence held to show assent to a loan to a stockholder within the meaning of Pub. St. 1882, c. 106, § 60, rendering a director personally liable for debts contracted between the time of such loan and its re-payment—Old Colony Boot & Shoe Co. v. Parker-Sampson-Adams Co. (Mass.) 67 N. E. 870.

80. Old Colony Boot & Shoe Co. v. Parker-Sampson-Adams Co. (Mass.) 67 N. E. 870.

of the laws relating to insolvency or bankruptcy, and a discharge in bankruptcy is not a bar to an action to enforce such liability.[81]

Unlawful payment of dividends.—Where by statute the directors are liable to the corporation and its creditors in case they pay dividends from the capital, such liability exists though the corporation does not dissolve or become insolvent;[82] such a statute is not regarded as penal and may be enforced in equity.[83] The fact that such dividends induced complainants to purchase their stock may be considered.[84] Under such statute, however, the action being for the benefit of the corporation, stockholders may maintain it though they retain the dividends or though the stock has been transferred to holders who have not received any of the dividends.[85]

Unless it is shown that in the exercise of ordinary diligence directors should have known that at the time a dividend was voted and paid the company was insolvent or that they might have known that an indebtedness greater than the capital stock was being created, they cannot be held liable.[86] Where the statute imposes a liability on directors in behalf of creditors for wrongful payment of dividends when the capital stock has not been fully paid in, when they are paid other than from the net profits, or when the corporation is insolvent or in danger thereof, there being no reason to believe that the capital will not thereby be diminished, the liability of the directors is not affected by the fact that the unpaid capital is subsequently collected and liability is incurred by payment under either of the provisions, and a director need not have taken an actual part in the payment, but need only have consented thereto and accepted the benefits. The giving of a note does not constitute actual payment under such statute.[87] The directors who have wrongfully authorized dividends are jointly and severally liable to the creditors as a class, but not as individuals. Individual common-law liabilities of directors are not included.[88]

In an action against a director, there need not be a specific allegation that the company is a stock corporation, if facts are set forth so that such fact appears.[89] Defendants who are not served must be brought in though the action may be maintained against the defendant who was served or the defendants not served have a good defense.[90]

Liability as to certificate of payment of stock.—A president who under the advice of counsel makes a certificate that the capital stock has been paid in does not become personally liable for the debts of the corporation, his act being in good faith.[91] Where a false certificate has been given, a creditor may be entitled

81. Pub. St. 1882, c. 106, § 60; Bankruptcy Act 1898, § 17—Old Colony Boot & Shoe Co. v. Parker-Sampson-Adams Co. (Mass.) 67 N. E. 870.

82. Pub. Laws 1896, c. 185, § 30—Appleton v. American Malting Co. (N. J. Law) 54 Atl. 454. The lower court held that the stockholders could not compel the directors to repay the amount of such dividends to the corporation unless the assets were insufficient to pay the corporation creditors (Sess. Laws 1896, c. 185, § 30)—Siegman v. Maloney, 63 N. J. Eq. 422.

83. Appleton v. American Malting Co. (N. J. Law) 54 Atl. 454. See contra decision of lower court—Siegman v. Maloney, 63 N. J. Eq. 422.

84. Appleton v. American Malting Co. (N. J. Law) 54 Atl. 454.

85. Siegman v. Maloney, 63 N. J. Eq. 422; Appleton v. American Malting Co. (N. J. Law) 54 Atl. 454.

86. Evidence held insufficient to show such knowledge—Chick v. Fuller (C. C. A.) 114 Fed. 22.

87. Rev. St. 1898, § 1765—Williams v. Brewster (Wis.) 93 N. W. 479.

88. Williams v. Brewster (Wis.) 93 N. W. 479.

89. Allegations that company was organized under the General Manufacture act of 1848 and statement of the object is sufficient—Ginsburg v. Von Seggern, 172 N. Y. 662.

90. Action to enforce statutory liability of directors—Geoghegan v. Luchow, 75 App. Div. (N. Y.) 581.

91. Pub. St. c. 106, § 46 provides for such certificate, section 60 makes an officer knowingly signing a false certificate liable for corporate debts—International Paper Co. v. Gazette Co., 182 Mass. 578.

to a remedy, though he was not deceived thereby.[92] If a statute impose liability to creditors on failure of the directors to make and file a certificate of the fully paid capital stock within a specified time, no extension of time can be granted.[93]

Liability for failure to file reports.[94]—Statutes making a notice essential to the enforcement of the liability of a director to creditors on account of failure to make annual reports do not apply to pending actions.[95] The liability of an officer for a false report under the New York law is not penal and subject to the restrictions provided by statute as to the place of trial of actions to recover a penalty or forfeiture imposed by statute.[96] The duty to make an annual report as to financial condition is not removed by an assignment for the benefit of creditors,[97] or a mere discontinuance of business.[98] A co-director who is a creditor may nevertheless sue another director.[99] The debt need not be one which was to have been paid within a year.[1] A judgment need not first be obtained and execution levied against the corporation.[2] Where it is shown that plaintiff did not pay the debts declared on except as agent for a third person, he cannot enforce personal liability of directors for failure to file an annual report.[3] Renewal of a note given for a corporate debt by the corporation does not toll a cause of action provided by statute against the corporate president for failure to make a certificate to specified facts, and the limitation runs from the maturity thereof.[4]

A director's personal liability resulting from failure to file the required annual report is not affected by an interlocutory judgment against a person seeking to enforce such liability granting an accounting against such person as trustee in the results of which the director was to share proportionately.[5]

Where it is sought to hold a director personally liable for failure to file an annual report, the director must prove a waiver and the absence of a waiver need not be specifically found.[6] It is not sufficient that a statement be filed which is verified by the president and vice-president.[7] It is not sufficient to state that the assets do not exceed a certain sum.[8] Defendant may complain of plaintiff's failure to bring in other defendants, though he has agreed to stipulations extending his time to answer.[9]

CORPSES AND BURIAL.

Property in bodies.—There may be a recovery for injuries to a corpse.[10]

92. Heard v. Pictorial Press, 182 Mass. 530.

93. Gen. St. § 252—Cannon v. Breckenridge Mercantile Co. (Colo. App.) 69 Pac. 269.

94. The filing of articles in the office of the secretary of state and the calling of a meeting at which officers were elected and a contract authorized which was not completed prior to Jan. 1, 1900, does not render the directors personally liable on failure to file an annual report in January, 1900, the corporation articles not having been filed in the office of the county clerk and a de facto existence not having been established—Emery v. De Peyster, 77 App. Div. 65, 12 N. Y. Ann. Cas. 218.

95. Laws 1899, c. 354, § 34—Shepard v. Fulton, 171 N. Y. 184; Staten Island Midland R. Co. v. Hinchliffe, 170 N. Y. 473.

96. Construing Stock Corporation Law, § 31 and Code Civ. Proc. § 983—Hutchinson v. Young, 80 App. Div. (N. Y.) 246.

97. Stock Corporation Law, § 30—Horrocks Desk Co. v. Fangel, 71 App. Div. (N. Y.) 313.

98. Liability on account of a failure to make an annual report of financial condition as required by statute is not removed by the fact that a water company discontinues business, but nevertheless maintains an action to establish an exclusive right to supply water to a village which has been infringed by the erection of a public plant—Stevenson v. Cowan, 84 App. Div. (N. Y.) 135.

99, 1, 2. Ginsburg v. Von Seggern, 172 N. Y. 662.

3. Staten Island Midland R. Co. v. Hinchliffe, 170 N. Y. 473.

4. Sanders & Hill Dig. Ark. § 1347—Continental Nat. Bank v. Buford (C. C. A.) 114 Fed. 290.

5. Ginsburg v. Von Seggern, 172 N. Y. 662.

6. Laws 1899, c. 354—Shepard v. Fulton, 171 N. Y. 184.

7. Rhodes v. Hinds, 79 App. Div. (N. Y.) 379.

8. Lilienthal v. Betz, 172 N. Y. 643.

9. Geoghegan v. Luchow, 75 App. Div. (N. Y.) 581.

10. Relatives not allowed to recover for mental anguish caused by witnessing body

Burials.—The next of kin of a deceased unmarried person has the right to the custody of the body and to decide upon its place of burial,[11] and a waiver of this right can only be established by most satisfactory evidence of free and voluntary intent to that end.[12]

An undertaker may be liable in exemplary damages for imposition in substituting a coffin where the circumstances indicate willfulness and disregard of rights and feelings of relatives paying therefor.[13]

Removal of bodies.—The court will consent to the removal of a body only where reasons given therefor are substantial and meritorious.[14] The New York act, allowing removal of the body of the widow of the lotowner by consent of the heirs, is limited to lots set apart to particular families, and does not authorize removal of such body from an individual grave in an undivided portion of the cemetery, without the consent of the corporation.[15] The membership corporation law of New York allowing the removal of bodies from a cemetery owned by a cemetery corporation as defined in the act confers no authority on a court to grant permission to remove a body from a cemetery controlled by a corporation, created by a special law and not repealed by the corporation law.[16]

Graves.—The fact that a widow may not remove the remains of her husband will not operate to deny her access to the plot for purposes of adornment and care.[17]

Crimes against sepulture.—An indictment for disturbing a grave and removing a dead body should state the name of the body,[18] or the reason for not stating that fact should be averred.[19]

COSTS.

§ 1. Scope, Nature and Definition.
§ 2. Power to Award.
§ 3. Security for Costs; Forma Pauperis.
§ 4. To Whom and Against Whom.
§ 5. Right Dependent on Amount in Suit.
§ 6. Character of Litigation.—A. Equity. B. Appeal or Error. C. Justices and Municipal Courts.
§ 7. Amount and Items.
§ 8. Procedure to Tax Costs.
§ 9. Enforcement and Payment.

§ 1. *Scope, nature, and definition.*—By the term costs as here used is meant all statutory allowances made in actions to parties or their attorneys, guardians ad litem, or other officers of the court, allowances for disbursements in the action, and allowances of statutory sums as "costs" as well as the taxation of fees in the cause.[1]

§ 2. *Power to award costs.*—Costs are not recoverable at common law.[2] Courts of equity have power to award costs.[3] In proceedings in personam, the court is without power to award costs against the defendant where jurisdiction of

thrown out of wagon by collision with train where body was not injured—Hockenhammer v. Lexington & E. R. Co., 24 Ky. L. R. 2383, 74 S. W. 222.

11, 12. McEntee v. Bonacum (Neb.) 92 N. W. 633, 60 L. R. A. 440.

13. Substitution of cheap pine box too small to decently contain remains, for suitable coffin paid for by relatives of one dying of smallpox—J. E. Dunn & Co. v. Smith (Tex. Civ. App.) 74 S. W. 576.

14. Want of sufficient burial space might have been foreseen—Smith v. Shepherd (N. J. Ch.) 54 Atl. 806.

15. In re Cohen, 76 App. Div. (N. Y.) 401.

16. In re Owens, 79 App. Div. (N. Y.) 236.

17. Smith v. Shepherd (N. J. Ch.) 54 Atl. 806.

18. Williamson v. State (Tex. Cr. App.) 72 S. W. 600.

19. Leach v. State (Tex. Cr. App.) 72 S. W. 600.

1. Costs paid as an element of damages, see Damages.

Assessment of expenses of eminent domain proceedings as an element of damage, see Eminent Domain.

Commissions, etc., paid as compensation to Executors and the like, see Estates of Decedents; Trusts; Receivers, etc.

2. Price v. Clevenger (Mo. App.) 74 S. W. 894.

3. And in an action on a foreign decree it is not necessary to plead the statute allowing costs. Davis v. Cohn, 96 Mo. App. 587.

the person had not been obtained.[4] A general prayer for relief is broad enough to authorize the allowance of costs.[5]

§ 3. *Security for costs and proceeding in forma pauperis.*—Questions concerning the giving of and the right to demand security for costs being governed by various statutory regulations will be shown in the footnotes,[6] nonresidence of the party being generally ground for requiring security.[7] If the required security is not given,[8] or if the bond given is not in conformity with the statute, the complaint will be dismissed,[9] or the court may compel the filing of security where it was not filed before the commencement of the action.[10]

It cannot be conclusively presumed that the clerk approved the security.[11]

A party may sue or defend,[12] or appeal in forma pauperis,[13] whether residents or nonresidents.[14] The order permitting plaintiff infant to sue in forma pauperis must provide that the attorney prosecute without compensation.[15]

§ 4. *To whom and against whom award should be made. A. On termination of actions.*—The general rule is that the prevailing party is entitled to costs of course,[16] but they can be charged only against parties to the record.[17] The de-

4. On dismissal of a petition in bankruptcy for want of jurisdiction the court cannot award costs against the debtor—In re Williams, 120 Fed. 34.

5. Saunders v. King, 93 N. W. (Iowa) 272.

6. A school district is within Code Civ. Pro. § 1058 exempting counties and cities from giving security—Mitchell v. Board of Education, 137 Cal. 372, 70 Pac. 180. Code Civ. Pro. § 3268 requiring assignees in bankruptcy to give security is mandatory—Joseph v. Raff, 75 App. Div. (N. Y.) 447. An action to recover preferences within four months of the proceedings in bankruptcy is not within the section—Kronfeld v. Liebman, 78 App. Div. (N. Y.) 437. Code Civ. Pro. § 3271 does not include trustees in bankruptcy—Kronfeld v. Liebman, 78 App. Div. (N. Y.) 437. Security should have been required where the administrator's complaint in an action under Laws 1902, c. 600, fails to state a cause of action.—Gmaehle v. Rosenberg, 80 App. Div. (N. Y.) 541. In chancery security may be ordered after answer or even after vacation of a decree entered (Code, art. 16, § 152) —Watson v. Glassie, 95 Md. 658. Liability of attorneys as indorsers of writ by nonresident plaintiffs—Johnson v. Sprague, 183 Mass. 102. Security for costs cannot be required of contestant of a will—In re Scott's Will, 80 App. Div. (N. Y.) 369. Merely because the defendant is the committee of an insane person is not ground for requiring plaintiff to give security for costs. Code Civ. Pro. § 3271 provides that when the plaintiff is the committee the defendant may require security—Kelly v. Kelly, 77 App. Div. (N. Y.) 519. On appeal from a justice's court appellant may be required to give security for costs—State v. Edwards, 109 La. 210.

7. Under Wis. Rev. St. 1898, § 2942 it is discretionary to order security. Discretion held properly exercised though the application was based on §§ 2943 et seq. under which it could not have been ordered—Colbeth v. Colbeth (Wis.) 93 N. W. 829.

8. Colbeth v. Colbeth (Wis.) 93 N. W. 829.

9. Meade County Bank v. Bailey, 137 Cal. 447, 70 Pac. 297.

10. The statute requires a filing of security before commencement of the suit—Carrier v. Missouri Pac. Ry. Co. (Mo.) 74 S. W. 1002.

11. Therefore parol evidence is admissible to show that it was not in fact approved—Little v. State (Ala.) 34 So. 620.

12. Leave to sue in forma pauperis will not be granted where the action is prosecuted under a valid contract for a contingent fee—Feil v. Wabash R. Co., 119 Fed. 490. Security may be required from one suing in forma pauperis on his subsequent removal from the state (Shan. Code, § 4928, Am'd Oct. 1901, c. 126)—Southern Ry. Co. v. Thompson (Tenn.) 71 S. W. 820. That the guardian ad litem, not the parent of the infant plaintiff, is responsible is not ground for refusing leave—Muller v. Bammann, 77 App. Div. (N. Y.) 212. Otherwise if he is the parent—Sumkow v. Sheinker, 84 App. Div. (N. Y.) 463. Contra, Gallagher v. Geneva, W., S. F. & C. L. Traction Co., 39 Misc. (N. Y.) 637. A false showing of poverty may result in a dismissal if properly brought to the court—Woods v. Bailey, 122 Fed. 967.

13. Alexander v. Morris (Tenn.) 71 S. W. 751. The required affidavit must be filed in the lower court before the record is transmitted—Smith v. State, 117 Ga. 16.

14. Carrier v. Missouri Pac. Ry. Co. (Mo.) 74 S. W. 1002.

15. Code Civ. Pro. § 460—Sumkow v. Sheinker, 84 App. Div. (N. Y.) 463.

16. Spencer v. Mungus (Mont.) 72 Pac. 663; Decker & St. Louis & S. Ry. Co., 92 Mo. App. 50. Trespass on realty. Finding of jury not guilty and on issue of title in plaintiff's favor; plaintiff held not entitled to costs—Hill v. McMahon, 81 App. Div. (N. Y.) 324. An administrator who is unsuccessful in a personal action against the estate, is within the rule—Holburn v. Pfanmiller's Adm'r, 24 Ky. L. R. 1613, 71 S. W. 940. Where the claim for damages under the civil damage act brought the action within the jurisdiction of a court of record on recovery plaintiff is entitled to costs—Purvis v. Segar (Mich.) 93 N. W. 261. Applied to drainage proceedings—In re Bradley, 117 Iowa, 472. Applied to proceedings to establish highway—Wilhite v. Wolfe, 90 Mo. App. 18. Applied to an action to recover a reward offered, several claimants intervening and the reward being deposited in court—Kinn v. First Nat. Bank (Wis.) 95 N. W. 969. Applied to a proceeding by a person

fendant is the prevailing party on counts dismissed or abandoned,[18] and the court may award costs against a successful plaintiff where he unnecessarily multiplied the actions,[19] or they may be allowed defendant's attorney on settlement of the action between the parties.[20] Costs cannot be allowed against the United States as a party,[21] and in actions relating to official duties they should not be charged against the officer where it is not shown that he acted with gross negligence, in bad faith, or with malice.[22]

(§ 4) *B. In interlocutory or special proceedings,* as on motions[23] relating to the amendment of pleadings,[24] or to strike the cause from the short-cause calendar, costs are discretionary.[25] Generally they will be charged against the party whose fault occasioned the motion.[26] In special proceedings costs are generally statutory.[27]

(§ 4) *C. Several co-parties.*—Each defendant who answered separately is entitled to the statutory costs on judgment going against plaintiff,[28] and on a joint judgment against several defendants, the costs should be divided,[29] but a defendant should not be charged with the costs of parties unnecessarily made defendant.[30]

(§ 4) *D. Parties in special capacity or qualified interest.*—Whether an executor shall be personally charged with costs rests within the court's discretion,[31] and it is proper to so charge him if his misconduct occasioned the action,[32] as where he unmeritoriously contests a claim against the estate,[33] or where he made his ac-

adjudged a lunatic to be discharged from the committee allowing the latter costs on adverse decision—In re Larner, 75 App. Div. (N. Y.) 509.

Applied to proceeding by a remonstrant wherein he obtained a revocation of a liquor license—Bachman v. Inhabitants of Phillipsburg, 68 N. J. Law, 552.

17. Where executors abandoned petition for probate and filed a subsequent petition, contestants on the first proceedings and not parties to the second cannot be charged with costs on the admission of the will to probate—Woodall v. McLendon (Ala.) 34 So. 406.

18. Edwards v. Missouri, K. & T. Ry. Co., 97 Mo. App. 103.

19. Kreiger v. Gosnell, 24 Ky. L. R. 1095, 70 S. W. 683.

20. Plaintiff's attorney refused to discontinue and defendants' attorney being compelled to answer and place cause on calendar—Himberg v. Rogers, 40 Misc. (N. Y.) 190. Costs belong to the attorney—Adams v. Niagara Cycle Fittings Co., 108 N. Y. St. Rep. 485.

21. United States v. Warren (Okl.) 71 Pac. 685.

22. O'Connor v. Walsh, 83 App. Div. (N. Y.) 179.

23. It is error to charge opponent on an appeal to the favor of the court as where a city asked to have a judgment in condemnation vacated because prematurely entered —Fargo v. Keeney, 11 N. D. 484. Amount as condition of opening default judgment—Randall v. Shields, 80 App. Div. (N. Y.) 625. On denial of a motion for an injunction $10 costs only can be allowed—Cotusa Parrot Min. Co. v. Barnard (Mont.) 72 Pac. 45.

24. All costs and disbursements should be allowed where the original complaint did not state a cause of action—Lindblad v. Lynde, 81 App. Div. (N. Y.) 603. Allowance on amendment of complaint held reasonable—Perry v. Levenson, 82 App. Div. (N. Y.) 94.

25. Costs to defendant are discretionary where the cause has proceeded less than one hour before being stricken from the short cause calendar (Hurds' Rev. St. 1899, c. 110, § 97)—Jeffery v. Babcock, 98 Ill. App. 17.

26. Coffey v. Gamble (Iowa) 94 N. W. 936.

27. Compensation of assessors to assess damages in eminent domain cannot be taxed as costs, nor can fees of stenographer—Boston Belting Co. v. Boston (Mass.) 67 N. E. 428. In taxing costs of commissioners in condemnation proceedings commissioners' clerk fees should be allowed only on proof of the nature and value of the services—In re Collis, 78 App. Div. (N. Y.) 495.

28. Koyukuk Min. Co. v. Van De Vanter, 30 Wash. 385, 70 Pac. 966. An intervener after judgment against plaintiff at his cost, is entitled to recover his costs—Johnson v. New Orleans, 109 La. 696.

29. Albers v. Dillavou (Neb.) 93 N. W. 937.

30. Baughn v. Allen (Tex. Civ. App.) 73 S. W. 1063.

31. Costs of accounting—In re Holmes, 79 App. Div. (N. Y.) 264.

32. Steinway v. Von Bernuth, 82 App. Div. (N. Y.) 596; Roberts v. Lamberton (Wis.) 94 N. W. 650.

33. The extra allowance under Code Civ. Pro. § 3253 may be given though costs had been granted against the executor for unreasonably resisting a claim under § 1836—Weeks v. Coe, 76 App. Div. (N. Y.) 310. Costs under Code Civ. Pro. § 1836 should not be allowed against an executor where the claim was materially reduced on the trial, though with claimant's consent—Healy v. Malcolm, 75 App. Div. (N. Y.) 422. Where no material benefit resulted from the contest of the account the contestants will not be allowed costs—In re Eadie, 39 Misc. (N. Y.) 117.

counts so intricate that an audit was necessary.[34] If the costs are not in the terms of the judgment charged against the estate the executor is personally liable.[35]

The person for whose benefit an action is brought may be charged with all the costs.[36]

(§ 4) *E. Waiver of right and effect of tender or offer of judgment.*—The successful party may waive his right to judgment and execution for costs.[37]

On recovery of a less favorable judgment than offered by defendant,[38] or for less than the amount tendered,[39] or if only for the amount of the offer or tender, the defendant is entitled to costs.[40]

§ 5. *Right dependent on minimum amount of demand or recovery.*—In some jurisdictions the right of a successful plaintiff to recover costs depends on the amount of recovery,[41] but the statute has been held not to apply to a defendant who recovers on a counterclaim though in a sum less than the statutory limit,[42] or to a suit in equity.[43]

§ 6. *Right affected by character of litigation or proceeding. A. In equity and equitable code actions.*—While in equity costs are discretionary,[44] the rule at law that the successful party is entitled to costs has been generally followed,[45]

34. Executor held not liable for cost of audit of his accounts—Young's Estate, 204 Pa. 32.

35. McCarthy v. Speed (S. D.) 94 N. W. 411.

36. As the person who requested the receiver to sue. Code Civ. Pro. § 3247—Droege v. Baxter, 77 App. Div. (N. Y.) 78.

37. Decker v. St. Louis & S. Ry. Co., 92 Mo. App. 50. A stipulation to submit the controversy, the judgment to be without costs should be followed by the court—Real Estate Corp. v. Harper, 174 N. Y. 123.

38. Mills' Ann. Code, Colo. § 281—Florence Oil & Ref. Co. v. Farrar (C. C. A.) 119 Fed. 150.

39. Saunders v. King (Iowa) 93 N. W. 272. Acceptance of tender held not to include costs—McEldon v. Patton (Neb.) 93 N. W. 938.

40. Maxwell v. Missouri, K. & T. Ry. Co., 91 Mo. App. 582; Edward Hines Lumber Co. v. Chamberlain (C. C. A.) 118 Fed. 716.

41. Action for rent or use and occupation; plaintiff recovered less than fifty dollars; defendant entitled to costs of course—United States Mortg. Co. v. Willis, 41 Or. 481, 69 Pac. 266. On recovery in the supreme court of less than $200 for unlawful distress the plaintiff is not entitled to costs—Brown v. Howell, 68 N. J. Law, 292. On recovery in foreclosure of a mechanic's lien in the supreme court for a claim less than fifty dollars and reduced to but $2.65 the plaintiff is not entitled to costs—Majory v. Schubert, 82 App. Div. (N. Y.) 633. In tort actions the costs should not exceed the recovery—Guttery v. Boshell, 132 Ala. 596. In the city court of Baxley it is error to enter judgment for defendant for the difference between the justice's court costs and the usual city court costs. Act 1897, p. 420, § 2, allowing only justice's court costs on recovery of $100 or less—Graham v. City of Baxley, 117 Ga. 42. On recovery of less than $100 in a municipal court only $10 costs can be allowed. Laws 1902, p. 1585, c. 580—Brendon v. Traders' & T. Acc. Co., 84 App. Div. (N. Y.) 530.

42. Spencer v. Mungus (Mont.) 72 Pac. 663.

43. On foreclosure of a mechanic's lien and for equitable relief the plaintiff is entitled to costs, though he recovers less than $50—Faville v. Hadcock, 39 Misc. (N. Y.) 397.

44. Jennings v. Parr, 66 S. C. 385. Applied to suit for dissolution of partnership—Hart v. Hart (Wis.) 94 N. W. 890. Applied in action to enforce contract lien—Roussel v. Mathews, 171 N. Y. 634. Applied in foreclosure of mechanic's lien and costs held properly allowed—Harvey v. Brewer, 82 App. Div. (N. Y.) 589. The chancery rule governing costs does not apply to proceedings to foreclose mechanics' liens—Kalina v. Steinmeyer, 103 Ill. App. 502. Discretion held properly exercised in dismissing bill to foreclose mortgage—Williams v. Williams (Wis.) 94 N. W. 25. Held error to award plaintiff costs on mandamus requiring approval of official bond—State v. Holm (Neb.) 92 N. W. 1006. In proceedings to recover damages resulting from change of grade of highway, costs before appointment of commissioners are discretionary and under Code Civ. Pro. § 3240—Bley v. Village of Hamburg, 84 App. Div. (N. Y.) 23. Simply because the court sustained but one of the defenses the defendant should not be charged with costs—Oliver v. Wilhite, 201 Ill. 552. Where there was reasonable cause to contest the will the costs will be charged against the estate; but where the contestant had no reasonable cause to appeal the costs of the appeal will not be so charged—In re Claus' Will (N. J. Prerog.) 54 Atl. 824.

45. Trespass to try title. Issue only as to boundary, on which defendant was successful and entitled to costs — Rountree v. Haynes (Tex. Civ. App.) 73 S. W. 435. Action held equitable and plaintiff entitled to costs though recovery was less than $300—Bemmerly v. Smith, 136 Cal. 5, 68 Pac. 97. Plaintiff in injunction may be required to pay costs of mandamus directing dissolution of the injunction—Johnson v. New Orleans, 109 La. 696. The partner whose acts in refusing to account caused the other partner to sue for dissolution, which was granted, will be charged with the costs—Richard v. Mouton, 109 La. 465. Applied to a bill to interplead

though where both parties are successful the costs may be divided,[46] apportioned,[47] or each party may be compelled to pay his own costs.[48] Costs follow the defendant on dismissal of the bill on demurrer sustained,[49] or because complainant failed to do equity,[50] but a failure to offer to do equity will not affect complainant's right to costs where the offer would have been unavailing.[51] If complainant is successful the intervenor may be charged with the costs after the intervention.[52] As between co-defendants, the complainant will be charged with the costs of those dismissed from the bill,[53] and a defendant on disclaimer is not entitled to costs against the other defaulting defendants.[54] Costs should be allowed only on the final determination of the suit.[55]

(§ 6) *B. On appeal, error, etc.*—Ordinarily the successful party on appeal is entitled to the costs,[56] though the allowance is discretionary,[57] and where both parties are successful each may be required to pay his own costs.[58] If the appeal could have been avoided, the appellant though successful will be charged with the costs,[59] or if he appealed merely for the purpose of delay.[60] Costs will be charged to one whose laches caused a dismissal;[61] they will be charged against appellant where the dismissal was because of a defective record,[62] or where he fails to pro-

claimants to a fund, the whole costs being charged against the claimant whose invalid claim caused the proceeding to be instituted —Sovereign Camp Woodmen v. Wood (Mo. App.) 75 S. W. 377. Where in interpleader the issue as to the amount due from complainant went against the complainant he will not be allowed costs out of the fund—English v. Warren (N. J. Ch.) 54 Atl. 860.

46. Mo. Rev. St. 1899, §§ 1549, 1550—Schumacher v. Mehlberg, 96 Mo. App. 598. As where the defendant was successful in reducing the amount of recovery—Fielder v. Beekman (N. J. Ch.) 54 Atl. 156; Sternbach v. Friedman, 75 App. Div. (N. Y.) 418. Both partners should be charged with the cost of taking account when both contributed to delay after dissolution—Dyer v. Ballinger, 24 Ky. L. R. 1918, 72 S. W. 738.

47. Fees of master—Hall v. Bridgeport Trust Co., 122 Fed. 163.

48. Jones v. Garrigues, 75 App. Div. (N. Y.) 539; Barger v. Gery, 64 N. J. Eq. 263.

49. Chan. Act, § 24; Rev. 1902—Brown v. Tallman (N. J. Ch.) 54 Atl. 457.

50. Insufficient tender before suing to avoid deeds—Glos v. Woodard, 202 Ill. 480.

51. Tender of consideration of contract before suit for rescission—Hansen v. Allen (Wis.) 93 N. W. 805.

52. So held in quo warranto to try title to office—People v. Campbell, 138 Cal. 11, 70 Pac. 918.

53. Hurd's St. 1899, c. 33, § 18—McDavid v. McLean, 202 Ill. 354.

54. Halpin v. Donovan (Mich.) 92 N. W. 782.

55. They should not be given on interlocutory judgments directing an accounting—McWhirter v. Bowen, 82 App. Div. (N. Y.) 144.

56. Coffey v. Gamble (Iowa) 94 N. W. 936; State v. Miller, 109 La. 240. The appellant is the successful party if he sustains his appeal on any of the grounds—McQueeney v. Norcross Bros., 75 Conn. 381. Or where he procured a modification of the judgment against him—Fanning v. Supreme Council, 84 App. Div. (N. Y.) 205; McInnis v. Greaves, 80 Miss. 632. By the filing by appellee of a remittitur—First Nat. Bank v. Calkins (S. D.) 93 N. W. 646; White v. Glover (Tex. Civ. App.) 71 S. W. 319. But merely because appellant obtained a modification of the judgment will not entitle him to the costs of the trial court—Vogt v. Hecker (Wis.) 95 N. W. 90. If appellant obtains a less favorable judgment he will be charged with the costs of the appeal—Barrall v. Quick, 24 Ky. L. R. 2393, 74 S. W. 214. Where the plaintiff appealed from the judgment against him and the appellate court reversed the judgment sua sponte because of want of jurisdiction in the lower court the defendant is the prevailing party—Freer v. Davis, 52 W. Va. 1. Costs of appeal charged against fund in receivers' hands and of the court below to abide the event—Alfred Richards Brick Co. v. Rothwell, 19 App. D. C. 178.

57. On vacation of order of contempt plaintiffs in certiorari were charged with the costs, it appearing that they were committing an illegal act and the order was vacated because the original proceeding was not the proper remedy—Coffey v. Gamble (Iowa) 94 N. W. 936.

58. Clerks' Inv. Co. v. Sydnor, 19 App. D. C. 89. So held in admiralty—Donnell v. Amoskeag Mfg. Co. (C. C. A.) 118 Fed. 10. Where a decree had been reversed with costs and execution therefor returned unsatisfied appellant may be taxed with costs incurred at his instance—Wooten v. Hecker, 136 Ala. 230.

59. As by filing a demurrer to the petition for foreclosure he could have avoided the personal judgment against him (Bush v. Louisville Trust Co., 24 Ky. L. R. 2182, 23 S. S. 775); or where the only result of the appeal was to decrease the amount of the judgment, which was too large, owing to a clerical error—Poerschke v. Horowitz, 84 App. Div. (N. Y.) 443. If the question on which appellant was successful should first have been raised in the lower court, he will be charged with the costs—Herry v. Benoit (Tex. Civ. App.) 70 S. W. 359.

60. Gammage v. Smith, 116 Ga. 779.

61. Rush v. Connor (Fla.) 32 So. 796.

62. Defect of parties in printed record on

cure a mandate to the lower court after procuring a reversal of the judgment,[63] or if he dismisses on his own motion.[64] If the plaintiff dismisses the action after favorable judgment and after proceedings for review have been instituted, the costs of the latter will be charged against him.[65] No costs being allowed by the intermediate appellate court, a reversal by the final court with costs will include the costs of the appeal to the lower court.[66] The rules as to taxation of costs on appeal will be applied on certiorari.[67]

(§ 6) *C. Justices' courts and municipal courts.*—Costs in an action brought in the municipal court of New York city will be allowed as though commenced in the court to which the action is removed.[68]

§ 7. *Amount and items; after trial.*—The lex fori governs as to the amount of the costs,[69] and only such costs as are allowed by statute can be taxed.[70] Costs

certiorari, the original record being proper—Fitch v. Board of Auditors (Mich.) 94 N. W. 952.

63. Laws 1901, p. 122, c. 54—Watson v. Boswell (Tex. Civ. App.) 73 S. W. 985; Watson v. Mirike (Tex. Civ. App.) 73 S. W. 986.

64. Post v. Spokane, 28 Wash. 701, 69 Pac. 371, 1104.

65. So held on dismissal after certiorari brought—State v. Third Judicial Dist. Ct. (Nev.) 71 Pac. 664.

66. Where a judgment was affirmed on respondent filing a remittitur and without costs to either party in the appellate division a reversal by the court of appeals with costs to abide the event will include costs of appeal to appellate division; plaintiff being successful on new trial—Smith v. Lehigh Valley R. Co., 116 N. Y. St. Rep. 674.

67. Coffey v. Gamble (Iowa) 94 N. W. 93.

68. Kochman v. Hefter, 115 N. Y. St. Rep. 691. Cf. article "Justices of the Peace."

69. Items of cost accruing without the state will be allowed under the fee bill provided by the laws of this state—Dignan v. Nelson (Utah) 72 Pac. 936.

70. Douglas County v. Moores (Neb.) 92 N. W. 199. Laws 1893, p. 421, § 2, subds. 3, 4, govern the fees to be collected by clerks in jury cases—Nelson v. Nelson Bennett Co. (Wash.) 71 Pac. 749.

Preparation of exhibits. Without order or evidence that the originals could have been used cost for printing exhibits cannot be taxed—Edison v. American Mutoscope Co., 117 Fed. 192. Expenses for models, surveys and for development of work done in preparation for trial cannot be taxed—Montana Ore Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co., 27 Mont. 288, 70 Pac. 1114.

Stenographer and clerk fees. Fees of stenographer on hearing before a master in chancery cannot be allowed—Smyth v. Stoddard, 203 Ill. 424. Fees paid a private stenographer acting in the place of the official stenographer by consent cannot be taxed—Montana Ore Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co., 27 Mont. 288, 70 Pac. 1114.

Docket and trial fees. Order remanding cause to state court is a final judgment on which $10 docket fees may be allowed plaintiff's attorney (U. S. Rev. St. § 824)—Riser v. Southern Ry. Co., 116 Fed. 1014. A hearing had after service of an infant's answer is a trial for the purpose of taxation of trial fees as costs, though counsel for infants did not cross-examine plaintiff's witnesses—Wandell v. Hirschfeld, 40 Misc. (N. Y.) 527. Costs after notice of trial may be taxed on sustaining a demurrer to the answer with costs—Veriscope Co. v. Brady, 115 N. Y. St. Rep. 498.

Mileage and fees of officers and witnesses. There must be proof of the distance traveled before the sheriff can be allowed mileage—Hakonson v. Metropolitan St. Ry. Co., 40 Misc. (N. Y.) 182. So, also, as to witnesses—Duree v. Chicago, M. & St. P. Ry. Co. (Iowa) 92 N. W. 890. Where the witness was not sworn or summoned by ordinary subpoena, living beyond the reach thereof, it must appear that an oral examination was important and desirable. That the objection to the bill was on that ground will not admit evidence thereof—Luckey v. Lincoln County, 42 Or. 231, 70 Pac. 509. The bill should show the name, residence of, place of subpoena, miles actually traveled and days attended by witnesses—Garr v. Cranney, 25 Utah, 193, 70 Pac. 853. Bill held insufficient to show days attendance or miles traveled by witnesses—Garr v. Cranney, 25 Utah, 193, 70 Pac. 853. Mileage for witnesses appearing and testifying will be allowed whether they were legally subpoenaed or not—McGlauflin v. Wormser (Mont.) 72 Pac. 428. Witness fees can be taxed only for such witnesses as were summoned at the request of one of the parties—Manuel v. State (Tex. Cr. App.) 74 S. W. 30. Sheriffs' costs of sending messages to witnesses to attend cannot be taxed—Egan v. Finney, 42 Or. 599, 72 Pac. 133.

Attorney's fees and extra allowances. Allowances for counsel fees are not costs (Acts 1898, c. 123, § 315)—Singer v. Fidelity & Deposit Co., 96 Md. 221; Kaufmann v. Kirker, 22 Pa. Super. Ct. 201; Rowland v. Maddock (Mass.) 67 N. E. 347; Wormely v. Mason City & Ft. D. R. Co. (Iowa) 95 N. W. 203. **Colorado.** Attorney's fees cannot be allowed on foreclosure of mechanics' liens—Sickman v. Wollett (Colo.) 71 Pac. 1107. **Georgia.** Attorney's fees cannot be allowed merely because defendants had refused to pay without suit (Civ. Code 1895, § 3796)—Pferdmenges Preyer & Co. v. Butler (Ga.) 43 S. E. 695. **Illinois.** Attorney's fees cannot be taxed as costs where no evidence of their value had been given—Mehan v. Mehan, 203 Ill. 180. **Iowa.** The corporation in condemnation proceedings should not be charged with attorney's fees on appeal where it procured a reduction in the amount of the award (Code, § 2007)—Wormely v. Mason City & Ft. D. R.

allowable by the laws of the state wherein the action was brought are recoverable in the federal court to which the action was removed.[71]

On appeal.—The expense for printing all assignments of error on appeal may be taxed though appellant was not successful on all of them.[72] If the abstract or brief is defective,[73] or if unnecessary parts of the record are sent up, the cost of printing will not be allowed,[74] though in the latter case the clerk's fees for making up the transcript will be taxed against the party requesting the same,[75] but the clerk will be allowed only for that part of the record which the parties stipulated should be sent up,[76] and he will be charged with the expense of a proceeding to compel him to deliver transcript where he delivers it after proceeding brought but before action thereon is taken.[77] The cost of procuring an appeal and stay bond cannot be taxed.[78] If the appeal was frivolous, double costs,[79] or a per centum allowance on the recovery, will be given.[80]

In criminal proceedings, the costs chargeable against a person after conviction,[81] or to the county for services of counsel assigned by the court to defend, will

Co. (Iowa) 95 N. W. 203. It is only where the injunction was dissolved that attorney's fees may be taxed. That the action went against plaintiff and permanent injunction was refused, there having been no motion to dissolve the preliminary injunction, attorney's fees cannot be taxed—Hocking Valley Coal Co. v. Climie (Iowa) 92 N. W. 77. **Missouri.** Receiver's attorney fees are not costs—Pullis v. Pullis Bros. Iron Co., 90 Mo. App. 244. **New Jersey.** Under chancery act 1902 (P. L. p. 504, § 91) in partition attorney's fees may be allowed—Keeney v. Henning (N. J. Ch.) 55 Atl. 88. Practice stated to obtain allowance for attorney's fees under Chan. Act 1902 (P. L. p. 540, § 91)—McMullen v. Doughty (N. J. Ch.) 55 Atl. 115. **New York.** In proceedings like mandamus to compel reinstatement of expelled members of an association, attorney's fees can be recovered only on proof of malice—Lurman v. Jarvie (N. Y.) 82 App. Div. 37. The right to an extra allowance is limited to actions and does not include special proceedings. As summary proceedings by landlord against tenant—Lauria v. Capobianco, 39 Misc. (N. Y.) 441. The extra allowance should not be granted in an action to recover for injuries resulting from a collision at a railroad crossing. Such an action is not "extraordinary" within the Code—Smith v. Lehigh Valley R. Co., 77 App. Div. (N. Y.) 47. Where the issue was solely one of title to land and there was no evidence as to its value, it is error to award an extra allowance (Code Civ. Pro. § 3253, subd. 2)—Deuterman v. Pollock, 172 N. Y. 595. Attorney's fees can be allowed a party only where he had recovered the costs of the action—Frost v. Reinach, 115 N. Y. St. Rep. 246. **Oklahoma.** A school teacher is not within the statute allowing attorney's fees in actions for personal services (Sess. Laws 1895, p. 268, c. 51, § 1)—School Dist. No. 94 v. Gautier (Okl.) 73 Pac. 954.

New trial. After disagreement of the jury and recovery on the second trial only one item after notice of trial can be taxed. In N. Y. City Court—Hakonson v. Metropolitan St. Ry. Co., 40 Misc. (N. Y.) 182. Costs of new trial should not be allowed on an order restoring the case on calendar after withdrawal of a juror by the plaintiff. The second trial is not a new trial within Code Civ. Pro. § 3251—Bloch v. Linsley, 40 Misc. (N. Y.) 184.

71. Attorney's fees on dissolution of attachment allowed—Fidelity & Deposit Co. v. L. Bucki & Son Lumber Co., 189 U. S. 135.

72. Curry v. Sandusky Fish Co. (Minn.) 93 N. W. 896.

73. Brinkley Car Co. v. Cooper, 70 Ark. 331. If respondent's abstract supplied a deficiency in appellant's, the latter is chargeable only with the cost of curing the defect—Berkshire v. Hoover, 92 Mo. App. 349.

74. Greene v. Montana Brewing Co. (Mont.) 72 Pac. 751; Liver v. Thielke, 115 Wis. 389. The appellant will be charged with costs of bill of exceptions containing testimony in extenso—Sup. Ct. Rule 33; Gaynor v. Louisville & N. R. Co., 136 Ala. 244. There being reasonable grounds for the necessity of printing the whole evidence, costs will be taxed in favor of the prevailing appellant to the full extent allowable by law—McQueeney v. Norcross Bros., 75 Conn. 381.

75. Harris v. Davenport, 132 N. C. 697. The party causing a needless amended abstract to be filed will be taxed with the costs thereof—Martin v. Martin (Iowa) 94 N. W. 493. The cost of an additional abstract filed too late will be charged against the party filing it—Ridgeway v. Jewell (Iowa) 95 N. W. 410.

76. Lamb Knit Goods Co. v. Lamb Glove & Mitten Co. (C. C. A.) 120 Fed. 257.

77. State v. Estorge (La.) 34 So. 643.

78. The cost of procuring an appeal and stay bond cannot be taxed as a disbursement—Edison v. American Mutoscope Co., 117 Fed. 192; In re Hoyt, 119 Fed. 987.

79. Under Mass. Rev. Laws, c. 156, § 13, the appellant is chargeable with double costs if his appeal was frivolous—Connell v. Morse, 182 Mass. 439.

80. Under Missouri Rev. Stat. 1899, § 867, in case of a frivolous appeal recovery of 10 per cent. damages may be had—Mooneyham v. Cella, 91 Mo. App. 260. So also in Illinois—Potter v. Leviton, 199 Ill. 93. In the Indian Territory following Arkansas, damages of 10 per cent. will be allowed on affirming a money judgment which has been superseded—Missouri, K. & T. Ry. Co. v. Truskett, 186 U. S. 480, 46 Law. Ed. 1259.

81. **Iowa.** The county may recover the costs though the record entry of judgment contained no reference to the matter of costs—Hayes v. Clinton County (Iowa) 92 N. W.

be treated in the footnotes, the right thereto and the amounts and items varying according to the statute under which they are allowed.[82]

§ 8. *Procedure to tax costs.*—The right to costs is lost if the bill is not served within the statutory time,[83] though the court may on application extend the time for filing and service.[84]

While the right to a retaxation may be barred by laches,[85] or by payment of the judgment and costs,[86] it may be had after the term of judgment or appeal.[87] On permitting corroborative affidavits to be filed, the opposing party should be given leave to reply thereto,[88] and on retaxation by the court, all intendments are in favor of a proper taxation by the clerk,[89] and the allowance by the court is conclusive.[90]

A motion for the allowance of attorneys' fees made three years after entry of the judgment comes too late.[91]

A party taxed with costs on appeal can only object to the aggregate allowance and not to the manner of dividing between adverse parties.[92]

§ 9. *Enforcement and payment of cost judgment.*—A judgment for the costs must be entered before execution for their collection can be issued.[93] A fee bill is the proper process for the collection of witnesses' and officers' costs.[94]

Costs must first be paid from the funds arising from a sale of the debtor's property.[95] If money be deposited as security for appeal costs only, the reviewing court cannot order its application to payment of the judgment and costs below.[96] Accrued costs deposited in court as a tender should be offset against the costs allowed on final recovery by plaintiff.[97]

Generally nonpayment of costs stays further proceedings in the action,[98] though the stay may be waived.[99]

860. **Kansas.** The clerk in taxing costs allowed against a county in a criminal prosecution must specify the services for which the amount is due—Lockard v. Board of Com'rs (Kan.) 71 Pac. 856. **Missouri.** Jury costs in criminal proceedings cannot be taxed against defendant when he pleads guilty. Accrued costs of preliminary examination before a justice of the peace are chargeable against defendant after conviction on trial on information filed in the circuit court on the same charge—State v. Williams, 92 Mo. App. 443. **Washington.** The county cannot be charged with the expense of printing the brief on appeal in forma pauperis from a conviction—State v. Superior Ct. (Wash.) 72 Pac. 1027.

82. **New York.** Allowance to assigned counsel in capital cases can be made only to those assigned at the time of the pleading to the indictment. If defendant appeared by counsel at the arraignment, counsel assigned at later term is not entitled to the allowance. (Crim. Code, § 308)—People v. De Medicis, 39 Misc. (N. Y.) 438. And when so assigned he may be allowed the full statutory allowance together with his expenses—In re Monfort, 78 App. Div. (N. Y.) 567. Including expense of preparing exhibits—In re Monfort 78 App. Div. (N. Y.) 567. If he appeals merely for delay he will not be allowed compensation therefor—People v. Triola, 175 N. Y. 407. **Indiana.** Attorneys assigned to defend can only recover fees against the county to the amount apportioned for such purpose—Miami County Com'rs v. Mowbray (Ind.) 66 N. E. 46.

83. Code Civ. Pro. § 1867—Reins v. King, 27 Mont. 511, 71 Pac. 763.

84. Beilby v Superior Ct., 138 Cal. 51, 70 Pac. 1024.

85. A motion to retax made a year after the decree had been entered, and from which no appeal had been taken, comes too late—Palsley v. Jones (Miss.) 34 So. 557.

86. Iowa Sav. & Loan Ass'n v. Chase, 118 Iowa, 51; Patton v. Cox (Tex. Civ. App.) 75 S. W. 871.

87. Chicago City Ry. Co. v. Burke, 102 Ill. App. 661.

88. In re Spafford Ave., 76 App. Div. (N. Y.) 90.

89. Chicago City Ry. Co. v. Burke, 102 Ill. App. 661.

90. They cannot be reviewed by mandamus—Murray v. Gillespie (Tex.) 72 S. W. 160. The remedy of a surety is by appeal from the original judgment, it going against them for costs, and not by motion for retaxation and appeal from the order—Staples v. Barclay (Colo.) 71 Pac. 374.

91. Attorneys' fees in suits to collect taxes—State v. Keokuk & W. R. Co. (Mo.) 75 S. W. 636.

92. Johnson v. New Orleans, 109 La. 696.

93. Hendon v. Delvichio (Ala.) 34 So. 830.

94. Execution cannot issue—Decker v. St. Louis & S. Ry. Co., 92 Mo. App. 50.

95. Applied to tax sale—State v. Wilson (Mo.) 74 S. W. 636.

96. Mitchell v. Evans, 18 App. D. C. 254.

97. Grafeman Dairy Co. v. St. Louis Dairy Co., 96 Mo. App. 495.

98. Where the plaintiff had been allowed to sue as a poor person in the federal court it was proper not to stay the action in the state court after a non-suit had been taken

COUNTERFEITING.

The prosecution should not be required to elect, before introducing evidence, between a count for making and one for uttering.[100]

COUNTIES.

§ 1. Creation and Organization.
§ 2. Officers, Personal Rights and Liabilities.
§ 3. Public Powers, Duties and Liabilities. Contracts; Bonds; Torts; Claims and Warrants.

§ 1. *Creation and organization.*—Generally a new county can be created only on consent of the qualified voters; the proceedings to establish being purely statutory will be shown in the footnotes.[1] The question of legality of organization cannot be raised collaterally.[2] On the dissolution of a county and the formation of a new division including the entire county territory, the former succeeds to the property and liabilities of the old county.[3] The newly organized county is liable for the expenses of organization.[4]

§ 2. *Officers, personal rights, and liabilities.*—A county officer cannot at the

in the former court—Fox v. Jacob Dold Packing Co., 96 Mo. App. 173. The action may be stayed until costs of the former action should be paid—Plumley v. Simpson (Wash.) 71 Pac. 710. Dismissal with costs and without prejudice will only stay the new suit in case of non-payment from the time the costs must be paid under the statute. N. Y. Code Civ. Pro. § 779 provides that such costs shall be paid within 10 days—Kellogg Switchboard & Supply Co. v. Glen Tel. Co., 121 Fed. 174. A second application for the same relief cannot be had without payment of the costs on denial of first application—Hunt v. Sullivan, 79 App. Div. (N. Y.) 119. It is error to order dismissal of complaint on failure to pay costs as a condition of granting a continuance—Hewett v. Cook, 75 App. Div. (N. Y.) 239. Where the motion to amend title was denied with costs an order permitting supplementary summons to issue is void—Hochman v. Hauptman, 76 App. Div. (N. Y.) 72. Costs on affirmance of an order granting new trial must be paid before the cause can be restored to the calendar—Cohen v. Krulewitch, 81 App. Div. (N. Y.) 147.

99. As by noticing the cause for trial (Mattice v. Shelland, 76 App. Div. [N. Y.] 236); or by proceeding to trial after default judgment had been vacated with costs plaintiff waived the stay—Dout v. Brooklyn Heights R. Co., 84 App. Div. (N. Y.) 618.

100. Burgess v. State (Miss.) 33 So. 499.

1. **Minnesota.** The petition first filed for organization of a new county is entitled to priority of consideration by the state officials—State v. Larson (Minn.) 94 N. W. 226. Laws 1895, p. 270, c. 124, § 2 amending Laws 1893, p. 262, c. 143, § 4 is not in violation of constitution, § 2, art. 1, since it does not operate to disfranchise electors having the right to vote on the organization of a new county—State v. Falk (Minn.) 94 N. W. 879. But one proposition involving the same territory can be submitted at the same election to create a new county and to warrant a submission of more than one there must be a material and substantial difference in the territory to be included within their respective boundaries—State v. Larson (Minn.) 94 N. W. 226. In case several competing propositions are submitted at the same election, the electors are authorized to vote only upon one, which must be carried by an affirmative vote of the majority on that issue and a plurality over its competitors—State v. Falk (Minn.) 94 N. W. 879.

South Carolina. A petition to the governor for the establishment of a new county should be made by the qualified voters within the area of each section of the old county proposed to be cut off to form a new county, irrespective of township or school district lines—Fraser v. James, 65 S. C. 78. The result of an election governs the legislative right to create a new county—Id. Whether the constitutional requirements in the creation of a new county from the old have been followed is a question for the determination of the legislature—Id.

Wyoming. The county organization commissioner may incur obligations for supplies for the conduct of the election—Taylor v. Board of Com'rs (Wyo.) 70 Pac. 835. The commissioners and their clerk are not entitled to compensation as county officers—Id.

2. A newly organized county is a de facto county from the time of the governor's proclamation to that effect, and the legality of its organization cannot be collaterally attacked—State v. District Ct. (Minn.) 95 N. W. 591.

3. Garfield Tp. v. Herman (Kan.) 71 Pac. 517. Green County of Texas transferred to Green County Oklahoma by act of Congress, May 4, 1896, the latter county on such transfer being liable for debts of the former—Board of Com'rs v. Clarke (Okl.) 70 Pac. 206. A legislative resolution providing for a commission to audit accounts and claims against a disorganized county, creating a board of auditors for that purpose with power to determine the validity and amount of the claims and to apportion them against property of the disorganized county, is invalid as conferring judicial powers on such board—Fitch v. Board of Auditors of Claims (Mich.) 94 N. W. 952.

4. Taylor v. Board of Com'rs (Wyo.) 70 Pac. 835.

same time hold more than one office,[5] nor can they while holding office enter into contractual relations with the county.[6] Statutes giving a remedy to compel officers to perform their duties must be strictly followed.[7]

The county treasurer is entitled to all the county funds,[8] and may, by mandamus, compel county commissioners to pay over funds in their possession.[9]

An officer's powers are co-extensive with his term of office,[10] but an action instituted in behalf of a county by an officer does not abate on the expiration of his term of office.[11] The issuance and service of a summons in error in an action against the county may be waived by the county commissioners.[12]

For a tort which results from a mere neglect of duty, the officer cannot be held personally liable,[13] but he may be held liable for the costs of proceedings to compel him to perform his duties,[14] and for official misconduct he may be prosecuted criminally.[15]

The right and amount of compensation that officers are entitled to being purely statutory will be shown in the footnotes.[16] Generally the salaries of county

5. That the trustee of county bonds was a county commissioner at the time of his appointment is not ground for removal, he having thereafter and before entering upon his duties as trustee resigned from the office of commissioner—Potter v. Lainhart (Fla.) 33 So. 251. Rev. St. 1898, §§ 541, 542, vests in the county commissioners discretionary power to consolidate the duties of the county officers and in the absence of such consolidation one person cannot hold and discharge the duties of two or more county offices simultaneously—State v. Woolfenden (Utah) 72 Pac. 690. Where at a county election, one candidate was nominated by both parties to two offices and his name alone appeared on the ballots which were voted and canvassed without objection, a presumption of consolidation arises—State v. Woolfenden (Utah) 72 Pac. 690. Evidence that an attempted consolidation was ineffectual, because publication thereof was not properly made, is insufficient to overcome a presumption of consolidation of offices—Id.

6. County officers including a county surveyor cannot purchase public lands (Tex. Pen. Code, art. 123)—Keen v. Featherston (Tex. Civ. App.) 69 S. W. 983.

7. The fiscal court has no power to enforce the attendance of justices of the peace by attachment as is allowed in case of a court of claims—Stephens v. Wilson, 24 Ky. L. R. 1832, 72 S. W. 336.

8. He is entitled to the public road fund under Political Code 1895, §§ 458, 575—Board of Roads & Revenue v. Clark (Ga.) 43 S. E. 722.

9. Board of Roads & Revenue v. Clark (Ga.) 43 S. E. 722.

10. County commissioners having appointive powers can only appoint for the term of office for which they were elected—Hancock v. Craven County Com'rs, 132 N. C. 209. An act changing the time for commencement of term of office of a particular officer of a particular county, is valid—Hunt v. Buhrer (Mich.) 94 N. W. 589. A county treasurer elected at a general election in 1902 will not begin his term of office until the first Monday in October 1903—Finley v. Combs (Okl.) 71 Pac. 625.

11. Sebree v. Commonwealth, 25 Ky. L. R. 121, 74 S. W. 716.

12. Dakota County v. Bartlett (Neb.) 93 N. W. 192.

13. County commissioners cannot be held under Gen. St. § 1829 for death caused by fire which resulted from defective electric wiring of the county jail and which they neglected to repair—Miller v. Ouray Elec. Light & Power Co. (Colo. App.) 70 Pac. 447.

14. Where the holder by mandamus compels payment of a warrant, he may recover as damages against the county treasurer individual attorney's fees and other expenses incurred in the prosecution of the mandamus suit with interest on the amount of the warrant; but to recover double damages under Rev. St. 1899, art. 4, §§ 6772, 6808, it is essential that the plaintiff must plead and show that the treasurer had been convicted of a misdemeanor for refusing to pay the warrant on presentation and demand—State v. Adams (Mo. App.) 74 S. W. 497. To recover double damages under Rev. St. 1899, art. 4, §§ 6772, 6808, it is essential that the treasurer willfully and knowingly in disregard of his official duty refused to pay the warrant and acting under legal advice that it was not his duty to pay, is not a willful refusal—Id.

15. The letting of contracts without the presence of other members of the board of commissioners by a county supervisor, is such misconduct as will call for criminal prosecution, but that he did not let contracts to the lowest bidder will not subject him to criminal prosecution (Act Feb. 19, 1900, p. 280)—State v. Jaques, 65 S. C. 178. If the supervisor knowingly approves a false claim he may be prosecuted criminally—Id.

16. County officers are entitled to a per diem allowance for services as members of the board of review in addition to their regular compensation (Acts 1891, p. 197, § 114, amended 1895 is not repealed by act 1895, p. 319)—Seiler v. State (Ind.) 65 N. E. 922, 66 N. E. 946, 67 N. E. 448. In a proceeding calling in treasury warrants for cancellation, and re-issuance, the county clerk should be allowed commission for indexing and allowance for all claims presented—Duncan v. Scott County, 70 Ark. 607. A county bond trustee acting as a substitute is entitled to compensation—Mercer

officials cannot be increased during their term of office,[17] nor will the imposition of additional duties within the scope of the office warrant an allowance in addition to the regular salary.[18]

For any breach of official duty, the officer and his sureties are, generally speaking, liable.[19]

§ 3. *Public powers, duties, and liabilities.*[20]—Courts cannot compel the exercise of county officer's discretionary powers,[21] but they can compel the performance of duties.[22]

County v. Pearson, 24 Ky. L. R. 1368, 71 S. W. 639. The county trustee of realty bonds under the statute is entitled to be reimbursed for counsel fees expended in collecting from the county—Mercer County v. Pearson, 24 Ky. L. R. 1368, 71 S. W. 639. Mississippi Code 1892 did not repeal Act 1890, p. 386, c. 250, § 8, authorizing salary to members of the board of supervisors of Madison County—Adams v. Dendy (Miss.) 33 So. 843. A county clerk is entitled only to the statutory per diem compensation and to none other for acting as a member of the board of equalization—State v. Adams (Mo.) 72 S. W. 655. County treasurers are entitled to a limited commission on funds belonging to the state collected and paid over by them in addition to the statutory compensation. Laws 1871, p. 227, c. 110, § 1, limiting the commission to 1% and not to exceed $500, except in certain counties, is not affected by Laws 1892, p. 1775, c. 686, § 141, subd. 5, fixing compensation of county treasurers—Upham v. State, 174 N. Y. 336. The complaint in an action by a county surveyor to recover compensation must state the time actually occupied as such surveyor—Sayles v. Walla Walla County, 30 Wash. 194, 70 Pac. 256. After fixing the salary of the register in probate and collecting the taxes to meet the same, a county board cannot prohibit payment—Roberts v. Erickson (Wis.) 94 N. W. 29.

17. Etsell v. Knight (Wis.) 94 N. W. 290.

18. Jefferson County v. Waters, 24 Ky. L. R. 816, 70 S. W. 40.

19. The articles on "Officers" and "Suretyship" will treat more specifically of these matters. A county officer's bond should run to a state or territory. It may be joint and several in form—Brady v. Pinal County (Ariz.) 71 Pac. 910. An action on the county bond of a county officer should be brought in the name of the state on relation of the county commissioner—Nowlin v. State, 30 Ind. App. 277. The town and its supervisors cannot maintain an action on the county treasurer's bond for failure to pay over school funds apportioned to the town—Town of Ulysses v. Ingersoll, 81 App. Div. (N. Y.) 304. The sureties on a county treasurer's bond are not liable for losses occurring by reason of payment of forged school district warrants—State v. Weeks, 92 Mo. App. 359. The neglectful performance of duties as a county treasurer is a breach of a condition of his bond to faithfully discharge his duties, as where he received a check from a bank for county bonds, gave the revenue board a receipt as for money received, deposited the check in the bank to his credit as treasurer as a special fund, the bank having failed after a small part had been paid on warrants—Montgomery County v. Cochran (C. C. A.) 121 Fed. 17. Sureties on an official bond are liable only for such sums of money as the principal may lawfully receive in the discharge of his official duties—Wilson v. State (Kan.) 72 Pac. 517. An action may be maintained on the bond of a county officer for failure to pay over to a successor, though the auditors had not yet settled and adjusted his accounts—Lancaster County v. Hershey, 205 Pa. 343. The county attorney's sureties are not liable for his failure to pay over money collected on promissory notes given by needy farmers under a provision of Laws 1895, p. 394, § 242—Wilson v. State (Kan.) 72 Pac. 517. The sureties on the county auditor's bond are liable for the acts of the auditor's deputy, the latter having power to remove him from office—Board of Com'rs v. Sullivan (Minn.) 93 N. W. 1056. The county treasurer and his sureties are liable for the redemption by him of fraudulent orders drawn by the deputy county auditor—Board of Com'rs v. Sullivan (Minn.) 93 N. W. 1056. The sureties on the bond of an official are liable for fees unlawfully received—State v. Adams (Mo.) 72 S. W. 655. The sale of county warrants is not a part of the duty of the county clerk, and the purchaser of a warrant from such clerk cannot maintain an action on the official bond of the clerk—State v. Harrison (Mo. App.) 72 S. W. 469. Actions against the bond of county officers may be properly brought in the name of the county commissioners—Board of Com'rs v. Sullivan (Minn.) 93 N. W. 1056.

20. Contruction and maintenance of highways and bridges see "Highways," "Bridges."

21. The county commissioners having exclusive power to determine the necessity for erection of a new court house cannot, in the absence of fraud, be compelled to act. Matkin v. Marengo County (Ala.) 34 So. 171. That proceedings by the court of county commissioners for the erection of a new court house was adjourned over to the second succeeding term, the intervening term being limited by the Code to the transaction of business relating solely to taxation, will not affect the validity of proceedings—Matkin v. Marengo County (Ala.) 34 So. 171.

22. Mandamus is the proper remedy for enforcement of the duty of a county fiscal court to restore a destroyed bridge on the county road—Leslie County v. Wooton (Ky.) 75 S. W. 208.

County officers cannot by virtue of their office alone donate county funds,[23] or release county claims,[24] or sell county property.[25]

Removal of the court house within the same town is not a removal of the "county seat" on which a vote must be taken.[26] Proceedings to enlarge or establish a new court house instituted under an invalid act cannot be supported as a proceeding under a previously existing valid statute.[27]

A county cannot be estopped to dispute the validity of an unauthorized and void act by officers merely because it received the benefit of such act,[28] though the approval of a report of the act will operate as a ratification.[29]

On refusal of officers to act, a taxpayer may sue to recover county funds in the possession of an officer, to which action the state is not a necessary party.[30] The prosecuting attorney is the proper person to restrain misuse of county property by the commissioners.[31]

Contracts.—Generally, counties are without authority to contract or incur indebtedness beyond certain fixed limits,[32] but such a limitation refers only to that class of debts which it is optional with the county to incur and not to necessary expenses of the governmental functions.[33] If a fund has reached the legal limit, it cannot be increased by the transfer of another fund to it.[34] The issuance of refunding bonds is not an incurring of new debt.[35]

A county is liable only on contracts made as authorized,[36] and it can contract

23. Awarding by resolution a sum of money "as a charity rather than as a settlement of a legal liability" to one whose claim for personal injuries was disallowed, is without authority—Kircher v. Pederson (Wis.) 93 N. W. 813.

24. The board of county commissioners has no power to release surety on an official's bond—Fidelity & Deposit Co. v. Fleming, 132 N. C. 332.

25. An order directing a sale of lands purchased by the county under execution in favor of the county, held to authorize a sale by the commissioners—Cardwell v. Hargis, 24 Ky. L. R. 1406, 71 S. W. 488. Rev. St. 1895, art. 845, authorizing a county which holds a judgment which cannot at the time be collected, to sell and dispose of the same, is not in conflict with Const. art. 3, § 55, providing that the legislature shall have no power to release or extinguish any liability of any county or other municipal corporation—Lindsey v. State (Tex.) 74 S. W. 750.

26. Constitution, § 41, in case of removal of a county seat—Matkin v. Marengo County (Ala.) 34 So. 171.

A county resident may institute proceedings to review proceedings for the removal of the county seat—Board of Sup'rs v. Buckley (Miss.) 33 So. 650. Act Feb. 5, 1901, providing for the removal of a county seat held valid—Hand v. Stapleton, 135 Ala. 156.

27. Proceedings under Act March 5, 1902 cannot be sustained as a proceeding under Act April 16, 1846—Moreau v. Board of Chosen Freeholders, 68 N. J. Law, 480.

28. Missouri & S. W. Land Co. v. Quinn (Mo.) 73 S. W. 184.

29. Cardwell v. Hargis, 24 Ky. L. R. 1406, 71 S. W. 488. Unauthorized acts by the representative of the county commissioners' court are not ratified by the latter by accepting the report of such representatives making no reference to particular acts—Fayette County v. Krause (Tex. Civ. App.) 73 S. W. 51.

30. State v. Casper (Ind.) 67 N. E. 185.

A resident may obtain review of county seat removal—Board of Sup'rs v. Buckley (Miss.) 33 So. 650.

31. First German Reformed Church v. Summit County Com'rs, 23 Ohio Cir. R. 553.

32. F. C. Austin Mfg. Co. v. Colfax County (Neb.) 93 N. W. 145. A county cannot levy a special assessment to meet valid outstanding warrants which represent indebtedness in excess of the constitutional limit (Rev. St. Mo. 1899, § 9274)—State v. Wabash R. Co., 169 Mo. 563. A statute authorizing the employment and payment of guards to protect property threatened with mob violence does not contravene Const. § 157, providing that no county shall become indebted for any purpose exceeding in any year the income provided for in such year without the assent of a third of the voters—Hopkins County v. St. Bernard Coal Co., 24 Ky. L. R. 942, 70 S. W. 289.

33. Hopkins County v. St. Bernard Coal Co., 24 Ky. L. R. 942, 70 S. W. 289.

34. In such case the levy for the fund transferred is void—Chicago, B. & Q. R. Co. v. Lincoln County (Neb.) 92 N. W. 208. Comp. St. Neb. 1901, c. 18, art. 3, § 4—Bacon v. Dawes County (Neb.) 92 N. W. 313.

35. Walling v. Lummis (S. D.) 92 N. W. 1063.

36. It is not liable for services rendered in securing evidence to assist the prosecution for violations of the liquor laws on request of the prosecutor of pleas; but such party should submit his claim to the judge of sessions or oyer and terminer—Gibboney v. Board of Chosen Freeholders (C. C. A.) 122 Fed. 46.

only through its authorized officials,[37] who can act only within the scope of their authority.[38]

Since the board of commissioners can act only as an entity, contracts made by individual members are not binding on the county.[39] If given authority to appropriate money for a specific purpose, it has authority to enter into contracts involving the expenditure of moneys appropriated.[40] It has power to enter into a contract to erect a fireproof vault for public records without previous legislative authorization,[41] to make a contract with one to investigate and discover taxable property which through fraud or otherwise had been omitted from taxation,[42] to employ counsel to defend civil suits, though the county had at the time a regular attorney,[43] but only to prosecute and defend actions wherein the county is a party.[44]

Bonds.[45]—It is within the power of the legislature to authorize counties to issue bonds for the construction of public improvements without a submission of the question to the people.[46] It is essential to the validity of county bonds that all the statutory requirements as to their issuance be followed; the mode of issuance being dependent on various statutes is shown in the footnotes.[47] An issue of bonds

37. The county court having authority to subscribe for railroad stock may properly order the clerk of court to make the subscription, such being a mere ministerial act and not a delegation of power—Green County v. Shortell (Ky.) 75 S. W. 251.

38. County officers cannot contract for the publication of a sheriff's election proclamation or other public notice in excess of the number directed by statute and the fact that there is on the same paper a charge for a publication which is authorized will not render it valid (Vindicator Printing Co. v. State, 68 Ohio St. 362); and the members of the board do not become individually liable on contracts beyond the scope of their power—Warren County v. Dabney (Miss.) 32 So. 908.

39. Williams v. Board of Com'rs (Mont.) 72 Pac. 755. An oral commission given by members to person to connect with a county sewer is not the act of a commissioners' court—Fayette County v. Krause (Tex. Civ. App.) 73 S. W. 51. A resolution signed and attested by commissioners individually offering a reward is not a personal obligation—Schieber v. Von Arx, 87 Minn. 298.

40. Bayne v. Board of Com'rs (Minn.) 95 N. W. 456.

41. B. F. Smith Fireproof Const. Co. v. Munroe (Md.) 55 Atl. 315.

42. It is not the duty of the county treasurer to investigate and discover property omitted from the assessment list. The court will not on appeal presume that a contract for fifty per cent as a compensation for such services, is unreasonable—Shinn v. Cunningham (Iowa) 94 N. W. 941. Act 28th Gen. Assem. p. 333, c. 50, limiting payment for discovery of property omitted from taxation to 15 per cent, does not apply to a contract for a greater rate made with the county supervisors prior to its passage—Shinn v Cunningham (Iowa) 94 N. W. 941.

43. Act 1892, § 293—Board of Sup'rs v. Booth (Miss.) 32 So. 1000. Contract with one not a county officer to pay for services in preparing evidence is valid, though such person employed a county officer to do work for him—Contra Costa County v. Soto, 138 Cal. 57, 70 Pac. 1019.

44. Williams v. Board of Com'rs (Mont.) 72 Pac. 755.

45. Under N. Car. Ordinance March 8, 1868, Wilkes County had authority to issue bonds to aid construction of the Northwestern North Carolina Railroad—Wilkes County v. Coler, 190 U. S. 107.

46. But Gen. Laws 1893, c. 133 authorizing county commissioners of certain counties to issue bonds for the construction of a court house, limiting its operation to such counties as had, at the time of its passage, expended at least $7,000 for the court house purpose, is invalid as special legislation—Hetland v. Board of Com'rs (Minn.) 95 N. W. 305.

47. Hillsborough County v. Henderson (Fla.) 33 So. 997.

Election to obtain consent of taxpayers. The county commissioners have authority to submit the question whether bonds shall be issued for the erection of public buildings and the construction of highways to the voters as an entirety. (Rev. St. Fla. § 591, amended acts 1899, c. 4711, Rev. St. § 593)—Potter v. Lainhart (Fla.) 33 So. 251. It is essential that the notice of an election for the purpose of determining the question of issuance of bonds must be published during the statutory time prior to the election; that is thirty days next preceding the day of the election (Pol. Code, Ga. § 377, not being repealed by Civil Code, § 5458)—Davis v. Dougherty Co. (Ga.) 42 S. E. 764. A notice of an election in every respect in compliance with the statute, is sufficient, though it fails to state the date that the bonds were to bear, or the price at which the bonds are to be sold, or that the notice does not bear any date, it being properly published prior to the election—Wimberly v. Twiggs Co., 116 Ga. 50. The form of the ballot for an election to determine the issuance of bonds for county improvements will be governed by Rev. St. Fla. §§ 592, 595—Potter v. Lainhart (Fla.) 33 So. 251. A majority vote at an election to determine the issuance of bonds for pub-

is not invalid in toto because of excess issue,[48] nor will the making of illegal special assessments to pay them affect their validity.[49] That the bidder was permitted to take the bonds on payment of the first instalment without giving security will not invalidate the bonds.[50]

It is within the power of the legislature to validate county bonds,[51] and such an act will affect bonds issued and those to be issued.[52]

A county may be estopped to question the validity of bonds issued by the recitals therein,[53] but it cannot be estopped, even as against a bona fide purchaser, to question the validity of bonds issued which contained no recital as to the authority of officers issuing them or as to the performance of the requisite preliminaries,[54] since a purchaser of such bonds is put upon inquiry as to the authority of the officers,[55] particularly where the issuance was made a matter of court record,[56] and this though the county had paid interest on the bonds for a few years.[57] A county which had received a valuable consideration,—which is presumed—for bonds issued, cannot repudiate bonds issued in lieu of the original issue.[58] A taxpayer may

lic improvements determines the result—Potter v. Lainhart (Fla.) 33 So. 251.

Issuance by officers. A resolution of the board of commissioners to issue bonds duly recorded and signed by each is valid, though the minutes of the board did not recite that it was seconded and formally voted upon by the board—Potter v. Lainhart (Fla.) 33 So. 251. The commissioners have authority to issue bonds only for the purpose specified in the resolution authorizing the issuance—Id. It is essential that the county board of commissioners provide a sinking fund by resolution for the redemption of bonds before their issuance (Fla. Rev. St. § 602, Act 1893, c. 4286)—Potter v. Lainhart (Fla.) 33 So. 251. The resolution of county commissioners for the issuance of bonds must fix the rate of interest that they will bear. Rev. St. Fla. 1892, §§ 591-593. A provision that they shall not bear more than 4 per cent. interest per annum is insufficient—Hillsborough County v. Henderson (Fla.) 33 So. 997. The county commissioners' resolution for the issuance of bonds should state the amount of bonds required for each purpose where more than one purpose is designated. Providing for gross amount, one of the purposes being the funding of the county debt, is sufficient—Hillsborough County v. Henderson (Fla.) 33 So. 997. County bonds issued in form prescribed by resolution of the commissioners, signed by the chairman, attested by the county clerk and countersigned by the county treasurer under seal of the board are valid county bonds—Potter v. Lainhart (Fla.) 33 So. 251. Counties having authority to issue bonds may make them payable in gold coin of the United States of the present standard weight and fineness—Hillsborough County v. Henderson (Fla.) 33 So. 997. The presentment of county bonds to the attorney general for approval as required by statute is a mere ministerial act—Martin Co. v. Gillespie Co. (Tex. Civ. App.) 71 S. W. 421. The issuance of bonds and the levying of a tax required for their payment and delivery to a purchaser, authorizes such purchaser to submit them to the attorney general for approval—Id. It is not a fraud on the part of the purchaser of bonds from a county to fail to disclose to the attorney general at the time of submitting them to him for approval as required by the statute an attempted repudiation of the bonds by the county—Id.

48. Martin Co. v. Gillespie Co. (Tex. Civ. App.) 71 S. W. 421.

49. Com'rs of Franklin County v. Gardiner Sav. Inst. (C. C. A.) 119 Fed. 36.

50. If the action is not discretionary with the commissioners it is an irregularity at most that may be cured by legislative action—Potter v. Lainhart (Fla.) 33 So. 251. If a bid is stated in the amount of dollars and is accepted, it must be paid in current money—Id. A county treasurer may receive checks or certificates of deposit in exchange for county bonds which will be considered "funds and money" in his hands within the statute authorizing the issue of the bonds—Montgomery County v. Cochran (C. C. A.) 121 Fed. 17.

51. Where bonds were issued before a sinking fund was provided for their redemption an act validating them is not in violation of Const. art. 9, § 5, authorizing the legislature to empower counties and towns to assess taxes for county and municipal purposes and for no other purpose—Potter v. Lainhart (Fla.) 33 So. 251. A statute validating bonds issued for the construction of highways and county buildings, validates bonds issued for roads and a courthouse, and a resolution of the board of commissioners authorizing a submission to the electors for the latter issuance—Id.

52. Potter v. Lainhart (Fla.) 33 So. 251.

53. Bonds issued by Stanley County, North Carolina, to aid the construction of the Yatkin Valley Railroad are valid obligations of the county—Stanley County v. Coler, 190 U. S. 437. A statement in the certificate of approval of county bonds by the attorney general that they were submitted in accordance with the requirement of the statute for approval by him, estops the county from denying the truth thereof—Martin Co. v. Gillespie Co. (Tex. Civ. App.) 71 S. W. 421.

54, 55, 56, 57. Green County v. Shortell (Ky.) 75 S W. 251.

58. Martin County v. Gillespie County (Tex. Civ. App.) 71 S. W. 421.

maintain an action and declare bonds void as being in excess of the statutory limit.[59]

The statutory mode of redemption of county bonds has been held not the exclusive mode.[60]

Torts.—In the absence of statutory provisions, counties cannot be held liable for torts,[61] particularly the torts of its officers acting without the scope of their authority.[62]

Presentation, allowance, enforcement, and payment of claims. Issuance of warrants.—In presenting claims against a county, the statutory requisites must be complied with.[63] The decision must specify the items allowed or disallowed.[64] An appeal lies from the refusal of the proper officers to inspect and accept a work done under a contract,[65] only after they have refused to allow a claim for the work done.[66] The appeal from the decision of the board on a claim presented must be from the entire decision,[67] and it vacates the entire decision of the board.[68] In the absence of a specific agreement, a county is not liable for interest on claims.[69]

It is essential that a claim against the county be first audited before action can be brought thereon,[70] and a decision may be presumed by reason of lapse of

59. Comr's of Owen County v. Spangler, 159 Ind. 575.

60. A provision in an act authorizing the issuance of county bonds for road improvements that they be paid for by assessment upon the property abutting the improvements is not exclusive of any other mode of payment for the same, the obligation to pay being unconditional—Com'rs of Franklin County v. Gardiner Sav. Inst. (C. C. A.) 119 Fed. 36. Act Gen. Assem. Ala. 1900, 1901, pp. 1722-1728, providing for the issuance of bonds for the construction of sewers, held not to intend by section 11 providing for a special tax levy, that the principal of such bonds should be paid exclusively from such fund but that it was payable out of any funds—Birmingham Trust & Sav. Co. v. Jefferson County (Ala.) 34 So. 398.

61. Trespass in taking land for construction of highway cannot be maintained—Hitch v. Edgecombe County Com'rs (N. C.) 44 S. E. 30. A county cannot be held liable for false arrest (Const. art. 5, § 15, Rev. St. §§ 1104, 5181, provides that all prosecutions shall be carried on in the name of the state by the prosecuting attorney)—Houtz v. Com'rs of Uinta County (Wyo.) 70 Pac. 840. General discussion in 7 Am. & Eng. Enc. Law, 947 et seq. A county may be liable for depreciation of adjoining realty by the erection of a pest-house. Evidence held sufficient to support a verdict for defendant —Banks v. Henderson Co., 24 Ky. L. R. 1560, 71 S. W. 902.

62. It is not a part of the official duties of a county treasurer to examine the account of a tax collector and report the same to one intending to become a surety for such collector and a false statement made therein to such surety is not binding on the county—Commonwealth v. American Bonding & Trust Co. (Pa.) 54 Atl. 1034.

63. The county is liable only for the recorder's assistant's salary when a bill for such services had been filed by the recorder as required by the statute, that is at the next regular meeting after the rendition of the services (Code, § 496)—Allen v. Adams County (Iowa) 94 N. W. 261. The claim of an attorney for services under appointment of the court to assist in the prosecution of an action need not be verified as required by statute on a claim against the county—Com'rs of Hinsdale County v. Crump (Colo. App.) 70 Pac. 159. A certified copy of the order of appointment would be sufficient—Com'rs of Hinsdale County v. Crump (Colo. App.) 70 Pac. 159. Claim presented held sufficiently verified under the statute—Bayne v. Board of Com'rs (Minn.) 95 N. W. 456. A mere letter from the attorney for the claimant demanding payment is not a presentment of the claim in such form as would authorize commissioners to act upon it—Houtz v. Comr's of Uinta County (Wyo.) 70 Pac. 84. A mere declination to allow a claim is not a waiver of an objection that it had not been presented in due statutory form—Id.

64. People v. Board of Sup'rs, 83 App. Div. (N. Y.) 51.

65. Young v. Leflore County (Miss.) 33 So. 410. Claimant is not confined to an appeal from the fiscal court's judgment; he may bring action against the county—Hudgins v. Carter County, 24 Ky. L. R. 1980, 72 S. W. 730.

66. Young v. Leflore County (Miss.) 33 So. 410.

67. Claimant cannot accept payment under the favorable part of a decision and at the same time appeal from the remainder—Dakota County v. Borowsky (Neb.) 93 N. W. 686.

68. Dakota County v. Borowsky (Neb.) 93 N. W. 866.

69. Chambers v. Custer County (Idaho) 71 Pac. 113.

70. Chambers v. Custer County (Idaho) 71 Pac. 113; Houtz v. Com'rs of Uinta County (Wyo.) 70 Pac. 84. The trustee who holds the county bonds pursuant to the statute may recover his compensation in an action on the bond, where it is but an incident to the suit, without first presenting his claim—Mercer County v. Pearson, 24 Ky. L. R. 1368, 71 S. W. 639. It is not an essential prerequisite to a suit by a city against the county to recover taxes, interest and penal-

time and failure of the commissioners to act;[71] this, however, does not apply to county bonds.[72] Payment of county warrants cannot be enforced until there is money in the fund against which they are drawn or on neglect of the authorities to provide such fund.[73] Garnishment will not lie against a county.[74] The action should be brought against the county and not against the officers,[75] and recovery is limited to the amount as submitted for audit.[76]

In the adjustment of claims, county commissioners act ministerially and their allowances are not conclusive,[77] and if the allowance and payment of the claim was illegal or unauthorized, the county may recover back the payment,[78] in an action by a taxpayer when the proper officers refuse to act,[79] and in such case the judgments should be in favor of the county with costs to the taxpayer;[80] the fund so collected may be charged with counsel fees and expenses of the suit,[81] but only such fees as are reasonable and necessary.[82] A taxpayer may sue to restrain payment of alleged illegal claims.[83]

In the issuance of warrants, it is essential that all the statutory requirements as to form be followed,[84] but an admission of the issuance of county warrants is a waiver of an objection to their sufficiency in form.[85]

County warrants are valid, though a sufficient amount of taxes had not been collected to pay them,[86] but if drawn in excess of the statutory limitation of indebtedness are void.[87]

Void warrants cannot be ratified by the county,[88] nor will false statements in

ties received by the county treasurer that it file an itemized claim with the county commissioner—City of Fergus Falls v. Com'rs of Otter Tail County (Minn.) 93 N. W. 126.

71. Com'rs of Hinsdale v. Crump (Colo. App.) 70 Pac. 159.

72. Martin County v. Gillespie County (Tex. Civ. App.) 71 S. W. 421.

73. Bacon v. Dawes County (Neb.) 92 N. W. 313.

74. Duval County v. Charleston Lumber & Mfg. Co. (Fla.) 33 So. 531; Michigan Lumber & Mfg. Co. v. Duval County (Fla.) 34 So. 245.

75. The complaint in an action against the county commissioners may be amended so as to be against the county—Conyers v. Com'rs of Roads & Revenues, 116 Ga. 101. The failure to amend the complaint in action pending when Const. 1877 took effect, by changing name of county commissioners to that of the county as defendant will not abate the suit. Actions pending when Const. 1877 took effect—Conyers v. Com'rs of Roads & Revenues, 116 Ga. 101. Evidence in an action to recover for services as an attorney for the county, held sufficient to warrant its submission to the jury. Sufficiency of evidence to sustain validity of warrant—Dakota County v. Bartlett (Neb.) 93 N. W. 192; Hancock v. Board of Com'rs, 132 N. C. 209.

76. Hudgins v. Carter County, 24 Ky. L. R. 1980, 72 S. W. 730.

47. Chase County v. Kelley (Neb.) 95 N. W. 865; Honey v. Com'rs of Jewell County, 65 Kan. 428, 70 Pac. 333; Vindicator Printing Co. v. State, 68 Ohio St. 362; Saline County v. Gage County (Neb.) 92 N. W. 1050. The decision of a county commissioner allowing a claim is not in the nature of a judgment precluding the auditor from questioning the validity of a claim—State v. Perry, 159 Ind. 508.

78. Etsell v. Knight (Wis.) 94 N. W. 290; Honey v. Com'rs of Jewell County, 65 Kan. 428, 70 Pac. 333. In Ohio prior to April 25, 1898, a prosecuting attorney could not maintain an action in the absence of fraud, but since that act he has power—Vindicator Printing Co. v. State, 68 Ohio St. 362. Complaint in action by a tax payer to recover back allowances illegally made to a member of the board of supervisors, held insufficient—Wallace v. Jones, 83 App. Div. (N. Y.) 152.

79. A tax payer may sue to compel a county auditor to restore money allowed him in excess of his fees which action is not barred by a lapse of 60 days after the allowance and payment of such claims, under Burns' Rev. St. 1901, § 7848c—Kimble v. Board of Com'rs (Ind. App.) 66 N. E. 1023. Burns' Rev. St. 1901, § 5594, providing for the recovery in addition to moneys misappropriated by county officers, of attorney's fees and necessary expenses, does not apply to a tax payer's action against county commissioners to recover funds misappropriated on illegal claims allowed—Id.

80. Etsell v. Knight (Wis.) 94 N. W. 290.

81, 82. Kimble v. Board of Com'rs (Ind. App.) 66 N. E. 1023.

83. Rogers v. Board of Sup'rs, 77 App. Div. (N. Y.) 501.

84. County warrants which do not state on their face the purpose for which they were drawn and when the claim accrued are void—Bingham County v. First Nat. Bank (C. C. A.) 122 Fed. 16.

85. As an objection that they did not bear the seal—Dakota County v. Bartlett (Neb.) 93 N. W. 192.

86. Walling v. Lummis (S. D.) 92 N. W. 1063.

87. Neb. Comp. St. 1901, c. 18, art. 1—Bacon v. Dawes County (Neb.) 92 N. W. 313.

88. Bingham County v. First Nat. Bank (C. C. A.) 122 Fed. 16.

warrants estop the county from questioning their validity.[89] The acceptance of a county warrant which contains a statement that it was in full settlement precludes claimant from recovering on the disallowed balance of his claim.[90] To render transfer of a county warrant valid, the assignment must be in the form prescribed by statute.[91]

The fund particularly charged with the payment of a warrant alone is liable, and it cannot be charged against any other fund.[92] Payment of warrants by check drawn on an insolvent bank does not discharge the county's liability.[93]

COURTS.[1]

§ 1. *Creation, change, and alteration.*—The legislature unless restricted has power to establish courts other than those provided in the constitution,[2] especially those of inferior jurisdiction,[3] or to increase the number of judicial districts;[4] but in the absence of constitutional warrant, the legislature cannot change the constitutional classification of the state courts.[5]

In the absence of such an intent it will not be presumed that an act conferring upon a new tribunal the greater part of the jurisdiction of an inferior court abolished the latter.[6]

§ 2. *Officers and instrumentalities of courts.*[7]—Bailiffs and criers are officers of the court.[8]

§ 3. *Places, terms, and sessions of courts.*—Courts of equity in absence of a contrary statute are always open.[9]

Generally, the time of the commencement of the term is fixed by statute,[10] and a statute fixing the term of court and limiting it to a court of a particular district is valid.[11] A term continues until the succeeding term as to a pending motion,[12]

89. False indorsement by the county board of the amount of the levy and expenditures on a warrant against a particular fund will not estop the county from asserting invalidity of the warrant because beyond the statutory limit. The purpose of the statute is to guard against overdrawing of warrants against the fund—National Life Ins. Co. v. Dawes County (Neb.) 93 N. W. 187.

90. Com'rs of Garfield County v. Beardsley (Colo. App.) 70 Pac. 155.

91. Mere assignment by indorsement is insufficient—State v. Harrison (Mo. App.) 72 S. W. 469.

92. There being no stenographers' fund, the court stenographer's salary cannot be paid out of any other fund. Arkansas act March 16, 1897—Dunn v. Ouachita Valley Bank (Ark.) 71 S. W. 265. A warrant against the "advertising fund" will be considered as drawn against the general fund—Dakota County v. Bartlett (Neb.) 93 N. W. 192.

93. Green v. Custer Co. (Idaho) 71 Pac. 115.

1. The establishment, organization, constituency, and the general procedure of courts only will be treated herein; for questions of jurisdiction see "Jurisdiction," rules of decision by precedent see "Stare Decisis" and for practice governing in particular actions see the specific heads.

2. P. L. 1898, p. 866, empowering quarter sessions to transmit indictments to oyer and terminer which it has no jurisdiction to try is valid—State v. Gruff, 68 N. J. Law, 287. It is within the power of the legislature to confer on the judge of the common pleas court the power to hold a term of oyer and terminer. Pub. Laws 1898, p. 867, § 3, is valid—State v. Taylor, 68 N. J. Law, 276.

3. Act 1901, creating municipal courts is valid—State v. Howell (Utah) 72 Pac. 187.

4. Act March 12, 1903, increasing the number of judges in the third judicial district—State v. Lewis (Utah) 72 Pac. 388.

5. Love v. Liddle (Utah) 72 Pac. 185.

6. Laws 1899, c. 127, p. 250, creating the city court in Ft. Scott did not abolish the office of police judge—City of Ft. Scott v. Slater (Kan.) 72 Pac. 550.

7. Rights, duties and liabilities of particular officers, see Attorney and Client, Clerks of Court, Judges, Justices of the Peace, Stenographers.

8. And are entitled to per diem compensation on days when it was adjourned by written order of the federal circuit court—United States v. McCabe, 122 Fed. 653.

9. To order sale of infants' estates within equity jurisdiction—Webb v. Hicks (Ga.) 43 S. E. 738; Mitchell v. Turner (Ga.) 44 S. E. 17.

10. Indiana Act March 9, 1903, did not change the time for holding court in Fountain county circuit until the beginning of the court year that is on the last Monday of August—Rabb v. McAdams (Ind.) 67 N. E. 182. Sufficiency of evidence to show that court did not convene entitling a defendant in a criminal proceeding to discharge—Farr v. State, 135 Ala. 71.

11. Ill. Act May 15, 1903—City of Mt. Ver-

or for the correction of the court's minutes,[13] or for the purpose of entry of a judgment on verdict rendered at the preceding term.[14] Appellate courts will take judicial notice of the terms of the trial courts,[15] but not of adjournments;[16] but any court may take judicial notice of its own terms, adjournments, and vacations.[17]

In the absence of statute, a court has no power to call a special term thereof,[18] and a term beginning on the day to which the regular term had been adjourned is not a special term.[19] An additional session may be held by calling on another judge of the same court.[20]

Except in a few instances usually statutory, the functions of a court can be exercised only when it is in session.[21]

§ 4. *Conduct and regulation of business.*[22]—Courts have power to make reasonable rules governing the procedure before them,[23] and if not in violation of law and made of record are binding,[24] on both court and suitors.[25] In federal courts, the rules of procedure adopted by state courts must be pleaded and proved.[26] The existence of rules must be proved by the record and nonexistence by the clerk's testimony.[27] A court may, to prevent disturbance of the court's business, prevent traffic on a street running by the room dedicated to court purposes.[28]

COVENANTS FOR TITLE.

§ 1. *Persons and estates benefitted or bound.*—Covenants running with the land cannot be held separately from the title.[29] A covenant against incumbrances does not run with the land.[30] Only those who could have vouched in an action real can sue on a covenant.[31]

non v. Evans & H. Fire Brick Co. (Ill.) 68 N. E. 208.

12. Walker v. Moser (C. C. A.) 117 Fed. 230. If not ordered to be heard in vacation —Wood v. Wiley Mfg. Co. (Ga.) 43 S. E. 983.

13. Baum v. Corsicana Nat. Bank (Tex. Civ. App.) 75 S. W. 863.

14. Walker v. Moser (C. C. A.) 117 Fed. 230; Jones v. Miller (Neb.) 92 N. W. 201.

15. Lanckton v. United States, 18 App. D. C. 348; Hadley v. Bernero, 97 Mo. App. 314; Emery v. League (Tex. Civ. App.) 72 S. W. 603.

16, 17. Hadley v. Bernero, 97 Mo. App. 314.

18. Under Laws 1891, p. 142, c. 83 the circuit court of Shawnee county has power—Durand v. Higgins (Kan.) 72 Pac. 567.

19. First Nat. Bank v. Abe Block & Co. (Miss.) 33 So. 849.

20. Without regard to the disability of the requesting judge—Bigcraft v. People, 30 Colo. 298, 70 Pac. 417.

21. A motion to set aside a verdict in a criminal case cannot be entertained in a city court during vacation—Chapman v. State, 116 Ga. 596. It is within the civil district court's power to make its terms continuous for the trial of particular actions—Succession of Hoyle, 109 La. 623. After adjournment for the day the court in which the prosecution is pending may take a bail bond —State v. Eyermann, 172 Mo. 294. Expropriation proceedings cannot be entertained in vacation by the district court—State v. St. Paul, 109 La. 8. A decree dismissing a bill can only be entered in term time though the motion to dismiss may be heard out of term —Cain v. City of Wyoming, 104 Ill. App. 538. Certiorari may be issued at chambers in the first department of the supreme court—People v. Stillings, 76 App. Div. (N. Y.) 143.

22. See Records for judge's minutes.

23. Hopper v. Mather, 104 Ill. App. 309. A rule limiting the number of requests to charge each party is entitled to present to 12 is unreasonable—Chicago City Ry. Co. v. Sandusky, 198 Ill. 400. Special term supreme court rule 14 requiring notice of sale under execution to contain diagram of the property is valid—Francis v. Watkins, 171 N. Y. 682. A rule that matter not denied by pleading shall stand as admitted is valid—Easton Power Co. v. Sterlingworth Ry. Supply Co., 22 Pa. Super. Ct. 538.

24. Hopper v. Mather, 104 Ill. App. 309; State v. St. Paul, 109 La. 8.

25. District of Columbia v. Roth, 18 App. D. C. 547; Klinesmith v. Van Bramer, 104 Ill. App. 384; Talty v. District of Columbia, 20 App. D. C. 489.

26. Randall v. New England Order of Protection, 118 Fed. 782.

27. Affidavit of counsel of non-existence of rule is not evidence of that fact—Hughes v. Humphreys, 102 Ill. App. 194.

28. Ex parte City of Birmingham, 134 Ala. 609, 59 L. R. A. 572.

29. Dalton v. Taliaferro, 101 Ill. App. 592.

30. Sears v. Broady (Neb.) 92 N. W. 214; Water's Estate v. Bagley (Neb.) 92 N. W. 637.

31. Smith v. Ingram, 130 N. C. 100. Subsequent grantees without warranty may sue on a warranty—Ravenal v. Ingram, 131 N. C. 549. The holder of a contract for deed cannot sue on a warranty to his vendor—Ravenal v. Ingram, 131 N. C. 549.

§ 2. *Performance or breach. Seisin and right to convey.*—The covenantor may be disseised by a tax deed.[32]

Against incumbrances.—An easement of light is an "incumbrance."[33] Whether an incumbrance exists is to be determined according to the lex rei sitae.[34] An unconfirmed assessment for local improvements is not.[35]

Warranty and quiet enjoyment.—There is no right of action until eviction,[36] or the acquisition of paramount title to avoid it.[37] Actual eviction without judicial action is sufficient,[38] and judicial without actual eviction is not sufficient.[39]

§ 3. *Enforcement of covenants.*—The declaration must allege the covenant,[40] if of warranty, and eviction,[41] and if of special warranty that the evictor claimed under the covenantor.[42]

Reconveyance in suit on covenant of seisin need not be offered.[43]

Peculiar value of property from which plaintiff was evicted may be shown.[44] The measure of damage for breach of covenant of seisin is the consideration with interest;[45] for breach of the covenant against incumbrances, it is the difference in the value of the premises;[46] for breach of the covenant of warranty, it is the purchase price in case of eviction,[47] the amount paid to extinguish the paramount title,[48] or the damage to the premises where the warranty is broken by the existence of an easement.[49]

CREDITORS' SUIT.[50]

§ 1. *Nature and grounds of remedy and property which may be reached.*—The purpose of a creditor's bill is to reach assets which are either not subject to levy or have been fraudulently conveyed.[51] A judgment at law for the debt is prerequisite,[52] as is the insolvency of defendant.[53] The property to be subjected must be

32. Koepke v. Winterfield (Wis.) 92 N. W. 437.

33. Denman v. Mentz, 63 N. J. Eq. 613. Facts held not to create an easement which would be a breach of the covenant—Farley v. Howard, 172 N. Y. 628.

34. Dalton v. Taliaferro, 101 Ill. App. 592. And see Smith v. Ingram, 132 N. C. 959.

35. Real Estate Corp. v. Harper, 174 N. Y. 123.

36. Boulden v. Wood, 96 Md. 332; Merrill v. Suing (Neb.) 92 N. W. 618.

37. Leet v. Gratz, 92 Mo. App. 422.

38. Covenantee quit possession after sale under paramount mortgage—Harr v. Shaffer, 52 W. Va. 207.

39. Ravenal v. Ingram, 131 N. C. 549; Pharr v. Gall, 108 La. 307. Even an adverse judgment in ejectment is not an eviction—Lundgren v. Kerkow (Neb.) 95 N. W. 501. But it has been held that an injunction preventing beneficial use is a constructive eviction—Ensign v. Colt, 75 Conn. 111.

40. Gano v. Green, 116 Ga. 22.

41. Sears v. Broady (Neb.) 92 N. W. 214.

42. Revenal v. Ingram, 131 N. C. 549.

43. Koepke v. Winterfield (Wis.) 92 N. W. 437.

44. Louisville Public Warehouse Co. v. James, 24 Ky. L. R. 1266, 70 S. W. 1046.

45. Rules for computation when covenant is broken as to part of land stated—Conklin v. Hancock, 67 Ohio St. 455. Where the tracts are severable the measure of damages is the consideration paid for that as to which the covenant is broken—Lloyd v. Sandusky (Ill.) 68 N. E. 154.

46. Herb v. Metropolitan Hospital & Dispensary, 80 App. Div. (N. Y.) 145. Where the incumbrance is an outstanding lease, the measure of damages is the rental value of the premises for its term—J. Wragg & Sons Co. v. Mead (Iowa) 94 N. W. 856.

47. Leet v. Gratz, 92 Mo. App. 422; West Coast Mfg. & Inv. Co. v. West Coast Imp. Co. (Wash.) 72 Pac. 455.

48. Leet v. Gratz, 92 Mo. App. 422. Expenses in defending title cannot be recovered unless covenantor was notified to defend—Wiggins v. Pender, 132 N. C. 628.

49. Louisville Public Warehouse Co. v. James, 24 Ky. L. R. 1266, 70 S. W. 1046.

50. For statutory proceedings in aid of execution see "Execution." For bills by creditors merely to set aside fraudulent conveyances, see "Fraudulent Conveyances."

51. State Bank v. Belk (Neb.) 94 N. W. 617. The bill does not lie in the absence of statute to reach known assets subject to levy and the remedy provided by Code 1886, § 3540 is by way of a discovery only and does not authorize a bill to subject known assets—Henderson v. Hall, 134 Ala. 455. One purpose of the remedy is to prevent multiplicity of suits and accordingly the existence of a legal remedy by garnishment is no bar—Benedict v. T. L. V. Land & Cattle Co. (Neb.) 92 N. W. 210.

52. Ready v. Smith, 170 Mo. 163. An award of arbitrators has been deemed a substitute—Sanborn v. Maxwell, 18 App. D. C. 245. Where the judgment is reversed on appeal the creditors' suit must fail—Kudrna v. Ainsworth (Neb.) 91 N. W. 711. A trustee in bankruptcy may sue without reduction of creditors' claims to judgment—Hood v. Blair

beyond the reach of execution,[54] and must not be speculative in its character,[55] or in custodia legis.[56]

§ 2. *Procedure.*—Holdings as to limitations are found in the note.[57]

Jurisdiction of the court rendering complainant's judgment need not be alleged.[58]

Return of *nulla bona* is prima facie evidence that legal remedy is exhausted,[59] and statutes sometimes prescribe what shall be a prima facie case on the entire bill.[60]

A receiver may be appointed.[61]

The bill should be dismissed as to parties not shown to be liable.[62] A personal judgment against the debtor's grantees is unauthorized.[63]

Complainant is not entitled to a preference in the assets discovered.[64]

CRIMINAL LAW.

§ 1. Elements of Crime.
§ 2. Defenses.
§ 3. Capacity to Commit Crime.
§ 4. Parties in Crimes.
§ 5. Former Adjudication and Second Jeopardy.
§ 6. Punishment of Crime.
§ 7. Rights in Property Subject of Crime.

This article is intended to embrace only the general substantive law of crimes. Matters of general criminal procedure are treated in an article, "Arrest and Binding Over," covering the procedure to the time of indictment, and one on "Indictment and Prosecution" embracing the procedure from indictment to final judgment. Matters of law and procedure peculiar to particular crimes are treated under titles expressive of the names of such crimes where they have well recognized names or, where they are violations of mere statutory regulations, under titles dealing with the subject-matter involved.

§ 1. *Elements of crime. Sources of the criminal law.*—In most of the states, the common law of crimes is now abolished.[65] The statute creating an offense must have been in effect before the criminal act in question or it will be ex post facto.[66]

State Bank (Neb.) 91 N. W. 701. The indebtedness of a defendant to the judgment debtor cannot be litigated as he has a right to a jury trial thereon—Hudson v. Wood, 119 Fed. 764.

53. Oppenheimer v. Collins, 115 Wis. 283. Trust property may be subjected by creditors of the beneficiary though he was not insolvent when the trust was created—Burke v. Tewksbury (Neb.) 92 N. W. 726. Where there has been an assignment for the benefit of creditors, creditors can sue only when the assignee fails to do so—Cornell v. Sulter, 23 Ohio Circ. R. 384.

54. Henderson v. Hall, 134 Ala. 455. But see Benedict v. T. L. V. Land & Cattle Co. (Neb.) 92 N. W. 210 where it is held that a remedy by garnishment will not bar the suit.

55. Contingent remainder cannot be—Howbert v. Cawthorn (Va.) 42 S. E. 683. A widow's interest in the rents and profits of dower lands unassigned may be reached—Muir v. Hodges, 116 Fed. 912. The interest of the beneficiary in a trust may be—Kilham v. Western Bank & Safe Deposit Co. (Colo.) 70 Pac. 409; Burke v. Tewksbury (Neb.) 92 N. W. 726.

56. Property in hands of executor—Williams v. Smith (Wis.) 93 N. W. 464.

57. For general doctrine of laches see forthcoming article on "Equity." Limitations do not begin to run until the recovery of judgment against defendant—Montgomery Iron Works v. Capital City Ins. Co. (Ala.) 34 So. 210. Effect to suspend running of limitations on claims embraced in suit—Gunnell's Adm'rs v. Dixon's Adm'r (Va.) 43 S. E. 340; Woods v. Douglass, 52 W. Va. 517. Two years' delay held fatal—Ready v. Smith, 170 Mo. 163.

58. Kilham v. Western Bank & Safe Deposit Co. (Colo.) 70 Pac. 409.

59. Evidence held not to overcome prima facie case so made—Oppenheimer v. Collins, 115 Wis. 283. There must be evidence of the judgment and execution—Hagek v. Pracheil (Neb.) 95 N. W. 35.

60. Comp. Laws, § 10203 makes proof of judgment, execution and return thereof, and a conveyance by judgment debtor a prima facie case, and this statute is held due process of law—Crane v. Waldron (Mich.) 94 N. W. 593.

61. The fact that complainant appeals because part of the relief demanded is denied will not prevent the appointment of a receiver to protect that which is granted—Benedict v. T. L. V. Land & Cattle Co. (Neb.) 94 N. W. 962.

62. As to purchasers in good faith, but not as to parties shown to have received property who fail to answer—Benedict v. T. L. V. Land & Cattle Co. (Neb.) 92 N. W. 210.

63. Oppenheimer v. Collins, 115 Wis. 283.

64. Moore v. Parker Drug Co., 135 Ala. 287.

65. But the common law may be resorted to for the definition of a crime forbidden by name—State v. De Wolfe (Neb.) 93 N. W. 746. The common law as to capacity to commit crime obtains in the absence of statute—

Criminal intent.—Guilty intent is essential only when made so by the statute.[67] *Attempts.*—Some act, other than mere preparation, is essential to an attempt.[68] *Felonies and misdemeanors.*—Attempt to obtain money under false pretenses is a felony.[69] Malicious mischief is a misdemeanor,[70] as is petit larceny.[71]

§ 2. *Defenses.*[72]—One may, in general, defend his person or property with all needful force.[73] Mistake of fact is a defense only where the facts as believed would make the act wholly lawful.[74] Personal convictions against policy of the law are no defense,[75] nor is command of a superior.[76] Consent of party aggrieved is, with few exceptions, a defense only to crimes involving taking of property.[77] Testimony against co-defendant gives no immunity.[78] Pendency of an injunction to restrain enforcement of the statute is no defense.[79]

§ 3. *Capacity to commit crime.*—The admissibility and sufficiency of evidence of insanity is treated elsewhere.[80] Ability to distinguish between right and wrong as to the act in question is the test,[81] and "irresistible impulse" is not recognized,[82] but the insanity need not be permanent.[83] Voluntary intoxication is no defense,[84] though delirium tremens or insanity induced by alcoholism is,[85] and intoxication

Davis v. State (Fla.) 32 So. 822. Statute held to abolish common law offense of obstructing highway—Eaton v. People, 30 Colo. 345, 70 Pac. 426.

66. See Constitutional Law.

67. State v. Keller (Idaho) 70 Pac. 1051. Criminal intent is essential to arson—State v. Jones (Del.) 53 Atl. 858. Escape—State v. Daly, 41 Or. 515, 70 Pac. 706. Larceny—Long v. State (Fla.) 32 So. 870; People v. Hoagland, 138 Cal. 338, 71 Pac. 359; State v. Kavanaugh (Del.) 53 Atl. 335; State v. Palmer (Del.) 53 Atl. 359; State v. Riggs (Idaho) 70 Pac. 947; People v. Walburn (Mich.) 92 N. W. 494. Receiving stolen goods—Goldsberry v. State (Neb.) 92 N. W. 906. And to forgery—State v. Bjornaas (Minn.) 92 N. W. 980. But belief in right to make alterations must be based on reasonable grounds—Towles v. United States, 19 App. D. C. 471. And a belief that the person whose name was forged would ratify the act is immaterial—People v. Weaver, 81 App. Div. (N. Y.) 567. But not to embezzlement—People v. Jackson, 138 Cal. 462, 71 Pac. 566. Nor to negligent permitting of escape by jailor—Lynch v. Commonwealth, 24 Ky. L. R. 2180, 73 S. W. 745. Abandonment of intent after breaking no defense to burglary—Ragland v. State (Ark.) 70 S. W. 1039; Walker v. State (Fla.) 32 So. 954. Intent to properly criticise public officer as defense to prosecution for libel—Commonwealth v. Scouton, 20 Pa. Super. Ct. 503. Intent may be inferred from circumstances—State v. Jones (Del.) 53 Atl. 858. The motive is immaterial—State v. Crabtree, 170 Mo. 642. Malice is essential to arson—Boone v. State (Miss.) 33 So. 172.

68. Groves v. State, 116 Ga. 516. Discharging a pistol into a room where a person was believed to be is an attempt to kill though he was not in the room—State v. Mitchell, 170 Mo. 633. Going to a building with intent to break and enter is an attempt to commit burglary—People v. Sullivan, 173 N. Y. 122.

69. A penalty not to exceed five years in the penitentiary is provided by statute for the completed offense and by Rev. St. § 2360 the penalty for an attempt is not to exceed one-half of that for the completed offense—State v. Scroggs, 170 Mo. 153.

70. State v. McLain, 92 Mo. App. 456.

71. People v. Stein, 80 App. Div. (N. Y.) 357.

72. Effect of general amnesty law—State v. Eby, 170 Mo. 497.

73. See "Assault and Battery"; "Homicide." Preventing entry without search warrant not obstruction of justice—Neifeld v. State, 23 Ohio Circ. R. 246. Driving trespassing cattle from premises—Alexander v. State (Tex. Cr. App.) 70 S. W. 425.

74. Belief that a child was over the age of consent no defense to prosecution for carnal knowledge—Smith v. State (Tex. Cr. App.) 73 S. W. 401. Request of abducted female no defense—Griffin v. State (Tenn.) 70 S. W. 61. Misinformation as to title excuses trespass—Kimmons v. State (Tex. Cr App.) 71 S. W. 283. Belief in right to alter instrument or sign another's name must be based on reasonable grounds—Towles v. United States, 19 App. D. C. 471; People v. Weaver, 81 App. Div. (N. Y.) 567.

75. Individual belief against vaccination no justification for failure to obey health regulation—Commonwealth v. Pear (Mass.) 66 N. E. 719.

76. Robbery—Thomas v. State, 134 Ala. 126.

77. Consent of owner is a defense to larceny—Lowe v. State (Fla.) 32 So. 956; Tyler v. State (Tex. Cr. App.) 70 S. W. 750. But see State v. Meldrum, 41 Or. 380, 70 Pac. 526. Purchase of the property after the larceny is not—Landreth v. State (Tex. Cr. App.) 70 S. W. 758.

78. Martin v. State, 136 Ala. 32.

79. State v. Keller (Idaho) 70 Pac. 1051.

80. See Indictment and Prosecution.

81. State v. Kavanaugh (Del.) 53 Atl. 335; Davis v. State (Fla.) 32 So. 822; Lee v. State, 116 Ga. 563.

82. Davis v. State (Fla.) 32 So. 822; McCarty v. Commonwealth, 24 Ky. L. R. 1427, 71 S. W. 656. Kleptomania—Lowe v. State (Tex. Cr. App.) 70 S. W. 206.

83. People v. Ford, 138 Cal. 140, 70 Pac. 1075.

84. Fielding v. State, 135 Ala. 56; Lanckton v. United States, 18 App. D. C. 348; State v. Ford (S. D.) 92 N. W. 18; Wright v. Commonwealth, 24 Ky. L. R. 1838, 72 S. W. 340.

85. State v. Kavanaugh (Del.) 53 Atl. 335.

incapacitating one from forming a specific intent prevents a conviction if an offense to which that intent is essential.[86]

§ 4. *Parties in crimes.*—All the parties to a misdemeanor are principals.[87] Presence at the commission of a crime is essential to constitute one a principal.[88] One present aiding and abetting is a principal.[89] An accessory after the fact must have acted with knowledge of the crime.[90] There may be an accessory before the fact to manslaughter.[91] The common-law distinctions as to principals and accessories are abolished in many states.[92]

§ 5. *Former adjudication and second jeopardy.*—There is no jeopardy where the indictment is dismissed without a trial,[93] or where the trial is abortive,[94] or where the court had no jurisdiction.[95] A finding on a plea in bar which was subsequently set aside,[96] or a conviction of an included offense, reversed on appeal, does not preclude a retrial.[97] The offenses must have been so far identical that a conviction of one might have been had on an indictment for the other.[98]

§ 6. *Punishment of crime.*—Validity of various statutes relating to punishment is considered in the note.[99]

Extent of imprisonment.—Punishment imposed must not exceed the statutory limit.[1] If execution of sentence is legally suspended, the term is computed from

86. State v. Kavanaugh (Del.) 53 Atl. 335; State v. Davis, 52 W. Va. 224. But see Commonwealth v. Dudash, 204 Pa. 124; State v. Pasnau (Iowa) 92 N. W. 682.

87. State v. McLain, 92 Mo. App. 456.

88. Mitchell v. State (Tex. Cr. App.) 70 S. W. 208; McCulloh v. State (Tex. Cr. App.) 71 S. W. 278. But one who instigated the offense and was near the scene of the crime may be convicted as principal—Martin v. State (Tex. Cr. App.) 70 S. W. 973.

89. Jahnke v. State (Neb.) 94 N. W. 158; Greene v. State (Ark.) 70 S. W. 1038. One present and abetting is a principal though he did not assist—State v. Palmer (Del.) 53 Atl. 359. One who stands outside and receives the goods from his confederate who broke and entered a house to steal them is guilty of burglary—State v. Boysen, 30 Wash. 338, 70 Pac. 740. One who assisted in a crime need not have previously instigated it—Bynum v. State (Tex. Cr. App.) 72 S. W. 844.

90. Whorley v. State (Fla.) 33 So. 849.

91. Mathis v. State (Fla.) 34 So. 287.

92. Jahnke v. State (Neb.) 94 N. W. 158. One who procured and advised the commission of a crime is guilty as principal where the distinction between principals and accessories is abolished—Pearce v. Territory (C. C. A.) 118 Fed. 425.

93. Before trial—State v. Taylor, 171 Mo. 465; State v. Lewis (Wash.) 71 Pac. 778. After impannelling jury but before evidence is introduced—State v. Holton, 88 Minn. 171. Two informations for the same offense may be filed—State v. Vinso, 171 Mo. 576.

94. Jury discharged for illness of a juror—People v. Smith, 172 N. Y. 210. Disagreement—Dreyer v. Illinois, 187 U. S. 71. Discharge on holiday for failure to agree—State v. Lewis (Wash.) 72 Pac. 121.

95. Wrong venue—State v. Bacon, 170 Mo. 161.

96. State v. Ellsworth, 131 N. C. 773.

97. People v. McFarlane, 138 Cal. 481, 71 Pac. 568, 72 Pac. 48; People v. Wheeler, 79 App. Div. (N. Y.) 396; State v. Balsley, 159 Ind. 395.

98. Commonwealth v. Campbell, 22 Pa. Super. Ct. 98. The following have been held identical: Bigamous marriage with "Gussie S" and "Bessie S"—Gully v. State, 116 Ga. 527. Affray and assault with intent to kill—Jackson v. State, 136 Ala. 96. Failure to reconstruct parts of a public road and failure to reconstruct the whole road—Commonwealth v. Allegheny Valley Ry. Co., 21 Pa. Super. Ct. 188. Arson of building within curtilage and of same building without mention of curtilage—State v. Switzer, 65 S. C. 187. Abandoning wife and failure to provide for her—State v. Miller, 90 Mo. App. 131. The following have been held not identical: Burglary and receiving stolen goods—Pat v. State, 116 Ga. 92. Using vulgar language in presence of female and using abusive language—McIntosh v. State, 116 Ga. 543. Sales of different uninspected packages of beer—State v. Broeder, 90 Mo. App. 169. Gaming at different times on the same day—Miller v. State (Tex. Cr. App.) 72 S. W. 856.

99. Indeterminate sentence act not bad for uncertainty nor does it encroach on executive function—People v. Warden of Sing Sing, 39 Misc. (N. Y.) 113. Indeterminate sentence law is due process of law—Dreyer v. Illinois, 187 U. S. 71; Shular v. State (Ind.) 66 N. E. 746. A fine based on amount of embezzlement in addition to imprisonment is not double punishment—Everson v. State (Neb.) 92 N. W. 137. The fine for the benefit of the victim of an embezzlement is not within Const. Art. 8 § 5, providing that fines shall become part of the school fund—Everson v. State (Neb.) 92 N. W. 137. **Fines:**. The legislature may provide for the disposition of money realized from fines—Lloyd v. Dollisin, 23 Ohio Circ. R. 571. The act authorizing workhouse sentences is not repealed by Act June 26, 1895, providing for work about premises by county jail convicts—Commonwealth v. Barton, 20 Pa. Super. Ct. 447.

1. Stark v. State (Miss.) 33 So. 175. Where a completed offense is punishable by imprisonment for not less than a specified number of years, with no limit as to the maximum, and an attempt is punishable by one-half such penalty one guilty of an at

date of incarceration.[2] Imprisonment until fine and costs are paid is not justified on conviction of felony.[3] Particular punishments held proper are found in the note.[4]

Place of imprisonment.—Under Act Congress, June 16, 1880, one convicted in a territory may by contract of the authorities be imprisoned in the penitentiary of another state or territory.[5] In the note are cases as to place of imprisonment of females and infants.[6]

Second offenses.—One who pleads guilty to the first offense cannot attack the information therefor.[7]

§ 7. *Rights in property the subject of crime.*—One who in good faith received stolen money in payment of a debt cannot be compelled to repay it.[8]

CURTESY.[9]

A husband has curtesy only in lands of which the wife was seized during her life.[10] Initiate curtesy rights are not devested by statutory abolition.[11] A tenant by the curtesy has no right to dispose of emblements.[12] Inchoate curtesy in lands acquired during coverture is not subject to execution.[13] Curtesy vests on the death of the wife.[14]

CUSTOMS AND USAGES.

§ 1. *General requisites.*—The words "custom" and "usage" are not synonymous.[15] Usage must be uniform and reasonable,[16] general,[17] and consonant with the law.[18] As to duration, there is a distinction between custom and usage.[19]

§ 2. *Application to contracts and other dealings.*—Usage becomes a part of contracts on the theory that it is known to the parties and enters into their intentions,[20] and knowledge of the usage is accordingly essential.[21] Usage cannot con-

tempt may be sentenced for a definite number of years though one-half of the possible life imprisonment cannot be calculated—People v. Burns, 138 Cal. 159, 69 Pac. 16, 70 Pac. 1087. The court has no power at a subsequent term of court to reduce the sentence—State v. Dalton (Tenn.) 72 S. W. 456.

2. In re Morse, 117 Fed. 763. If it is delayed by wrongful act of a ministerial officer the computation is from date of sentence—In re Jennings, 118 Fed. 479.

3. Smith v. State, 24 Ohio Circ. R. 140. Discharge on affidavit in forma pauperis—Ex parte Rodriquez (Tex. Cr. App.) 73 S. W. 1050.

4. Death penalty held proper in homicide case—Johnson v. State (Tex. Cr. App.) 71 S. W. 25. Ten years imprisonment for larceny held not excessive—State v. Williams (Iowa) 92 N. W. 652; State v. Connor (Iowa) 92 N. W. 654.

5. In re Terrill (Kan.) 71 Pac. 589.

6. A woman cannot be committed to the state reformatory for loitering on the streets—People v. Davis, 80 App. Div. (N. Y.) 448. St. 1895, p. 122 did not give the superior judge all the powers theretofore possessed by a magistrate to commit infants to the school of industry—In re Peterson (Cal.) 71 Pac. 690. An infant convicted of crime must be committed to a reformatory institution and not to any institution willing to receive him—People v. New York Catholic Protectory, 38 Misc. (N. Y.) 660.

7. Latney v. United States, 18 App. D. C. 265.

8. Rankin v. Chase Nat. Bank, 188 U. S. 557.

9. Husband's dower under statutes abolishing curtesy is treated in "Dower."

10. Not in a remainder vesting after the wife's death—Appeal of Ward, 75 Conn. 598.

11. Dillon v. Dillon, 24 Ky. L. R. 781, 69 S. W. 1099. But see Hallyburton v. Slagle, 132 N. C. 947, in which the Constitution of 1868 was held to apply to a marriage before its ratification.

12. Lease giving right to extract oil held void—Barnsdall v. Boley, 119 Fed. 191.

13. Rev. St. § 4339 so provides—Ball v. Woolfolk (Mo.) 75 S. W. 410.

14. McNeeley v. South Penn. Oil Co., 52 W. Va. 616.

15, 16. "Custom" relates to places, and "usage" to vocations—Currie v. Syndicate Des Cultivators Des Oignons a' Fleur, 104 Ill. App. 165.

17. Currie v. Syndicate Des Cultivators Des Oignons a' Fleur, 104 Ill. App. 165; Johnston v. Parrott, 92 Mo. App. 199.

18. McCurdy v. Alaska & C. Commercial Co., 102 Ill. App. 120; De Sola v. Pomares, 119 Fed. 373.

19. Custom is established by immemorial practice; usage need only be well known and generally observed in the business to which it relates—Currie v. Syndicate Des Cultivators Des Oignons a' Fleur, 104 Ill. App. 165. It is not necessary that a usage should have been in existence any particular length of time—Rastetter v. Reynolds (Ind.) 66 N. E. 612.

20. Currie v. Syndicate Des Cultivators Des Oignons a' Fleur, 104 Ill. App. 165; McCurdy v. Alaska & C. Commercial Co., 102 Ill. App. 120. Usage to pay assignee of labor

travene the contract,[22] but may explain it.[23] Usage may also be considered in determining the question of negligence.[24]

§ 3. *Pleading and proof.*—Usage, as an affirmative defense, must be specially pleaded.[25] Judicial notice will be taken of some customs.[26] Testimony that a certain usage exists is not a mere opinion.[27] Existence of a usage is for the jury; its sufficiency and effect for the court.[28]

CUSTOMS LAW.

§ 1. Interpretation and Operation.
§ 2. Dutiable Articles and Classification.
§ 3. Administration of Customs Laws.
§ 4. Violations and Consequences Thereof.

§ 1. *Interpretation and operation of customs laws in general.*—The act in force at the time of entry of importations governs,[29] and if the importation is in bond, it is subject to duties existing at the time of the deposit, though the country of export subsequently became United States territory.[30] In determining the question of classification, the customs laws must be strictly construed,[31] and if the statute is open to construction which would place the goods as well on the free list, the course most favorable to the importer must be adopted.[32]

§ 2. *Dutiable articles and classification of the same.*—The particular importations and the cases in which they are discussed for purposes of classification only are collected in the footnotes.[33]

checks held to create implied contract—Bryan v. Brown, 3 Pen. (Del.) 504. Usage as to number of ounces in pound held binding—Baer v. Glaser, 90 Mo. App. 289. Evidence as to what constituted a "season" of employment held competent—Johnston-Woodbury Hat Co. v. Lightbody (Colo. App.) 70 Pac. 957. The usage of the port is to be considered in determining what is reasonable dispatch—Donnell v. Amoskeag Mfg. Co. (C. C. A.) 118 Fed. 10.

21. Currie v. Syndicate Des Cultivators Des Oignons a' Fleur, 104 Ill. App. 165; Consumers' Ice Co. v. Jennings (Va.) 42 S. E. 879; Bixby v. Bruce (Neb.) 95 N. W. 34. One is not presumed to have knowledge of the usages of a business in which he is not engaged—Great Western Elevator Co. v. White (C. C. A.) 118 Fed. 406. Circumstances held to show knowledge of usage—Rastetter v. Reynolds (Ind.) 66 N. E. 612; Heyworth v. Miller Grain Co. (Mo.) 73 S. W. 498. Evidence insufficient to establish notoriety of usage of seaport—Bonanno v. Tweedie Trading Co., 117 Fed. 991. A party who contracted in ignorance of a usage cannot take advantage of it—Hendricks v. Middlebrooks Co. (Ga.) 44 S. E. 835.

22. Currie v. Syndicate Des Cultivators Des Oignons a' Fleur, 104 Ill. App. 165; Withers v. Moore (Cal.) 71 Pac. 697; McIntosh v. Pendleton, 75 App. Div. (N. Y.) 621.

23. Gehl v. Milwaukee Produce Co. (Wis.) 93 N. W. 26; Hayes v. Union Mercantile Co., 27 Mont. 264, 70 Pac. 975; Richardson v. Cornforth (C. C. A.) 118 Fed. 325.

24. Employe assumes risk of customary methods—Olsen v. North Pac. Lumber Co. (C. C. A.) 119 Fed. 77; Carr v. St. Clair Tunnel Co. (Mich.) 92 N. W. 110. Exceeding customary speed is not necessarily negligence—Martin v. Chicago. R. I. & P. R. Co. (Iowa) 91 N. W. 1034. Customary violation of rules of employment as abrogating them—Clark v. Manhattan Ry. Co., 77 App. Div. (N. Y.) 284; Wright's Adm'r v. Southern Ry. Co. (Va.) 42 S. E. 913. Duty of railroad company to take precautions at place not crossing customarily traveled by public—Bullard v. Southern Ry. Co., 116 Ga. 644; Ringstaff v. Lancaster & C. Ry. Co., 64 S. C. 546.

25. McCurdy v. Alaska & C. Commercial Co., 102 Ill. App. 120.

26. Of custom to irrigate from natural streams—Crawford Co. v. Hathaway (Neb.) 93 N. W. 781.

27. Galveston, H. & S. A. Ry. Co. v. Collins (Tex. Civ. App.) 71 S. W. 560. A statement that two persons were married according to the Indian custom is a mere opinion—Henry v. Taylor (S. D.) 93 N. W. 641.

28. Currie v. Syndicate Des Cultivators Des Oignons a' Fleur, 104 Ill. App. 165.

29. Goods are not dutiable under Act 1897, but under Act 1894, where tendered for consumption entry before four o'clock July 24, 1897, and a warehouse entry made after refusal of the former and on July 26—United States v. Perkins, 119 Fed. 384. Ginger ale in bottles imported when tariff act 1894 was in effect, is not subject to duty for corking, wiring, labeling or capping as fixed by Act 1890—West v. United States, 119 Fed. 495.

30. As goods shipped from Porto Rico—Mosle v. Bidwell, 119 Fed. 480.

31. O. G. Hempstead & Son v. Thomas (C. C. A.) 122 Fed. 538.

32. O. G. Hempstead & Son v. Thomas (C. C. A.) 122 Fed. 538.

33. Books: Books printed in foreign language—F. H. Petry & Co. v. United States, 121 Fed. 207. Scientific books—Macmillan Co. v. United States, 116 Fed. 1018. Books consigned to a social club, not entitled to free entry—United States v. Vandiver, 122 Fed. 740.

Chemicals and medicines. Subacitate of copper—United States v. Petry, 116 Fed. 929. Sheep dip—Wyman v. United States, 118 Fed. 202. Commercial carbonate of baryta—Gabriel v. United States, 121 Fed. 208. Albumen—Merchants' Despatch Transp. Co. v. United States, 121 Fed. 443. Whiting (Act 1894, par. 46)—United States v. Tiffany, 117 Fed. 367. Salol—Schering v. United States, 119 Fed. 472. Hyoscin hydrobromate—

§ 3. *Administration of customs laws; liquidation and reliquidation of duties, remedies and procedure; liability of importer or owner.*[34] It is within the discretion of the secretary of the treasury to employ inspectors for less than three dollars per day.[35]

Duties on goods in bond may be liquidated at any time after entry or withdrawal for consumption.[36] Drawback on goods imported and entering into articles manufactured in this country are allowed only on exportation to a foreign destination.[37] In the exportation of metals or ores imported under bond for smelting or refining purposes, there must be a deduction for wastage from the amount imported in calculating the product of the refined metal required to be exported.[38]

In appraising the goods, the general rule is to reduce standard foreign coins to the value of the pure metal and not to take the exchange value,[39] and the general

Schering v. United States, 119 Fed. 472. Chloral hydrate—United States v. Schering, 119 Fed. 473. Precipitated chalk—I. W. Lyon & Son v. United States, 121 Fed. 204.

Textiles and manufactures thereof. Bands of cotton cloth woven in widths 1 to 2½ inches and imported in pieces—Walter H. Graef & Co. v. United States, 120 Fed. 1015. Trimmings cut out of cotton velvet cloth in different designs and colors—Horstmann v. United States, 121 Fed. 147. Garnitures and hussar sets in designs of silk cord and braid to be used on dresses sold by the piece—Garrison, Wright & Co. v. United States, 121 Fed. 149. Silk goods four to twelve inches wide used in trimming women's hats—Robinson v. United States, 121 Fed. 204. Narrow cotton tape used for covering seams of underwear and waists—A. Steinhardt & Bro. v. United States, 121 Fed. 442. Cotton corsets trimmed around the upper border with cotton lace edging—Wanamaker v. United States (C. C. A.) 120 Fed. 16. Braids composed of india rubber and cotton—Calhoun v. United States, 122 Fed. 894. All silk mourning crepes of 4-4 widths in lengths not marked for cutting—Robinson v. United States, 122 Fed. 970. Linoleum in colors—Hunter v. United States, 121 Fed. 207.

Agricultural products and provisions. Grass piquets consisting of stalks of oats or wheat and grasses dyed to imitate their natural color, mixed with leaves, natural and artificial, bound together to be used for millinery purposes—Herman & Guinzeberg v. United States, 121 Fed. 201. Canary seed—United States v. Nordlinger, 119 Fed. 478. Sago flour—Littlejohn v. United States, 119 Fed. 483. Tobacco unsuitable for either wrapper or filler purposes—Dominguez Bros. v. United States, 122 Fed. 556. Bleached wheat stems or wheat heads—Bayersdorfer & Co. v. United States, 122 Fed. 968. Leghorn citron—United States v. Nordlinger (C. C. A.) 121 Fed. 690. Currants are dutiable in the condition imported—United States v. Reid (C. C. A.) 120 Fed. 242. Decayed fruit—Lawder v. Stone, 187 U. S. 281. The duty on fruits in spirits is to be computed on all the excess alcohol whether absorbed or supernatant—Rheinstrom v. United States, 118 Fed. 303.

Minerals and manufactures thereof. Ferrochrome—Dana v. United States, 116 Fed. 933. Tungsten ore—O. G. Hempstead & Son v. Thomas (C. C. A.) 122 Fed. 538. Crude hematite ore—Francklyn v. United States, 119 Fed. 470. Thin steel strips from one to six inches wide and in lengths of one hundred feet or more—Boker v. United States, 116 Fed. 1015. Boiler plate trimmings of various dimensions to be manufactured into tacks, trunk irons, etc.—United States v. Milne, 117 Fed. 352. Old brass cannons—Downing v. United States (C. C. A.) 122 Fed. 445. Surgical scissors—O. G. Hempstead & Son v. United States, 122 Fed. 752. Electric carbon sticks—R. F. Downing & Co. v. United States, 120 Fed. 1014. Asphaltum mastic—Saacke v. United States, 122 Fed. 895; Gabriel v. United States, 122 Fed. 896. Fire brick—Wing v. United States, 119 Fed. 479.

Glassware. Gauge glass—Rogers v. United States (C. C. A.) 121 Fed. 546. Museum or preparation jars and reagent bottles—O. G. Hempstead & Son v. United States, 122 Fed. 752.

Precious stones, jewelry, ornaments, etc. Articles as paper cutters, etc., made wholly or chiefly of agate or onyx—Hahn v. United States, 121 Fed. 152. Pearl imitations in glass or paste—Lorsch v. United States, 119 Fed. 476. Shells cleansed from animal or vegetable matter—Schoenemann v. United States (C. C. A.) 119 Fed. 584. Decorated and ornamented statuettes made from plaster of paris—T. Bing & Co.'s Successors v. United States, 121 Fed. 194. Horsehair braids carrying spangles—Veit Son & Co. v. United States, 121 Fed. 205.

Spirits, wines and other beverages. Chinese spirituous beverages—Kwong Chin Chong v. United States, 119 Fed. 383. Chartreuse—Nicholas v. United States, 122 Fed. 892.

Packages and coverings. Glass bottles—United States v. Austin (C. C. A.) 121 Fed. 729; Kwong Chin Chong v. United States, 119 Fed. 383. Boxes containing tobacco—Laverge v. United States, 119 Fed. 481.

34. Complaint in an action to recover duties held sufficient to show defendant chargeable with the duties—Abner Doble Co. v. United States (C. C. A.) 119 Fed. 152.

35. The statute allowing certain inspectors not exceeding $3 per day does not apply to persons guarding the goods at night to prevent their removal, not having inspectors' powers—Johnston v. United States, 37 Ct. Cl. 309.

36. Act 1874, § 21, limiting time for reliquidation to one year, etc., does not apply to bonded goods—Abner Doble Co. v. United States (C. C. A.) 119 Fed. 152.

37. The shipment of the goods by a foreign vessel to be consumed in transitu is not an exportation—Swan & Finch Co. v. United States, 37 Ct. Cl. 101.

38. In re Guggenheim Smelting Co., 121 Fed. 153.

39. United States v. Beebe (C. C. A.) 122 Fed. 762.

internal revenue tax of the foreign state may be added to the invoice but not local taxes.[40]

Where a part of an entry, though not specified in the original protest, was in fact the subject of consideration on reliquidation by the collector, the time for protest will begin to run from such reliquidation.[41] If good grounds are set forth in the protest against the collector's classification, it will be sustained though the wrong paragraph of the statute in support is cited or if the paragraph is not cited at all.[42] The collector may reconsider his classification after the goods have passed into consumption.[43]

The board of general appraisers has jurisdiction to review a decision of the collector on reliquidation ordered by the secretary of the treasury.[44] Only so much of the importation can be examined by the board as the statute directs.[45] The burden of showing that particular goods should be classified under particular paragraphs is on the government.[46]

In the absence of evidence, the court on appeal will sustain the classification of the board of general appraisers.[47]

If goods not ordered were consigned and the consignee does not exercise or perform any act of ownership, the entry for consumption being made by one without authority from the consignee, he cannot be charged with the duties.[48]

§ 4. *Violations of customs laws and consequences thereof.*—The importer is liable for the additional duty on account of undervaluation though no actual loss by reason thereof occurred to the government,[49] which is recoverable though the collector of the port did not levy such duty on the importation.[50]

Goods fraudulently imported are subject to forfeiture though the importer was a fraudulent purchaser of the same and the seller entitled to rescind the sale.[51]

DAMAGES.

§ 1. Kinds of Damages and Characteristics.—Special; Nominal; Exemplary; Liquidated; Double and Treble.

§ 2. General Principles for Ascertaining.—Proximate Consequences; Speculative Damages; Loss of Profits; Avoidable Loss; Mitigation and Aggravation.

§ 3. Recovery as Affected by Status or Limited Interest.

§ 4. Breach of Contract.—A. Miscellaneous Contracts. B. Land Contracts. C. Covenants for Title. D. Leases. E. Sales. F. Bailment and Telegrams. G. Services. H. Marriage.

§ 5. Torts.—A. Miscellaneous. B. Loss of, or Injury to, Property. C. Nuisance. D. Trespass. E. Conversion. F. Wrongful Taking or Detention. G. Fraud or Deceit. H. Libel and Slander. I. Personal Injuries.

§ 6. Death by Wrongful Act.

§ 7. Excessive and Inadequate.

§ 8. Pleading; Evidence; Procedure.—A. Pleading. B. Evidence. C. Instructions. D. Verdicts.

§ 1. *Kinds of damages and their characteristics.*—*Special damages* are such as do not ordinarily or generally result from a given cause. They are extraordinary

40. In France the general internal revenue being remitted on exportation. The special local taxes as "droit de ville" and "octroi" are to be excluded—Rheinstrom v. United States, 118 Fed. 303.

41. In re Brown, Durrell & Co., 121 Fed. 605.

42. Knowles v. United States, 122 Fed. 971. Act 1890, c. 407, § 14 (26 Stat. 137). Protest held sufficient though it claimed under a paragraph of an act different from the one applied where both acts contained the same paragraph—Shaw v. United States (C. C. A.) 122 Fed. 443. Protest held sufficient which claimed a right of free entry though the paragraph of the statute under which the goods were in fact entitled to free entry was not cited in the protest—Bayersdorfer & Co. v. United States, 122 Fed. 968.

43. Knowles v. United States, 122 Fed. 971.

44. United States v. Beebe (C. C. A.) 122 Fed. 762. The appraiser is presumed to have acted fairly in exercising his discretion as to the production of packages for examination—Renvy v. United States, 121 Fed. 441.

45. U. S. Rev. St. § 2939—Renvy v. United States, 121 Fed. 441.

46. O. G. Hempstead & Son v. Thomas (C. C. A.) 122 Fed. 538.

47. Knowles v. United States, 122 Fed. 971; E. H. Bailey & Co. v. United States, 122 Fed. 751.

48. United States v. O'Neill Bros., 122 Fed. 547.

49. Act 1897, § 32—United States v. Nuckolls (C. C. A.) 118 Fed. 1005.

50. United States v. Nuckolls (C. C. A.) 118 Fed. 1005.

51. 581 Diamonds v. United States (C. C. A.) 119 Fed. 556.

in character in the sense that they follow as the natural result of the intervention of some condition or circumstance out of the ordinary, and therefore not generally to be expected.[1] There can be no recovery of such damages in the absence of special averment.[2]

Nominal damages are a trifling sum allowed where an infraction of a right is shown but no resultant damage is proved.[3] The rule does not apply to a defendant who seeks, under plea of recoupment, to reduce the claim of plaintiff, arising under a contract, by nominal damages, in consequence of some breach of the same contract by the plaintiff.[4] A verdict for nominal damages is improper where actual damage is shown with certainty as to amount.[5] Where plaintiff is entitled to at least nominal damages a nonsuit is improperly granted.[6]

Liquidated damages are those whose amount has been determined by anticipatory agreement between the parties.[7] They are enforceable without regard to the actual damages suffered where the actual damages cannot be measured with approximate certainty.[8] Where the damages are of easy ascertainment and the amount agreed upon is disproportionate to the actual damages, such sum will be regarded as a penalty to secure the performance of the contract and actual damages only are recoverable.[9] The use of the term "liquidated damages" or "penalty" in the agreement is not conclusive on the question,[10] and the case is the same where the contract contains a provision making time of its essence.[11] The question is one largely of intent of the parties to be deduced from the circumstances.[12] Amounts agreed

1. Kircher v. Incorporated Town of Larchwood (Iowa) 95 N. W. 184.

2. Rules relating to necessity of averment of special damages, see post, § 8.

3. Raymond v. Yarrington (Tex.) 73 S. W. 800; Yoder v. Reynolds (Mont.) 72 Pac. 417; Wilcox v. Morten (Mich.) 92 N. W. 777; Armstrong v. Rhoades (Del. Super.) 53 Atl. 435; Armstrong v. Little (Del. Super.) 54 Atl. 742; Gruell v. Clark (Del. Super.) 54 Atl. 955; Williamson County v. Farson, Leach & Co., 199 Ill. 71. Nominal damages only are recoverable for infringement of a patent, where the owners sold the article without marking it "patented"—B. B. Hill Mfg. Co. v. Stewart, 116 Fed. 927. More than nominal damages are recoverable against a sheriff for oppressive acts in the service of a civil process—Foley v. Martin (Cal.) 71 Pac. 165. Nominal damages at least are recoverable for an unlawful levy on property for the debt of another—State ex rel. Lilly v. Carter, 92 Mo. App. 6.

4. Foote & Davies Co. v. Malony, 115 Ga. 985.

5. Paxson v. Dean (Ind. App.) 67 N. E. 112.

6. Bloom v. Grocery Co., 116 Ga. 784.

7. Cyc. Law Dict.

8. Pressed Steel Car Co. v. Railway Co. (C. C. A.) 121 Fed. 609; Eastern Ry. Co. v. Car Co., Id.; St. Louis, I. M. & S. Ry. Co. v. Stone Co., 90 Mo. App. 171; Drumheller v. Surety Co., 30 Wash. 530, 71 Pac. 25; Leavitt v. Bolton, 102 Ill. App. 582; American Copper, Brass & Iron Works v. Galland-Burke Brewing & Malting Co., 30 Wash. 178, 70 Pac. 236; Hipp v. City of Houston (Tex. Civ. App.) 71 S. W. 39; Wood v. Paper Co. (C. C. A.) 121 Fed. 818; Menges v. Piano Co., 96 Mo. App. 283; Dobbs v. Turner (Tex. Civ. App.) 70 S. W. 458; Champlain Const. Co. v. O'Brien, 117 Fed. 271, 788; O'Brien v. Construction Co., Ia., Womack v. Coleman (Minn.) 93 N. W. 663; Lamson v. City of Marshall (Mich.) 95 N. W. 78; Wood v. Paper Co. (C. C. A.) 121 Fed. 818. An amount fixed upon as the damages for breach of a water contract is in the nature of liquidated damages and not a penalty—Pogue v. Kaweah Power & Water Co. (Cal.) 72 Pac. 144. A stipulation in a contract for $10 a day as liquidated damages for delay in completing a structure is not unreasonable, and will be upheld where the building rents for $300 per month—Ramlose v. Dollman (Mo. App.) 73 S. W. 917. Under Civ. Code of Mont. § 2243, which provides that every contract by which the amount of damage to be paid for breach is determined in advance, is to that extent void except as expressly provided by the following section, which declares that the parties to a contract may agree upon an amount presumed to be the amount of damage sustained by breach thereof, when from the nature of the acts it would be impracticable to fix the actual damage. It is the duty of defendant to plead and prove that a contract is one wherein it is impracticable or extremely difficult to fix the actual damages—Deuninck v. Irrigation Co. (Mont.) 72 Pac. 618.

9. Mansur & Tebbetts Implement Co. v. Tissier Arms & Hardware Co., 136 Ala. 597; Schreiber v. Cohen, 38 Misc. (N. Y.) 546; Foote & Davies Co. v. Malony (Ga.) 42 S. E. 413; Hicks v. Cycle Mfg. Co. (N. Y.) 68 N. E. 127; Zimmerman v. Conrad (Mo. App.) 74 S. W. 139.

Where in an action on a contract, the stipulated damages are so disproportionate as to amount to a penalty, and there is no evidence of the actual damages sustained by the delay, all damages are properly disallowed—Zimmerman v. Conrad (Mo. App.) 74 S. W. 139.

10. Use of word "penalty"—Lamson v. City of Marshall (Mich.) 95 N. W. 78. Deposit of $1,000 designated as "liquidated damages" for breach of lease providing for monthly rent at $45—Caesar v. Rubinson, 174 N. Y. 492.

11. Sherburne v. Hirst, 121 Fed. 938.

12. Hicks v. Cycle Mfg. Co. (N. Y.) 68 N. E. 127.

upon as the damages for breach of a contract not to engage in a similar business within a specified territory are generally regarded as liquidated damages.[13]

Exemplary damages.—Damages variously termed "exemplary," "punitive" and "vindictive" are recoverable in addition to actual damages where the act causing the injury is maliciously or willfully done.[14] Their recovery is confined to cases of private tort and even then damages must be only compensatory as a general rule.[15] They are limited to the aggravation of the injury and are not given for purposes of punishment,[16] nor as a penalty for a public wrong.[17] They are not recoverable in the absence of proof of actual damages, and must bear a reasonable proportion to the actual damages suffered.[18] Damages for mental pain and suffering are actual and not punitive damages.[19] Exemplary damages are not recoverable against a principal,[20] or master[21] for acts of their agents or servants unless there has been a ratification of the misconduct.

Where willfulness or malice is shown exemplary damages may be recovered for false imprisonment,[22] malicious prosecution,[23] libel,[24] slander,[25] aggravated trespass,[26] ejection of passengers,[27] and abuse of process by sheriffs.[28]

13. Newpaper—Robinson v. Centenary Fund & Preacher's Aid Soc. (N. J. L.) 54 Atl. 416. Barbershop—Liotta v. Abruzzo, 82 App. Div. (N. Y.) 429.

14. Harmon v. Western Union Tel. Co. (S. C.) 43 S. E. 959; Boyd v. Blue Ridge Ry. Co., 65 S. C. 326; Gildersleeve v. Overstolz, 90 Mo. App. 518; Petit v. Colmary (Del.) 55 Atl. 344; Oliver v. Columbia N. & L. R. Co., 65 S. C. 1.

Exemplary damages are recoverable for an assault committed under aggravating circumstances—Berkner v. Dannenberg, 116 Ga. 954. For gross negligence in failing to deliver a telegram announcing a death—Western Union Tel. Co. v. Lawson (Kan.) 72 Pac. 283. Failure to deliver a telegram announcing the death of a husband, where the evidence shows a willful disregard of rights—Western Union Tel. Co. v. Watson (Miss.) 33 So. 76. Injuries to a passenger, where speed indicates a reckless disregard of rights of passengers—Griffin v. Southern Ry. Co., 65 S. C. 122. From an undertaker who receiving pay for a good coffin in which to bury a person infected with the small pox substitutes a plain pine box too small to contain the remains—Dunn v. Smith (Tex. Civ. App.) 74 S. W. 576. Where the party with full knowledge of an easement for a sewer across his lot destroys such sewer and refuses to permit its re-construction although it could be done without injury to property—Jones v. Sanders, 138 Cal. 405, 71 Pac. 506.

In the absence of proof of actual malice, oppression or bad motive, there can be no recovery of exemplary damages for wrongful refusal to honor a check—American Nat. Bank v. Morey, 24 Ky. L. R. 658, 69 S. W. 759. Nor for the protest of a note fully satisfied—State Mut. Life & Annunity Ass'n v. Baldwin, 116 Ga. 855.

15. Hurxthal v. St. Lawrence Boom & Lumber Co. (W. Va.) 44 S. E. 520. Exemplary damages are not recoverable against a steamship company for reselling a state room and refusing to return money paid therefor by a passenger; the rules printed on the back of the ticket allowing such resale where the room was not demanded at a certain time after boat had left the wharf—Clark v. New York, N. H. & H. R. Co., 40 Misc. (N. Y.) 691.

16. McChesney v. Wilson (Mich.) 93 N. W. 627.

17. Oliver v. Columbia, N. & L. R. Co., 65 S. C. 1. For a wrong, the commission of which subjects the wrong-doer to both a criminal prosecution and a civil action, punitive damages cannot be assessed—Borkenstein v. Schrack (Ind. App.) 67 N. E. 547.

18. Flanary v. Wood (Tex. Civ. App.) 73 S. W. 1072; Hoagland v. Forest Park Highlands Amusement Co., 170 Mo. 335; Cumberland Telegraph & Telephone Co. v. Hendon, 24 Ky. L. R. 1271, 71 S. W. 435. A recovery of $2,344 exemplary damages is excessive where the actual damages amount to $56—Flanary v. Wood (Tex.) 73 S. W. 1072.

19. Young v. Gormley (Iowa) 94 N. W. 922.

20. Rueping v. Chicago & N. W. R. Co. (Wis.) 93 N. W. 843.

21. Kastner v. Long Island R. Co., 76 App. Div. (N. Y.) 323, 12 N. Y. Ann. Cas. 77; Kentucky Distillery & Warehouse Co. v. Schreiber, 24 Ky. L. R. 2236, 73 S. W. 769. Not awarded where the act of wilfulness was not ratified and the servant had been prosecuted criminally therefor—Patterson v. New Orleans & C. R. Light & Power Co. (La.) 34 So. 782.

22. Harness v. Steele, 159 Ind. 286. Evidence of good faith of those making arrest is admissible on the question of exemplary damages in action for false imprisonment—Pincham v. Dick (Tex.) 70 S. W. 333.

23. Kelly v. Durham Traction Co. (N. C.) 43 S. E. 923.

24. Turner v. Hearst, 137 Cal. 232, 70 Pac. 18; Crane v. Bennett, 77 App. Div. (N. Y.) 102; Clark v. North American Co., 203 Pa. 346; St. Louis S. W. Ry. Co. v. McArthur (Tex. Civ. App.) 72 S. W. 76; Palmer v. Mahin (C. C. A.) 120 Fed. 737; Minter v. Bradstreet Co. (Mo.) 73 S. W. 668; Brandt v. Morning Journal Ass'n, 81 App. Div. (N. Y.) 183; Donahoe v. Star Pub. Co. (Del.) 55 Atl. 337. Where some of the defendants publishing the libellous article were inspired by malice and the others were not, the verdict should be so framed as to include exemplary damages against the parties guilty of express malice and compensatory damages against the other parties—Mauk v. Brundage, 68 Ohio St. 89.

25. Schofield v. Baldwin, 102 Ill. App. 560.

A statute requiring a verdict to separately state the amount allowed as exemplary damages has no application to actions pending at the time of its enactment.[29] Under a constitutional provision allowing recovery of exemplary damages for willful homicide, a court may instruct the jury as a matter of law to award exemplary as well as actual damages, where the evidence justifies the direction of a verdict for plaintiff.[30]

Under the civil damage act of South Dakota, there may be no recovery of exemplary damages by a married woman.[31]

Statutory double and treble damages.—In Missouri, a judgment for twice the the value of monthly rents and profits of the premises is given in an unlawful detainer case for wrongful detainer after notice to vacate.[32] In California, the code of civil procedure allows a judgment for three times the amount of rent due at the time of the trial, if the unlawful detainer is after default in rent.[33] To authorize the recovery of treble damages for forcible ejectment from real property under the North Dakota laws, it is necessary that the entry should be forcible, but it is not necessary that force should be actually applied; it is enough if it is present and threatened and is justly to be feared.[34] Where an entry has been peaceably made, a tenant in New York cannot recover the treble damages allowed for a disseizin in a forcible manner under a code provision authorizing such recovery under these circumstances.[35] One buying from a trespasser, timber cut on land of another with guilty knowledge of trespass before completing the purchase, is liable to the owner for treble damages under the Missouri laws.[36]

A statute giving tenfold damages for the killing of sheep by dogs has been upheld.[37]

§ 2. *General principles for ascertaining. Rule of strictness as between contracts and torts.*—In an action for breach of contract the measure of damages is more strictly confined than in cases of tort, the primary and immediate results are alone to be looked to.[38]

Limitation to natural and proximate consequences.—There may be no recovery of remote and speculative damages or those depending on mere contingencies.[39] The recovery is limited to damages which are the natural and proximate

26. Avera v. Williams (Miss.) 33 So. 501; Hickey v. Welsh, 91 Mo. App. 4.

27. Kansas City, Ft. S. & M. R. Co. v. Little (Kan.) 71 Pac. 820; Norman v. Southern Ry. Co., 65 S. C. 517. Compelling payment of fare under threat of ejection—Myers v. Southern R. Co., 64 S. C. 514. Not deprived of damages for humiliation and disgrace because no one was present beside the conductor and brakeman—Kansas City, Ft. S. & M. R. Co. v. Little (Kan.) 71 Pac. 820.

28. Foley v. Martin (Cal.) 71 Pac. 165. Against sheriff for breaking into a mill and carrying away the belt by which the machinery was propelled instead of securing a lien of record under the laws—Friedly v. Giddings, 119 Fed. 438.

29. Rev. St. 1899, § 595—Minter v. Bradstreet Co. (Mo.) 73 S. W. 668.

30. Morgan v. Barnhill (C. C. A.) 118 Fed. 24.

31. Garrigan v. Thompson (S. D.) 95 N. W. 294.

32. Hadley v. Bernero, 97 Mo. App. 314.

33. Nolan v. Hentig, 138 Cal. 281, 71 Pac. 440.

34. Rev. Code, N. D. § 5007—Wegner v. Lubenow (N. D.) 95 N. W. 442.

35. Code Civ. Proc. § 1669—Yeamans v. Nichols, 81 N. Y. Supp. 500.

36. Caris v. Nimmons, 92 Mo. App. 66.

37. Does not deny equal protection of laws—Rausch v. Barrere, 109 La. 563.

38. Hurxthal v. St. Lawrence Boom & Lumber Co. (W. Va.) 44 S. E. 520.

39. Puget Sound Iron & Steel Works v. Clemmons (Wash.) 72 Pac. 465. A nervous chill is too remote to be considered as an item of damages in an action for the dishonor of a check by a bank in which plaintiff has a deposit—American Nat. Bank v. Morey, 24 Ky. L. R. 658, 69 S. W. 759.

Mental distress: There may be no recovery for fright which results in an injury unless fright is the proximate cause of a legal wrong against plaintiff by defendant—Sanderson v. Northern Pac. Ry. Co., 88 Minn., 162, 60 L. R. A. 403. For a wrongful refusal to honor a check, there may be no recovery for humiliation or mortification of feelings—American Nat. Bank v. Morey, 24 Ky. L. R. 658, 69 S. W. 759. There can be no recovery for mental anguish caused by the dead body of a relative being thrown from a wagon by the negligent operation of a train, where it is not shown that any injury resulted to the body—Hockenhammer v. Lexington & E. Ry. Co., 24 Ky. L. R. 2383, 74 S. W. 222. Nor for mental distress caused by the seizure and sale of exempt property—Morris v. Willford (Tex. Civ. App.) 70 S. W. 228. Nor

consequence of a breach of a contract or are such as may reasonably be supposed to have been in the contemplation of the parties at the time they made the contract as the probable consequence of the breach of it.[40] Damages traceable in some measure to a tortious act but resulting chiefly from other and contingent circumstances, not the legal or natural consequences of the act, are too remote to be the basis of recovery against the wrong doer.[41] The question whether a breach of warranty is the proximate cause of the damages claimed is a matter relating to the proof and not to the pleadings, so as to authorize striking items of that character from the answer.[42]

Speculative and prospective damages.—There may be no recovery of speculative or conjectural,[43] or uncertain prospective damages.[44]

Loss of profits.—It is generally held that probable future profits are not recoverable as damages either for breach of contract or for tort. Their recovery is refused not because there may be no profits but because of difficulty if not impossibility, in estimating them with any sort of certainty.[45] Where there is nothing to show that special circumstances existed which would affect the subject-matter of the contract, so that gains would be lost as a result of the breach, such loss will be disregarded and the damages will be such only as may fairly be supposed to have been in contemplation of the parties at the time the contract was entered into.[46]

for shame and degradation where the only basis for such a recovery is a defense urged in good faith to the action—Loomis v. Hollister, 75 Conn. 275. Annoyance and disturbance of mind caused by an invasion of an exclusive privilege at a fair is too remote to warrant a recovery as an element of damages—Mason v. Davis, 24 Ky. L. R. 1312, 71 S. W. 434.

In Louisiana there may be a recovery for disappointment and humiliation suffered by a bride on account of defects in wedding garments provided for her wedding, and in this recovery may be included damages for mortification at being deprived from attending receptions in her honor after marriage by reason of her not having suitable dresses to wear at these functions—Lewis v. Holmes, 109 La. 1030.

Mental distress as an element of damages for errors and delays in transmission of telegrams, see post, § 4. As an element of damages for personal injuries, see post, § 5.

40. J. Wragg & Sons Co. v. Mead (Iowa) 94 N. W. 856; Leek Mill. Co. v. Langford (Miss.) 33 So. 492; Colvin v. McCormick Cotton Oil Co., 66 S. C. 61. Recovery for an existing disease is not lost by reason of the length of time which has elapsed between its discovery and the infliction of original injuries, nor upon the character of the disease if an unbroken connection is shown—Wood v. New York Cent. & H. R. Co., 83 App. Div. (N. Y.) 604.

41. Central of Georgia Ry. Co. v. Dorsey, 116 Ga. 719. Evidence as to damages fifteen months after the negligent act complained of is too remote and conjectural to warrant a recovery therefor—Simonson v. Minneapolis & St. L. R. Co., 88 Minn. 89.

42. Mallory Commission Co. v. Elwood (Iowa) 95 N. W. 176.

43. Expert testimony that injury sustained in a street car accident might be the cause of headache suffered by plaintiff after the accident is too speculative to be adopted in estimating damages—Huba v. Schenectady Ry. Co., 85 App. Div. (N. Y.) 199. There can be no recovery of damages under a stipulation for a renewal of a lease where tenants may never avail themselves of the stipulation—Jackson v. Doll, 109 La. 230.

44. Where damages resulting ex contractu are continuing, but as to the future too uncertain to support an action for their recovery, and suit is brought for such as have been actually sustained at the day of its filing, evidence as to the damages subsequently sustained whilst the suit is pending and before judgment, should be excluded —Jamison v. Cullom (La.) 34 So. 775.

45. Raywood Rice, Canal & Mill. Co. v. Langford (Tex. Civ. App.) 74 S. W. 926. Loss of profits to a street railway company in the transportation of passengers to and from a summer resort are too speculative and uncertain to furnish the basis for damages for failure of an engine to furnish sufficient power to operate the line—People's Sav. Bank v. Rapid Transit Co. (Iowa) 92 N. W. 691. Damages for loss of profits in a business may be recovered only where they are susceptible of definite ascertainment and direct results of the injury—Paul E. Wolff Shirt Co. v. Frankenthal, 96 Mo. App. 307. Where tenant of a leased building partially destroyed, moved out, an allowance of profits on the lease for the unexpired term would be remote and speculative—Jackson v. Doll, 109 La. 230. The profits that a purchaser of logs could have made had the logs been delivered, is too remote to be considered in an action for damages for breach of the contract—Wilson v. Russler, 91 Mo. App. 275. Loss of profits on breach of contract of sale of goods and machinery, see post, § 4.

46. South Gardiner Lumber Co. v. Bradstreet, 97 Me. 165; Paguin v. St. Louis & S. Ry. Co., 90 Mo. App. 118. In an action for breach of a contract to furnish a retail dealer with fertilizer, there may be a recovery of loss of profits on sales which the purchaser would have made if defendant had not broken his contract, and this particularly where he had spent much time and labor in advertising the brands and the refusal to fill the orders came at the time when a demand for fertilizer was the greatest—Currie Fertilizer Co. v. Krish, 24 Ky. L. R. 2471, 74 S. W. 268.

Loss of profits are recoverable for damages sustained by reason of an obstruction of adjoining landowner preventing the construction of a factory for the manufacture of patented articles.[47] Where the damages allowed for loss of a vessel sunk in a collision are based on a total loss including interest on the value of the vessel and the pending freight, there may be no recovery for loss of future earnings under an unexpired charter.[48]

Difficulty of proof of amount as bar.—Recovery of damages will not be defeated because of difficulty of proving their exact amount, it will be sufficient to approximate damages by the best evidence obtainable.[49]

Avoidable consequences.—A party suing for breach of contract is required to do what he reasonably can and embrace all reasonable opportunity to lessen the injury and reduce the damages caused by the breach.[50] Whether any act of plaintiff would have lessened the amount of damages for breach of a contract is a question for the jury.[51]

Where obstruction of highways or ditches could be removed at a slight expense, that will be the measure of the recovery.[52] There may be no recovery for aggravation of an injury by the negligent conduct of the injured person.[53] He is not prevented from recovering because he considered the injury unconsequential and did not seek the services of a physician until home remedies had failed.[54] Though it is the duty of one injured to render the loss as light as possible, yet he is not required to anticipate a loss.[55] A recovery of damages for personal injury will not be defeated by the fact that his susceptibility to a delirium resulted in a measure from his own acts.[56] Where plaintiff knew of the dangers of his employment, he may not recover exemplary damages for an injury received which he could have guarded against.[57]

Mitigation and aggravation of damages.—Abusive and insulting language and misconduct of one suffering at the hands of a carrier's servants may be considered in mitigation of damages.[58] The damages for loss of animals are properly reduced

47. Barnes v. Berendes (Cal.) 72 Pac. 406.

48. The Fontana (C. C. A.) 119 Fed. 853.

49. Lincoln v. Orthwein (C. C. A.) 120 Fed. 880; Banta v. Banta, 84 App. Div. (N. Y.) 138.

50. Hurxthal v. St. Lawrence Boom & Lumber Co. (W. Va.) 44 S. E. 520; Colvin v. McCormick Cotton Oil Co., 66 S. C. 61. On the failure of an advertiser to comply with his contract, it is the duty of the publisher to use reasonable efforts to fill the space contracted for in order to reduce the damages—Peck v. Metal Roofing & Corrugating Co., 96 Mo. App. 212. On the failure of the seller of goods to deliver according to contract, it is the duty of the purchaser to purchase the goods as cheaply as possible and thus render the damages as light as possible, and in an action for such damages his failure to do so will be considered—Creve Coeur Lake Ice Co. v. Tamm. 90 Mo. App. 189. A chartered vessel loading at a river port during a low stage of water cannot recover dead freight from the charterer because of inability to cross a bar with the maximum cargo, which the charterer was willing to furnish, where the vessel did not wait a reasonable time for the river to rise—Tweedie Trading Co. v. New York & B. Dyewood Co., 118 Fed. 492.

51. Peck v. Kansas City Metal Roofing, etc., Co., 96 Mo. App. 212.

52. Highway—Mellick v. Pennsylvania R., 203 Pa. 457. Ditch—Raleigh v. Clark, 24 Ky. L. R. 1554, 71 S. W. 857.

53. Campbell v. Los Angeles Traction Co., 137 Cal. 565. If the injured party fails to use ordinary care to treat and have treated his injury and by reason of such failure the same is aggravated or increased, he cannot recover damages for increased injury resulting from his failure to use ordinary care under all the circumstances to have the same treated—Texas Portland Cement Co. v. Poe (Tex. Civ. App.) 74 S. W. 563; Galveston, H. & S. A. Ry. Co. v. Hubbard (Tex. Civ. App.) 70 S. W. 112. The law as to damages for the aggravation of existing injury is correctly stated by an instruction that plaintiff could not hold defendant liable for the effects due to the former condition of the injury and he was only entitled to damages on account of decreased earning power, as in accordance with his former condition the jury should consider just—Leslie v. Jackson & S. Traction Co. (Mich.) 96 N. W. 580. Violation of a physician's instructions by using an injured limb negligently thereby retarding or preventing recovery—Gulf, C. & S. F. Ry. Co. v. Denson (Tex. Civ. App.) 72 S. W. 70.

54. Toledo v. Radbone, 23 Ohio Circ. R. 268.

55. Taylor v. Norfolk & C. R. Co., 131 N. C. 50.

56. Maguire v. Sheehan (C. C. A.) 117 Fed. 819. 59 L. R. A. 496.

57. Louisville & N. R. Co. v. Hall, 24 Ky. L. R. 2487, 74 S. W. 280.

58. Assault by conductor—Houston & T.

by the amount realized from sales of hides and pelts.[59] There may not be a recovery of the entire value of a broken article of art where it is shown that it has some value after restoration.[60] One impaired in his earning capacity by an accident is required to labor to his capacity in order to mitigate the damages as much as possible,[61] and it may be shown that the use of artificial limbs will enable one to pursue ordinary occupations.[62] The jury may take into consideration the fact that defendant, guilty of a trespass, acted on the advice of capable counsel.[63] It may not be shown in mitigation of damages for the wrongful occupancy of land with a tramway that defendant hauled freight free of charge for plaintiff's tenants, as this does not show any benefits derived by the landowner.[64] Where plaintiff was prevented from completing work by fault of the owner, the defendant may show that the contractor had not done his work in accordance with the contract.[65]

In an action for illegal arrest it may be shown as a matter of aggravation that plaintiff was arrested in the presence of his family.[66]

§ 3. *Recovery as affected by status of plaintiff or limited interest in property affected.*—Under laws providing for the survival of actions for negligent injuries to persons, the administrator may recover the same damages his intestate would have recovered if living.[67]

The owner of a freehold may recover for an injury which permanently depreciates his property while a tenant, or one having only a possessory right may recover for an injury to the use and enjoyment of that right.[68] Under the laws of North Carolina providing for the assessment of the entire amount of damages suffered by a trespass, a tenant may sue for injury to his leasehold estate caused by the trespass without joining the landlord.[69] Where the acts complained of were commenced before a lease of the land, an action therefor can be maintained only by the landlord.[70] A landlord of property on leased ground may recover for loss of rents during the remainder of a lease for the destruction of the building.[71]

In an action by a child, the damages for lessened earning capacity are limited to the period to which the child would be entitled to his own earnings.[72] The measure of damages for the loss of a child's services is their pecuniary value during minority less care, support, and maintenance.[73] In Nebraska, a parent may recover for loss of the expected services of a child, not only during minority but afterwards, on evidence justifying the reasonable expectation of pecuniary benefit therefrom.[74]

In an action for personal injuries plaintiff may show that she is a widow, as being a feme sole she may recover for her own services.[75] In an action for injuries to a married woman living apart from her husband, and supporting herself by her

C. R. Co. v. Batchler (Tex. Civ. App.) 73 S. W. 981. Ejection of passenger—Bough v. Metropolitan St. Ry. Co., 82 App. Div. (N. Y.) 215.

59. Chicago, R. I. & P. Ry. Co. v. Lee (Kan.) 72 Pac. 266. A verdict for damages on the killing of sheep will not be considered excessive by reason of the failure of the jury to deduct the value of the pelts where there was no evidence before them on this question—Peeler v. McMillan, 91 Mo. App. 310.

60. Comerford v. Smith, 82 App. Div. (N. Y.) 638.

61. Missouri, K. & T. Ry. Co. v. Flood (Tex. Civ. App.) 70 S. W. 331.

62. Hamilton v. Pittsburgh, C., C. & St. L. Ry. Co., 104 Ill. App. 207.

63. United States v. Homestake Min. Co. (C. C. A.) 117 Fed. 481.

64. Leigh v. Garysburgh Mfg. Co., 132 N. C. 167.

65. Wilson v. Borden, 68 N. J. Law, 627.

66. Young v. Gormley (Iowa) 94 N. W. 922.

67. Kyes v. Valley Tel. Co. (Mich.) 93 N. W. 623.

68. St. Louis, I. M. & S. Ry. Co. v. Hall (Ark.) 74 S. W. 293.

69. Dale v. Southern Ry. Co., 132 N. C. 705.

70. Sposato v. New York, 75 App. Div. (N. Y.) 304.

71. McPhillips v. Fitzgerald, 76 App. Div. (N. Y.) 15.

72. Chicago, B. & Q. R. Co. v. Krayenbuhl (Neb.) 91 N. W. 880, 59 L. R. A. 920.

73. Schnable v. Providence Public Market, 24 R. I. 477; McGarr v. National & P. Worsted Mills, 24 R. I. 447, 60 L. R. A. 122. No recovery allowed for loss of child's society—Id.

74. Draper v. Tucker (Neb.) 95 N. W. 1026.

75. Bradley v. City of Spickardsville, 90 Mo. App. 416.

own labor, the jury may take into consideration her age and condition in life in assessing the damages.[76] Under the Married Women's act of Colorado, a married woman in an action for personal injuries cannot recover for her inability to perform household duties.[77]

§ 4. *Measure and elements of damages for breach of contract. A. Miscellaneous contracts. Interest as an element.*—There may be no recovery of interest for breach of a contract where the damages are uncertain and indefinite.[78] Where the recovery is for a breach of an obligation not arising from contract, the allowance of interest is a question for the jury under the laws of South Dakota.[79]

For breach of a contract for sale of a medical practice, the measure of damages is the difference between the contract price to be paid and the market value of the property at the time of the breach, not exceeding the amount demanded.[80] In an action by one person against another for a wrongful dissolution of partnership, the measure of damages is the value of the partnership to the plaintiff and not his share of the profits which defendant made thereafter on carrying on the business.[81] On breach of a contract to maintain a person for the remainder of his life in consideration of the conveyance of certain property, the measure of damages would be the cost of boarding and clothing the person during his life less what care he had already received from the defendant.[82]

Newspaper contracts.—For breach of a contract with a news association for furnishing news, the association may recover the difference between what it would have received after the breach up to the time of its insolvency, which occurred some months later, and what it would have cost the association to have performed the contract during that time.[83]

The measure of damages for breach of an advertising contract before the purchaser had done anything thereunder is the contract price less the sum the publisher might have obtained by the exercise of reasonable diligence for advertising in the space.[84] On rejection of an advertising scheme providing for the payment of a certain per cent based on an increase of advertising business shown by its use, there may be a recovery of the percentage on the amount of the increase of business shown by the surreptitious adoption of part of the scheme, though the seller was not the sole originator of the scheme or its forms.[85]

Insurance contracts.—An act allowing the recovery of a percentage of the loss as attorney's fees from an insurance company for failure to pay a loss within the time specified in its policy does not apply to accident insurance.[86] The measure of damages for breach of a contract to insure property against loss by fire is the value thereof up to the amount for which it was agreed that insurance should be procured.[87]

Contracts referring to negotiable instruments.—In an action for damages for

76. Brake v. Kansas City (Mo. App.) 75 S. W. 191.

77. Mills' Ann. St. Colo. §§ 3009, 3012, 3020—Denver & R. G. R. Co. v. Young (Colo.) 70 Pac. 688.

78. Dady v. Condit, 104 Ill. App. 507.

79. For possession on refusal of sheriff to issue deed on ground that period of redemption had expired (Comp. Laws S. D. § 4578)—Hollister v. Donahoe (S. D.) 92 N. W. 12.

80. Wallingford v. Aitkins, 24 Ky. L. R. 1995, 72 S. W. 794.

81. McCollum v. Carlucci (Pa.) 55 Atl. 979.

82. Poston v. Eno, 91 Mo. App. 304.

83. United Press v. Abell, 79 App. Div. (N. Y.) 550.

84. Peck v. Kansas City Metal Roofing, etc., Co., 96 Mo. App. 212. The amount is a question for the jury under all the circumstances disclosed by the evidence—Id.

85. Taylor v. Times Newspaper Co. (Minn.) 93 N. W. 659.

86. Rev. St. 1895, art. 3071—Aetna Life Ins. Co. v. Parker (Tex.) 72 S. W. 168, 580. Where the policy was payable in annual installments, the penalty prescribed and the attorney's fees should be computed only on installments due when suit was commenced—New York Life Ins. Co. v. English (Tex. Civ. App.) 70 S. W. 440.

87. Everett v. O'Leary (Minn.) 95 N. W. 901. Loss under policy, see title Insurance.

refusal to repurchase a trust deed according to agreement, evidence of the value of the premises sold under foreclosure is inadmissible, as there is a presumption in the absence of fraud or irregularity, that the price obtained at the sale was all that they would bring,[88] nor will a deficiency judgment afford a just estimate of the damages suffered by reason of the refusal to repurchase.[89]

Oil contracts.—For breach of a contract to furnish oil on certain terms for a certain period, the plaintiff may recover all damages for the breach and not merely those accruing prior to the filing of his petition.[90] Where pending an appeal by defendant from a judgment for specific performance of an agreement to transfer oil property, the defendant removes material and produces oil therefrom, the damage on affirmance is based on the value of the material and oil on the day plaintiffs are put in possession of the property, though this value exceeds that at the time when the material and oil were taken.[91]

Contracts with railroad companies.—On breach of a contract to operate a railroad across land under which the railroad company had received a bonus, the measure of damages is the actual loss suffered by the landowner to be determined by ascertaining the value of the land to its owner with the railroad on it and in operation and the value of the same land with the railroad abandoned.[92] On the removal of a switch built under an agreement with the landowner that he should construct the grade and furnish the ties, the contract stipulating no time for the existence of a switch, the landowner may recover for the ties and his expenditures in making the grade.[93] Where the owner of a brickyard was deprived of its use by failure to build a tramway as agreed upon between the parties, the rental value of the works is competent to go to the jury as showing the damages sustained.[94]

(§ 4) *B. Contracts for sale or purchase of land.*—In an action by the vendee of realty for breach of a contract to convey, the measure of damages is not the purchase price paid with legal interest but the actual value of land at the time it should have been conveyed.[95] In Virginia, the measure of damages for a breach of contract of sale of realty by the vendor is the contract price and not the difference between the contract price and the market value of the property at the time of the breach.[96] For breach of a parol contract for the sale of land, the damages are limited to the purchase money paid and expenses incurred, and there can be no recovery for loss of profits.[97]

A vendor suing on a contract of sale of realty is not limited to the difference between the agreed price and the market value when the vendee agreed to take and pay for the realty, but he may recover on the basis of the agreed price.[98] The measure of damages in an action against an abstracter for failure to discover a defect is the difference between what the purchaser paid and the present worth of what he actually received,[99] and where plaintiff has not been ejected but has received

88, 89. Loeb v. Stern, 198 Ill. 371.

90. Standard Oil Co. v. Denton, 24 Ky. L. R. 906, 70 S. W. 282.

91. Southern Oil Co. v. Scales (Tex. Civ. App.) 69 S. W. 1033.

92. Eckington & S. H. Ry. Co. v. McDevitt, 18 App. D. C. 497.

93. Scholten v. St. Louis & S. F. R. Co. (Mo. App.) 73 S. W. 915.

94. Lipscomb v. South Bound R. Co., 65 S. C. 148.

95. Krepp v. St. Louis & S. F. R. Co. (Mo. App.) 72 S. W. 479. Where the conditions are such at the time when the deed is to be delivered that a higher price could be obtained in the market than that agreed upon, then the jury may take into consideration this increased value without regard to whether the conditions are permanent or temporary—Dady v. Condit, 104 Ill. App. 507. In an action for specific performance, the measure of damages, where performance cannot be enforced, is the amount paid by vendee with interest, expense in searching title, and the difference between the contract price and the market value of the property together with costs—Schorr v. Gewirz, 39 Misc. (N. Y.) 186.

96. Stuart v. Pennis (Va.) 42 S. E. 667.

97. Gray v. Howell, 205 Pa. 211.

98. Gray v. Meek, 199 Ill. 136.

99. Kenthan v. St. Louis Trust Co. (Mo App.) 73 S. W. 334.

rents and profits of the property, he is not entitled to interest in addition to the damages.[1]

(§ 4) *C. Breach of covenant as to title.*—For breach of covenant of seizin, the measure of damages is the consideration with interest from the time of the conveyance.[2] Where the title has partially failed and the consideration was paid as a whole, then the measure of damages is the proportion in value that the land to which title failed bore to the whole land, or if the consideration was severable as to the various tracts, and title failed as to one of these tracts, then the measure of damages is the price paid for the particular tract with interest.[3] Where there is a partial failure of title, the value of the property at the time of the conveyance forms the basis.[4]

On a covenant against incumbrances where the breach alleged is an outstanding lease of the premises, the measure of damages is the rental value for the unexpired term.[5]

For breach of a covenant of warranty of title, the measure of damages is the consideration money lost to the buyer and not the value of the property less any unpaid consideration,[6] nor damages for loss of the bargain.[7] Where the title fails to a portion sold for a gross sum, the measure of damages is such a proportion of the consideration paid as the value of that part of the land to which the title has failed bears to the value of the whole land and interest on such proportion.[8]

(§ 4) *D. Contracts to give lease and liabilities as between lessor and lessee.*—Where a tenant is wrongfully evicted during the term for which he has paid rent, he can recover from the landlord the entire amount paid for the period.[9] Loss of profits to a business are recoverable where such loss can be proved with reasonable certainty to have resulted from the landlord's act.[10] A tenant unlawfully removed under judgment in forcible entry may recover the difference between the rental value of the premises and the rent reserved from the day of the eviction to the end of the term or the termination of the lease otherwise.[11] For failure of a landlord to deliver possession at the commencement of the term, lessee may recover the difference between rent agreed to be paid and the value of the term, together with such special damages as may be shown.[12] The special damages recoverable are limited to damages the direct and natural result of the breach of contract, as these damages are

1. Kenthan v. St. Louis Trust Co. (Mo. App.) 73 S. W. 334.

2. Conklin v. Hancock, 67 Ohio St. 455.

3. Lloyd v. Sandusky (Ill.) 68 N. E. 154. Where the parties have agreed on a fixed and uniform price per acre or per front foot or any other standard or quantity, the measure of damages is such price multiplied by the quantity of land as to which the convenant fails with interest—Conklin v. Hancock, 67 Ohio St. 455.

4. Lloyd v. Sandusky (Ill.) 68 N. E. 154.

5. J. Wragg & Sons Co. v. Mead (Iowa) 94 N. W. 856. The fact that the grantor knew that plaintiff intended to use the land for storage purposes will not make defendant liable for the amount expended by plaintiff during the continuance of the incumbrance in hauling stock to and from a more distant place of storage, as such damages are too remote to have been within the contemplation of the parties—Id.

6. West Coast Mfg. & Inv. Co. v. West Coast Imp. Co., 31 Wash. 610, 72 Pac. 455; Roberts v. McFaddin (Tex. Civ. App.) 74 S. W. 105.

7. Roberts v. McFaddin (Tex. Civ. App.) 74 S. W. 105.

8. West Coast Mfg. & Inv. Co. v. West Coast Imp. Co., 31 Wash. 610, 72 Pac. 455.

9. Mallette v. Hillyard (Ga.) 43 S. E. 779.

10. Murphy v. Century Bldg. Co., 90 Mo. App. 621. Where a landlord breaks into a tenant's place of business and tears down partitions and bars doors and puts the room in possession of private detectives for a few days, the plaintiff may prove the net income of his business before the wrongful dispossession to show what he lost by dispossession—Gildersleeve v. Overstolz, 90 Mo. App. 518.

11. Small v. Clark, 97 Me. 304.

12. Bernhard v. Curtis, 75 Conn. 476; Williamson v. Stevens, 84 App. Div. (N. Y.) 518. Will include expenses incurred in renting and fitting up another store if necessary to protect him from loss but not expenditures made toward the occupancy of the store after knowledge of the situation as to a tenant in possession of the leased premises, nor loss sustained by depreciation in value of goods which he had on hand before he had obtained the lease, but may be allowed loss sustained by reserving goods for use in the store—Bernhard v. Curtis, 75 Conn. 476. For breach of a lease of an exclusive privilege in a railway station caused by failure to eject a former tenant and designate place for work, loss of profits may not be recovered, the recovery being limited to the rent paid in advance and the costs of the action—Deluise v. Long Island R. Co., 174 N. Y. 516.

presumed to have been in contemplation of the landlord.[13] The measure of damages for the breach of a farm rental contract is the difference between the contract price and the market rental value of the land.[14] For breach of a crop-sharing rental contract, the measure of damages is the reasonable market value of the tenant's share of the crops he would be reasonably expected to have raised during the term, less his earnings for the period, or what he would have earned by the exercise of reasonable diligence, and such damages are not regarded as speculative.[15] Where a landlord lawfully distrains for rent justly due but in later proceedings acts irregularly or unlawfully, the tenant cannot maintain a suit for these irregular acts without a showing of special damage.[16] On breach of a contract to make repairs on leased premises, the party making the repairs may recover their value from the party in default.[17] A tenant is not deprived of his right of recovery for forcible entry by the fact that his lease has expired before the trial of the action making it impossible to grant a writ of restitution.[18]

(§ 4) *E. Contracts for sale or purchase of goods and chattels.*—The seller of goods for refusal of purchaser to accept same may recover the difference between the market value at the time of the breach and the contract price.[19] As to articles not manufactured but included in the contract, the measure is the difference between the cost of manufacture and the contract price.[20] The market value may be determined by a prompt resale at the best obtainable price.[21] There is a presumption in the absence of evidence that the value of bonds is that expressed on their face,[22] and where there is a breach of a contract to receive ores deliverable in monthly instalments throughout the year, insufficient deliveries to be made good by the last day of the year, it is the market value on the last day of the year that governs.[23]

The purchaser on a breach of a contract to sell and deliver may recover the market value of the article at the time and place of the breach.[24] Loss of profits may be considered,[25] unless they are so uncertain as to rest in conjecture.[26] Where

13. Bernhard v. Curtis, 75 Conn. 476.

14. Scottish-American Mortg. Co. v. Taylor (Tex. Civ. App.) 74 S. W. 564.

15. Rogers v. McGuffey (Tex.) 74 S. W. 753; Rogers v. McGuffey (Tex. Civ. App.) 75 S. W. 817.

16. Brown v. Howell, 68 N. J. Law, 292.

17. Barnhart v. Boyce, 102 Ill. App. 172; Thompson v. Clemens, 96 Md. 196, 60 L. R. A. 580. For failure of a tenant to make repairs in accordance with the contract, and by reason of this breach the landlord is compelled by the authorities to make the repairs, he may recover from the tenant the cost of repairs and the rental value of the building during the time occupied in making the repairs—Loughlin v. Carey, 21 Pa. Super. Ct. 477.

18. Cutler v. Co-operative Brotherhood, 31 Wash. 680, 72 Pac. 464.

19. Gehl v. Produce Co. (Wis.) 93 N. W. 26; First Nat. Bank v. Ragsdale, 171 Mo. 168; Pratt v. S. Freeman & Son's Mfg. Co., 115 Wis. 648; Saveland v. Railroad Co. (Wis.) 95 N. W. 530; Kincaid v. Price (Colo. App.) 70 Pac. 153; Hamilton v. Finnegan, 117 Iowa, 623; Gruell v. Clark (Del. Super.) 54 Atl. 955. Where the seller of goods is ready to deliver them in accordance with the contract, the measure of damages on refusal of the purchaser to receive them is the difference between the contract price and the cost of manufacture and delivery—Puritan Coke Co. v. Clark, 204 Pa. 556. For breach of a contract to receive piles, the measure of damages is the difference between the actual cost to the contractor of delivering the piles and the contract price therefor—Reed v. Railroad Co. (Ky.) 75 S. W. 200.

20. Puritan Coke Co. v. Clark, 204 Pa 556.

21. Gehl v. Produce Co. (Wis.) 93 N. W. 26; American Hide & Leather Co. v. Chalkley & Co. (Va.) 44 S. E. 705.

22. Weigley v. Kneeland, 60 App. Div. (N. Y.) 614.

23. Duluth Furnace Co. v. Mining Co (C. C. A.) 117 Fed. 138.

24. O'Gara v. Ellsworth, 85 App. Div. (N. Y.) 216.

25. E. B. Williams & Co. v. Bienvenue, 109 La. 1023. For breach of a contract to furnish goods purchased by a merchant to fulfill contracts made for their sale, there may be a recovery of the expected profit on the sale—Lapp v. Illinois Watch Co., 104 Ill. App. 255. For breach of a contract to deliver goods to a purchaser for resale, there may be a recovery of the profits lost through the seller's breach of the contract, where the purchaser was unable to obtain other like good in the open market—F. W. Kavanaugh Mfg. Co. v. Rosen (Mich.) 92 N. W. 788. For delay in the delivery of machinery the seller is responsible for the loss of the use or possibly for interest on the investment where there is no rental value, but not for loss of profits in the business in which such machinery is to be used—Creamery Pkg. Mfg. Co. v. Creamery Co. (Iowa) 95

the article is machinery, there may be recovered all damages within the contemplation of the parties at the time of entering into the contract.[27] Where property should have been delivered at any time within a certain period, the law in regulating the measure of damages contemplates a range of the entire market, and the average price as thus found running through the period of time, and not sudden or transient inflation of prices or depression of prices.[28] For breach of a contract to deliver during the month, the market price at the place of delivery on the last day of the month controls.[29]

For breach of a warranty on return of goods, the vendee may recover such damages as may reasonably be supposed to have been in contemplation of the parties when the contract was made.[30] This does not allow recovery of expense of making an examination of the articles bought.[31] In case of live stock bought with warranty of soundness, purchaser may recover reasonable compensation for attempts to cure diseases manifesting themselves in the stock.[32] Where the warranted article is worthless for any purpose, purchaser can recover the entire price paid.[33] For breach of a contract to furnish suitable machinery, which has been accepted and put in use in ignorance of its failure to comply with the contract, the buyer may recover the difference between its value, if it had complied with the contract, and its value in its defective condition.[34] For breach of a warranty of an engine to furnish motive power to a street railway line, there may be a recovery of losses due to passengers being compelled to leave the cars before reaching their destination, the excessive use of coal, injury to boilers and the generator, and extra labor.[35] For breach of a

N. W. 188. Mere delay in furnishing machinery which does not interrupt an established business will not allow the award of prospective profits by way of damages—Creamery Pkg. Mfg. Co. v. Benton County Creamery Co. (Iowa) 95 N. W. 188.

26. Lapp v. Illinois Watch Co., 104 Ill. App. 255. The general rule of damages for nondelivery of goods excludes the elements of profit and loss—South Gardiner Lumber Co. v. Bradstreet, 97 Me. 165.

27. Colvin v. Cotton Oil Co., 66 S. C. 61. For the breach of a contract in failing to deliver machine for a cotton mill, there may be recovered damages to the seed by the firm manufacturing, arising from expenses incurred in cooling it after heating, as these expenses are within the reasonable contemplation of the parties—Id. For breach of a contract to furnish an essential part of a disabled machine within a specified time, the measure of damages is the value of use of machine in the business for the time which intervenes between day for delivery fixed by contract and day of actual delivery, if the circumstances are known to both parties at the time of making the contract—Champion Ice Mfg. & Cold Storage Co. v. Iron Works Co., 68 Ohio St. 229. In an action for damages for delay in furnishing machinery for creamery, there may be no recovery for damages arising out of the fact that the patrons delivered their milk to others, as being too remote and speculative—Creamery Pkg. Mfg. Co. v. Creamery Co. (Iowa) 95 N. W. 188. Where the warranty of a logging engine is merely that defective parts will be replaced and the seller of the engine knew nothing of the extent of the buyer's operations, there can be no recovery of loss of profits caused by the breaking of defective parts of the machine, as they will not be deemed to have been within the contemplation of the parties at the time of entering into the contract—Puget Sound Iron & Steel Works v. Clemmons (Wash.) 72 Pac. 465.

28. O'Gara v. Ellsworth, 85 App. Div. (N. Y.) 216.

29. J. P. Gentry Co. v. Margolius & Co. (Tenn.) 75 S. W. 959.

30. Punteney-Mitchell Mfg. Co. v. T. G. Northwall Co. (Neb.) 91 N. W. 863. In an action for breach of warranty of powder for use in flash lamps sold on a warranty that it contained no explosive compound, damages for injuries received by the buyer from an explosion of powder are recoverable in an action for breach—Wood v. E. & H. T. Anthony & Co., 79 App. Div. (N. Y.) 111. In an action for the purchase price of goods, where breach of warranty is pleaded as to the quality of the goods and it is shown that the goods were bought for resale and the vendor knew that fact, and the vendee before discovering the defects sells them to customers who reject them because of defects, the reasonable expenses incurred in making such abortive sales and in returning the goods are proper elements of damages—Punteney-Mitchell Mfg. Co. v. T. G. Northwall Co. (Neb.) 91 N. W. 863.

31. Lifshitz v. McConnell, 80 App. Div. (N. Y.) 289.

32. Galbreath v. Carnes, 91 Mo. App. 512.

33. Small v. Bartlett, 96 Mo. App. 550; Westinghouse Electric & Mfg. Co. v. Troell (Tex. Civ. App.) 70 S. W. 324.

34. Florence Oil & Refining Co. v. Farrar (C. C. A.) 119 Fed. 150. For breach of a warranty of a filtering plant, the purchaser may recover all the money paid for the plant and all losses otherwise suffered in consequence of failure to do the work as warranted—O. H. Jewell Filter Co. v. Kirk, 200 Ill. 382.

35. People's Sav. Bank v. Rapid Transit

contract for the manufacture and delivery of a vessel to have a specified speed, the measure of damages is the difference between the market value of the vessel as she is and as she was warranted to be.[36] The measure of damages for selling unsound cattle feed which caused a lessening in the weight of the cattle and their deterioration in market value is the diminished market value at the time and place they are injured.[37] For sale of goods on which a partial payment had been made, the measure of damages to the persons making the payments is the value of the goods at the time they were sold.[38]

(§ 4) *F. Liability of bailees, carriers, and telegraph companies.*—Where no special damages are asked for breach of a contract of carriage, the recovery is limited to what it would cost the passenger to get from the point of departure to his destination in the most feasible and reasonable way, allowing nothing for humiliation or indignity.[39] For delays in transportation, a passenger may recover the reasonable value of the time lost.[40] For wrongful ejection of a passenger, there may be a recovery for loss of time, physical and mental suffering, and humiliation.[41] Where the ejection is rightfully made, no unnecessary force being used, damages are not recoverable.[42] There can be no recovery for mental suffering unaccompanied by physical injury for carrying a passenger beyond his destination.[43] In the absence of malice only actual damages can be recovered for refusal to stop a train at a flag station.[44] A steamship company, landing a party at a point short of the destination, is liable for expenses and loss of time occasioned thereby within reasonable limitations.[45] There may be no recovery for fright caused by collision where no physical or bodily injury resulted.[46]

Co. (Iowa) 92 N. W. 691; Fischer Foundry & Mach. Co. v. Same, Id.

36. Bull v. Bath Iron Works, 75 App. Div. (N. Y.) 380.

37. Houston Cotton Oil Co. v. Trammell (Tex. Civ. App.) 72 S. W. 244.

38. Trotter v. Tousey (Mich.) 92 N. W. 544.

39. Rose v. King, 76 App. Div. (N. Y.) 308.

40. For detention by a railroad wreck, an attorney can recover from the carrier only the value of his time during the delay based on the average of what he had earned for at least a year preceding, where he had not notified the carrier of special circumstances making it necessary for him to arrive on scheduled time—Cooley v. Pennsylvania R. Co., 40 Misc. (N. Y.) 239. In an action for damages for delay in furnishing transportation, the employment of one of the party in a menial capacity by the person in charge thereof during the delay will not warrant the allowance for such services the wages the person was to have been paid for work in the line of his employment at point of destination—Johnson v. San Juan Fish & Packing Co. (Wash.) 71 Pac. 787. For a refusal to issue to a passenger an exchange ticket for mileage as required by the condition of the mileage book which entitled the holder to transportation in exchange tickets over certain lines the measure of damages is the time lost by the passenger and any expense incurred or loss thereby directly sustained—Schmidt v. Cleveland, C., C. & St. L. Ry. Co., 25 Ky. L. R. 11, 74 S. W. 674.

41. Choctaw, O. & G. R. Co. v. Hill (Tenn.) 75 S. W. 963; Rawlings v. Wabash R. Co., 97 Mo. App. 515. Liable for injuries to the feelings though no physical injuries were inflicted—Mabry v. City Elec. Ry. Co., 116 Ga. 624, 59 L. R. A. 590. Increased pain to a lame hand caused by a wrongful ejection—Texas & P. Ry. Co. v. Lynch (Tex. Civ. App.) 73 S. W. 65. For a wrongful expulsion a lawyer cannot recover for the loss of time where there is no proof as to the value of the time lost—Pennsylvania Co. v. Scofield (C. C. A.) 121 Fed. 814. Under a law allowing the ejection of a passenger for failure to pay his fare, on the conductor's stopping the train, there may be recovery of at least nominal damages for ejection while the train is in motion—Holt v. Hannibal & St. J. Ry. Co. (Mo.) 74 S. W. 631.

42. England v. International & G. N. R. Co. (Tex. Civ. App.) 73 S. W. 24.

43. Kansas City, Ft. S. & M. R. Co. v. Dalton, 65 Kan. 661, 70 Pac. 645. A female passenger carried beyond her destination and required to walk a long distance without an escort to the house of a friend, cannot recover for fright at hearing loud voices of negro men walking behind her, unless it is shown that the railroad company knew that the locality was one in which such occasion for fright was likely to occur—Central of Georgia R. Co. v. Dorsey, 116 Ga. 719. One put off a train 250 yards beyond his station without any injury and no malice or inhumanity on the carrier's part may not recover for sickness caused by his falling into a stream while returning to the station—Rawlings v. Wabash R. Co., 97 Mo. App. 511.

44. Yazoo & M. V. R. Co. v. White (Miss.) 33 So. 970.

45. In an action against a steamship company for landing plaintiff and his employes at a point short of their destination, where they were compelled to remain for some time and to furnish an outfit and supplies to take them to their destination,

The owner of goods may recover for deterioration caused by the unreasonable delay of the carrier in delivering same,[47] and the value is not to be determined by the value of similar goods at nearby second-hand stores.[48] For the loss of a valuable package, recovery is limited to the liability fixed by the company on shipments, unless their true value is stated.[49] Stipulations fixing the value of the property in case of injury or loss are valid.[50] The limitation only applies to the carrier relation, and not to that as a bailee for hire.[51]

The measure of damages for a carrier's delay in the delivery of stock is the difference between their market value in the condition in which they were delivered and their market price if seasonably delivered, deducting therefrom any depreciation necessarily resulting from the transportation.[52] The measure of damages for injuries to stock is the difference between the market value of the stock in the condition in which they would have arrived but for the negligence and the market value in the condition in which they did arrive.[53] The value of stock may be proved by opinion, but whether or not there is a market for stock as injured is not provable by opinion evidence.[54] The measure of damages for cattle dying from injuries received in transit is the market value of the cattle at the point of destination,[55] less the amount received by the owner on a sale of carcasses.[56] A shipper may recover the amount of a feed bill where the cattle were not actually fed and he had to pay the bill to get possession.[57]

Compensatory damages are recoverable for damages caused by delays and errors in the transmission of telegrams where they may be determined with certainty and are not objectionable as being remote,[58] and the company is advised of the im-

plaintiff may recover his own and the parties' living expenses at the point where they were landed and the cost of the supplies and outfit—Bullock v. White Star S. S. Co., 30 Wash. 448, 70 Pac. 1106.

46. Ohliger v. Toledo Traction Co., 23 Ohio Circ. R. 265.

47. San Antonio & A. P. R. Co. v. Josey (Tex. Civ. App.) 71 S. W. 606.

48. Wells-Fargo Exp. Co. v. Williams (Tex. Civ. App.) 71 S. W. 314.

49. Rowan v. Wells-Fargo & Co., 80 App. Div. (N. Y.) 31.

50. Nelson v. Great Northern Ry. Co. (Mont.) 72 Pac. 642; 101 Live Stock Co. v. Kansas City, M. & B. R. Co. (Mo. App.) 75 S. W. 782; Central of Georgia Ry. Co. v. Glascock (Ga.) 43 S. E. 981.

51. Bermel v. New York, N. H. & H. R. Co., 172 N. Y. 639.

52. Galveston, H. & S. A. Ry. Co. v. Botts (Tex. Civ. App.) 70 S. W. 113; Missouri, K. & T. Ry. Co. v. Storey (Tex. Civ. App.) 75 S. W. 847. Interest may be included—Texas & P. Ry. Co. v. Smissen (Tex. Civ. App.) 73 S. W. 42.

53. Cleveland, C., C. & St. L. R. Co. v. Patton, 203 Ill. 376; International & G. N. R. Co. v. Young (Tex. Civ. App.) 72 S. W. 68; Texas & P. Ry. Co. v. Meeks (Tex. Civ. App.) 74 S. W. 329.

54. Texas & P. Ry. Co. v. Meeks (Tex. Civ. App.) 74 S. W. 329.

55, 56. Gulf, C. & S. F. Ry. Co. v. Butler (Tex. Civ. App.) 73 S. W. 84.

57. Galveston, H. & S. A. Ry. Co. v. Botts (Tex. Civ. App.) 70 S. W. 113.

58. The damages caused by failure to deliver a telegram to come and contract for building a house, are too uncertain—Harmon v. Western Union Tel. Co. (S. C.) 43 S. E. 959. Compensatory damages cannot be recovered of a telegraph company for failure to send or deliver a mere proposal to sell lumber, as they are contingent upon its acceptance—Beatty Lumber Co. v. Western Union Tel. Co. (W. Va.) 44 S. E. 309. In an action for failure to deliver a message correctly which caused a loss of a position to a student in a normal school, a failure of the student to receive benefit from his course in the school because of worry over loss of position, is too remote to be considered—Western Union Tel. Co. v. Partlow (Tex. Civ. App.) 71 S. W. 584. For failure of a telegraph company to deliver a message which resulted in the failure of the addressee to sell property to a person who had agreed to purchase it at a certain price, the measure of damages is the difference between the amount which he would have received for the property and the amount which he did receive on disposing of it after due diligence to obtain the highest price which he could under the circumstances. In this case it was held that the evidence failed to show that the price received was the highest price that with reasonable diligence could have been obtained under the circumstances—Brooks v. Western Union Tel. Co. (Utah) 72 Pac. 499. In an action for failure to deliver a message announcing a death, there can be no recovery of the cost of exhuming and reburying the deceased, unless it is shown that the plaintiff incurred the expense—Western Union Tel. Co. v. Watson (Miss.) 33 So. 76. Damages are not recoverable in an action for failure to promptly deliver a telegram, where it is not shown that plaintiff suffered any physical injury—Western Union Tel. Co. v. Cross' Adm'r (Ky.) 74 S. W. 1098.

portance of the message.[59] For nondelivery of a telegram, there may be recovered, as actual damages, money paid for the transmission and delivery of the telegram.[60] Mental suffering is an element of recovery in some states for delay in transmission and delivery of telegrams announcing fatal illness or death of near relatives.[61] There is a sufficient disclosure of the importance of a telegram to warrant recovery for mental anguish for failure to deliver it, where it recites the death of a person.[62] Mental anguish at delay in the delivery of a telegram asking for information as to the health of a child is not recoverable.[63] Where a message is delivered to the telegraph company at a point for transmission to a point in another state, damages for mental anguish suffered by delay in the delivery may be recovered in the state from which the message was sent, though such damages are not recoverable in the state of the delivery of the message.[64] There may be no recovery for mental anguish caused by the failure to deliver a telegram to a clergyman requesting his attendance at a funeral.[65] Plaintiff may be asked as to the nature and duration of his grief on hearing of the death of his brother, and whether it was increased by his inability to attend the funeral.[66] The intentional failure of a messenger boy to deliver a telegram authorizes the awarding of punitive damages against the company.[67]

For disconnecting a telephone by mistake, the subscriber, in the absence of proof of pecuniary injury, can recover only the amount paid for the service for the time the telephone was disconnected on the basis of the monthly rental.[68]

Penalties for failure to transmit telegrams promptly are recoverable only by the sender of the dispatch and not by the addressee.[69]

For loss of cotton delivered to a cotton compress company, the value is that at

59. Western Union Tel. Co. v. Pearce (Miss.) 34 So. 152. In an action against a telegraph company for failure to deliver a telegram to a sheriff to postpone an execution sale of land belonging to plaintiff, the plaintiff may recover to the full extent of his actual interest in the property where the message disclosed his interest—Western Union Tel. Co. v. Wofford (Tex. Civ. App.) 74 S. W. 943.

60. Western Union Tel. Co. v. Lawson (Kan.) 72 Pac. 283.

61. Graham v. Western Union Tel. Co., 109 La. 1069; Marsh v. Western Union Tel. Co. (S. C.) 43 S. E. 953; Western Union Tel. Co. v. Seffel (Tex. Civ. App.) 71 S. W. 616; Meadows v. Western Union Tel. Co. (N. C.) 43 S. E. 512; Western Union Tel. Co. v. Cavin (Tex. Civ. App.) 70 S. W. 229. Grandparents—Western Union Tel. Co. v. Crocker, 135 Ala. 492. Recovery of uncle standing in relation of parent to deceased —Bright v. Western Union Tel. Co. (N. C.) 43 S. E. 481. Mental anguish and inability to attend the funeral of a niece is not an element of damage in an action by the uncle for damages against a telegraph company for delay in delivery of the message announcing her death—Western Union Tel. Co. v. Wilson (Tex.) 75 S. W. 482. The complaint sufficiently states a cause of action for damages for delay in the delivery of a telegram, where it recites delivery for transmission within a reasonable time so that had it been promptly delivered plaintiff could have attended his sister's funeral, who was dying at the time of the sending of the message, and plaintiff did not know of her condition until the evening of the second day thereafter, at which time his sister had been buried, and by reason of wilful negligence the plaintiff was subject to great pain and anguish in consequence of being deprived of the privilege of attending his sister's funeral—Hartzog v. Western Union Tel. Co. (Miss.) 34 So. 361. In an action for delay in the delivery of a telegram, there may be no recovery for plaintiff's inability to reach her daughter's bed-side and for mental anguish in not being able to accompany her home, where the message was sent by a friend, announcing the sickness of the daughter and requesting the mother to telephone, as these damages could not have been in contemplation of the parties as a probable result of a breach of duty of the telegraph company—Western Union Tel. Co. v. McFadden (Tex. Civ. App.) 75 S. W. 352.

62. Bright v. Western Union Tel. Co. (N. C.) 43 S. E. 841.

63. Western Union Tel. Co. v. O'Callaghan (Tex. Civ. App.) 74 S. W. 798.

64. Western Union Tel. Co. v. Waller (Tex.) 74 S. W. 751.

65. Western Union Tel. Co. v. Arnold (Tex.) 73 S. W. 1043.

66. Western Union Tel. Co. v. Simmons (Tex. Civ. App.) 75 S. W. 822.

67. Butler v. Western Union Tel. Co. (S. C.) 44 S. E. 91.

68. Cumberland Telephone & Telegraph Co. v. Hendon, 24 Ky. L. R. 1271, 71 S. W. 435.

69. Thompson v. Western Union Tel. Co., 40 Misc. (N. Y.) 443.

the time of the discovery of the loss with interest and not its value at the time of suit.[70]

(§ 4) *G. Contracts for services.*—Where a contract for personal services is entire and breach of it is total, the measure of damages is what the plaintiff would have earned less what it would have cost him to perform services according to the terms of the contract.[71]

A contractor prevented from completing his work by the fault of the owner of the property may recover such a proportion of the entire price as the fair cost of the work done bears to the fair cost of the whole work, and in respect to work not done, the profits he would have realized by doing it.[72] On failure of a contractor to comply with his contract he may recover on a quantum meruit for the value of the services performed, less the damages occasioned by his breach of the contract.[73]

For breach of a contract of employment, the measure of damages is the salary for the contract time less what plaintiff earned or could have earned at other employment during the term.[74] What the servant earned or could have earned in the meantime is a matter of defense and should be pleaded in mitigation of damages,[75] and the employer has the burden of showing that other and more profitable employment than that in which plaintiff, in fact, engaged, in order to reduce the damages, had been offered and declined or might have been found.[76] Where the complaint in the action for breach of contract of employment averred inability to obtain employment, evidence as to earnings may be shown by defendant under a general denial.[77] The doctrine allowing deduction of earnings on breach of contract of employment has no application to earnings after the expiration of the contract time.[78]

One employed to perform services covering a number of years and prevented by his employer from working under the contract may recover his monthly salary as it accrues though he does no work whatever under the contract, where he is ready and willing to work and no work is offered.[79] On breach of a contract of permanent employment, where a part of the consideration was the rendition of services for a less rate than formerly received for the work, the plaintiff may recover the reasonable value of the services rendered up to the time of the breach of the contract and is not restricted to the lower rate.[80]

Where a person performs services under a void contract, or one that cannot for any reason be enforced, his recovery therefor should be measured by the value of the services performed.[81]

(§ 4) *H. Promise of marriage.*—For breach of a marriage promise, there may be recovered such a sum as will fairly compensate plaintiff for defendant's failure to

70. Hattiesburg Compress Co. v. Johnson (Miss.) 33 So. 654.

71. School Dist. v. McDonald (Neb.) 94 N. W. 829; Wood v. Wack (Ind. App.) 67 N. E. 562.

72. Wilson v. Borden, 68 N. J. Law, 627. In an action by a sub-contractor against a contractor for damages caused by preventing the performance of the contract to put in a heating apparatus, the damages may include the profits that would have accrued to the sub-contractor from a full performance of his contract, with interest from the time of the contractor's refusal not deducting therefrom the commissions paid by the subcontractor to the agent to obtain the contract—Peck-Hammond Co. v. Heifner, 136 Ala. 473.

73. McKnight v. Bertram Heating & Plumbing Co., 65 Kan. 859, 70 Pac. 345.

74, 75. Latimer v. New York Cotton Mills, 66 S. C. 135.

76. Griffin v. Brooklyn Ball Club, 174 N. Y. 535.

77. Latimer v. New York Cotton Mills, 66 S. C. 135.

78. Hughes v. School Dist. No. 37, 66 S. C. 259.

79. Stone v. Bancroft (Cal.) 72 Pac. 717.

80. Davidson v. Laughlin, 138 Cal. 320, 71 Pac. 345.

81. Banta v. Banta, 84 App. Div. (N. Y.) 138. In an action on a quantum meruit for services as a clerk where evidence has been received as to salary paid plaintiff's predecessor, it is proper to charge that the jury would not be bound by such salary, but could award what the services were fairly and reasonably worth—Meislahn v. Irving Nat. Bank, 172 N. Y. 631.

marry her and for any mortification of feelings suffered on account thereof.[82] The pecuniary status of defendant may be shown to establish the injury sustained by the breach,[83] and this intends the actual pecuniary circumstances and not general reputation for wealth.[84]

§ 5. *Measure and elements of damages for torts. A. Miscellaneous torts. Injuries to animals.*—The market value of an animal killed by a railroad train is that of the place and time of the accident.[85] That the animal was well broken may be shown as bearing on the extent of the loss.[86]

Alienation of affections.—In an action for the alienation of the affections of a husband, the financial condition of defendant may be shown.[87]

Obstruction of highways.—For obstruction of a right of way appurtenant to a farm, the measure of damages is the difference in the rental value with and without the way and this though the farm is not rented.[88]

False imprisonment.—Plaintiff may recover the expenses reasonably incurred in procuring his discharge, for his loss of time, for his physical and mental suffering, and for humiliation which the arrest and incarceration may have occasioned him.[89] Exemplary damages are not recoverable unless the arrest was accompanied with malice, gross negligence, or other circumstances of legal aggravation.[90] Where exemplary damages are claimed, defendant may, in mitigation of such damages, show resistance by plaintiff and any relative circumstances showing reasonable provocation for resorting to force in making the arrest.[91] Where an arrest is illegal only because the officer having the warrant is not present, but the arrest is made by his direction, damages may be recovered only to the time when the lawful officer takes the prisoner into his custody.[92] For assault and false imprisonment, there may be a recovery for physical and mental pain including humiliation.[93]

Malicious prosecution.—For malicious prosecution there may be a recovery for loss of time, attorney's fees paid to obtain acquittal or release, and injuries to feelings and reputation.[94] There may be no recovery for peril to plaintiff's life by his imprisonment in jail, as life is not necessarily imperiled by incarceration in a jail.[95]

Infringements of patents and trade marks and unfair competition.—For infringement of a patent, recovery is limited to damages clearly and strictly proved.[96] The profits recoverable for unfair competition are governed by the same rule as in

82. Grubbs v. Pence, 24 Ky. L. R. 2183, 73 S. W. 785.

83. Birum v. Johnson, 87 Minn. 362.

84. Johansen v. Modahl (Neb.) 94 N. W. 532.

85. Central of Georgia Ry. Co. v. Main, 135 Ala. 451.

86. Southern Kansas Ry. Co. v. Cooper (Tex. Civ. App.) 75 S. W. 328.

87. Love v. Love (Mo. App.) 73 S. W. 255.

88. Hey v. Collman, 78 App. Div. (N. Y.) 584.

89. Petit v. Colmary (Del.) 55 Atl. 344. Loss of time is sufficiently pleaded by an allegation that the plaintiff was deprived of his liberty—Young v. Gormley (Iowa) 94 N. W. 922. In actions for false imprisonment against officer and one causing arrest, there may be a recovery for wounded pride, humiliation and mortification from a public arrest—Harness v. Steele, 159 Ind. 286.

90. Kelly v. Durham Traction Co., 132 N. C. 368.

91. Petit v. Colmary (Del.) 55 Atl. 344.

92. McCullough v. Greenfield (Mich.) 95 N. W. 532.

93. Golibart v. Sullivan, 30 Ind. App. 428.

94. Ruth v. St. Louis Transit Co. (Mo. App.) 71 S. W. 1055. Injury to reputation—Lord v. Guyot, 30 Colo. 222, 70 Pac. 683. Mental suffering—Cohn v. Saidel, 71 N. H. 558. For malicious prosecution of an attachment suit, evidence is admissible to show damages sustained by reason of being unable to dispose of attached property—Lord v. Guyot, 30 Colo. 222, 70 Pac. 683.

95. Kansas & T. Coal Co. v. Galloway (Ark.) 74 S. W. 521.

96. Jennings v. Rogers Silver Plate Co., 118 Fed. 339. Where a patent is for a particular part of a machine it is not necessary to ascertain profits of the whole machine but it must be shown what portion of the profits is due to the particular invention secured by the patent in suit—Lattimore v. Hardsocg Mfg. Co. (C. C. A.) 121 Fed. 986. Profits from the manufacture, sale and leasing of patented machines, are too conjectural to form a basis for the recovery of damages where there were no averments that the machines were in use or that there was any demand for them or that their manufacture, sale or leasing was profitable or otherwise—Doane v. Preston (Mass.) 67 N. E. 867.

ases of infringement of trade marks and are not limited to those accruing from sales in which it is shown that the customer was actually deceived, but include all profits made on goods sold in a simulated package.[97] Under the Iowa label law, there can be no recovery of profits, unless it is shown that defendants acted in bad faith,[98] and clear proof of the damages or profits is required.[99]

Liability of corporate officers for conspiracy.—In an action for damages for conspiracy by the officers of a corporation to wreck the same, the measure of damages is the value of the property and franchise of the corporation as it existed before the overt acts complained of producing insolvency, less the amount which the property actually brought on foreclosure sale.[1]

(§ 5) *B. Loss of, or injuries to, property.*—For injury to a vehicle injured by collision, there may be a recovery of the expenses for repairs,[2] together with cost of removing the wreck and storage while arrangements for repairs were being made and the reasonable value of its use for such time.[3] For injuries to machinery, there may be a recovery of the difference in value before and after the injury or if it can be restored, the reasonable cash value of making repairs and the reasonable cash value of its use during the time of making the repairs.[4] The recovery for repairs is limited to necessary repairs and the reasonable amount therefor.[5] The measure of damages for injuries to stock caused by feeding impure meal furnished by defendant is the difference between the market value of the stock at the place where the injury occurred just before and just after they were made sick by eating the meal.[6]

For injuries to a yacht there may be recovered the amount paid for wages and provisions for the crew during the period of repairs, where the presence of the crew was necessary to care for the vessel,[7] but not demurrage unless actual pecuniary loss is shown.[8] Where both vessels were in fault in the collision and the damages are divided, interest is not recoverable as an element of damages.[9] Where the libelant of a vessel is entitled to damages for its detention for repairs, he may recover interest.[10] For injury to a dredge in a collision there may be no recovery of the salary of the superintendent in charge of the dredge work during the time of repairing the dredge, where he attended to his regular duties in addition to overseeing the repairs.[11]

The measure of damages for change of grade is the difference between the market value of the lots immediately before the grading of the street and the value after the injury was complete,[12] taking into consideration the value of the improvements to the property itself.[13] The damage to abutting property by the construction of a street railway above the street grade is the difference between the fair market value of the property immediately before the tracks of the railway were so raised and its fair market value after its tracks were changed,[14] excluding benefits from the railroad to the property involved of a general benefit to all other property in

97. N. K. Fairbank Co. v. Windsor, 118 Fed. 96.

98. Code, Iowa, § 5050—Beebe v. Tolerton & Stetson Co., 117 Iowa, 593.

99. Beebe v. Tolerton & Stetson Co., 117 Iowa, 593.

1. Niles v. New York Cent. & H. R. R. Co. (N. Y.) 68 N. E. 142.

2. San Antonio Traction Co. v. Upson (Tex. Civ. App.) 71 S. W. 565.

3. Moore v. Metropolitan St. Ry. Co., 82 N. Y. Supp. 778.

4. Davidson v. Chicago & A. Ry. Co. (Mo. App.) 71 S. W. 1069.

5. Rock v. Interurban St. Ry. Co., 40 Misc. (N. Y.) 664.

6. Houston Cotton Oil Co. v. Trammell (Tex.) 74 S. W. 899.

7, 8. Fisk v. New York, 119 Fed. 256.

9. The Itasca, 117 Fed. 885.

10. Harrison v. Hughes, 119 Fed. 997.

11. The Itasca, 117 Fed. 885.

12. Robinson v. St. Joseph, 97 Mo. App. 503.

13. Chicago v. McShane, 102 Ill. App. 239; Village of Barrington v. Meyer, 103 Ill. App. 124; Chicago v. Anglum, 104 Ill. App. 188.

14, 15. Farrar v. Midland Elec. Ry. Co. (Mo. App.) 74 S. W. 500.

the vicinity.[15] The measure of damages for opening a street along private property is the difference in the market value of the property with the improvement and without it, and the city may not offset any future increase in the value of part of the property in common with the public because of the improvement,[16] and the jury may take into consideration the fact that the market value of the land may be injuriously affected by reason of the cost of other street improvements that may be charged on the land.[17] One whose access from a public street has been cut off for several months while it was being located anew and improved may recover for loss of rent from the tenements and a decrease of their rental value for such time.[18] The question of damages to property caused by the construction of street improvements is for the jury.[19]

The recovery for damages to a building is the cost of placing the building in as good condition as it was before the damage,[20] and where destroyed, the owner may recover the cost of removing the debris under orders of the authorities.[21] For injuries to a building by failure of a contractor of an adjoining excavation to protect the foundation of the building, the measure is the actual damage to the property with interest for delay in paying same.[22] Where the erection of a building was prevented by encroachment of adjoining landowner and the price of lumber rose in the meantime, the owner may recover the difference between the contract price of the lumber and the price he was later required to pay for the same,[23] and the amount paid a watchman to guard and protect a temporary structure during the delay.[24]

It is the face value of treasury notes destroyed by fire while the notes were in custody of an officer, and not the cost to the United States government of issuing new notes, that is the measure of damages for their loss.[25]

For injury to pasture lands by a fire, the measure of damages is the difference in the value of the land immediately before and after the fire.[26] For destruction of a fence by fire there may be recovered the amount necessary to construct a fence equal to the one destroyed.[27] Fruit trees and hedges are to be regarded as part of the realty in determining damages for their destruction.[28]

The measure of damages for injury to a crop is the difference between the value of the crop just before and just after the damage. In speaking of the value of the growing crop at the time of the injury, what is meant is its value for the purpose of continuing its cultivation to maturity, for, in most, if not in all cases, it will be valueless for any other purpose.[29]

For injuries caused by the wrongful discharge of surface water on the owner's premises, there may be a recovery of the actual damages sustained up to the be-

16. City of Meridian v. Higgins (Miss.) 33 So. 1.

17. De Benneville v. Philadelphia, 204 Pa. 51.

18. Munn v. Boston (Mass.) 67 N. E. 312.

19. Board of Councilmen v. Howard, 25 Ky. L. R. 111, 74 S. W. 703.

20. Fitz Simons & Connell Co. v. Braun, 199 Ill. 390.

21. McPhillips v. Fitzgerald, 76 App. Div. (N. Y.) 15.

22. Irvine v. Smith, 204 Pa. 58.

23, 24. Barnes v. Berendes (Cal.) 72 Pac. 406.

25. Smythe v. United States, 188 U. S. 156, 47 Law. Ed. 425.

26. Galveston, H. & S. A. Ry. Co. v. Chittim (Tex. Civ. App.) 71 S. W. 294; St. Louis, I. M. & S. Ry. Co. v. Hall (Ark.) 74 S. W. 293. For destruction of grass the recovery is limited to the reasonable market value of grass at the time of its destruction, and if it had no market value, then its value in view of the use to which it was put—Galveston, H. & S. A. Ry. Co. v. Chittim (Tex. Civ. App.) 71 S. W. 294.

27. Galveston, H. & S. A. Ry. Co. v. Chittim (Tex. Civ. App.) 71 S. W. 294.

28. Kansas City, Ft. S. & M. R. Co. v. Perry, 65 Kan. 792, 70 Pac. 876.

29. Raywood Rice Canal & Mill. Co. v. Langford (Tex. Civ. App.) 74 S. W. 926. In ascertaining the value of growing crops, proof must be heard either as to the market price or its intrinsic worth and it follows that any witness who undertakes to speak intelligently as to its value must base his figures on a sound estimate of what the crops would probably produce if well cultivated and uninjured and to deduct from that result, the cost of cultivating and marketing—Id.

ginning of the action and the injured party is not limited to the difference between the value of the property just before and just after the injury.[30] It is not necessary to a recovery for damages to land from an overflow caused by an embankment built with inadequate provision for carrying off water, that the particular damage caused should be within the anticipation of reasonably intelligent and prudent persons.[31] For overflows, the damage is the difference between the market value of the land before and immediately after the overflow, and this rule applies to successive overflows if there were more than one.[32] For withdrawal of waters from land, the measure of damages is the diminution in the rental value caused thereby and not the loss of profits on crops and expenses incidental to the loss of water,[33] and in an action for injuries to land caused by the diversion of water, the difference in the value of land before and after the injury may be shown.[34] For injuries to a farm caused by the discharge of sewage over the land, the damages cannot exceed the rental value of the land.[35]

(§ 5) *C. Maintaining nuisance.*—In an action for damages for maintaining a nuisance, the recovery may include damages for discomfort in the occupancy of the home.[36] In an action to abate a nuisance, the reasonable cost of its removal may be recovered.[37] A tenant suing for damages for a nuisance may recover the depreciation in the rental value of the premises occasioned thereby.[38]

Where a nuisance is permanent and continuing, there may be a recovery in one action of all the damages past and future which the maintenance of the nuisance will occasion.[39] In the case of a permanent injury to a freehold caused by the maintenance of a nuisance, the measure of damages is the difference in market value before and after the construction of the works constituting the nuisance.[40] There can be no recovery on the theory that a city will continue to maintain the nuisance.[41] Where the market value of property is increased by the wrongful act of a city, it will still be liable for actual damages resulting from injuries therefrom to the property.[42] For injuries occasioned by a public nuisance, the damages are not the value of the use of the property when not devoted to any use whatever, but the value of the use when occupied for the purpose for which the property was suitable in its then condition.[43]

A petition for damages resulting from the location of a pesthouse in the neighborhood of plaintiff's farm, averring the fears of persons dealing with the plaintiff, must show that the fears of such persons are well grounded.[44]

30. Ready v. Missouri Pac. Ry. Co. (Mo. App.) 72 S. W. 142.

31. Schmeckpepper v. Chicago & N. W. Ry. Co. (Wis.) 93 N. W. 533. In an action for damages for alteration of a water level so as to make lands less fit for crops, there can be no recovery for loss of crops planted with the knowledge that they would fail —Westphal v. New York, 75 App. Div. (N. Y.) 252.

32. Houston & T. C. R. Co. v. Lensing (Tex. Civ. App.) 75 S. W. 826; Ready v. Missouri Pac. Ry. Co. (Mo. App.) 72 S. W. 142.

33. Kinsey v. New York, 75 App. Div. (N. Y.) 262.

34. Briscoe v. Young, 131 N. C. 386; Coleman v. Bennett (Tenn.) 69 S. W. 734.

35. $30,000 is not an excessive recovery for damages to land caused by a continuing nuisance, it being stipulated that plaintiff entitled to damages should recover permanent damages, where defendant's own evidence was that the property damaged was worth at least $100,000—Hentz v. City of Mt. Vernon, 78 App. Div. (N. Y.) 515.

36. Daniel v. Ft. Worth & R. G. Ry. Co. (Tex.) 72 S. W. 578; Louisville & N. Terminal Co. v. Jacobs (Tenn.) 72 S. W. 954; Houston, E. & W. T. Ry. Co. v. Charwaine (Tex. Civ. App.) 71 S. W. 401.

37. City of Mineral Wells v. Russell (Tex. Civ. App.) 70 S. W. 453.

38. Bly v. Edison Elec. Illuminating Co., 172 N. Y. 1, 58 L. R. A. 500.

39. Langley v. City Council of Augusta (Ga.) 45 S. E. 486. Where a nuisance caused by the faulty construction of a sewer is a continuing nuisance, plaintiff is entitled to all damages within the statutory limits not previously covered by him, though the original cause for establishing the nuisance is barred—Bennett v. City of Marion (Iowa) 93 N. W. 558.

40. Langley v. City Council of Augusta (Ga.) 45 S. E. 486; Missouri, K. & T. Ry. Co. v. McGehee (Tex. Civ. App.) 75 S. W. 841.

41, 42. Langley v. City Council of Augusta (Ga.) 45 S. E. 486.

43. Pettit v. Incorporated Town of Grand Junction (Iowa) 93 N. W. 381.

44. McKay v. Henderson, 24 Ky. L. R. 1484, 71 S. W. 625.

(§ 5) *D. Trespass on lands.*—For the unlawful occupancy of land with a tramway, the measure of damages is the rental value of land actually occupied together with the decrease in the rental value of the remainder of the land caused by its existence.[45] Defendant's abusive and violent conduct in an illegal trespass may be considered on the question of mental suffering of plaintiff.[46] In some states, the statutes allow a recovery of all damages down to the time of the trial.[47] The measure of damages for waste by removing timber from land is the diminished value of the land by such removal and not the value of the timber in its manufactured state.[48]

In an action for an illegal entry into plaintiff's place of business and injury to the contents, plaintiff may recover for injuries directly caused to his business by the entry.[49] Where property is taken by its true owners, the value of the property is not to be regarded as element of the damages.[50]

(§ 5) *E. Conversion.*—In an action for conversion, the measure of damages is the value of the article at the time of the conversion, with interest.[51] Attorney's fees are not recoverable as actual damages in action for conversion.[52] For conversion of coal by a carrier, the measure of damages is the value of the coal at its destination and not at the mines.[53] The measure of damages for the taking of ore or timber from another's land without right is the enhanced value of the property when finally converted to the trespasser's use; where the property is taken through mistake or honest belief that the trespasser is acting within his rights, the measure is the value of the property at the time of severance.[54] The measure of damages for the conversion of property by an innocent purchaser from an intentional trespasser is the value of the property at the time of the purchase.[55] A pledgor may recover damages sustained by wrongful sale of a pledge, taking into account the injury done to the property and expenses in getting it back.[56] In an action for conversion of goods sold under contract of conditional sale, proof of the price the vendee agreed to pay is not proof of the value of the goods.[57] Evidence of the

45. Leigh v. Garysburg Mfg. Co., 132 N. C. 167.

46. Hickey v. Welch, 91 Mo. App. 4.

47. Pub. Acts 1895, p. 297, c. 224—Dale v. Southern Ry. Co., 132 N. C. 705. Under an act allowing recovery of damages for a continuing trespass down to the day of the trial instead of obliging party to bring second action, this method cannot be used to bring in a subsequent cause of action arising between issue of writ and trial, though the trespass is of the same character as that alleged in the first action—Pantall v. Rochester & P. Coal & Iron Co., 204 Pa. 158.

48. Nelson v. Churchill (Wis.) 93 N. W. 799.

49. Gildersleeve v. Overstolz, 90 Mo. App. 518.

50. Pabst Brew. Co. v. Greenberg (C. C. A.) 117 Fed. 135.

51. Janeway v. Burton, 201 Ill. 78; Daugherty v. Lady (Tex. Civ. App.) 73 S. W. 837; Midville, S. & R. B. R. Co. v. Bruhl (Ga.) 43 S. E. 717; Hunt v. Boston (Mass.) 67 N. E. 244; State v. Sullivan (Mo. App.) 74 S. W. 417; Lynch v. White (Tex. Civ. App.) 73 S. W. 834. In assessing damages for conversion it is proper for the jury to consider not only the value of the property at the time of cenversion but also the time which has elapsed since the conversion to determine the fair compensation to plaintiff for his injury—Davis v. Bowers Granite Co. (Vt.) 54 Atl. 1084; Geo. D. Mashburn & Co. v. Dannenberg Co. (Ga.) 44 S. E. 97.

52. Lee v. McDonnell (Tex. Civ. App.) 72 S. W. 612.

53. Blackmer v. Cleveland, C., C. & St. L. Ry. Co. (Mo. App.) 73 S. W. 913. Punitive damages may be recovered where the consignee had contracted for its delivery to customers and there was no evidence that the carrier was compelled to use the coal or stop running its trains, evidence showing a willful taking without regard to plaintiff's rights and the carrier may not deduct the freight charges from the value of the coal at point of destination—Id.

54. United States v. Homestake Min. Co. (C. C. A.) 117 Fed. 481. Where defendant purchased timber of trespassers, who cut the same on plaintiff's land, some being purchased before and some after notice of the trespass, the measure of damages is for the timber purchased before notice, its value as it stood on the land, and for that purchased after notice, the value in its manufactured form without deduction for the expense of cutting and preparing for market in the absence of facts showing special injury to the land by the removal of the timber—Holt v. Hayes (Tenn.) 73 S. W. 111. In trover for timber cut in good faith by a trespasser the measure of damages is the value of the timber at the time of the conversion less the amount he added to its value—Anderson v. Besser (Mich.) 91 N. W. 737.

55. Potter v. United States (C. C. A.) 122 Fed. 49.

56. Schaaf v. Fries, 90 Mo. App. 111.

57. Mott Iron Works v. Reilly, 39 Misc. (N. Y.) 833.

par value of converted stock is insufficient on the question of its value at the time of conversion.[58]

(§ 5) *F. Wrongful taking or detention of property.*—The measure of damages for an unlawful seizure of goods under an execution subsequently quashed is the market value of the goods at the time and place of the seizure, less the market value at the time of their return.[59] Attorneys' fees necessarily expended may be recovered.[60] Where defendant in execution was not allowed to point out the property, the measure is the value of the goods seized at time of levy less amount of judgment.[61] For the sale of exempt property, where no special damages are alleged, the measure is the value of the property with interest thereon from the date of the levy.[62]

In an action for wrongful attachment of a stock of goods, the rent of the building is recoverable for the time the goods are in custody.[63] Lost profits are not recoverable, the allowance of legal interest on the value of the goods taking the place of such profits.[64] The measure of a debtor's damages for loss of time is what his time would have been worth in his particular business and not what he would have been able to earn in other employments.[65] Injury to credit or reputation in business must be shown in order to justify allowance therefor.[66] In the absence of any evidence on the question, the valuation of the officers will be conclusive.[67] Where goods attached are sold by order of the court as perishable and the money deposited in court, a judgment for the value of the goods instead of the amount in court is erroneous.[68]

In replevin of domestic animals, the amount of damages is determined by adding to the value of the use of the usable property its usable value from the time of taking to the date of judgment and interest on the value of the rest of the property for the same time.[69] The cost of caring for and feeding other animals during the time of detention may not be recovered on the ground that plaintiff intended to ship all the stock to market in one car and that all were necessary to make a carload; such damages are too remote and speculative.[70] Interest is recoverable from the time of demand, though the property is in the possession of the sheriff under order of court.[71] Where grain is wrongfully taken in replevin and consumed before trial, the value rising in the meantime, the measure of damages is the market value of the same quantity of grain of a similar grade and quality at the time of the trial.[72] Where plaintiff dismissed his suit after return of the property, attorney's fees and expenses incurred in preparing a defense to the replevin suit are not recoverable in an action on the bond.[73]

Damage for unlawful detainer of premises are recoverable from the date of the demand and not from the date of possession,[74] and the person entitled to possession may recover the value of use of the premises for any legitimate and proper purpose while he is deprived thereof.[75] Under a code provision that damages for withholding dower shall be computed, where the action is against the heirs from

58. Warren v. Stikeman, 84 App. Div. (N. Y.) 610.
59. Palmer v. Augenstein, 18 App. D. C. 511.
60. Deleshaw v. Edelen (Tex. Civ. App.) 72 S. W. 413.
61. Avindino's Heirs v. Beck (Tex. Civ. App.) 73 S. W. 539.
62. Morris v. Williford (Tex. Civ. App.) 70 S. W. 228.
63. Lord v. Wood (Iowa) 94 N. W. 842.
64. Moravec v. Grell, 78 App. Div. 146, 12 N. Y. Ann. Cas. 294.
65. Lord v. Wood (Iowa) 94 N. W. 842.
66. Hume v. Netter (Tex. Civ. App.) 72 S. W. 865; Fidelity & Deposit Co. v. Bucki & Son Lumber Co., 189 U. S. 135, 47 Law. Ed. 744.
67. Geiger v. Henry (Fla.) 32 So. 874.
68. Hughes Bros. Mfg. Co. v. Reagan (Ind. T.) 69 S. W. 940.
69. State Bank v. Showers, 65 Kan. 431, 70 Pac. 332.
70. Haas v. Tough (Kan.) 72 Pac. 856.
71. Follett Wool Co. v. Utica Trust & Deposit Co., 84 App. Div. (N. Y.) 151.
72. Schnabel v. Thomas (Mo. App.) 71 S. W. 1076.
73. Edwards v. Bricker (Kan.) 71 Pac. 587.
74. Moston v. Stow, 91 Mo. App. 554.
75. Curry v. Sandusky Fish Co. (Minn.) 93 N. W. 896.

the husband's death, but where against any one else from the time when the widow demanded her dower, the latter rule governs, though some defendants are heirs, where the action is against them as beneficiaries under a trust.[76]

(§ 5) *G. Fraud or deceit.*—The measure of damages for deceit inducing a transfer of property is the difference between the market value of the property and its value as represented.[77]

(§ 5) *H. Libel and slander.*—Where the article was libellous per se, plaintiff is entitled to recover compensatory damages attributable to the publication,[78] and is not required to show actual damages.[79] On the question of actual or compensatory damages, evidence of the standing of defendant suing for libel is not important.[80]

(§ 5) *I. Personal injuries.*—Only compensatory damages can be recovered for personal injuries resulting from negligence,[81] and these independent of punitive damages should be limited to compensation which consists in remuneration for loss of time, necessary expenditures, mental and physical suffering and permanent disability, where that is shown as a result.[82] There may be a recovery for aug-

76. Code Civ. Proc. N. Y. § 1600—Gorden v. Gorden, 80 App. Div. (N. Y.) 258.

77. Deceit inducing the sale of corporate stock—Warfield v. Clark, 118 Iowa, 69. False representations as to the condition of property on which plaintiff had accepted a mortgage for part payment of her own property—Lee v. Tarplin, 183 Mass. 52. A person induced to lease a building by false representations as to the amount to be derived from letting rooms therein, may recover the difference between the rental of the premises as represented and as in fact existing less what was due on the lease—Prince v. Jacobs, 80 App. Div. (N. Y.) 243.

78. Mauk v. Brundage, 68 Ohio St. 89.

79. Williams v. Fuller (Neb.) 94 N. W. 118.

80. Sun Life Assur. Co. v. Bailey (Va.) 44 S. E. 692.

81. City of Pueblo v. Timbers (Colo.) 72 Pac. 1059.

82. Louisville & N. R. Co. v. Mason, 24 Ky. L. R. 1623, 72 S. W. 27; Chicago Terminal Transfer R. Co. v. Gruss, 200 Ill. 195; Louisville & N. R. Co. v. Logsdon, 24 Ky. L. R. 1566, 71 S. W. 905; Wilman v. People's Ry. Co. (Del. Super.) 55 Atl. 332; Louisville & N. R. Co. v. Hall, 74 S. W. 280, 24 Ky. L. R. 2487. In an action for assault, plaintiff, being entitled to damages, is entitled to such a sum as will reasonably compensate him for the injuries and outlays made, including therein pain and suffering, loss of bodily and mental power, capacity for work and loss of time—Armstrong v. Rhoades (Del. Super.) 53 Atl. 435. A servant may recover for injuries in an amount necessary to compensate him for loss of time and wages, pain and suffering in the past and such as may come in the future, resulting from the accident, and also for pecuniary losses caused by his diminished capacity to earn a living in the future—Winkler v. Philadelphia & R. Ry. Co. (Del. Super.) 53 Atl. 90.

Loss of time and wages may be recovered—Karczewski v. Wilmington City Ry. Co. (Del. Super.) 54 Atl. 746; McAllister v. People's Ry. Co. (Del. Super.) Id. 743; Sachra v. Town of Manilla (Iowa) 95 N. W. 198. Amount of earnings—[Metz v. Metropolitan St. Ry. Co., 82 App. Div. (N. Y.) 168,] and value of lost time must be shown—Stoetzle v. Sweringen, 96 Mo. App. 592. It is proper to prove earnings in service of a previous employer, as furnishing data—Southern Ry. Co. v. Howell (Ala.) 34 So. 6. Where permanent injuries are shown to result, instructions are not objectionable which tell the jury that it would not be proper to multiply the amount of plaintiff's earnings by his expectancy, but it was the province of the jury to ascertain, by the exercise of their own judgment, what would be the present cash value of his earnings, considering the expectancy of life—Chicago House Wrecking Co. v. Birney (C. C. A.) 117 Fed. 72.

Impairment of earning power. In an action for personal injuries there may be a recovery for impairment of earning capacity—Karczewski v. Wilmington City Ry. Co. (Del. Super.) 54 Atl. 746; McAllister v. People's Ry. Co. (Del. Super.) Id. 743; Chesapeake & O. Ry. Co. v. Jordan (Ky.) 76 S. W. 145; International & G. N. R. Co. v. Clark (Tex.) 72 S. W. 584; Chicago & M. Elect. Ry. Co. v. Krempel, 103 Ill. App. 1; Reliance Textile & Dye Works v. Mitchell, 24 Ky. L. R. 1286, 71 S. W. 425; Chicago City Ry. Co. v. Fennimore, 199 Ill. 9. On the question of loss of earning power, plaintiff may testify that he was discharged from the position he obtained after the injury on the ground that he was too slow—Southern Car & Foundry Co. v. Bartlett (Ala.) 34 So. 20. In an action for injuries to a member of a pilot association, it may be shown that the pilot's fees were turned into an association from which the pilot received a certain amount monthly, as showing the earning capacity of the injured person—Waldie v. Brooklyn Heights R. Co., 78 App. Div. (N. Y.) 557.

Past and future damages. Past and future pain and suffering may be recovered for—Karczewski v. Wilmington City Ry. Co. (Del. Super.) 54 Atl. 746; McAllister v. People's Ry. Co. (Del. Super.) Id. 743; Stanley v. Cedar Rapids & M. C. Ry. Co. (Iowa) 93 N. W. 489; Heer v. Warren-Scharf Asphalt Pav. Co. (Wis.) 94 N. W. 789. The recovery for future damages is limited to those shown with reasonable certainty to be a consequence of the injury—Chicago, R. I. & P. R. Co. v. McDowell (Neb.) 92 N. W. 121; Allen B. Wrisley Co. v. Burke, 203 Ill. 250; McLain v. St. Louis & S. Ry. Co. (Mo. App.) 73 S. W. 909. Where it is shown that a person was permanently injured and as a result has hernia curable only by an

mented injuries to one suffering from a disease at the time of the accident.[83] Injuries to the sexual organs preventing performance of their functions may be considered in estimating damages.[84] An injured person may testify as to his own estimate of the amount of his damages.[85]

§ 6. *Measure and elements of damages for death by wrongful act.*—The jury may consider the number, age, and sex of dependent children,[86] the value of services of the deceased in the care, superintendence, and education of his minor children,[87] the amount he would have expended for their education,[88] his age,

operation and is partially paralyzed and has frequent attacks of vomiting blood, the jury may consider future pain and suffering, though no witness states that plaintiff will suffer in the future—Smith v. City of Sioux City (Iowa) 93 N. W. 81. An instruction allowing the jury to return a verdict for damages that plaintiff would be reasonably certain to suffer in future from the injury is not objectionable as allowing a recovery for loss of time in the future—Curtis v. McNair (Mo.) 73 S. W. 167.

Medical attendance and nursing. The reasonable value of medical services may be recovered—Sachra v. Town of Manilla (Iowa) 95 N. W. 198; Texas & P. Ry. Co. v. Ball (Tex. Civ. App.) 73 S. W. 420. The amount of the medical charges must be proved—Halley v. Tichenor (Iowa) 94 N. W. 472; Central Tex. & N. W. Ry. Co. v. Smith (Tex. Civ. App.) 73 S. W. 537; and also their necessity and reasonableness—St. Louis Southwestern Ry. Co. v. Highnote (Tex. Civ. App.) 74 S. W. 920; Houston. E. & W. T. Ry. Co. v. Charwaine (Tex. Civ. App.) 71 S. W. 401; City of Dallas v. Moore (Tex. Civ. App.) 74 S. W. 95; San Antonio & A. P. Ry. Co. v. Moore (Tex. Civ. App.) 72 S. W. 226; International & G. N. R. Co. v. Boykin (Tex. Civ. App.) 74 S. W. 93; Powers v. City of St. Joseph, 91 Mo. App. 55; Gulf, C. & S. F. Ry. Co. v. Robinson (Tex. Civ. App.) 72 S. W. 70. There may be a recovery, though bills have not been paid—San Antonio & A. P. Ry. Co. v. Moore (Tex. Civ. App.) 72 S. W. 226; Hickey v. Welch, 91 Mo. App. 4; Curtis v. McNair (Mo.) 73 S. W. 167. The question of the reasonableness of a physician's charge in a bill rendered but not paid is one for the jury—Lampman v. Bruning (Iowa) 94 N. W. 562. The services of a nurse may be recovered, though she has rendered no bill—Styles v. Village of Decatur (Mich.) 91 N. W. 622. There may be a recovery of probable future medical expenses—Chicago & M. Elect. Ry. Co. v. Krempel, 103 Ill. App. 1; but not where there is no evidence as to their probable cost—Missouri, K. & T. Ry. Co. v. Flood (Tex. Civ. App.) 70 S. W. 331. A husband can recover only the value of his services in nursing his wife and not the amount of his salary lost thereby—Southern Ry. Co. v. Crowder, 135 Ala. 417. A recovery may be had for services of a daughter as nurse, though the daughter stated that she performed the services as she would for a mother without thought of being recompensed—Beringer v. Dubuque St. Ry. Co. (Iowa) 91 N. W. 931. A motorman injured in a collision may recover for money paid for treatment at another hospital than the one he was taken to by his employer—McLain v. St. Louis & S. Ry. Co. (Mo. App.) 73 S. W. 909. Liability of a city for personal injury is a statutory one and in Massachusetts there may be no recovery in such an action of the amount expended for doctor's bills—Nestor v. City of Fall River (Mass.) 67 N. E. 248.

Mental suffering: Mental suffering may be taken in consideration in estimating damages in a case of physical injury—Reed v. Maley (Ky.) 74 S. W. 1079; Chesapeake & O. Ry. Co. v. Jordan (Ky.) 76 S. W. 145; Louisville & N. R. Co. v. Gordon, 24 Ky. L. R. 1819, 72 S. W. 311. Reasonable apprehension of blood poisoning—Butts v. National Exch. Bank (Mo. App.) 72 S. W. 1083. Direct proof thereof is not required where the injury is serious or permanent or continues for a long time—Galveston, H. & S. A. Ry. Co. v. Hubbard (Tex. Civ. App.) 70 S. W. 112. Where there is an ample allowance for the injury, including physical and mental suffering, there may be no recovery for regret and humiliation that party may feel because of inability to perform household duties—Linn v. Duquesne Borough, 204 Pa. 551. There may be a recovery for physical injury resulting from fright or nervous shock caused by blasting in the neighborhood of a residence, where defendant had been requested to conduct the blasting so as not to cause rocks to be thrown into the residence—Watkins v. Kaolin Mfg. Co., 131 N. C. 536, 60 L. R. A. 617.

Disfigurement: There may be a recovery for mental suffering and distress caused by disfigurement—Gray v. Washington Water Power Co., 30 Wash. 665, 71 Pac. 206; Chicago & M. Elec. Ry. Co. v. Krempel, 103 Ill. App. 1.

Permanency of injury: Where plaintiff has not recovered from an injury at the time of trial or has been to any extent permanently disabled, the jury may take into consideration such facts in estimating the damages—Palmquist v. Mine & Smelter Supply Co., 25 Utah, 257, 70 Pac. 994. Where evidence as to the extent of injuries is conflicting, it is proper to leave the question to the jury notwithstanding a physician testifies that the injuries are of a trivial character—Styles v. Village of Decatur (Mich.) 91 N. W. 622.

83. Jordan v. Coulter, 30 Wash. 116; Jordan v. Seattle, 30 Wash. 298, 70 Pac. 743.

84. Male organs—Galveston, H. & S. A. Ry. Co. v. Collins (Tex. Civ. App.) 71 S. W. 560. Female organs—Brake v. Kansas City (Mo. App.) 75 S. W. 191.

85. Oliver v. Columbia, N. & L. R. Co., 65 S. C. 1.

86. Coffeyville Min. & Gas Co. v. Carter, 65 Kan. 565, 70 Pac. 635.

87. Anthony Ittner Brick Co. v. Ashby, 198 Ill. 562; Sternfels v. Metropolitan St. Ry. Co. (N. Y.) 66 N. E. 1117.

88. Galveston, H. & S. A. Ry. Co. v. Puente (Tex. Civ. App.) 70 S. W. 362.

habits of industry, capacity for labor, and probable earnings,[89] the pecuniary condition of plaintiff,[90] the condition of health of deceased as bearing on the pecuniary value of his life,[91] and may not be required to consider the possibility of deceased becoming poor and his children being compelled to support him in old age,[92] nor may they consider prospective advancements in salary, dependent upon problematic conditions.[93] In some states the recovery may include grief or mental suffering.[94] In an action by parents for the death of a child, the measure of damages is the reasonable value of the child's services,[95] and the loss of its society and comfort excluding any recovery for sorrow, grief, or anguish of parents, or pain and suffering of the child,[96] and the jury are not limited to the consideration of the deceased's ability to earn wages during his minority but may take into consideration the expectation of benefits from the continuance of his life as shown by the evidence.[97] It may not be shown in mitigation of damages that a parent would receive a death benefit from a relief department maintained in connection with the railroad by whom deceased was employed.[98] Under the Texas statute the recovery by a child for the death of a parent is not limited to damages accruing during minority.[99]

The recovery is properly termed a "capital fund" which represents the future value of all the pecuniary loss to the widow and next of kin.[1] In Delaware the rule allows the recovery of such sum as deceased would probably have earned and left as his estate, considering his age and his ability and disposition to labor, and his habits of living and expenditures.[2]

For death caused by alleged malpractice, the recovery is limited to the damages sustained by the deceased in his lifetime,[3] and are limited to loss, expense, and suffering due to the physician's negligence in excess of what they would have been had the case been properly treated.[4]

§ 7. *Excessive and inadequate damages.*—The rule against the allowance of excessive damages is plainly violated by a verdict for double damages for an injury for which only compensatory damages are recoverable,[5] and by a verdict

89. Knight v. Sadtler Lead & Zinc Co., 91 Mo. App. 574; Snyder v. Lake Shore & M. S. Ry. Co. (Mich.) 91 N. W. 643.

90. St. Louis S. W. Ry. Co. v. Bowles (Tex. Civ. App.) 72 S. W. 451.

91. Coffeyville Min. & Gas Co. v. Carter, 65 Kan. 565, 70 Pac. 635.

92. Sternfels v. Metropolitan St. Ry. Co. (N. Y.) 66 N. E. 1117.

93. Fajardo v. New York Cent. & H. R. R. Co., 84 App. Div. (N. Y.) 354.

94. Brown v. Southern Ry. (S. C.) 43 S. E. 794; Davidson Benedict Co. v. Severson (Tenn.) 72 S. W. 967. A verdict is excessive, where the jury makes the allowance for the loss of society and comfort of the husband greater than the substantial pecuniary value of his life, the case not being one where punitive damages could be recovered—Florida Cent. & P. R. Co. v. Foxworth (Fla.) 34 So. 270.

95. Stumbo v. Duluth Zinc Co. (Mo. App.) 75 S. W. 185. The mother in indigent circumstances entitled to recover at all for the death of her son, is entitled to more than nominal damages under a law giving a right of action to a person dependent for support on a miner killed by reason of the violation of mining laws (Rev. St. c. 133, art. 2, § 8820)—Bowerman v. Lackawanna Min. Co. (Mo.) 71 S. W. 1062.

96. Corbett v. Oregon Short Line R. Co., 25 Utah, 449, 71 Pac. 1065.

97. Chicago & E. I. R. Co. v. Beaver, 199 Ill. 34.

98. Boulden v. Pennsylvania R. Co. (Pa.) 54 Atl. 906.

99. Galveston, H. & S. A. Ry. Co. v. Puente (Tex. Civ. App.) 70 S. W. 362.

1. Hackney v. Delaware & A. Telegraph & Telephone Co. (N. J. Law) 55 Atl. 252; Cox v. Wilmington City Ry. Co. (Del.) 53 Atl. 569; Florida Cent. & P. R. Co. v. Sullivan (C. C. A.) 120 Fed. 799. Under laws allowing a recovery for such sum as the jury deems just compensation for wrongful death, a sum which at current rate of interest for trust investment would bring an amount equal to the earning powers of decedent, does not constitute a just measure of damages—Fajardo v. New York Cent. & H. R. Co., 84 App. Div. (N. Y.) 354.

2. Neal v. Wilmington & N. C. Elec. Ry. Co., 3 Pen. (Del.) 467.

3, 4. Ramsdell v. Grady, 97 Me. 319.

5. An instruction allowing recovery of shrinkage in weight of stock caused by delay of carrier to promptly deliver said stock determined by weight of stock at destination before the feeding and allowing a recovery for feed purchased for the stock thereafter, amounts to an authorization of a recovery of double damages—Nelson v. Great Northern Ry. Co. (Mont.) 72 Pac. 642. An instruction allowing recovery of damages "for any future impairment

in excess of the demand in the complaint.[6] A recovery is not to be regarded as excessive merely because larger than the court, sitting as a juror, would have found.[7] The courts of New York may reduce a verdict for excessiveness though punitive damages are recoverable.[8] In Illinois there will be no review of the question of excessiveness by the supreme court where that point has been passed upon by the appellate court.[9] An excessive verdict may be cured by a remittitur,[10] unless so grossly excessive as to indicate passion, partiality, or misconception of the evidence.[11] The question of the excessiveness or adequacy of recoveries is so peculiarly one for the jury under the facts of each individual case that it is impracticable to attempt to deduce general rules governing the matter. These holdings, briefly stated, are collected and classified in a footnote.[12]

of health and mind" and "for impairment of capacity to labor and earn a livelihood for himself and family" is not objectionable as authorizing double damages for the same loss—Central Tex. & N. W. Ry. Co. v. Luther (Tex. Civ. App.) 74 S. W. 589. Where plaintiff was authorized to remove buildings and equipments erected by him in order to carry out a contract for cutting and delivering logs to defendant, the allowance of damages for breach of the contract by refusing plaintiff permission to carry out the contract and for damages for conversion of the building and equipments, does not amount to a double assessment of damages —McCorkle v. Mallory, 30 Wash. 632, 71 Pac. 186. Double damages are not called for by an instruction allowing recovery for loss of time, medical expenses, physical pain or mental anguish which plaintiff had endured and would endure in the future and also for the probable effect of injuries in impairing his ability to earn a livelihood in the future—Gulf, C. & S. F. Ry. Co. v. Robinson (Tex. Civ. App.) 72 S. W. 70.

6. Branower v. Independent Match Co., 83 App. Div. (N. Y.) 370.

7. Dickerson v. Payne (N. J. L.) 53 Atl. 699.

8. Riker v. Clopton, 83 App. Div. (N. Y.) 310.

9. Lasher v. Littell, 202 Ill. 551.

10. Davis v. Bowers Granite Co. (Vt.) 54 Atl. 1084; Bull v. Bath Iron Works, 75 App. Div. (N. Y.) 380; Vanderbeck v. City of Paterson (N. J. L.) 53 Atl. 216; Rose v. King, 76 App. Div. (N. Y.) 308; as condition to refusal of new trial—Creve Coeur Lake Ice Co. v. Tamm, 90 Mo. App. 189. Where the verdict exceeds the damages proved under either count of a petition and there is a general verdict on two counts and no exceptions are taken the mistake is cured by a remittitur—Rosenfeld v. Siegfried, 91 Mo. App. 169. Affirmance on appeal may be made to depend on acceptance of remission—Chicago City Ry. Co. v. Carroll, 102 Ill. App. 202; Skelton v. St. Paul City Ry. Co., 88 Minn. 192; Live Stock Remedy Co. v. White, 90 Mo. App. 498; United Press v. A. S. Abell Co., 79 App. Div. (N. Y.) 550; First Nat. Bank v. Calkins (S. D.) 93 N. W. 646; Hawes v. Warren, 119 Fed. 978.

11. Close v. Hinsley, 104 Ill. App. 65; Pittsburgh, C., C. & St. L. Ry. Co. v. Story, Id. 132; F. M. Davis Ironworks v. White (Colo.) 71 Pac. 384.

12. Largely question for jury—Economy Light & Power Co. v. Sheridan, 103 Ill. App. 145; True & True Co. v. Woda, 104 Ill. App. 15.

Recoveries held not excessive.

Breach of contract. $525.50 (against undertaker for substitution of coffin)—J. E. Dunn & Co. v. Smith (Tex. Civ. App.) 74 S. W. 576. $695 (breach of warranty of note)—Stanley v. Core (Iowa) 93 N. W. 343.

Delivery of telegrams. $225 (failure to deliver a telegram announcing death of child)—Western Union Tel. Co. v. Crocker, 135 Ala. 492. $1,995.25 (failure to deliver message announcing the sickness of a son until after his death and burial)—Western Union Tel. Co. v. James (Tex. Civ. App.) 73 S. W. 79.

Carrying passenger past destination. $125 —Rawlings v. Wabash R. Co., 97 Mo. App. 511. $1,875—Guthier v. Minneapolis & St. L. R. Co., 87 Minn. 355. $100—San Antonio Traction Co. v. Crawford (Tex. Civ. App.) 71 S. W. 306.

Torts in general. Injuries to crops. $400 (destruction of a crop)—Corwin v. Erie R. Co., 84 App. Div. (N. Y.) 555.

Wrongful levy. $996—Friedly v. Giddings, 119 Fed. 438. $500 (breaking into a house to serve summons in a civil action on paralytic)—Foley v. Martin (Cal.) 71 Pac. 165.

Wrongful ejection of passenger. $250—Choctaw, O. & G. R. Co. v. Hill (Tenn.) 75 S. W. 963. $1,500—Texas & P. Ry. Co. v. Lynch (Tex. Civ. App.) 73 S. W. 65. $1,500 —Foley v. Metropolitan St. Ry. Co., 80 App. Div. (N. Y.) 262.

Libel and slander. $30,000 (malicious libel affecting credit and mercantile standing)—Minter v. Bradstreet Co. (Mo.) 73 S. W. 668. $1,500 (libel reflecting on financial standing causing loss of trade)—Brown v. Providence Telegram Pub. Co. (R. I.) 54 Atl. 1061. $2,500 (libel attacking a prosecuting attorney)—Bee Pub. Co. v. Shields (Neb.) 94 N. W. 1029. $500 (slanderous charge of theft) —McMinemee v. Smith (Iowa) 93 N. W. 75; Fatjo v. Seidel, 109 La. 699.

Seduction. $5,000 (seduction of a seventeen year old girl by a man worth $125,000) —Willeford v. Bailey, 132 N. C. 402.

Assaults. $4,100—Houston & T. Cent. R. Co. v. Bell (Tex. Civ. App.) 73 S. W. 56. $500 (assault on woman)—Bruske v. Neugent (Wis.) 93 N. W. 454.

Alienation of affections. $2,250 (alienation of a husband's affections)—Love v. Love (Mo. App.) 73 S. W. 255.

Personal injuries. Injuries to head. $200 (injuries to head and other parts of body) —Ezell v. Outland, 24 Ky. L. R. 1970, 72 S. W. 784. $3,500 (fracture of nasal bones) —Bell v. Incorporated Town of Clarion

§ 8. *Pleading, evidence, and procedure. A. Pleading.*—It is not generally necessary to allege the separate items of damages resulting from a single act of

(Iowa) 94 N. W. 907. $4,100 (fracture of skull, injuring eyes and brain)—Revolinsky v. Adams Coal Co. (Wis.) 95 N. W. 122. $12,000 (crushed skull, causing paralysis)—Pouppirt v. Elder Dempster Shipping, 122 Fed. 983.

Sight and hearing. $20,000 (loss of one eye and impairment of the other)—Missouri K. & T. Ry. Co. v. Flood (Tex. Civ. App.) 70 S. W. 331. $12,500 (loss of one eye and impairment of other)—Cummings v. National & Providence Worsted Mills, 24 R. I. 390. $6,000 (loss of both eyes)—Bane v. Irwin, 172 Mo. 306. $6,000 (permanent injuries to hearing and sight)—Hunt v. St. Paul City Ry. Co. (Minn.) 95 N. W. 312.

Spinal and nervous injuries. $15,000 (spine)—Copeland v. Wabash R. Co. (Mo.) 75 S. W. 106. $5,000 (spine)—Sweeney v. New York Cent. & H. R. R. Co., 83 App. Div. (N. Y.) 565. $2,000 (spine)—Houston & T. C. R. Co. v. Harris (Tex. Civ. App.) 70 S. W. 335. $3,800 (spine and head)—Central Tex. & N. W. Ry. Co. v. Luther (Tex. Civ. App.) 74 S. W. 589. $4,208.33 (neck, back and head producing mental impairment)—Baumann v. C. Reiss Coal Co. (Wis.) 95 N. W. 139. $10,000 (injuries indicating chronic sclerosis of the spinal cord and brain)—Clark v. Brooklyn Heights R. Co., 78 App. Div. (N. Y.) 478, 12 N. Y. Ann. Cas. 333.

Internal injuries. $6,000 (internal injuries to a married woman)—Chicago, R. I. & T. Ry. Co. v. Armes (Tex. Civ. App.) 74 S. W. 77. $6,166.79 (diabetes)—Eichholz v. Niagara Falls Hydraulic Power & Mfg. Co., 68 App. Div. (N. Y.) 441. $4,000 (rupture)—Texas & N. O. R. Co. v. Lee (Tex. Civ. App.) 74 S. W. 345. $800 (rupture)—Chesapeake & O. Ry. Co. v. Jordan (Ky.) 76 S. W. 145. $7,000 (rupture)—Malloy v. St. Louis & S. Ry. Co. (Mo.) 73 S. W. 159. $3,900 (hernia)—Hennessy v. St. Louis & S. Ry. Co. (Mo.) 73 S. W. 162.

Paralysis: $5,000 (total paralysis of one arm)—Stauning v. Great Northern Ry. Co. (Minn.) 93 N. W. 518. $15,000 (paralysis below the waist)—City of Elgin v. Nofs, 103 Ill. App. 11.

Injuries peculiar to women: $1,500 (permanent organic injury)—Brake v. Kansas City (Mo. App.) 75 S. W. 191. $7,000 (displacement)—Louisville v. Bailey, 25 Ky. L. R. 6, 74 S. W. 688.

Burns and scalds: $4,650 (burns, destroying arteries)—Curtis v. McNair (Mo.) 73 S. W. 167. $10,000 (burns destroyings a large area of skin causing loss of fingers, and injury to sexual organs)—Quincy Gas & Elec. Co. v. Bauman, 104 Ill. App. 600. $4,000 (scalding)—Zellars v. Missouri Water & Light Co., 92 Mo. App. 107.

Fractures, dislocations and injuries to and loss of limbs: $3,000 (one hand)—Baltimore & O. S. W. R. Co. v. Roberts (Ind.) 67 N. E. 530. $3,000 (dislocation of fibula of the left limb)—Milledge v. Kansas City (Mo. App.) 74 S. W. 892. $6,000 (fracture of limbs and other injuries)—Missouri, K. & T. Ry. Co. v. Taff (Tex. Civ. App.) 74 S. W. 89. $8,000 (injuries making party a helpless cripple)—Heer v. Warren-Scharf Asphalt Co. (Wis.) 94 N. W. 789. $4,000 (joint of knee, crushing chest and breaking ribs)—Hanlon v. Milwaukee Elec. Ry. & Light Co. (Wis.) 95 N. W. 100. $1,000 (fracture of both bones of leg above ankle) —Isham v. Broderick (Minn.) 95 N. W. 224. $1,000 (partial dislocation of ankle)—Hoffman v. Village of North Milwaukee (Wis.) 95 N. W. 274. $6,090 (injury resulting in ulceration and partial disablement)—Jordan v. City of Seattle, 30 Wash. 298, 70 Pac. 743. $11,000 (arm and hand)—Galveston, H. & S. A. Ry. Co. v. Courtney (Tex. Civ. App.) 71 S. W. 307. $11,500 (loss of leg above knee), compound fracture of arm and bruises and cuts about head and body)—Hill v. Starin, 173 N. Y. 632. $1,000 (loss of leg) —Eberhardt v. Metropolitan St. Ry. Co. (N. Y.) 66 N. E. 1107. $4,346.93 (permanent crippling of limb)—Bertsch v. Metropolitan St. Ry. Co., 173 N. Y. 634. $1,000 (fracture of bones in leg requiring use of crutches)—Adams Exp. Co. v. Smith, 24 Ky. L. R. 1915, 72 S. W. 752. $6,000 (compound fracture of right leg necessitating numerous operations)—The Anchoria (C. C. A.) 120 Fed. 1017. $10,000 (one hand)—Sesselmann v. Metropolitan St. Ry. Co., 76 App. Div. (N. Y.) 336. $11,000 (one arm)—Baird v. New York Cent. & H. R. R. Co., 172 N. Y. 637. $15,000 (loss of foot)—New Omaha Thomson-Houston Elec. Light Co. v. Rombold (Neb.) 93 N. W. 966. $1,933 (injuries to hand and arm)—Baker v. City of Independence, 93 Mo. App. 165. $4,000 (limb broken in two places and serious injuries to back with shock)—Continental Tobacco Co. v. Knoop, 24 Ky. L. R. 1268, 71 S. W. 3. $847 (loss of arm)—Illinois Cent. R. Co. v. Taylor, 24 Ky. L. R. 1169, 70 S. W. 825. $7,750 (loss of hand)—South Chicago St. Ry. Co. v. Dufresne, 102 Ill. App. 493. $7,000 (loss of limb below knee)—Seaboard Air Line Ry. Co. v. Phillips, 117 Ga. 98. $1,000 (wrenching and spraining ankle)—Louisville R. Co. v. Casey, 24 Ky. L. R. 1527, 71 S. W. 876. $1,500 (impairment of use of arm)—Wagner v. Metropolitan St. Ry. Co., 79 App. Div. (N. Y.) 591. $2,000 (loss of fingers, cuts and bruises)—Dover v. Mississippi River & B. T. Ry. (Mo. App.) 73 S. W. 298. $2,000 (bruises, dislocation of shoulder, and fracture of shoulder joint)—Meyer v. Milwaukee Elec. Ry. & Light Co. (Wis.) 93 N. W. 6. $10,000 (fracture of thigh)—Waldie v. Brooklyn Heights R. Co., 78 App. Div. (N. Y.) 557. $400 (injuries to the hip of a female)—Louisville & N. R. Co. v. Shepherd, 24 Ky. L. R. 839, 69 S. W. 1070. $9,000 (broken bones and laceration of flesh, doubtful union of bones)—Bolton v. Missouri Pac. Ry. Co., 172 Mo. 92. $5,000 (broken ribs and collar bone)—Black v. Missouri Pac. Ry. Co., 172 Mo. 177. $500 (injuries necessitating the removal of a part of a bone)—Monticello & B. Turnpike R. Co. v. Jones (Ky.) 24 Ky. L. R. 821, 69 S. W. 1073. $3,000 (fracture)—Beringer v. Dubuque St. Ry. Co. (Iowa) 91 N. W. 931. $3,000 (side, leg and back)—Louisville & N. R. Co. v. Davis, 24 Ky. L. R. 1415, 71 S. W. 658.

Bruises and shock: $1,000 (severe shock and pain)—Chicago City Ry. Co. v. Biederman, 102 Ill. App. 617. $1,250 (bruises)—Ljungberg v. Village of North Mankato, 87 Minn. 484.

negligence,[13] nor is it a requisite to a recovery that all the damages averred should be proved.[14] Where interest is allowed as an incident of recovery, it is not nec-

Wrongful death: $1,500 (youth eighteen and a half years of age earning $2.00 a day)—Stumbo v. Duluth Zinc Co. (Mo. App.) 75 S. W. 185. $5,000 (the extreme statutory amount not excessive for death of a bright, active boy 16 years of age, who for nearly three years had been a general clerk in a store)—Nelson v. Branford Lighting & Water Co., 75 Conn. 548. $5,000 (married man of 37 earning $9.00 a week)—Geismann v. Missouri Edison Elec. Co. (Mo.) 73 S. W. 654. $25,000 (battalion fire chief, 38 years of age, salary of $3,300)—Lane v. Brooklyn Heights R. Co., 82 N. Y. S. 1057. $1,518 (boy of six years)—Hoon v. Beaver Valley Traction Co., 204 Pa. 369. $25,000 (man 62 years of age expending $5,000 a year on his family)—Sternfels v. Metropolitan St. Ry. Co. (N. Y.) 66 N. E. 1117. $3,600 (man earning $10 a week)—Garbaccio v. Jersey City, H. & P. St. Ry. Co. (N. J. Law) 53 Atl. 707. $1,100 (man of 35, earning $1,800)—Chicago, R. I. & P. R. Co. v. Young (Neb.) 93 N. W. 922. $2,750 (boy of 6, where two juries have returned the same verdict)—Gray v. St. Paul City Ry. Co., 87 Minn. 280. $500 (scowman having no one dependent on him for support)—The O. L. Hallenbeck, 119 Fed. 468. $10,000 (man of 35 earning $12 a week)—Stevens v. Union Ry. Co. (N. Y.) 75 App. Div. 602.

Recoveries Held Excessive.

Breach of contract: $250 (carrying a passenger beyond his station)—Central of Ga. Ry. Co. v. Wood (Ga.) 44 S. E. 1001. $25,000 (breach of promise by mail clerk owning house not fully paid for)—Broyhill v. Norton (Mo.) 74 S. W. 1024. $100 (injuries to shipment of stock)—Helm v. Missouri Pac. R. Co. (Mo. App.) 72 S. W. 148.

Torts in general: $1,250 (ejection of a passenger)—Georgia R. Co. v. Baldoni, 115 Ga. 1013. $1,000 actual and $1,000 punitive damages (arrest of a passenger tendering worn coin)—Ruth v. St. Louis Transit Co. (Mo. App.) 71 S. W. 1055. $1,450 (arrest by order of conductor of street car) $500 being ample—Grayson v. St. Transit Co. (Mo. App.) 71 S. W. 730. $3,333 (failure to stop a train at a flag station) $2,000 being ample—Yazoo & M. V. R. Co. v. Faust (Miss.) 34 So. 356. $400 (wrongful discharge of surface water)—Ready v. Missouri Pac. R. Co. (Mo. App.) 72 S. W. 142.

Libel and slander: $36,000 (libel charging conspiracy to defraud the insurance companies) $20,000 being ample—Duke v. Morning Journal Ass'n, 120 Fed. 860. $40,000 (libel holding a magistrate up to scorn as a bullying magistrate unfit for his position) $25,000 being ample—Crane v. Bennett, 77 App. Div. (N. Y.) 102. $5,000 (libel concerning business standing) $3,000 being ample—Daisley v. Douglass, 119 Fed. 485. $7,000 (slander with immediate recantation) $1,738.20 being ample—Riker v. Clopton, 83 App. Div. (N. Y.) 310.

Personal injuries: $10,000 (loss of hand and mental and physical suffering incident thereto) $5,000 being ample—Texas & Ft. S. Ry. Co. v. Hartnett (Tex. Civ. App.) 75 S. W. 809. $16,000 (injuries to wrist, back and partial paralysis of the leg) $8,000 being ample—Missouri, K. & T. Ry. Co. v. Bodie (Tex. Civ. App.) 74 S. W. 100. $3,100 (temporary injuries, party having sustained no fracture of bones and only slight detention from business)—Stoetzele v. Swearingen, 90 Mo. App. 588. $12,000 (compound fracture of the leg below the knee, causing looseness in knee joint)—Rueping v. Chicago & N. W. Ry. Co. (Wis.) 93 N. W. 843. $3,000 (broken leg not resulting in permanent injury)—South Omaha v. Fennell (Neb.) 94 N. W. 632. $7,500 (partial disablement of knee cap)—Langbein v. Swift, 121 Fed. 416. $10,000 (evidence of permanent impairment slight and no visible marks) $6,000 being ample—McDannald v. Washington & C. R. Ry. Co., 31 Wash. 585, 72 Pac. 481. $2,500 (injuries imperceptible to the eye)—Swafford v. Rosenbloom, 102 Ill. App. 578.

Wrongful death: $3,000 (alleged malpractice)—Ramsdell v. Grady, 97 Me. 319. $3,500 (girl 8½ years of age) $2,500 being ample—Wells v. New York Cent. & H. R. R. Co., 78 App. Div. (N. Y.) 1. $5,000 (domestic servant, turning over to parent $3 a month) $1,500 being ample—Lindstrom v. International Nav. Co., 117 Fed. 170. $5,200 (track walker earning $1.25 a day) $4,000 being ample—Erie R. Co. v. McCormick, 24 Ohio Circ. R. 86. $6,000 (ordinarily bright boy a little over 4 years of age) $3,000 being ample—Hively v. Webster County, 117 Iowa, 672. $10,000 (man seventy-three years of age) $5,000 being ample—Stillings v. Metropolitan St. Ry. Co., 84 App. Div. (N. Y.) 201. $10,000 (miner 55 years of age receiving $50 a month) $6,000 being ample—Vowell v. Issaquah Coal Co., 31 Wash. 103, 71 Pac. 725.

Adequacy of Recovery.

Torts: 6c. inadequate for injuries where $150 was expended for medical services alone—Tooker v. Brooklyn Heights R. Co., 80 App. Div. (N. Y.) 371. $100 inadequate for deprivation of wife's society caused by injuries, a considerably larger sum having been expended by husband for expenses—Caswell v. North Jersey St. Ry. Co. (N. J. Law) 54 Atl. 565. $250 not inadequate for levy of a wrongful execution—Avindino's Heirs v. Beck (Tex. Civ. App.) 73 S. W. 539.

Wrongful death: $10.00 for death of child three year four months old is grossly inadequate—Draper v. Tucker (Neb.) 95 N. W. 1026. $750 not inadequate for death of boy of 5 years—Schnable v. Providence Public Market, 24 R. I. 477. $200 is not so grossly inadequate for killing child of 6 as to justify setting aside award—Gubbitosi v. Rothschild, 75 App. Div. 477, 12 N. Y. Ann. Cas. 16. $250 for the death of a boy of 11 not so grossly inadequate as to justify the granting of a new trial—Snyder v. Lake Shore & M. S. Ry. Co. (Mich.) 91 N. W. 643.

13. Nokken v. Avery Mfg. Co., 11 N. D. 399. Action for wrongful death (Cutting's Ann. Comp. Laws, §§ 3983, 3984)—Peers v. Nevada Power, L. & W. Co., 119 Fed. 400.

14. Under an allegation that plaintiff's hip was dislocated, the dislocation including a bruise, strain or contusion, a recovery is not prevented by the fact that the

essary that it should be demanded in the declaration, otherwise where interest beyond the legal rate is sought to be included in the recovery by reason of a special contract.[15]

Special damages are those arising directly, but not necessarily or by implication of law,[16] and cannot be recovered unless specially alleged.[17] The expense of recovering property wrongfully taken and injured,[18] loss of earnings or of business,[19] loss of time or wages,[20] loss of profits for breach of an agreement to lease,[21] amount paid to others to perform the same services in carrying on plaintiff's business that he would have performed but for the injury,[22] are within the rule and must be pleaded. Increased injury by reason of the diseased condition of plaintiff at the time of the accident is not considered a special damage.[23] In Illinois evidence of the wages earned by the injured party at the time of the accident is admissible, though special damages are not averred.[24] An allegation that on account of the injuries plaintiff was compelled to hire a nurse to wait upon him and asking judgment for a stated sum allows evidence of the amount paid for nurse hire though there was no specific sum claimed therefor.[25] Where the damages are such as would necessarily follow a breach of the contract, allegations as to special damages are unnecessary.[26] The rule as to pleading special damages is relaxed where willful negligence is charged.[27]

There is a physical injury stated where the complaint alleges disturbance in body to the great damage of plaintiff.[28]

On an application for the appointment of commissioners to assess damages for change in a street grade, a railroad company liable for a portion of the damages may interpose an answer setting up any defense it may have.[29]

Whether evidence of particular damages is admissible under the issues is

evidence does not show a dislocation—St. Louis S. W. Ry. Co. v. Brown (Tex. Civ. App.) 69 S. W. 1010.

15. Camp v. First Nat. Bank (Fla.) 33 So. 241.

16. Cyc. Law Dict.

17. Kircher v. Incorporated Town of Larchwood (Iowa) 95 N. W. 184; Cronin v. Metropolitan St. Ry. Co., 81 N. Y. Supp. 752.

Sufficiency of allegations of special damages: Special damages are averred in a petition for slander stating that plaintiff became sick and suffered great bodily pain—Hitzfelder v. Koppelmann (Tex. Civ. App.) 70 S. W. 353. Special damages in a suit for slander are insufficiently averred by an allegation that defendant falsely and maliciously said to a person with whom plaintiff was negotiating a trade that plaintiff "is no good, he will not pay for anything he gets" and therefore the trade was broken off—Ford v. Lamb, 116 Ga. 655. In an action for damages to one article of clothing, it is not necessary to allege special damages to the entire suit—J. Harzburg & Co. v. Southern Ry. Co., 65 S. C. 539. Loss of time of a peculiar and special value is insufficiently averred in a petition alleging in addition to suffering, the inability of plaintiff to do ordinary farm work, permanent injuries and damages in a certain sum—Louisville & N. R. Co. v. Mason, 24 Ky. L. R. 1623, 72 S. W. 27.

18. Patee v. McCabe-Bierman Wagon Co., 97 Mo. App. 356.

19. Louisville & N. R. Co. v. Reynolds, 24 Ky. L. R. 1402, 71 S. W. 516; Pequin v. St. Louis & S. Ry. Co., 90 Mo. App. 118; Stoetzle v. Swearingen, 90 Mo. App. 592.

20. Brake v. Kansas City (Mo. App.) 75 S. W. 191. Sufficiency of allegation to admit evidence of the value of time lost while disabled from injuries—General Elec. Co. v. Murray (Tex. Civ. App.) 74 S. W. 50. There is a sufficient allegation of damages for loss of time where it is alleged that plaintiff has been ill and still is partially disabled from attending to her work and household affairs—Brake v. Kansas City (Mo. App.) 75 S. W. 191.

21. Drischman v. McManemin, 68 N. J. Law, 337.

22. Paquin v. St. Louis & S. Ry. Co., 90 Mo. App. 118.

23. Campbell v. Los Angeles Traction Co., 137 Cal. 565, 70 Pac. 624. Where the damages are for an assault, evidence that plaintiff was an epileptic at the time of the assault with evidence showing the assault might aggravate the disease, is admissible, though the fact that plaintiff was in an epileptic condition was not pleaded—St. Louis Trust Co. v. Murmann, 90 Mo. App. 555.

24. Illinois Steel Co. v. Ryska, 200 Ill. 280.

25. Moore v. Southwest Missouri Elec. Ry. Co. (Mo. App.) 75 S. W. 176.

26. Bussard v. Hibler, 42 Or. 500, 71 Pac. 642.

27. Henry Sonneborn & Co. v. Southern Ry., 65 S. C. 502, 22 St. at Large, p. 693—Stembridge v. Southern Ry., 65 S. C. 440.

28. Watkins v. Kaolin Mfg. Co., 131 N. C. 536, 60 L. R. A. 617.

29. In re Grade Crossing Com'rs, 171 N Y. 685.

largely a matter of construction of averments in the pleadings describing the particular injuries and their effects.[30] Evidence inadmissible for want of proper pleading should be stricken.[31]

(§ 8) *B. Evidence as to damages. In general.*—There may be no recovery of damages in the absence of proof of their amount.[32] The Northampton tables though not conclusive are competent evidence on question of probable duration of a life in an action for breach of a contract for support.[33] The value of realty cannot be established by the testimony of witnesses as to the amount they would be willing to take for their property.[34] Where it becomes necessary to establish the value of land in an action for failure to convey and the value has been estimated by parcels in the terms of the contract, such estimate is prima facie evidence thereof.[35] A witness cannot testify that in his opinion the breach of a contract by one of the parties thereto caused damages to the other in a lump sum stated.[36]

The fact that property is insured for a certain amount is not conclusive evidence as to its value in an action for its destruction by fire.[37] Direct proof of injuries to the feelings alleged as an element of damages is not indispensable to their recovery, as the existence of this element may be determined from circum-

30. Evidence of hernia is admissible under an averment of injury to muscles of legs, arms, side, back, abdomen and that bowels were strained and bruised—City of Connersville v. Snider (Ind. App.) 67 N. E. 555. Impairment of hearing may not be shown under averment of serious and permanent injuries to head and body and nerves and physical shock, great pain in head and body and loss of sleep and loss of memory—Piltz v. Yonkers R. Co., 83 App. Div. (N. Y.) 29. Evidence of injuries to nerves is admissible under an allegation that plaintiff's arm was cut off, his foot mutilated, and he was otherwise permanently injured—Kappus v. Metropolitan St. Ry. Co., 82 App. Div. (N. Y.) 13. Under allegation of internal injuries about the head, and other pains, injuries to the eye may be shown—Stembridge v. Southern Ry., 65 S. C. 440. Diabetes may be shown under allegation of bruises, strain of spinal column and laceration of muscles causing great pain and preventing labor—Eichholz v. Niagara Falls Hydraulic Power & Mfg. Co., 174 N. Y. 519. Averment of injuries to the nervous system allows testimony of physician that such injuries produce a lower state of vitality, causing defects of hearing, speech and sight—Missouri, K. & T. Ry. Co. v. Hawk (Tex. Civ. App.) 69 S. W. 1037. Averment of injuries to the spine allows evidence of the effect of an injury to the spine on the sense of hearing—Id. Averment of fracture of skull and contusion of person with internal injuries does not authorize evidence of dementia—Sealey v. Metropolitan St. Ry. Co., 78 App. Div. (N. Y.) 530. Retroversion of womb may not be shown under averment of injuries in and around head and body making plaintiff sick and sore and causing great bodily pain and injuries of a permanent character—Ramson v. Metropolitan St. Ry. Co., 78 App. Div. (N. Y.) 101. Averment of concussion of the spine does not allow evidence of injury to sexual organs, that not being a necessary result from the injury pleaded—Page v. Delaware & H. Canal Co., 76 App. Div. 160, 12 N. Y. Ann. Cas. 18. Averment of injuries as affecting the back, leg and hip causing concussion of the spine and other bruises or injuries, allows evidence as to the injury of sexual organs—Atlanta Ry. & Power Co. v. Maddox, 117 Ga. 181. Averment of great injury, bruises on leg, back wrenched and sprained, severe contusion of muscles and nerves, and that plaintiff became sick and unable to labor, and his health greatly impaired, does not authorize proof of traumatic neurosis resulting from concussion or shock—Maynard v. Oregon R. Co. (Or.) 72 Pac. 590. Averment of great injury, bruises on limbs and wrenching of back, sprains and contusion of muscles and nerves allows evidence that plaintiff was skinned on the knee and bruised on the right hip, and that sharp pains extended into his neck and that his legs would draw and cramp—Id. Under an averment that by reason of injury to his leg plaintiff endured great pain and bodily suffering, and evidence of a physician without objection, that the temporary derangement of the kidneys frequently resulted from confinement due to broken leg, plaintiff may testify that kidneys were affected by his inactivity—Kircher v. Incorporated Town of Larchwood (Iowa) 95 N. W. 184. The amount actually paid for medical attendance and its reasonableness may be shown under a petition alleging the amount paid, and that the treatment was necessary and plaintiff was compelled to pay the same—St. Louis S. W. Ry. Co. v. Duck (Tex. Civ. App.) 69 S. W. 1027. Evidence of plaintiff's condition a year and a half after an accident is admissible under a complaint alleging serious resulting injury—Mogk v. New York & N. J. Tel. Co., 78 App. Div. (N. Y.) 560.

31. Brown v. Manhattan Ry. Co., 82 App. Div. (N. Y.) 222.

32. Riggs v. Gray (Tex. Civ. App.) 72 S. W. 101.

33. Banta v. Banta, 84 App. Div. (N. Y.) 138.

34. Eastern Tex. R. Co. v. Scurlock (Tex. Civ. App.) 75 S. W. 366.

35. Humphreys v. Shellenberger (Minn.) 94 N. W. 1083.

36. Foote & Davies Co. v. Malony, 115 Ga. 985.

37. Verdon v. United Elec. Co. (N. J. Law) 55 Atl. 99.

stances disclosed by the evidence.[38] The credibility of witnesses testifying as to damages may be tested.[39] In an action against officers for an alleged unlawful search of premises where special damages are asked for humiliation and disgrace, it may be shown that a part of the house was occupied by persons of low character.[40]

Cases passing on the sufficiency of evidence are collected in the footnote.[41]

Evidence in action for personal injuries.—The condition of the injured person before and since the injury may be shown,[42] but this does not authorize the admission of hearsay evidence.[43] The injured person may testify as to the condition of his health previous to the injury.[44] The evidence must have reference to the effect of the injury.[45] The size and dependent condition of plaintiff's family may not be shown.[46] The fact that testimony as to an injury was not admissible to show the injury as an element of damages because not pleaded will not prevent its admission when offered solely as a manifestation of injuries received which were properly pleaded.[47] The opinion of a husband as to the value of his wife's services is admissible together with facts to the effect that she had been able to perform all of the ordinary duties of the household and family prior to the injury but not thereafter,[48] and he may testify as to the value of his time and services devoted to her care and the reasonable amount of drug bills, nurse hire, and hospital bills that were expended.[49] There can be no recovery where there is no data from which the jury may determine the amount of the damages suffered, though it is clear that the party is entitled to recover something.[50]

Expectancy life tables are admissible where the injuries are permanent,[51] and in actions for wrongful death.[52]

Physical examination is usually allowable.[53]

38. Hoover v. Haynes (Neb.) 93 N. W. 732.

39. Houston Cotton Oil Co. v. Trammell (Tex.) 74 S. W. 899.

40. Collins v. Clark (Tex. Civ. App.) 72 S. W. 97.

41. Breach of contract—Slater v. La Grande Light & Power Co. (Ore.) 72 Pac. 738. Illegal levy by sheriff—Whitworth v. McKee (Wash.) 72 Pac. 1046. Value of bonds at a certain date—Scrivner v. Woodward (Cal.) 73 Pac. 863. Breach of contract involving sale of inventions—South African Reduction Co. v. Peck (C. C. A.) 120 Fed. 87. Loss of or damage to property—Golden v. Heman Const. Co. (Mo. App.) 71 S. W. 1093; Wagner v. Conway, 76 App. Div. (N. Y.) 623; Goldberg v. Besdine, 76 App. Div. (N. Y.) 451; Glass v. Hauser, 38 Misc. (N. Y.) 780; Dibble v. State, 77 App. Div. (N. Y.) 647; Lippert v. Leski, 79 App. Div. (N. Y.) 632; Forrest v. Buchanan, 203 Pa. 454; Houston & T. C. Ry. Co. v. Cluck (Tex. Civ. App.) 72 S. W. 83. Loss of profits—Consumers' Ice Co. v. Jennings (Va.) 42 S. E. 879. Amount of profits lost by delay in furnishing machinery for the operation of a street railroad—Bristol Belt Line Ry. Co. v. Bullock Elec. Mfg. Co. (Va.) 44 S. E. 892. Value of stock converted—Warren v. Strikeman, 84 App. Div. (N. Y.) 610. Cost of completing a building—Central Lumber Co. v. Kelter, 201 Ill. 503.

42. Rea v. St. Louis S. W. Ry. Co. (Tex. Civ. App.) 73 S. W. 555; Chicago Terminal Transfer R. Co. v. Kotoski, 199 Ill. 383. Acts or occupation showing physical strength—Birmingham Ry. & Elec. Co. v. Ellard, 135 Ala. 433; Heer v. Warren-Scharf Asphalt Pav. Co. (Wis.) 94 N. W. 789.

43. Statements to a physician as to past sufferings—Internatonal & G. N. R. Co. v. Boykin (Tex. Civ. App.) 74 S. W. 93.

44. Isherwood v. Lumber Co., 87 Minn. 388.

45. Not confined to the effect of the injuries sued upon—Lentz v. City of Dallas (Tex.) 72 S. W. 59. Testimony as to effect of assumed injury is bad—Cronin v. Metropolitan St. Ry. Co., 82 App. Div. (N. Y.) 227.

46. Louisville & N. R. Co. v. Collinsworth (Fla.) 33 So. 513.

47. Bopp v. New York Elec. Vehicle Transp. Co., 78 App. Div. (N. Y.) 337.

48. Chicago, R. I. & T. Ry. Co. v. Armes (Tex. Civ. App.) 74 S. W. 77.

49. City of Dallas v. Moore (Tex. Civ. App.) 74 S. W. 95.

50. Louisville Bridge Co. v. Louisville & N. R. Co. (Ky.) 75 S. W. 285.

51. Galveston, H. & S. A. Ry. Co. v. Mortson (Tex. Civ. App.) 71 S. W. 770; Galveston, H. & S. A. Ry. Co. v. Hubbard (Tex. Civ. App.) 70 S. W. 112; San Antonio & A. P. Ry. Co. v. Moore (Tex. Civ. App.) 72 S. W. 226. Carlisle tables need no proof of their correctness—Atlanta Ry. & Power Co. v. Monk (Ga.) 45 S. E. 494. Defendant not prejudiced by an instruction assuming the Carlisle tables to be conclusive—Chicago, R. I. & P. R. Co. v. Sizer (Neb.) 95 N. W. 498.

52. Coffeyville Min. & Gas Co. v. Carter, 65 Kan. 565, 70 Pac. 635.

53. Denied by U. S. Supreme Court—Union Pac. Ry. Co. v. Botsford, 141 U. S. 250, 35 Law. Ed. 734. A like rule obtains in Texas—

Sufficiency of evidence is shown by citations below.[54]

(§ 8) *C. Instructions.*—Instructions should limit the recovery to such damages as are shown by the evidence,[55] and to the amount demanded.[56] The instructions should be so clear as not to mislead the jury.[57] An instruction that the jury should take into consideration mental and physical pain is not made erroneous by the use of the word "should,"[58] nor the words "may" for "will" and "has sustained" for "will sustain."[59] An instruction on the question of aggravation of an injury by unskillful or improper treatment should state the exceptions allowing a recovery where diligence has been used.[60] It is not proper to instruct the jury to consider the probable duration of plaintiff's life in a particularly hazardous business, unless it is shown that plaintiff intended to follow that business for the remainder of his life.[61] Where there is no evidence authorizing the allowance of exemplary damages, the court should instruct that if plaintiff is entitled to any damages the jury should state how much and should find only such actual damages as were proved by the evidence.[62] Generally speaking it is not material whether an instruction which goes simply to the amount of the damages to be recovered is good or bad, if the jury, upon proper instruction as to the question of negligence on main issue, find against the plaintiff.[63] There is no prejudice to a defendant by the statement of an incorrect rule of damages, where the rule adopted diminished the recovery rather than increased it.[64] An instruction on humiliation and shame is proper though these elements were not specifically pleaded and though there was no direct testimony on the point.[65]

(§ 8) *D. Verdicts* when special must find and not assume all the facts in issue.[66] A separate finding of exemplary damages must be requested[67] and a failure to separately state them does not vitiate a general verdict.[68]

Austin & N. W. R. Co. v. Cluck (Tex. Civ. App.) 73 S. W. 569; Gulf, C. & S. F. Ry. Co. v. Brown (Tex. Civ. App.) 75 S. W. 807; Gulf, C. & S. F. Ry. Co. v. Gibbs (Tex. Civ. App.) 76 S. W. 71. Illinois (Pittsburgh, C., C. & St. L. Ry. Co. v. Story, 104 Ill. App. 132); and Kentucky—Louisville Ry. Co. v. Hartlege, 25 Ky. L. R. 152, 74 S. W. 742. Where the injured person refuses a personal examination, evidence as to whether the examination would be hurtful to his case is inadmissible—Chicago & E. I. R. Co. v. Stewart (Ill.) 67 N. E. 830. A code provision allowing a physical examination of an injured person, does not authorize a second examination on a subsequent trial, where the permission for the first examination was voluntarily given (Code Civ. Proc. § 873)—Whitaker v. Staten Island Midland R. Co., 76 App. Div. (N. Y.) 351.

In North Dakota it is recognized—Brown v. Chicago, M. & St. P. Ry. Co. (N. D.) 95 N. W. 153. See case for list of conflicting authorities on this proposition.

54. Willis v. Metropolitan St. Ry. Co., 76 App. Div. (N. Y.) 340; Eichholz v. Niagara Falls Hydraulic Power & Mfg. Co. (N. Y.) 66 N. E. 1107; Comerford v. Smith, 82 App. Div. (N. Y.) 638; First Nat. Bank v. San Antonio & A. P. Ry. Co. (Tex. Civ. App.) 72 S. W. 1033. Permanency of injury—Ashley v. Sioux City (Iowa) 93 N. W. 303; Louisville R. Co. v. Casey, 24 Ky. L. R. 1527, 71 S. W. 876. Loss of time—Sachra v. Town of Manilla (Iowa) 95 N. W. 198. Value of wife's services—Houston & T. C. R. Co. v. Harris (Tex. Civ. App.) 70 S. W. 335. Loss of future earning capacity—Hanlon v. Milwaukee Elec. Ry. & Light Co. (Wis.) 95 N. W. 100. Rupture—Texas & N. O. R. Co. v. Lee (Tex. Civ. App.) 74 S. W. 345.

55. Brink's Chicago City Exp. Co. v. Herron, 104 Ill. App. 269; Denver & R. G. R. Co. v. Young (Colo.) 70 Pac. 688; Hoover v. Haynes (Neb.) 93 N. W. 732; Comstock v. Price, 103 Ill. App. 19; Gulf, C. & S. F. Ry. Co. v. Robinson (Tex. Civ. App.) 72 S. W. 70. Need not expressly do so—Stanley v. Cedar Rapids & M. C. Ry. Co. (Iowa) 93 N. W. 489.

56. Louisville & N. R. Co. v. Watkins, 24 Ky. L. R. 1464, 71 S. W. 882; Morris v. Williford (Tex. Civ. App.) 70 S. W. 228.

57. Held not to authorize double damages—Missouri, K. & T. Ry. Co. v. Flood (Tex. Civ. App.) 70 S. W. 331. As to lessened earnings—St. Louis S. W. Ry. Co. v. Byers (Tex. Civ. App.) 70 S. W. 558. As to unanticipated but proximate damages—Coleman v. Perry (Mont.) 72 Pac. 42.

58. Galveston, H. & S. A. Ry. Co. v. Collins (Tex. Civ. App.) 71 S. W. 560.

59. Baker v. City of Independence, 93 Mo. App. 165.

60. Louisville & N. R. Co. v. Mason, 24 Ky. L. R. 1623, 72 S. W. 27.

61. Louisville & N. R. Co. v. Gordan, 24 Ky. L. R. 1819, 72 S. W. 311.

62. Florida Cent. & P. R. Co. v. Mooney (Fla.) 33 So. 1010.

63. Zimmerman v. Denver Consol. Tramway Co. (Colo. App) 72 Pac. 607.

64. Friedrich v. Milwaukee (Wis.) 95 N. W. 126.

65. Berger v. Chicago & A. Ry. Co. (Mo. App.) 71 S. W. 102.

66. Bredlan v. York, 115 Wis. 554.

67. Foley v. Martin (Cal.) 71 Pac. 165.

68. Friedly v. Giddings, 119 Fed. 438

CURRENT LAW.

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DEATH AND SURVIVORSHIP.

Presumption of death.—The absence of a person from his usual place of abode for seven years without tidings from him raises a presumption of his death.[1] The presumption of death may be raised in less time, where there is convincing though not actual proof of loss of life.[2]

Letters of administration are prima facie evidence of death of one on whose estate they are granted.[3]

Survivorship.—Under the common law there is no presumption of survivorship depending on the age, sex, or physical condition of persons losing their lives in a common disaster, hence evidence on that question is required.[4]

DEATH BY WRONGFUL ACT.

§ 1. **Nature and Elements of Liability.**
§ 2. **Who May Bring Action.**
§ 3. **Beneficiaries.**
§ 4. **Damages.**
§ 5. **Actions.**—Pleading; Evidence; Instructions; Questions for Jury; Verdicts, Judgments and Costs.
§ 6. **Distributive Rights in Amount Recovered.**

§ 1. *Nature and elements of liability.*—The right to recover for wrongful death is purely a statutory right and did not exist under the common law,[5] except under that prevailing in Hawaii.[6]

1. This was the rule at common law—Ruoff v. Greenpoint Sav. Bank, 40 Misc. (N. Y.) 549; Griffin v. Southern Ry., 66 S. C. 77. Proof of absence for more than seven years is sufficient where there is no rebutting proof—Wilcox v. Trenton Potteries Co., 64 N. J. Eq. 173. A statute making seven years' absence a presumption of death unless proof is made of life within that time means that the person referred to must absent himself from his home and proof of change of residence from one state to another and that he has not been heard of in the former state for seven years, does not make a case—Latham v. Tombs (Tex. Civ. App.) 73 S. W. 1060. A code provision that a person on whose life an estate in real property depends who remains without the United States and absents himself for seven years altogether, is presumed to be dead in an action relating to the property in which his death comes in question has reference only to a case where the right to possession of real property depends on the life of a third person and does not apply to a person who is the owner of the property, and the widow and heirs at law of the owner of property sold under condemnation proceedings do not show the death of the owner by the fact that he had made no will and that seven years had elapsed since he had been seen or heard from; there must be other evidence either presumptive or direct to raise the presumption of death—In re Boerum St., 173 N. Y. 321.

2. There is a strong presumption of death where a passenger on an ocean vessel was seen late at night when the vessel was in mid-ocean and was never seen or heard of afterwards though a diligent search was made for him the next morning—Traveler's Ins. Co. v. Rosch, 23 Ohio Circ. R. 491.

3. Ruoff v. Greenpoint Sav. Bank, 40 Misc. (N. Y.) 549.

4. Young Women's Christian Home v. French, 187 U. S. 401, 47 Law. Ed. 233; Males v. Sovereign Camp Woodmen of the World (Tex. Civ. App.) 70 S. W. 108; Middeke v. Balder, 198 Ill. 590, 59 L. R. A. 653. Where testatrix designated a charity as a beneficiary in the event that she survived her son and husband the charity will take to the exclusion of next of kin of testatrix or her son where both survive the husband and perish in a common disaster without proof as to the order of death, the intention of testatrix to this disposition being plainly manifest—Young Women's Christian Home v. French, 187 U. S. 401, 47 Law. Ed. 233.

5. Louisville & N. R. Co. v. Jones (Fla.) 34 So. 246; Peers v. Nevada Power, Light & Water Co., 119 Fed. 400.

6. The common law of Hawaii is adopted by Act of Congress—The Schooner Robert

In Michigan, the action for personal injuries survives where the injured persons live an appreciable time thereafter and the action must be prosecuted for the injury and not for the wrongful death.[7] In Texas the opposite rule obtains and the action for the injuries does not survive.[8] In some states, plaintiff may recover in one action for injuries to deceased and for the wrongful death.[9]

There can be no recovery under the general maritime law for damages for negligence resulting in death on the high seas.[10] Where the vessel is registered in a state in this country, the action may be brought in such state, as the injury, in the eye of the law, was consummated therein.[11] Where the statute in force at the place of collision gives a right of action to the widow or next of kin, the action may be enforced in a court of admiralty in proceedings by the owner of the offending vessel for a limitation of liability.[12]

The negligence of defendant must be the proximate cause of the death.[13] Negligence of the nurse in a smallpox camp in connection with the hospital maintained by the railroad as a part of its legal department is imputable to the railroad making it liable for resulting death.[14]

The law of the state where the wrongful death occurs governs though the action therefor is brought in another state.[15]

A release of one person from liability for an accident does not release another, the defendant, unless their relation made them joint tort feasors.[16]

§ 2. *Who may bring action.*—Non-existence of any of the persons having a precedent right to sue is requisite,[17] and defendant may show as a matter of defense

Lewers Co. v. Kekauoha (C. C. A.) 114 Fed. 849.

7. Olivier v. Houghton County St. Ry. Co. (Mich.) 96 N. W. 434.

See Abatement and Revival, (§ 3 Survivability of Actions) ante, pp. 3, 4. There may be a recovery for pain and suffering previous to death together with decedent's loss by being deprived of power to labor during time he would have lived if not injured—Olivier v. Houghton County St. Ry. Co. (Mich.) 96 N. W. 434.

8. Ellyson v. International & G. N. R. Co. (Tex. Civ. App.) 75 S. W. 868.

9. Under the laws of Tennessee damages to the deceased accruing up to the time of his death and damages to widow and next of kin for the pecuniary loss sustained by them by the death, may be recovered. (Shannon's Code, §§ 4025, 4026, 4028)—Davidson Benedict Co. v. Severson, 109 Tenn. 572.

The damages for the wrongful death are equivalent to loss of earning capacity to one totally disabled—Id. The Nevada act creating liability for wrongful death where the act causing death is such as would, if death had not ensued, entitle the party injured to maintain an action, the action to be brought by a personal representative of deceased, and prescribing the manner for distribution, creates but a single cause of action and not one in right of deceased by survival and the other in the right of the next of kin—Peers v. Nevada Power, Light & Water Co., 119 Fed. 400.

10. In re La Bourgogne, 117 Fed. 261.

11. Lindstrom v. International Nav. Co., 117 Fed. 170.

12. The Northern Queen, 117 Fed. 906.

The jurisdiction of admiralty to enforce such causes is treated in Admiralty, ante, p. 23.

13. It is not important that the negligence of a third person may also have contributed to the accident—Neal v. Wilmington & N. C. Elec. R. Co., 3 Pen. (Del.) 467. To attribute death to two or more concurrent causes, each must be a prominent efficient cause, for if one of the alleged causes operates slightly with another, which is the prominent efficient cause, then the proximate cause of death should be traced to the latter—Ellyson v. International & G. N. R. Co. (Tex. Civ. App.) 75 S. W. 868. The voluntary willful act of suicide of an insane person whose insanity was caused by a railroad accident, and who knows the purpose and the physical effect of his act, is a new and independent agency not flowing from the accident—Daniels v. New York, N. H. & H. R. Co. (Mass.) 67 N. E. 424.

14. Missouri, K. & T. Ry. Co. v. Freeman (Tex. Civ. App.) 73 S. W. 542.

15. Foreign cause of action recognized—St. Louis, I. M. & S. Ry. Co. v. Haist (Ark.) 72 S. W. 893.

Parties who may sue—Fabel v. Cleveland, C., C. & St. L. R. Co., 30 Ind. App. 268; McGinnis v. Missouri Car & Foundry Co. (Mo.) 73 S. W. 586. A non-resident widow could not sue for wrongful death in Wisconsin, the statute of that state giving the right of action to the personal representative of the deceased for the benefit of the husband or widow—McMillan v. Spider Lake Saw Mill & Lumber Co., 115 Wis. 332.

16. The employer of a teamster killed by negligence of a street railway company in running a car upon him after the wheel of his wagon had broken and thrown him on the track is not a joint tort feasor—O'Brien v. Brooklyn Heights R. Co., 80 App. Div. (N. Y.) 474.

17. Laws of Florida of 1883, c. 3439, § 2 (Rev. St. Fla. § 2343) gives the right to recover for wrongful death to the widow or

that there is in being a person given by statute a precedent right of action over plaintiff.[18]

In some states the action can only be brought by the representative of deceased for the benefit of the parties entitled to the recovery,[19] and the appointment of a special administrator is not required.[20] This allows the suit to be prosecuted by a foreign administrator.[21] The widow's acceptance of a benefit certificate will not bar an action by the personal representative of the deceased against the company for the benefit of minor children.[22] In other states the action in certain cases is made personal to the designated beneficiaries and may not be brought by the representative of the deceased.[23] In still other states the action may be brought by either the heirs or the personal representative of deceased.[24]

The fact that the parties entitled to sue are nonresident aliens will not prevent a recovery.[25]

§ 3. *Beneficiaries.*—Many of the statutes make the right to the recovery depend on whether the party was dependent on deceased for support. In such cases the fact of dependency must be established.[26]

husband of deceased; if there are neither widow nor husband then to the minor child or children; where there is neither widow nor husband nor minor children then to any person dependent on the person killed; and where there is neither of the above classes then to the executor or administrator of the person killed—Louisville & N. R. Co. v. Jones (Fla.) 34 So. 246. The Missouri act providing that a right of action shall accrue to the widow of a person so killed, his lineal heirs or adopted children, or to any person or persons who were before such loss of life dependent for support on the person so killed, gives separate and alternative rights of action first to the widow, if there is one, second to the lineal heirs or adopted children, and third to persons dependent, and under this act where the widow de jure is alive, no action can be maintained by the children of the deceased. The right to maintain suit by the widow is not affected by her personal misconduct—Cole v. Mayne, 122 Fed. 836; Poor v. Watson, 92 Mo. App. 89.

18. Louisville & N. R. Co. v. Jones (Fla.) 34 So. 246.

19. Wetherell v. Chicago City R. Co., 104 Ill. App. 357; Peers v. Nevada Power, Light & Water Co., 119 Fed. 400; Carrigan v. Stillwell, 97 Me. 247. The laws of Oregon permit the action to be brought by the personal representative of a minor though he leaves surviving him a father, mother or guardian (B. & C. Comp., §§ 34, 379, 381)—Schleiger v. Northern Terminal Co. (Or.) 72 Pac. 324.

20. Burns' Rev. St. 1901, § 285—Lake Erie & W. R. Co. v. Charman (Ind.) 67 N. E. 923.

21. Boulden v. Pennsylvania R. Co. (Pa.) 54 Atl. 906. Rev. St. Fla. §§ 2342, 2343—Florida Cent. & P. R. Co. v. Sullivan (C. C. A.) 120 Fed. 799; Harrill v. South Carolina & G. Extension Ry. Co. (N. C.) 44 S. E. 109.

22. Oyster v. Burlington Relief Department (Neb.) 91 N. W. 699, 59 L. R. A. 291.

23. The laws of Indiana allowing an action for wrongful death of men employed in mines in excess of the number prescribed, intends the right of action as personal to the widow and children of the deceased and does not allow the action to be maintained by the administrator of deceased—L. T. Dickason Coal Co. v. Unverferth, 30 Ind. App. 546. Under the laws of New Mexico giving the right of action for death caused by railroad accidents to the husband or wife of deceased, or if there be no husband or wife then to the minor children, or if there be no minor children then to the father or mother of either of them, the action cannot be prosecuted in favor of legal representatives of the deceased. (Comp. Laws N. Mex. 1897, § 3213)—Romero v. Atchison, T. & S. F. Ry. Co. (N. Mex.) 72 Pac. 37. Under the Pennsylvania Act of 1855, the widow alone could maintain the action though deceased left children surviving him—Marsh v. Western N. Y. & P. Ry. Co., 204 Pa. 229.

24. Under a statute allowing the action to be brought by the heirs of the deceased or his personal representatives, an administrator can sue only where there are heirs, as the right of action is for their benefit—Webster v. Norwegian Min. Co., 137 Cal. 399, 70 Pac. 276. The fact that the only heirs of decedent had assigned all their interest in the cause of action to the administrator of deceased before the commencement of the suit, and the administrator appeared as plaintiff, will not bar the action where the statute allows the suit to be brought either by the heirs or the administrator, as the administrator was entitled to sue in his own right and recovery by him would bar a subsequent action. (Rev. St. of Utah, § 2912)—Fritz v. Western Union Tel. Co., 25 Utah, 263, 71 Pac. 209.

25. Gen. St. 1894, § 5913—Renlund v. Commodore Min. Co. (Minn.) 93 N. W. 1057. Code, Ariz. 1887, §§ 2145, 2149, 2150—Bonthron v. Phœnix Light & Fuel Co. (Ariz.) 71 Pac. 941.

26. Hurd's Rev. St. 1899, p. 1775—Willis Coal & Min. Co. v. Grizzell, 198 Ill. 313. A mother in indigent circumstances, living generally with her unmarried son and dependent on him for support, is dependent within the meaning of the statute giving the right of action to persons dependent for support on one killed by reason of the violation of the mining laws by the owner of the mine—Bowerman v. Lackawanna Min. Co. (Mo. App.) 71 S. W. 1062. The dependent condition of a father is shown by the fact that he lived in a foreign country, was advanced

Minor grandchildren are not included in the term "minor children" in the Louisiana statute.[27] The mother of an illegitimate child may not sue for his wrongful death under the laws of Georgia.[28] The next of kin of a child are the next of kin by blood and not the adopting parents.[29] A posthumous child is not deprived of his cause of action by the fact that the mother and other children have recovered damages for the death.[30]

§ 4. *Damages.*—The jury in considering the amount of recovery may properly take into consideration the age, habits of industry, capacity for labor, and probable earnings of deceased,[31] the number, age, and sex of decedent's children dependent on him for support,[32] the special aptitude of a boy for a particular trade on the question of his earning capacity,[33] the condition of decedent's health as bearing on the pecuniary value of his life to plaintiff,[34] the ability of the deceased to earn money and his disposition to contribute to the support of his family.[35] They may not consider prospective advances in salary to deceased based on the prosperity of his employer's business,[36] nor the habits and moral character of the widow of deceased.[37] A widow may recover such a sum as will reasonably compensate her for all damage sustained or that she may subsequently sustain by reason of her hus-

in years, destitute, feeble and unable to work, and that deceased had on numerous occasions sent him money for his support—Boyle v. Columbian Fire Proofing Co., 182 Mass. 93. The dependent condition of a mother is shown by evidence that she had no property but her house and no support except what she received from her sons, and that other children occupied the home with the mother paying only a small sum for their board, and that deceased had promised to take care of his mother and had at different times sent her money—Id. On the question of dependency of a mother on her son for support, evidence is admissible of his promise a few days before his death, to help her all he could and to send money at stated intervals—Id. An invalid adult to whom a father gave money when requested, has such a pecuniary interest in the life of the father as to entitle her to share in damages recovered for his death—Duzan v. Myers, 30 Ind. App. 227. Where the issue is as to whether a person is dependent on the deceased for support it may be shown that regardless of any strict legal right to such support, the person was because of some disability coupled with lack of property, dependent on deceased for support, and that by reason of past support the person had a reasonable expectancy of its continuation had deceased lived—Louisville & N. R. Co. v. Jones (Fla.) 34 So. 246. A recovery in favor of a father is erroneous where there was no evidence that the father received any pecuniary benefits from the earnings of deceased at the time of his death or that he had any reasonable expectation of ever sharing in such earnings—Missouri, K. & T. Ry. Co. v. Freeman (Tex. Civ. App.) 73 S. W. 542. Where it is shown that deceased was unmarried and had sent sums of money to his parents at different times, testimony as to his paying attention to some young lady was properly excluded as too remote to affect the recovery for support of parents—Fritz v. Western Union Tel. Co., 25 Utah, 263, 71 Pac. 209.

27. Walker v. Vicksburg, S. & P. Ry. Co. (La.) 34 So. 749.

28. Robinson v. Georgia R. & Banking Co., 117 Ga. 168.

29. 2 Gen. St. N. J. p. 1714—Heidecamp v. Jersey City, H. & P. St. Ry. Co. (N. J. Law) 55 Atl. 239.

30. Galveston, H. & S. A. Ry. Co. v. Contreras (Tex. Civ. App.) 72 S. W. 1051.

31. Knight v. Sadtler Lead & Zinc Co., 91 Mo. App. 574; Davidson Benedict Co. v. Severson, 109 Tenn. 572; Watson v. Seaboard Air Line Ry. (N. C.) 45 S. E. 555. An instruction that the measure of damages for wrongful death is such sum as would represent the value of the future earnings of deceased which the beneficiaries had reasonable expectation he would contribute to them if he had lived, and in determining the amount of damages sustained by them, the jury could consider the deceased's earning capacity, his age and life expectancy, is not open to the construction that it allows plaintiffs to recover all the future earnings of deceased—St. Louis S. W. Ry. Co. v. Bowles (Tex. Civ. App.) 72 S. W. 451.

32. Coffeyville Min. & Gas Co. v. Carter, 65 Kan. 565, 70 Pac. 635. On the question of the amount the deceased would have contributed to support, evidence is admissible to show that a married daughter separated from her husband accompanied by her children was on her way to live with and be supported by her father at time of his death, and that another daughter was dying with consumption and unable to support herself—St. Louis S. W. Ry. Co. v. Bowles (Tex. Civ. App.) 72 S. W. 451. In an action by a child for the wrongful death of parent, he may show that his mother and numerous other children are living and entitled to recover pecuniary damages, as bearing on the extent of his recovery—Galveston, H. & S. A. Ry. Co. v. Contreras (Tex. Civ. App.) 72 S. W. 1051.

33. Snyder v. Lake Shore & M. S. Ry. Co. (Mich.) 91 N. W. 643.

34, 35. Coffeyville Min. & Gas Co. v. Carter, 65 Kan. 565, 70 Pac. 635.

36. Fajardo v. New York Cent. & H. R. R. Co., 84 App. Div. (N. Y.) 354.

37. Consolidated Stone Co. v. Morgan (Ind.) 66 N. E. 696.

band's death, basing the calculation on the number of years he would probably have lived.[38] The amount of the recovery is not affected by her subsequent marriage.[39]

For the death of a parent, the recovery may include the value of his services for care, sustenance, and education of his minor children.[40] The damages to the child are not limited to those accruing during his minority.[41]

Parents are not limited, in the matter of recovery, to the ability of the deceased to earn wages during his minority, but the jury may take into consideration the reasonable expectation of the parents of benefits from the continuation of the life of their son.[42] The recovery may include loss of services of a child and its society and comfort but not for sorrow, grief, or anguish to the parents or pain and suffering to the child.[43] A mother in indigent circumstances, entitled to recover at all for the wrongful death of her son, should recover more than merely nominal damages under a law giving a right of action to dependent persons killed by reason of violation of mining laws by the owner of the mine.[44]

The expectancy of life may be shown as bearing on the amount of damages caused by his death,[45] unless the deceased was engaged in a particularly dangerous occupation.[46] This expectancy may be shown by any proper evidence.[47] This does not allow evidence of the longevity of the father of deceased.[48] Under laws allowing recovery of such damages as may be just, the ages and expectancy of life of the beneficiaries where they are dependent in whole or in part on the deceased may be taken into account in fixing the damages.[49] The jury are not required to take into consideration the possibility of deceased becoming impoverished and his children being required to support him in his old age.[50]

The amount plaintiff is entitled to recover is properly termed a "capital fund" which represents the present value of all the pecuniary loss.[51]

Under the laws of Michigan, the plaintiff may recover the same damages for injuries to his intestate that the intestate would have recovered if he had lived.[52]

In South Carolina the heirs may recover for loss resulting from grief or mental suffering.[53]

38. Cox v. Wilmington City Ry. Co. (Del.) 53 Atl. 569.

39. Consolidated Stone Co. v. Morgan (Ind.) 66 N. E. 696.

40. Anthony Ittner Brick Co. v. Ashby, 198 Ill. 562; Sternfels v. Metropolitan St. Ry. Co., 174 N. Y. 512; Galveston, H. & S. A. Ry. Co. v. Puente (Tex. Civ. App.) 70 S. W. 362; St. Louis, I. M. & S. Ry. Co. v. Haist (Ark.) 72 S. W. 893.

41. Galveston, H. & S. A. Ry. Co. v. Puente (Tex. Civ. App.) 70 S. W. 362.

42. Chicago & E. I. R. Co. v. Beaver, 199 Ill. 34; Draper v. Tucker (Neb.) 95 N. W. 1026; Corbett v. Oregon Short Line R. Co., 25 Utah, 449, 71 Pac. 1065.

43. Corbett v. Oregon Short Line R. Co., 25 Utah, 449, 71 Pac. 1065.

44. Bowerman v. Lackawanna Min. Co. (Mo. App.) 71 S. W. 1062.

45. Coffeyville Min. & Gas Co. v. Carter, 65 Kan. 565, 70 Pac. 635.

46. Western & A. R. Co. v. Clark (Ga.) 44 S. E. 1.

47. Haines v. Pearson (Mo. App.) 75 S. W. 194.

48. Hinsdale v. New York, N. H. & H. R. Co., 81 App. Div. (N. Y.) 617.

49. Code Civ. Proc. Cal. § 377—The Dauntless, 121 Fed. 420.

50. Sternfels v. Metropolitan S. Ry. Co., 174 N. Y. 512.

51. Hackney v. Delaware & A. Telegraph & Telephone Co. (N. J. Law) 55 Atl. 252; Watson v. Seaboard Air Line Ry. (N. C.) 45 S. E. 555; Florida Cent. & P. R. Co. v. Sullivan (C. C. A.) 120 Fed. 799; Merchants' & P. Oil Co. v. Burns (Tex.) 74 S. W. 758. In Delaware it is held that the recovery is properly limited to such a sum as deceased would probably have earned in his business in life and left as his estate, taking into consideration his age, ability, habits of industry and his expenditures. Neal v. Wilmington & N. C. Elec. R. Co., 3 Pen. (Del.) 467. Under a Code provision allowing recovery of damages in such sum as the jury deems just compensation for pecuniary injuries resulting from death, it is not a just measure of damages to instruct that the recovery should be limited to such an amount as the current rate of interest for trust investments would bring an amount equal to the earning power of the deceased—Fajardo v. New York Cent. & H. R. R. Co., 84 App. Div. (N. Y. 354. In an action for wrongful death, on the question of damages evidence of the cost of annuity based on deceased's expectancy of life, sufficient to produce a yearly income equal to his yearly income at time of his death, is inadmissible—Hinsdale v. New York, N. H. & H. R. Co., 81 App. Div. (N. Y.) 617.

52. Comp. Laws Mich. § 10,117—Kyes v. Valley Tel. Co. (Mich.) 93 N. W. 623.

53. Brown v. Southern Ry., 65 S. C. 260.

Under the constitution and laws of Texas allowing the recovery of exemplary damages for the commission of a willful homicide, where the evidence justifies the direction of a verdict for plaintiff, it is not error to instruct the jury as a matter of law to award exemplary as well as actual damages.[54]

It may not be shown in mitigation of damages that the mother of the deceased would receive benefits from a relief association,[55] and the amount of property left by deceased may not be inquired about.[56] Declarations of deceased that his children are trying to get his property from him may not be shown in mitigation of damages.[57] Excessiveness and adequacy of recovery have been passed on in cases cited.[58] Where punitive damages are not recoverable, the recovery is excessive where the loss of society and comfort of a husband is estimated at a greater valua-

54. Const. Tex. 1876, art. 16, § 26, and Rev. St. Tex. art. 3019—Morgan v. Barnhill (C. C. A.) 118 Fed. 24.

55. Boulden v. Pennsylvania R. Co. (Pa.) 54 Atl. 906.

56. Comp. St. 1901, c. 21, § 2—Chicago, R. I. & P. Ry. Co. v. Holmes (Neb.) 94 N. W. 1007. The pecuniary condition and resources of the widow or next of kin or their unfortunate condition may not be shown but it is not error to allow proof of the earnings of the deceased and that the wife and children were supported by him—Pittsburgh, C., C. & St. L. R. Co. v. Kinnare, 203 Ill. 388.

57. Brown v. Southern Ry., 65 S. C. 260.

58. **Amounts held not excessive:** $1,500 (boy 18½ years of age, earning $2 a day, and assisting his mother in the housework, and contributing a portion of his earnings to the support of the family)—Stumbo v. Duluth Zinc Co. (Mo. App.) 75 S. W. 185. $1,518 (boy six years old)—Hoon v. Beaver Valley Traction Co., 204 Pa. 369. $25,000 (battalion chief in a fire department receiving $3,300 a year whose income was the sole support of his wife and two children aged 8 and 12 years, he being 38 years of age at the time of his death)—Lane v. Brooklyn Heights R. Co., 82 N. Y. Supp. 1057. $25,000 (one 62 years of age, in good health, with a life expectancy of 13 years, who had accumulated considerable property and expended for his own and his family's support about $5,000 a year)—Sternfels v. Metropolitan St. Ry. Co. 174 N. Y. 512. $5,000 (bright, active boy of 16 years, who for nearly three years had been a general clerk in a grocery store though this is the extreme statutory limit of recovery)—Nelson v. Branford Lighting & Water Co., 75 Conn. 548. $5,000 (man 37 years of age earning $9 a week and leaving a wife and four children)—Geismann v. Missouri Edison Elec. Co. (Mo.) 73 S. W. 654. $2,750 (boy of 6 particularly where two juries have returned the same verdict)—Gray v. St. Paul City Ry. Co., 87 Minn. 280. $1,100 (man 35 years of age, earning $1,800 a year and accustomed to render assistance to plaintiffs)—Chicago, R. I. & P. R. Co. v. Young (Neb.) 93 N. W. 922.

Second verdict for less than might have been given under the mortuary tables will stand on appeal—Georgia, C. & N. Ry. Co. v. Mathews, 116 Ga. 424.

Amounts held excessive: $3,500 (a bright, healthy girl between 8 and 9 years of age who lived with her mother apart from her father, $2,500 being ample)—Wells v. New York Cent. & H. R. R. Co., 78 App. Div. (N. Y.) 1. $10,000 (a miner 55 years of age receiving $50 a month, whose expectancy was 17 years, $6,000 being ample)—Vowell v. Issaquah Coal Co., 31 Wash. 103, 71 Pac. 725. $6,000 (an ordinarily bright boy 4 years and 4 months of age, $3,000 being ample)—Hively v. Webster County, 117 Iowa, 672. $5,000 (a daughter, a domestic servant 23 years of age who remitted to her father about $3.00 a month, $1,500 being ample)—Lindstrom v. International Nav. Co., 117 Fed. 170. $3,000 (malpractice resulting in death where the physician had the patient under his care six days)—Ramsdell v. Grady, 97 Me. 319. $5,200 (a track walker earning $1.25 a day, $4,000 being ample)—Erie R. Co. v. McCormick, 24 Ohio Circ. R. 86. $10,000 (a man of 73 years, engaged in successful business, leaving a wife and adult children, and giving financial assistance only to the wife, $5,000 being ample)—Stillings v. Metropolitan St. Ry. Co., 84 App. Div. (N. Y.) 201.

Adequacy of recovery: $10 is a grossly inadequate recovery for the death of a child three years and four months old—Draper v. Tucker (Neb.) 95 N. W. 1026. $500 (death of a scowman leaving two sisters who supported themselves to whom he had promised funds to take them back to the old country to live)—The O. L. Hallenbeck, 119 Fed. 468. $10,000 (death of a milk driver 35 years of age earning $12 a week, leaving a widow and two daughters aged 9 and 12 years)—Stevens v. Union Ry. Co., 75 App. Div. (N. Y.) 602. $250 not so grossly inadequate as to justify granting of a new trial in an action for the death of a boy between eleven and twelve years of age, though it was shown that within a year from the time of his death he would have been able to earn from $12 to $15 a week and there was some evidence that a boy of deceased's age would not earn more than the cost of his maintenance before reaching his majority—Snyder v. Lake Shore & M. S. Ry. Co. (Mich.) 91 N. W. 643. $200 not grossly inadequate for the wrongful death of an infant 6 years of age—Gubbitosi v. Rothschild, 75 App. Div. 477, 12 N. Y. Ann. Cas. 16. $750 not grossly inadequate for death of boy of 5 years—Schnable v. Providence Public Market, 24 R. I. 477. $3,600 (death of man 50 years of age earning $10 a week, leaving a widow and four children one of whom was self-supporting and the others aged respectively 13, 6 and 5 years)—Garbaccio v. Jersey City, H. & P. St. Ry. Co. (N. J.) 53 Atl. 707.

tion than the amount of the actual and substantial pecuniary value of his life.[59] It is not error to allow the full statutory damages though it does appear that the party lived for some minutes after the accident and suffered some pain, where there was little or no contest as to the amount of the damages and the attention of the court was not called to the matter except by a somewhat ambiguous claim of law.[60]

§ 5. *Actions.*—A requirement of notice of injury as a condition precedent to the action does not apply to actions for death.[61] Especially when the right of action for wrongful death is secured from abrogation by a state constitution.[62] Contributory negligence of deceased may be urged in defense of the action,[63] but not where wantonness on the part of defendant is charged.[64]

To determine the jurisdiction of the Federal court on the ground of diverse citizenship, it is the citizenship of the administrator and not of the beneficiaries that controls.[65]

The laws of Utah allow the action to be brought either in the county where the injury was inflicted or in the county where the death occurred.[66]

The action is commenced when the process is put in the hands of the sheriff for service.[67] Under the laws of Louisiana the parties entitled may sue at any time within one year from the death.[68] In Kansas, the time is not extended by the pendency and dismissal of the former action as allowed by the Code in other cases.[69]

All persons entitled to recover must be joined or represented in the action.[70]

Pleading.—In an action by the administrator, it is proper to allege such facts as will show a pecuniary loss to the next of kin,[71] but not necessary as these damages will be presumed.[72] Where the names of those entitled to share are stated it is not necessary to expressly negative the existence of other relatives.[73] Under the Code of California it is the duty of plaintiff to plead and prove the existence of heirs of deceased, as the administrator can sue for wrongful death only where there are heirs.[74] Under laws giving the right of action to a personal representative of one whose immediate death was caused by negligence, it is not necessary that the declaration should contain an averment of immediate death, it is sufficient if it necessarily appears that the death was immediate.[75] Where exemplary damages are recoverable, the complaint need not specify what portion or whether or not the dam-

59. Florida Cent. & P. R. Co. v. Foxworth (Fla.) 34 So. 270.

60. Hesse v. Meriden, S. & C. Tramway Co., 75 Conn. 571.

61. Laws of Minn. 1897, c. 248 referring to defective sidewalks etc.—Orth v. Village of Belgrade, 87 Minn. 237.

62. Const. N. Y. art. 1, § 18—Gmaehle v. Rosenberg, 83 App. Div. (N. Y.) 339.

63. See Negligence and related titles treating liability for negligence such as Carriers, Municipal Corporations, Railroads, etc., for treatment of contributory negligence as defense to actions for injuries including those resulting in death.

64. Gaynor v. Louisville & N. R. Co., 136 Ala. 244; Alabama G. S. R. Co. v. Guest, 136 Ala. 348.

65. The complaint should allege citizenship of administrator—Bishop v. Boston & M. R. R., 117 Fed. 771.

66. White v. Rio Grande Western Ry. Co., 25 Utah, 346, 71 Pac. 593.

67. County v. Pacific Coast Borax Co., 68 N. J. Law, 273.

68. Goodwin v. Bodcaw Lumber Co., 109 La. 1050.

69. Civil Code, Kan. § 422—Rodman v. Missouri Pac. Ry. Co., 65 Kan. 645, 70 Pac. 642, 59 L. R. A. 704.

70. The failure of a widow suing to join the husband's mother as a party plaintiff, is not prejudicial where she joins as defendant and the jury awards the entire recovery to plaintiff (Rev. St. Tex. arts. 3021, 3022)—Merchants' & P. Oil Co. v. Burns (Tex. Civ. App.) 72 S. W. 626.

71. Union Pac. R. Co. v. Roeser (Neb.) 95 N. W. 68.

72. Peers v. Nevada Power, Light & Water Co., 119 Fed. 400; Peden v. American Bridge Co., 120 Fed. 523.

73. Peers v. Nevada Power, Light & Water Co., 119 Fed. 400.

74. Code Civ. Proc. Cal. § 377—Webster v. Norwegian Min. Co., 137 Cal. 399, 70 Pac. 276.

75. There is a sufficient averment of immediate death within the requirements of the laws of Maine where it is alleged that deceased being properly in the third story when the fire broke out, by reason of such negligence without fault on her part, was then and there burnt to death and consumed by said fire, and then and thereby lost her life (Pub. Laws of Maine, 1891, c. 124)—Carrigan v. Stillwell, 97 Me. 247.

ages prayed for are claimed as exemplary; the allowance of such damages as well as damages resulting to the kindred being matter for the determination of the jury in their discretion from the evidence.[76] A petition is not demurrable because it alleges a contract to support the next of kin, made by the deceased in his lifetime, without alleging that the estate of the deceased is insufficient for that purpose.[77] Cases cited show what amendments are allowable.[78]

The cause of the death may be shown by defendant under the general issue.[79] Under the Kansas Code in an action by a widow who was a resident of the state, an allegation that no personal representative had been appointed is put in issue by an unverified denial.[80]

Evidence.—There is a legal presumption that one found dead and killed by alleged negligence of another has exercised due care.[81] In Georgia it is the duty of plaintiff to show that deceased was without negligence.[82] Holdings as to sufficiency of evidence will be found in the footnote.[83]

Instructions.—Instructions should state the rules of recovery clearly,[84] and

76. Peers v. Nevada Power, Light & Water Co., 119 Fed. 400.

77. Union Pac. R. Co. v. Roeser (Neb.) 95 N. W. 68.

78. In an action in Kentucky for a death occurring in Virginia, an amendment setting out the Code of Virginia allowing such recovery is properly allowed—Louisville & N. R. Co. v. Pointer's Adm'r, 24 Ky. L. R. 772, 69 S. W. 1108. Where the petition sets forth in general terms the pecuniary loss, the court may permit an amendment setting forth the particular facts from which the loss is inferable—Chicago, R. I. & P. R. Co. v. Young (Neb.) 93 N. W. 922. Where the action is erroneously commenced by the widow and children, who are the only parties in interest, instead of by all personal representatives, it is the duty of the court to allow an amendment of the complaint substituting the widow in her capacity as administratrix (Rev. St. Utah 1898, § 3005) —Pugmire v. Diamond Coal & Coke Co. (Utah) 72 Pac. 385.

79. Wetherell v. Chicago City R. Co., 104 Ill. App. 357.

80. Vaughn v. Kansas City N. W. R. Co., 65 Kan. 685, 70 Pac. 602.

81. Cogdell v. Wilmington & W. R. Co., 132 N. C. 852. Plaintiff is not bound to show by direct evidence that deceased was free from negligence, and where there were no eye witnesses of the killing, the fact of his exercise of due precautions for his safety may be shown by special evidence, or facts and circumstances from which that fact may be reasonably inferred, including the natural instinct of self-preservation—Chicago, R. I. & P. Ry. Co. v. Keely, 103 Ill. App. 205.

82. Jones v. Central of Ga. Ry. Co., 116 Ga. 27.

83. Sufficiency of evidence of cause of death of one thrown from a train by the sudden jerking of the same—Southern Ry. Co. v. Webb, 116 Ga. 152, 59 L. R. A. 109. Evidence is insufficient to warrant recovery of full statutory amount where the only fact established is the death of the party at a certain age—Hesse v. Meriden, S. & C. Tramway Co., 75 Conn. 571. Evidence that a body was found in the neighborhood of a bridge and an overcoat close by, is not sufficient evidence to justify submission to the jury of the issue whether deceased came to his death by falling from the defective bridge—Armstrong v. Town of Cosmopolis (Wash.) 72 Pac. 1038.

84. An instruction allowing the recovery of an amount proportionate to the pecuniary injury occasioned should explain the meaning of the term "porportionate to the pecuniary injury"—Merchants' & P. Oil Co. v. Burns (Tex.) 74 S. W. 758. An instruction that the jury should estimate the reasonable probabilities of the life of deceased if they find for plaintiffs, and give such damages not only for past losses but for such prospective damages as plaintiffs might have suffered or would suffer as the direct consequence of the death, and that the jury should apportion the damages among the plaintiffs, was not improper when taken in connection with a further instruction that no recovery could be had in favor of one of plaintiffs as to whom no pecuniary loss had been shown—Western Md. R. Co. v. State, 95 Md. 637. The action of a court in refusing to instruct that the law presumes the exercise of due care by one found dead and killed by the alleged negligence of another, and giving on his own motion an instruction that an inference arises from the instinct of self-preservation that the person killed has exercised due care himself, is erroneous, as presumption and inference do not have the same significance—Cogdell v. Wilmington & W. R. Co., 132 N. C. 852. An instruction that the jury might consider in assessing the damages, the pecuniary benefits which the plaintiff may have derived from deceased had he not been killed at that stage of his life, providing plaintiff is next of kin and dependent on deceased for support, though awkwardly drafted is not erroneous—O'Fallon Coal & Min. Co. v. Laquet, 198 Ill. 125. Where the only evidence in an action for wrongful death was relevant to the issue of pecuniary injury, and there was no intimation that damages might be given as a solace for loss of deceased or as punitive damages, an instruction that the jury should consider the age of deceased and his earnings and all other evidence in the case, was not objectionable as allowing an inclusion of other than pecuniary damages—Chicago & E. I. R. Co. v. Rains, 203 Ill. 417. Instruction need not direct a deduction of the amount of the child's "keep"

must be based on the evidence.[85] Generally speaking it is immaterial in an action for wrongful death whether an instruction which goes simply to the amount of damages to be recovered is good or bad if the jury on proper instructions as to the question of negligence, the main issue, find against plaintiff.[86] An instruction that the jury might assess the damages as they deemed fair and just, not exceeding the statutory amount, is not erroneous where defendant asked for no instructions or modifications.[87]

Question for jury.—The questions as to the actual cause of the death,[88] and of decedent's contributory negligence, are for the jury;[89] likewise the question whether a deserting wife was damaged by the husband's death.[90]

Verdicts, judgments, and costs.—The failure of the jury to apportion two or more plaintiffs is not reversible error where plaintiffs make no objection, as the general verdict is sufficient to bar a subsequent action by any of the plaintiffs.[91] A joint judgment is improperly awarded plaintiffs where one of the parties is not entitled to sue therefor.[92] Security for costs should be required where the complaint fails to state a cause of action.[93]

§ 6. *Distributive rights in amount recovered.*—The mere failure of the administrator to name all the legal beneficiaries provided in the act allowing recovery for wrongful death will not prevent persons entitled to share in the distribution from receiving their distributive share.[94] A child is not deprived of a right to share in the damages recovered for the death of his parent by the fact that he had for some years lived away from his father's home and the father did not contribute anything to his support.[95] Where the widow of deceased has recovered for his death, children of full age who have lived apart from the family are not entitled to share in the judgment.[96]

DECEIT. *

WALTER A. SHUMAKER.

§ 1. Definition and Nature of the Wrong.—A. In General. B. Deceit as between Parties to Contract. C. Deceit Not Connected with Contract.

§ 2. Character of the Representation.—A. In General. B. Opinion or Prediction. C. Promises and Statements of Intention. D. Reasons. E. Misrepresentation of Law. F. Immaterial Statements. G. Vague Statements. H. Ambiguous Statements.

§ 3. Oral Representations and Statute of Frauds.

§ 4. Misrepresentation by Conduct.

§ 5. Nondisclosure and Concealment.—When General Rule Does Not Apply.

§ 6. Representation Must be False.

§ 7. Knowledge of Falsity, and Intent to Deceive.—A. Knowledge in General. B. Negligence and Unreasonable Belief. C. Reckless Ignorance. D. Intention to Deceive. E. Failure to Disclose.

§ 8. Representation Must be Made to Plaintiff.—A. In General. B. Those Made to a Class or to Public.

§ 9. Necessity for Reliance on Representations.

§ 10. Representations on which One Has a Right to Rely.

§ 11. Negligent Reliance.

§ 12. Necessity for Damage.

§ 13. Actions and Procedure.

This article covers fraudulent misrepresentation as ground for an action for

in estimating the value of his services, as the jury would be presumed to understand that recovery should be based on a deduction of such an amount—Texas & P. Ry. Co. v. Yarbrough (Tex. Civ. App.) 73 S. W. 844.

85. North Chicago St. R. Co. v. Irwin, 202 Ill. 345. A court properly refused to submit the issue of self defense in an action for damages for wilful homicide where defendant's own testimony showed that he brought on the difficulty, used the first offensive language and struck the first blow, and pursued and shot the deceased while the latter was attempting to escape—Morgan v. Barnhill (C. C. A.) 118 Fed. 24.

86. Zimmerman v. Denver Consol. Tramway Co. (Colo. App.) 72 Pac. 607.

87. Geismann v. Missouri Edison Elec. Co. (Mo.) 73 S. W. 654.

88. City of Madisonville v. Pemberton's Adm'r, 25 Ky. L. R. 347, 75 S. W. 229.

89. Wells v. Town of Remington (Wis.) 95 N. W. 1094.

90. Houston & T. C. R. Co. v. Bryant (Tex. Civ. App.) 72 S. W. 885.

91. International & G. N. R. Co. v. Lehman (Tex. Civ. App.) 72 S. W. 619.

92. Willis Coal & Min. Co. v. Grizzell, 198 Ill. 313.

*Includes all late cases.

damages, whether the action be in common law form for deceit or an equivalent action under the Codes. Fraud as a ground for relief other than damages is elsewhere treated.[97]

§ 1. *Definition and nature of the wrong. A. In general.*—The wrong called "deceit" consists "in leading a man into damage by willfully or recklessly causing him to believe and act on a falsehood";[98] or to be more specific, it may be defined as a false representation of a material fact, made with knowledge that it is false or recklessly, and with intent to deceive, and which is acted upon to his damage by the person to whom it is made, or a concealment or suppression of a material fact, which there is a duty to disclose, with like intent and effect.[99] It is a tort for which, at common law, the person damaged may maintain an action on the case, known as an action of deceit, or an action for deceit.

Analyzing the above definition, it will be seen that, to sustain such an action, the following conditions are essential:

(1) There must be a representation of a material fact, or a concealment of a fact which there is a duty to disclose.

(2) The representation must be false.

(3) It must be made with knowledge that it is false, or recklessly.[1]

(4) There must be an intention to deceive.

(5) The person to whom the representation is made must rely and act upon it.

(6) And he must sustain damage by reason of doing so.

(§ 1) *B. Deceit as between the parties to a contract.*—Most of the cases in which an action of deceit is brought are cases in which false and fraudulent representations are made by one of the parties to a proposed contract and acted upon by the other party in entering into the contract, the term "contract" being here used in the broad sense, as including executed, as well as executory contracts. In such a case, the party who has been deceived and induced to enter into the contract by the other's false and fraudulent representations may rescind the contract at law for want of real consent, and recover back what he has parted with under it, or under some circumstances he may obtain relief in a court of equity. But rescission or avoidance of the contract is not his only remedy. He may, instead of rescinding, affirm the contract or allow it to stand, and maintain an action of deceit to recover any damages he has sustained by reason of the fraud; and his affirmance of the contract, and keeping what he has received under it, or receiving what he is entitled to under it, after discovery of the fraud, is not of itself a waiver of the right to maintain the action.[2]

93. Gmaehle v. Rosenberg, 80 App. Div. (N. Y.) 541.

94. Oyster v. Burlington Relief Department (Neb.) 91 N. W. 699, 59 L. R. A. 291; Duzan v. Myers, 30 Ind. App. 227.

95. Duzan v. Myers, 30 Ind. App. 227.

96. Lewis v. Hunlock's Creek & M. Turnpike Co., 203 Pa. 511.

97. See the forthcoming article on Fraud and Undue Influence, and articles on such subjects as Cancellation of Instruments, Reformation of Instruments, Contracts (rescission), etc.

98. Pollock, Torts (Webb's Ed.) 348. And see Fottler v. Moseley, 179 Mass. 295.

99. Pasley v. Freeman, 3 Term R. 51, 2 Smith's Lead. Cas. 94, Bigelow's Cas. 1; Byard v. Holmes, 34 N. J. Law, 296; Ming v. Woolfolk, 116 U. S. 599; Southern Development Co. v. Silva, 125 U. S. 247; Matlock v. Reppy, 47 Ark. 148; Upton v. Vail, 6 Johns. (N. Y.) 181, 5 Am. Dec. 210; Arthur v. Griswold, 55 N. Y. 400; Brackett v. Griswold, 112 N. Y. 454, 467, Erwin's Cas. 416; Medbury v. Watson, 6 Metc. (Mass.) 246, 39 Am. Dec. 726, Bigelow's Cas. 22; McGar v. Williams, 26 Ala. 469, 62 Am. Dec. 739; Alexander v. Church, 53 Conn. 561; Bartholomew v. Bentley, 15 Ohio, 659, 45 Am. Dec. 596; Endsley v. Johns, 120 Ill. 469, 60 Am. Rep. 572; Cox v. Highley, 100 Pa. 249; Hexter v. Bast, 125 Pa. 52, 11 Am. St. Rep. 874; Buschman v. Conrad, 52 Md. 202; Fenley v. Moody, 104 Ga. 790; Bank of Atchison County v. Byers, 139 Mo. 627.

1. As to this, however, there is some conflict. See post, § 7.

2. Mallory v. Leach, 35 Vt. 156, 82 Am. Dec. 625; Allaire v. Whitney, 1 Hill (N. Y.) 484, Bigelow's Cas. 36; Whitney v. Allaire, 4 Denio (N. Y.) 554, 1 N. Y. 305; Rohrschneider v. Knickerbocker L. Ins. Co., 76 N.

Thus a person who is induced to buy goods, notes, bonds, stock, or other personal property, by the false and fraudulent representations of the seller as to material facts, may, instead of rescinding the purchase, keep the property and bring an action of deceit to recover such damages as he has sustained.[3] And one who has been induced to sell property by the false and fraudulent representations of the purchaser may allow the sale to stand and sue to recover damages for the deceit; and he does not waive this right by merely accepting the amount due under the contract after discovery of the fraud.[4]

It was at one time doubted whether an action of deceit would lie for false and fraudulent representations on the sale of land, but it is now well settled that the action will lie,[5] if the representation is one of fact,[6] and if it is of such a character and made under such circumstances that the purchaser has a right to rely on it.[7]

Effect of warranty or covenant.—An action of deceit to recover damages for false and fraudulent representations by the seller of personal property is not barred by the fact that there is an express or implied warranty upon which the purchaser might maintain an action of assumpsit.[8] He has an election to sue either on the warranty or for the deceit: "The warranty is none the less a contract because it is the means by which the fraud is accomplished, and the fraud is in no way diminished because the seller has at the same time bound himself by a warranty."[9]

Nor is an action of deceit for false and fraudulent representations by the vendor of land barred by the fact that there are express covenants in his deed,—as covenants of seizin or against incumbrances, etc.,—upon which the purchaser might maintain an action of covenant.[10]

(§ 1) *C. Deceit not connected with contract.*—It must not be supposed from what has been said above that the action of deceit is limited to cases of fraud as between the parties to a contract, for it will lie in many other cases. It may be laid down as a general rule that this action will lie whenever the plaintiff has been led to act to his damage by false representations of fact made by the defendant, with knowledge of their falsity or recklessly, and with intent to deceive; and it is altogether immaterial that the defendant was not in any way benefited by the deceit and did

Y. 216, 32 Am. Rep. 290; Whiting v. Price, 172 Mass. 240, 70 Am. St. Rep. 262; Binghampton Trust Co. v. Auten, 68 Ark. 299, 82 Am. St. Rep. 295; Milnazek v. Libera, 83 Minn. 288, and other cases in the notes following.

3. Houldsworth v. City of Glasgow Bank, 5 App. Cas. 323; Stiles v. White, 11 Metc. (Mass.) 356, 45 Am. Dec. 214; Andrews v. Jackson, 168 Mass. 266, 60 Am. St. Rep. 390; Whiting v. Price, 172 Mass. 240, 70 Am. St. Rep. 262; Handy v. Waldron, 18 R. I. 567, 49 Am. St. Rep. 794; Trice v. Cockran, 8 Grat. (Va.) 442, 56 Am. Dec. 151; Binghampton Trust Co. v. Auten, 68 Ark. 299, 82 Am. St. Rep. 295; Goring v. Fitzgerald, 105 Iowa, 507; Pronger v. Old Nat. Bank, 20 Wash. 618, 56 Pac. 391; Chilson v. Houston, 9 N. D. 498.

4. Mallory v. Leach, 35 Vt. 156, 82 Am. Dec. 625.

5. Risney v. Selby, 1 Salk. 211; Dobell v. Stevens, 3 Barn. & C. 623; Journey v. Hunt, 1 N. J. Law, 235, 1 Am. Dec. 202; Bostwick v. Lewis, 1 Day (Conn.) 250, 2 Am. Dec. 73; Monell v. Colden, 13 Johns. (N. Y.) 395, 7 Am. Dec. 390; Culver v. Avery, 7 Wend. (N. Y.) 380, 22 Am. Dec. 586; Van Epps v. Harrison, 5 Hill (N. Y.) 63, 40 Am. Dec. 314; Foster v. Kennedy's Adm'r, 38 Ala. 359, 81 Am. Dec. 56; Atwood v. Chapman, 68 Me. 38, 28 Am. Rep. 5; Andrus v. St. Louis Smelting & Ref. Co., 130 U. S. 643.

For cases in which actions have been sustained for particular representations, see post, § 2 B, notes 35-42, § 10, notes 78-87.

6. Post, 2 B.

7. Post, § 10.

8. Wallace v. Jarman, 2 Stark. 162; Mahurin v. Harding, 28 N. H. 128, 59 Am. Dec. 401; Trice v. Cockran, 8 Grat. (Va.) 442, 56 Am. Dec. 151; Handy v. Waldron, 18 R. I. 567, 49 Am. St. Rep. 794; Hexter v. Bast, 125 Pa. 52, 11 Am. St. Rep. 874; Cobb v. O'Neal, 2 Sneed (Tenn.) 438.

Giving a warranty known to be false is a fraudulent representation—Handy v. Waldron, 18 R. I. 567, 49 Am. St. Rep. 794; Hexter v. Bast, 125 Pa. 52, 11 Am. St. Rep. 874.

9. Mahurin v. Harding, 28 N. H. 128, 59 Am. Dec. 401.

10. Wardell v. Fosdick, 13 Johns. (N. Y.) 325, 7 Am. Dec. 383; Ward v. Wiman, 17 Wend. (N. Y.) 193; Bostwick v. Lewis, 1 Day (Conn.) 250, 2 Am. Dec. 73; Reynolds v. Franklin, 44 Minn. 30, 20 Am. St. Rep. 540; Claggett v. Crall, 12 Kan. 393.

If a person sells land which has no existence the purchaser may disregard the covenants in the deed and maintain an action of deceit—Wardell v. Fosdick, supra.

not act in collusion with the party who was.[11] The fraud of the defendant and the damage of the plaintiff are the ground of the action. "Fraud without damage, or damage without fraud, gives no cause of action, but where these two do concur * * * an action lies."[12]

Thus it is well settled that a person who is induced to extend credit to another, to his damage, by the false and fraudulent representations of a third person as to the party's credit or financial condition, may maintain an action of deceit against such third person.[13]

And an action will lie for false and fraudulent representations by the defendant, however uninterested he may have been, by which the plaintiff has been induced to purchase real or personal property from a third person,[14] or to pay money to a third person,[15] or to enter into a marriage with a third person.[16]

An agent, although not personally interested, is liable in an action of deceit to one whom, by false and fraudulent representations, he induces to enter into a contract with his principal.[17]

And an agent is liable to his principal in an action for deceit if by false and fraudulent representations he induces the principal, by making a bad loan, or otherwise, to act to his damage.[18] Directors and other officers of a corporation are

11. Pasley v. Freeman, 3 Term R. 51, 2 Smith's Lead. Cas. 94, Bigelow's Cas. 1; Hart v. Tallmadge, 2 Day (Conn.) 381, 2 Am. Dec. 105; Medbury v. Watson, 6 Metc. (Mass.) 246, 39 Am. Dec. 726, Bigelow's Cas. 22; Bean v. Herrick, 12 Me. 262, 28 Am. Dec. 176; Upton v. Vail, 6 Johns. (N. Y.) 181, 5 Am. Dec. 210; Culver v. Avery, 7 Wend. (N. Y.) 380, 22 Am. Dec. 586; White v. Merritt, 7 N. Y. 352, 57 Am. Dec. 527; Sigafus v. Porter (C. C. A.) 84 Fed. 430; Stoney Creek Woolen Co. v. Smalley, 111 Mich. 321; Kroeger v. Pitcairn, 101 Pa. 311, 47 Am. Rep. 718; Endsley v. Johns, 120 Ill. 469, 60 Am. Rep. 572; James v. Crosthwait, 97 Ga. 673.

A vendor of land who gives the purchaser a false receipt for the purchase price to enable him to deceive a subsequent purchaser is liable to the latter—Stoney Creek Woolen Co. v. Smalley, 111 Mich. 321.

12. Croke, J., in Baily v. Merrell, 3 Bulst. 95. And see Pasley v. Freeman, 3 Term R. 51.

13. Pasley v. Freeman, 3 T. R. 51, 2 Smith's Lead. Cas. 94, Bigelow's Cas. 1; Foster v. Charles, 6 Bing. 396, 7 Bing. 105; Corbett v. Brown, 8 Bing. 33; Patten v. Gurney, 17 Mass. 182, 9 Am. Dec. 141; Potts v. Chapin, 133 Mass. 276; Upton v. Vail, 6 Johns. (N. Y.) 187, 5 Am. Dec. 210; Addington v. Allen, 11 Wend. (N. Y.) 374; Zabriskie v. Smith, 13 N. Y. 322, 64 Am. Dec. 551; Browning v. National Cap. Bank, 13 App. D. C. 1; Einstein v. Marshall, 58 Ala. 153, 29 Am. Rep. 729; Boyd's Ex'rs v. Browne, 6 Pa. 310, Burdick's Cas. 242; Wynne v. Allen, 7 Baxt. (Tenn.) 312, 32 Am. Rep. 562; Nevada Bank v. Portland Nat. Bank, 59 Fed. 338; Fooks v. Waples, 1 Harr. (Del.) 131, 25 Am. Dec. 64; Endsley v. Johns, 120 Ill. 469, 60 Am. Rep. 572; Thomas v. Wright, 98 N. C. 272; Anderson v. McPike, 86 Mo. 293. Compare Newsom v. Jackson, 26 Ga. 241, 71 Am. Dec. 206.

False representation that another's check is good—Endsley v. Johns, 120 Ill. 469, 60 Am. Rep. 572.

14. Medbury v. Watson, 6 Metc. (Mass.) 246, 39 Am. Dec. 726, Bigelow's Cas. 22; Bean v. Herrick, 12 Me. 262, 28 Am. Dec. 176; Irwin v. Sherril, Tayl. (N. C.) 1, 1 Am. Dec. 574; Culver v. Avery, 7 Wend. (N. Y.) 380, 22 Am. Dec. 586; Kountze v. Kennedy, 147 N. Y. 124, 49 Am. St. Rep. 651; Bostwick v. Lewis, 1 Day (Conn.) 250, 2 Am. Dec. 73 (a case, however, of conspiracy).

Inducing a person to invest in stock of a corporation or proposed corporation—Teachout v. Van Hoesen, 76 Iowa, 113, 14 Am. St. Rep. 206; Kountze v. Kennedy, 147 N. Y. 124, 49 Am. St. Rep. 651.

15. Inducing a bank to pay money on a draft or other instrument to another person than the payee by falsely representing him to be the payee—Lahay v. City Nat. Bank, 15 Colo. 339, 22 Am. St. Rep. 407.

16. One who falsely and fraudulently represents to another that a woman is virtuous, when she is pregnant by himself, and thereby induces the other to marry her, is liable in an action for deceit—Kujek v. Goldman, 150 N. Y. 176, 55 Am. St. Rep. 670.

17. Campbell v. Hillman, 15 B. Mon. (Ky.) 508, 61 Am. Dec. 195; Culver v. Avery, 7 Wend. (N. Y.) 380, 22 Am. Dec. 586; Kroeger v. Pitcairn, 101 Pa. 311, 47 Am. Rep. 718; Hedden v. Griffin, 136 Mass. 229, 49 Am. Rep. 25; Endsley v. Johns, 120 Ill. 469, 60 Am. Rep. 572; Hedin v. Minneapolis Med. & Surg. Inst., 62 Minn. 146, 54 Am. St. Rep. 628; Chisolm v. Gadsden, 1 Strobh. L. (S. C.) 220, 47 Am. Dec. 550.

Insurance agent making to the insured a false representation that a clause in the policy against the keeping of petroleum is not intended to and does not prohibit the keeping of a small quantity, the policy being subsequently avoided by reason of the keeping of a small quantity—Kroeger v. Pitcairn, 101 Pa. 311, 47 Am. St. Rep. 718. See, also, as to insurance agent's liability—Hedden v. Griffin, 136 Mass. 229, 49 Am. Rep. 25.

Agent falsely representing that the check of his principal is good—Endsley v. Johns, 120 Ill. 469, 60 Am. Rep. 572.

18. Pewtriss v. Austen, 6 Taunt. 522; Goodale v. Middaugh, 8 Colo. App. 223, 46 Pac. 11.

personally liable in an action of deceit for false and fraudulent representations as to its condition or other material facts, whereby persons are induced to contract with the corporation, or subscribe for or purchase its stock or bonds, or otherwise act to their damage.[19]

So, also, an action will lie against a public officer who makes false and fraudulent representations in selling property;[20] or against an executor or administrator who, by false and fraudulent representations as to the estate, induces one to loan or pay out money on its credit,[21] or who in selling his decedent's land falsely and fraudulently represents that there is no incumbrance.[22]

One who by false and fraudulent representations intentionally induces another to so act that he is prevented from fulfilling a contract with a third person, and thereby damaged, is liable in an action of deceit.[23] And such an action will lie where a man is induced to come into a state by false and fraudulent representations, with intent to arrest him and thus compel him to settle a disputed claim.[24]

§ 2. *The character of the representation. A. In general.*—Laying aside, for the present, cases of concealment or nondisclosure of facts which there is a duty to disclose,[25] the general rule is that, to sustain an action of deceit, there must be a false representation as to some material and existing fact.[26] And as we shall see in a subsequent section, the representation must be made as to such a fact and under such circumstances that the person to whom it is made has a right to rely upon it, instead of ascertaining the truth for himself.[27]

(§ 2) *B. Opinion or prediction.*—As a general rule, a mere expression of opinion or prediction, not being a representation of fact, cannot be made the ground for an action of deceit, even though it may not have been honestly entertained, but may have been given with intent to deceive, and may have had such effect.[28] The reason is that one is not supposed to rely upon the mere opinion of another, and if he does so, and is deceived, he cannot complain.[29]

This rule does not apply, of course, where an expression of opinion or prediction is accompanied by a false statement of fact, for there is then a false representation of fact in addition to the opinion or prediction.[30]

19. Peek v. Gurney, L. R. 6 H. L. 377; Andrews v. Mockford [1896] 1 Q. B. 372; Clarke v. Dickson, 6 C. B. (N. S.) 453; Salmon v. Richardson, 30 Conn. 360, 79 Am. Dec. 255; Tyler v. Savage, 143 U. S. 79; Bruff v. Mali, 36 N. Y. 200; Morgan v. Skiddy, 62 N. Y. 325; Westervelt v. Demarest, 46 N. J. Law, 37, 50 Am. Rep. 400, Burdick's Cas. 236; Seale v. Baker, 70 Tex. 283, 8 Am. St. Rep. 592; Windram v. French, 151 Mass. 547; Clark v. Edgar, 84 Mo. 106, 54 Am. Rep. 84; Shaw v. Gilbert, 111 Wis. 165. And see post, § 8 B. See, also, 3 Clark & Marshall, Corp. 2263.

20. Culver v. Avery, 7 Wend. (N. Y.) 380, 22 Am. Dec. 586.

21. Winston v. Young, 47 Minn. 80.

22. West v. Wright, 98 Ind. 335.

23. Benton v. Pratt, 2 Wend. (N. Y.) 385, 20 Am. Dec. 623.

24. Cook v. Brown, 125 Mass. 503, 28 Am. Rep. 259; Sweet v. Kimball, 166 Mass. 332, 55 Am. St. Rep. 406; Wanzer v. Bright, 52 Ill. 35.

25. Post, § 5.

26. People v. Healy, 128 Ill. 9, 15 Am. St. Rep. 90, and other cases in the notes following.

27. See post, § 10.

28. Harvey v. Young, Yelv. 21; Haycroft v. Creasy, 2 East, 92; Gordon v. Butler, 105 U. S. 553; Thompson v. Phoenix Ins. Co., 75 Me. 55, 46 Am. Rep. 357; Holbrook v. Connor, 60 Me. 578, 11 Am. Rep. 212; Parker v. Moulton, 114 Mass. 99, 19 Am. Rep. 315; Homer v. Perkins, 124 Mass. 431, 26 Am. Rep. 677; Mooney v. Miller, 102 Mass. 217; Lynch v. Murphy, 171 Mass. 307; Page v. Parker, 43 N. H. 363, 80 Am. Dec. 172; Syracuse Knitting Co. v. Blanchard, 69 N. H. 447; Davis v. Meeker, 5 Johns. (N. Y.) 354; Ellis v. Andrews, 56 N. Y. 83, 15 Am. Rep. 379; Robertson v. Parks, 76 Md. 118; Collins v. Jackson, 54 Mich. 186; Crocker v. Manley, 164 Ill. 282, 56 Am. St. Rep. 196; Brady v. Cole, 164 Ill. 116; Williams v. McFadden, 23 Fla. 143, 11 Am. St. Rep. 345; Handy v. Waldron, 18 R. I. 567, 49 Am. St. Rep. 794; Hedin v. Minneapolis Med. & Surg. Inst., 62 Minn. 146, 54 Am. St. Rep. 628; Foster v. Kennedy's Adm'r, 38 Ala. 359, 81 Am. Dec. 56; Ansley v. Bank of Piedmont, 113 Ala. 467; Cooke v. Cook, 100 Ala. 175; Hecht v. Metzler, 14 Utah, 408, 48 Pac. 37, 60 Am. St. Rep. 906; Cole v. Smith, 26 Colo. 506, 58 Pac. 1086; Dudley v. Minor's Ex'r (Va.) 42 S. E. 870; Wrenn v. Truitt, 116 Ga. 708.

29. Van Epps v. Harrison, 5 Hill (N. Y.) 63, 40 Am. Dec. 314, 318; Parker v. Moulton, 114 Mass. 99, 19 Am. Rep. 315; Page v. Parker, 43 N. H. 363, 80 Am. Dec. 172, and other cases cited in the note preceding.

Nor does the rule apply where it appears that a statement as to a matter which is sometimes, or even generally, a matter of opinion, was intended and understood in the particular case as a statement of fact within the knowledge of the party making it.[31] As a general rule a statement as to the value of real or personal property, stock of corporations, or choses in action, is treated as a mere statement of opinion, for which an action will not lie.[32] But a statement as to the value of property may be intended as a statement of fact within the knowledge of the party making it, and in such a case it may give rise to an action of deceit to the same extent as any other statement of fact,[33] unless it was made under such circumstances that there was no right to rely upon it.[34] The same is true of false statements as to the quality or condition of real property, or its adaptability to particular uses,[35] or as to the location or boundaries,[36] the number of acres,[37] the title,[38] etc.; and of statements as to the quality or condition of personal property,[39] or the title thereto,[40] or quantity,[41] etc.; and of a statement as to the amount of an estate.[42] A statement as to the financial condition or credit of another person or corporation, while it may be a mere expression of opinion for which an action will not lie,[43] may be intended and understood as a positive statement of fact, in which case, if it was known to be false and made with intent to deceive, an action may be maintained.[44]

30. Ekins v. Tresham, 1 Lev. 102; Rohrschneider v. Knickerbocker Life Ins. Co., 76 N. Y. 216, 32 Am. Rep. 290; Peffley v. Noland, 80 Ind. 164; McAleer v. Horsey, 35 Md. 439; Bristol v. Braidwood, 28 Mich. 191.

In a late Connecticut case, where the seller of a patented improvement in a machine represented to the purchaser that it had been extensively sold, and was in successful operation and practical use in many mills, and that there was a large demand for it, and that he found it a profitable business, it was held that matters of opinion were so blended with statements of the facts from which they arose, that they also became statements of fact—Scholfield Gear & Pulley Co. v. Scholfield, 71 Conn. 1.

31. See the cases in the notes following. Ordinarily, the question whether a statement was intended merely as a statement of opinion or as a representation of fact is a question of fact for the jury—Simar v. Canaday, 53 N. Y. 298, 13 Am. Rep. 523; Bradley v. Poole, 98 Mass. 169, 93 Am. Dec. 144; Morse v. Shaw, 124 Mass. 59; Homer v. Perkins, 124 Mass. 431, 26 Am. Rep. 677; American Nat. Bank v. Hammond, 25 Colo. 367, 55 Pac. 1090.

But it may be so clearly the one or the other as to admit of no question, in which case its character is to be determined by the court—Gordon v. Butler, 105 U. S. 553; Bellairs v. Tucker, 13 Q. B. Div. 562; Hickey v. Morrell, 102 N. Y. 454, 55 Am. Rep. 824, Chase's Cas. 260, Erwin's Cas. 424. Representations as to value of patent rights held to be of fact—Coulter v. Clark (Ind.) 66 N. E. 739.

32. Harvey v. Young, Yelv. 21; Davis v. Meeker, 5 Johns. (N. Y.) 354; Ellis v. Andrews, 56 N. Y. 83, 15 Am. Rep. 379; Bossingham v. Syck, 118 Iowa, 192.

33. Picard v. McCormick, 11 Mich. 68; Handy v. Waldron, 18 R. I. 567, 49 Am. St. Rep. 794; Simar v. Canaday, 53 N. Y. 298, 13 Am. Rep. 523; Chrysler v. Canaday, 90 N. Y. 272, 43 Am. Rep. 166, Bigelow's Cas. 17; Allen v. Hart, 72 Ill. 104; Murray v. Tolman, 162 Ill. 417; McClellan v. Scott, 24 Wis. 81; Moon v. McKinstry, 107 Mich. 668; Ruberg v. Brown, 50 S. C. 397.

34. Ellis v. Andrews, 56 N. Y. 83, 15 Am. Rep. 379. See post, § 10.

35. Van Epps v. Harrison, 5 Hill (N. Y.) 63, 40 Am. Dec. 314; Hecht v. Metzler, 14 Utah, 408, 48 Pac. 37, 60 Am. St. Rep. 906; Oakes v. Miller, 11 Colo. App. 374, 55 Pac. 193; Williams v. McFadden, 23 Fla. 143, 11 Am. St. Rep. 345; Holcomb v. Noble, 69 Mich. 396; Tryce v. Dittus, 199 Ill. 189. And see post, § 10, notes 78-87, and cases there cited. Representations by vendor that land is timbered and suitable for cultivation are of a fact—Sykes v. Reiher (Iowa) 91 N. W. 920.

36. Foster v. Kennedy's Adm'r, 38 Ala. 359, 81 Am. Dec. 56; Hecht v. Metzler, 14 Utah, 408, 48 Pac. 37, 60 Am. St. Rep. 906; Caldwell v. Henry, 76 Mo. 254; Baker v. Sherman, 71 Vt. 439. And see post, § 10. Pointing out of boundaries by vendor is a representation of a fact—Nelson v. Allen (Wis.) 93 N. W. 807.

37. Starkweather v. Benjamin, 32 Mich. 305; Lovejoy v. Isbell, 73 Conn. 368; Coon v. Atwell, 46 N. H. 510; Griswold v. Gebbie, 126 Pa. 353, 12 Am. St. Rep. 878. And see post, § 10. Compare Gordon v. Parmelee, 2 Allen (Mass.) 212; Bankson v. Lagerlof (Iowa) 75 N. W. 661.

38. Wardell v. Fosdick, 13 Johns. (N. Y.) 325, 7 Am. Dec. 383; Atwood v. Chapman, 68 Me. 38, 28 Am. Rep. 5; Hunt v. Barker, 22 R. I. 18, 84 Am. St. Rep. 812. And see post, § 10.

39. Stiles v. White, 11 Metc. (Mass.) 356, 45 Am. Dec. 214; Trice v. Cockran, 8 Grat. (Va.) 442 56 Am. Dec. 151.

40. Campbell v. Hillman, 15 B. Mon. (Ky.) 508, 61 Am. Dec. 195; Barney v. Dewey, 13 Johns. (N. Y.) 224, 7 Am. Dec. 372.

41. Lewis v. Jewell, 151 Mass. 345, 21 Am. St. Rep. 454.

42. Wilson v. Nichols, 72 Conn. 173.

43. Haycroft v. Creasy, 2 East, 92; Homer v. Perkins, 124 Mass. 431, 26 Am. Rep. 677; Marsh v. Falker, 40 N. Y. 562.

44. Pasley v. Freeman, 3 T. R. 51, 2 Smith's Lead. Cas. 94, Bigelow's Cas. 1; Up-

The same is true of a false representation by a person as to his own financial condition, where the other party has a right to rely upon it.[45]

The rule that a mere expression of opinion or prediction is not such fraud as will support an action of deceit does not apply where a person dishonestly expresses an opinion or prediction in form, with intent that it shall be relied upon, knowing at the time of the existence of a fact, which he does not disclose, rendering the opinion false, or the fulfillment of the prediction impossible or improbable, which fact is not equally within the means of knowledge of the other party. In such a case he impliedly represents that he does not know of any such fact, and the statement of opinion or prediction coupled with the suppression of such fact is a false and fraudulent representation.[46] Thus a statement by the vendor of a hotel to the purchaser that the lessee is a most desirable tenant is a false representation, and not a mere expression of opinion, where the vendor knows that the tenant is embarrassed and behind in the payment of his rent.[47] The same is true of a statement by the seller of cattle that they will weigh so much, when he knows that they weigh less,[48] and of a statement by a warehouseman that the exterior of his warehouse is fireproof, when he knows that portions of the exterior are constructed of wood.[49]

Nor does the rule that a mere statement of opinion is not actionable apply where there is a relation of special confidence between the parties, and the party making the statement has or is supposed to have special knowledge on the subject. A statement of opinion made by a person on a subject as to which he has, or is supposed to have, special knowledge, with knowledge that it is false and with intent to deceive, to one who he knows to be ignorant on the subject, and to rely on his opinion, is such fraud as will support an action of deceit.[50]

(§ 2) *C. Promises and statements of intention.*—Ordinarily a mere promise or a statement of intention as to the future, not being a representation as to an existing fact, cannot be made the basis of an action of deceit because it is not performed or fulfilled; and many courts have held that this is true even though the promise is given or statement made with the intention at the time not to perform it, or with knowledge that it cannot be performed.[51] This doctrine, however, is not recognized

ton v. Vail, 6 Johns. (N. Y.) 181, 5 Am. Dec. 210; Mendenhall v. Stewart, 18 Ind. App. 262; Einstein v. Marshall, 58 Ala. 153, 29 Am. Rep. 729; Wynne v. Allen, 7 Baxt. (Tenn.) 312, 32 Am. Rep. 562; Andrews v. Jackson, 168 Mass. 266, 60 Am. St. Rep. 390; Warfield v. Clark, 118 Iowa, 69. And see the other cases cited ante.

Representation by the seller of notes that the maker is responsible and that the notes are as good as gold—Andrews v. Jackson, 168 Mass. 266, 60 Am. St. Rep. 390.

45. Cain v. Dickenson, 60 N. H. 371; Eaton v. Avery, 83 N. Y. 31, 38 Am. Rep. 389; Gainesville Nat. Bank v. Bamberger, 77 Tex. 48, 19 Am. St. Rep. 738. And see post, § 10, note 6 et seq. Compare Syracuse Knitting Co. v. Blanchard, 69 N. H. 447.

46. Smith v. Land & House Property Corp., 28 Ch. Div. 7, Bigelow's Cas. 26; Birdsey v. Butterfield, 34 Wis. 52; Hickey v. Monell, 102 N. Y. 454, 55 Am. Rep. 824, Chase's Cas. 260, Erwin's Cas. 424; Glaspie v. Keator (C. C. A.) 56 Fed. 203; French v. Ryan, 104 Mich. 625.

47. Smith v. Land & House Property Corp., 28 Ch. Div. 7, Bigelow's Cas. 26.

48. Birdsey v. Butterfield, 34 Wis. 52.

49. Hickey v. Morrell, 102 N. Y. 454, 55 Am. Rep. 824.

50. Picard v. McCormick, 11 Mich. 68; Chase v. Boughton, 93 Mich. 285; Moon v. McKinstry, 107 Mich. 668; Gordon v. Butler, 105 U. S. 553; Hedin v. Minneapolis Med. & Surg. Inst., 62 Minn. 146, 54 Am. St. Rep. 628; Lofgren v. Peterson, 54 Minn. 343; Vilett v. Moler, 82 Minn. 12; Robbins v. Barton, 50 Kan. 120, 31 Pac. 686; Andrews v. Jackson, 168 Mass. 266, 60 Am. St. Rep. 390; Hicks v. Stevens, 121 Ill. 186; Murray v. Tolman, 162 Ill. 417; Blacknall v. Rowland, 116 N. C. 389.

Statement by a physician and surgeon in a hospital to an ignorant person, that injuries sustained by the latter are curable and can be cured at the hospital—Hedin v. Minneapolis Med. & Surg. Inst., 62 Minn. 146, 54 Am. St. Rep. 628.

"It is true, as a general rule, that the expression of belief or opinion as to a particular matter, though false, cannot be made the basis of an action of deceit; but an opinion falsely expressed, with intent to defraud, may, in special cases, where there is a disparity of knowledge, and the parties do not stand on a basis of equality, be material and actionable"—Vilett v. Moler, 82 Minn. 12.

51. Knowlton v. Keenan, 146 Mass. 86, 4 Am. St. Rep. 282; Dowe v. Morris, 149 Mass.

to the full extent in all jurisdictions. It is clear that a man's intention or purpose at a given time is a matter of fact, and a misrepresentation of intent or purpose is a misrepresentation of fact.[52] Many courts, therefore, have held that a false and fraudulent representation as to one's intention or purpose, or a promise to perform or not to perform acts in the future, may be made the ground of an action of deceit, if it was a mere device resorted to without any intention of performance and for the purpose of deceiving.[53] Thus in an English case, where a prospectus issued to shareholders in a company to invite subscriptions to a loan contained a false and fraudulent statement of the purposes for which the money was wanted, which was in effect a statement of intention as to its application, it was held a material statement of fact for which an action of deceit would lie.[54] And in Massachusetts, where it is generally held that a mere promise will not support an action of deceit, although made with the intention not to perform it, it was held in a late case that a promise to perform acts in the future, if a mere device resorted to without any intention of performance and for the purpose of inducing a debtor to come within the state, to be there arrested, followed by his coming into the state in reliance on such promise, and by his subsequent arrest, was such fraud as would support an action.[55]

Some of the courts hold that a person who sells property on credit cannot maintain an action of deceit against the buyer because he purchased with fraudulent intent not to pay, or knowing that he would not be able to pay,[56] while other courts hold that such a purchase involves a false and fraudulent representation as to present intention, for which the action will lie.[57]

The general rule that a promise or statement of intention will not support an action of deceit does not apply, of course, where the promise or statement is ac-

188, 14 Am. St. Rep. 404; People v. Healy, 128 Ill. 9, 15 Am. St. Rep. 90; Gage v. Lewis, 68 Ill. 609; Kitson v. Farwell, 132 Ill. 327; Ansley v. Bank of Piedmont, 113 Ala. 467, 59 Am. St. Rep. 122; Long v. Woodman, 58 Me. 49; Burt v. Bowles, 69 Ind. 1; Balue v. Taylor, 136 Ind. 368; Farrar v. Bridges, 3 Humph. (Tenn.) 565; Farris v. Strong, 24 Colo. 107, 48 Pac. 963; Tufts v. Weinfeld, 88 Wis. 647; Closius v. Reiners, 13 App. Div. (N. Y.) 163; Hackett v. Equitable Life Assur. Soc., 30 Misc. (N. Y.) 523, 50 App. Div. 266.

But it has been held that making a promise with intent not to perform it constitutes a fraud for which a contract may be rescinded—Lawrence v. Gayetty, 78 Cal. 126, 20 Pac. 382, 12 Am. St. Rep. 29; Chicago, etc. Ry. Co. v. Titterington, 84 Tex. 218, 31 Am. St. Rep. 39; Ansley v. Bank of Piedmont, 113 Ala. 467, 59 Am. St. Rep. 122.

52. Pollock, Torts (Webb's Ed.) 359. "The state of a man's mind is as much a fact as the state of his digestion"—Bowen, L. J., in Edgington v. Fitzmaurice, 29 Ch. Div. 459, 483.

53. Edgington v. Fitzmaurice, 29 Ch. Div. 459; Ayres v. French, 41 Conn. 142; Sweet v. Kimball, 166 Mass. 332, 55 Am. St. Rep. 406; Goodwin v. Horne, 60 N. H. 486; McCready v. Phillips, 56 Neb. 446.

See, also, Metcalf v. Hart, 3 Wyo. 513, 27 Pac. 900, 31 Pac. 407, 31 Am. St. Rep. 122.

54. Edgington v. Fitzmaurice, 29 Ch. Div. 459.

55. Sweet v. Kimball, 166 Mass. 332, 55 Am. St. Rep. 406.

56. Gage v. Lewis, 68 Ill. 604; People v. Healy, 128 Ill. 9, 15 Am. St. Rep. 90. And see Smith v. Smith, 21 Pa. 367, 60 Am. Dec. 51.

57. Swift v. Rounds, 19 R. I. 527, 61 Am. St. Rep. 791; Goodwin v. Horne, 60 N. H. 486; McCready v. Phillips, 56 Neb. 446; Place v. Minster, 65 N. Y. 89, Burdick's Cas. 259; Anon., 67 N. Y. 598, Burdick's Cas. 240. And see Morrill v. Blackman, 42 Conn. 324.

"Deceit, to ground a recovery," said the Nebraska court, "must relate to existing facts; but if a man buys property on credit, with the intention at the time of not paying therefor, his promise to pay is but a false token whereby the fraud is effected. The real fraud is the expressed or implied representation of his intention to pay"—McCready v. Phillips, 56 Neb. 446.

It has repeatedly been held that a purchase of goods with the fraudulent intent not to pay for them is such fraud as entitles the seller to rescind and recover the goods —Durell v. Haley, 1 Paige (N. Y.) 492, 19 Am. Dec. 444; Nichols v. Pinner, 18 N. Y. 306; Wright v. Brown, 67 N. Y. 1; Rowley v. Bigelow, 12 Pick. (Mass.) 307, 23 Am. Dec. 607; Dow v. Sanborn, 3 Allen (Mass.) 181; Talcott v. Henderson, 31 Ohio St. 162, 27 Am. Rep. 501; Shipman v. Seymour, 40 Mich. 274; Donaldson v. Farwell, 93 U. S. 631; Ayres v. French, 41 Conn. 142; Des Farges v. Pugh, 93 N. C. 31, 53 Am. Rep. 446; Powell v. Bradlee, 9 Gill & J. (Md.) 220; People v. Healy, 128 Ill. 9, 15 Am. St. Rep. 90; Ex parte Whittaker, 10 Ch. App. 446. See, also, Bidault v. Wales, 20 Mo. 546, 64 Am. Dec. 205.

Contra Smith v. Smith, 21 Pa. 367, 60 Am. Dec. 51.

companied by a false and fraudulent representation of fact, or by a fraudulent concealment of a fact which, under the circumstances, there is a duty to disclose.[58]

(§ 2) *D. Reasons.*—It has been said that a man's statement of his reasons is not such a representation as will support an action of deceit,[59] and this is no doubt generally true for the reason that such a statement is ordinarily immaterial, or is one upon which persons are not supposed to rely. Such a statement, however, is as much a statement of fact as it is a statement as to a man's intention, and it would probably be held actionable if shown to be material, to have been intended to deceive, and to have deceived.[60]

(§ 2) *E. Misrepresentation of law.*—As a rule, a false representation of the law, not being a representation of fact, does not constitute fraud, and will not support an action of deceit, although made with intent to deceive.[61] The reason is that a person is presumed to know the law, and has no right to rely upon a statement of matter of law made by another.[62] The rule applies, for example, in the absence of special circumstances, where a person misrepresents the legal effect of a contract, to induce another to enter into it, there being no misrepresentation as to the contents;[63] or where a person misrepresents the legal effect of certain acts, to induce another to release a claim, or to settle for less than is due under a contract.[64]

This rule does not apply, however, to a misrepresentation as to one's private rights, which is regarded as a statement of fact, although it may involve matters of law,[65] as a statement by a corporation or its officers, express or implied from conduct, that a certain power is conferred upon it by its charter, the person relying on the representation not having notice of the terms of the charter;[66] or where the holder of a tenant's notes for the rent of land makes false representations to a subtenant, who is ignorant of the terms of the contract between the landlord and tenant, as to the legal right in respect to crops grown on the land, and thereby induces the subtenant to surrender a right.[67] A representation by an officer that certain property has been attached by him is a representation of fact, and not of law.[68]

Nor does the rule apply where there is a special relation of confidence between

And if this is so, there is no good reason why it should not be held such fraud as will support an action of deceit. The Illinois court, however, has made a distinction. See People v. Healy, 128 Ill. 9, 15 Am. St. Rep. 90.

58. Pollock v. Sullivan, 53 Vt. 507, 38 Am. Rep. 702; Kley v. Healy, 127 N. Y. 555; Blake v. Blackley, 109 N. C. 257, 26 Am. St. Rep. 566.

A woman may maintain an action of deceit against a married man for promising to marry her, and is not limited to an action of assumpsit—Pollock v. Sullivan, 53 Vt. 507, 38 Am. Rep. 702.

59. Vernon v. Keyes, 4 Taunt. 488.

60. Pollock, Torts (Webb's Ed.) 360. Pollock here gives as an example the case of a buying agent's falsely naming, not merely as the highest price which he is willing to give, but as the actual limit of his authority, a sum lower than that for which he is really empowered to deal. See, also, Edelman v. Latshaw, 180 Pa. 419.

61. Pollock, Torts (Webb's Ed.) 361; Rashdall v. Ford, L. R. 2 Eq. 750; Thompson v. Phoenix Ins. Co., 75 Me. 55, 46 Am. Rep. 357; Upton v. Tribilcock, 91 U. S. 45; Burt v. Bowles, 69 Ind. 1; Aetna Ins. Co. v. Reed, 33 Ohio St. 283; Gormely v. Gymnastic Ass'n, 55 Wis. 350; Beall v. McGehee, 57 Ala. 438; Lehman v. Shackleford, 50 Ala. 437. And see Fish v. Cleland, 33 Ill. 238; Reed v. Sidener, 32 Ind. 373.

62. See the cases above cited.

63. Upton v. Tribilcock, 91 U. S. 45; Russell v. Branham, 8 Blackf. (Ind.) 277; Jaggar v. Winslow, 30 Minn. 263, and other cases in note 26 et seq., supra.

64. Thus it was held that one who had a claim against an insurance company for loss by fire, and who was induced to settle for less than the amount of his claim by the false representation of the company's agent that his policy had been forfeited by non-occupancy of the premises, could not maintain an action of deceit against the company—Thompson v. Phoenix Ins. Co., 75 Me. 55, 46 Am. Rep. 357.

65. Pollock, Torts (Webb's Ed.) 361.

66. West London Com. Bank v. Kitson, 13 Q. B. Div. 360, holding that acceptance of a bill by directors of a company incorporated by a private act of parliament was a representation by them to persons who might purchase the bill that the company had power under the act to accept the same, that it was a representation of fact and not merely of law, and being false, the directors were liable to an action.

67. Lehman v. Shackleford, 50 Ala. 437.

68. Burns v. Lane, 138 Mass. 350.

the parties, as where a lawyer misrepresents the law to one who he knows is relying on his advice, or even where a layman does so to one whom he knows to be ignorant of the law and to depend on his statement. In either case there is a special relation of confidence, and a false representation as to the law, made with intent to deceive, is such fraud as will support an action of deceit.[69]

Persons are not chargeable with notice of the laws of a foreign country or of another state, and a false representation as to such laws, therefore, is treated as a representation of fact which will support an action.[70]

(§ 2) *F. Immaterial statements.*—A false representation, in order that it may amount to actionable fraud, must be as to a material fact.[71] Thus where the defendant, to induce the plaintiff to enter into a contract to build a section of railroad, falsely represented that he had purchased certain rails, and would sell them to the plaintiff at a certain price, the court held that the representation that the defendant would sell the rails to the plaintiff, being a mere promise, would not support an action for deceit, and that the action could not be sustained on the false representation that he had purchased the rails, since this, separated from the promise, was unimportant and immaterial.[72]

(§ 2) *G. Vague statements.*—A statement does not amount to such a representation as will support an action of deceit if it is so vague or indefinite that a person of ordinary intelligence would not rely upon it. Such is the case, for example, where a vendor of land points out a line as the "probable" boundary,[73] or where a purchaser of goods on credit asserts that he is "a person safely to be trusted and given credit to."[74]

(§ 2) *H. Ambiguous statements.*—The fact that a statement is ambiguous does not prevent it from being made the ground of an action of deceit, but in such a case it is incumbent upon the plaintiff to show that the statement was reasonably capable of a meaning rendering it false and misleading, and that he relied upon it in that sense.[75]

§ 3. *Oral representations and the statute of frauds.*—The rule that parol evidence is not admissible to add to or vary a written contract does not exclude parol evidence of a false and fraudulent representation, not as a term of the contract, but

69. Townsend v. Cowles, 31 Ala. 428; Lehman v. Shackleford, 50 Ala. 437; Moreland v. Atchison, 19 Tex. 303 (where the seller of land to a newly arrived immigrant falsely represented that the title was good).

70. Haven v. Foster, 9 Pick. (Mass.) 112, 19 Am. Dec. 353; Wood v. Roeder, 50 Neb. 476; Rosenbaum v. United States Credit System Co., 64 N. J. Law, 34.

One who has purchased a warrant of another state, in reliance on a false and fraudulent representation of the seller as to the statute of limitations of the other state, may maintain an action of deceit—Wood v. Roeder, 50 Neb. 476.

71. Hedden v. Griffin, 136 Mass. 229, 49 Am. Rep. 25; Dowe v. Morris, 149 Mass. 188, 14 Am. St. Rep. 404. And see Holbrook v. Connor, 60 Me. 578, 11 Am. Rep. 212; Young v. Young, 113 Ill. 430; Tuck v. Downing, 76 Ill. 71; Winston v. Young, 52 Minn. 1; Palmer v. Bell, 85 Me. 352; Nounnan v. Sutter County Land Co., 81 Cal. 1, 22 Pac. 515; Jordan v. Pickett, 78 Ala. 331; Hart v. Waldo (Ga.) 43 S. E. 998.

Whether a representation was material, there being no dispute as to the facts, is purely a question of law for the court—Greenleaf v. Gerald, 94 Me. 91, 80 Am. St. Rep. 377; Caswell v. Hunton, 87 Me. 277. Compare, however, Fottler v. Moseley, 179 Mass. 295.

False representations by the seller of letters patent for the manufacture of an article, as to the cost of manufacturing the article, are material—Braley v. Powers, 92 Me. 203.

A misrepresentation as to quantity of land of 18 acres on sale of 160 is material—Leicher v. Keeney (Mo. App.) 72 S. W. 145.

72. Dowe v. Morris, 149 Mass. 188, 14 Am. St. Rep. 404.

Where the president of a corporation, to procure credit for it, represents that it is solvent, and also falsely represents that none of its assets are incumbered and that it is doing a profitable business, the fact that the corporation is solvent does not render the other representations immaterial—Shaw v. Gilbert, 111 Wis. 165.

73. Hall v. Thompson, 1 Smedes & M. (Miss.) 443, 483.

74. Lyons v. Briggs, 14 R. I. 222, 51 Am. Rep. 372.

75. Pollock, Torts (Webb's Ed.) 330; Smith v. Chadwick, 9 App. Cas. 187.

as an inducement thereto, and for the purpose of an action of deceit.[76] Nor is evidence of an oral representation rendered inadmissible because it was made as an inducement to a contract which is within the statute of frauds.[77]

An action of deceit for false and fraudulent representations as to the credit or identity of another is not within the clause of the statute of frauds providing that no action shall be brought to charge a person upon any oral promise to answer for the debt, default, or miscarriage of another.[78] In some jurisdictions, however, it is expressly provided, in somewhat varying language, that no action shall be brought to charge any person upon or by reason of any representation or assurance made or given, concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such person may obtain credit, money, or goods thereupon, unless such representation or assurance be made in writing, signed by the party to be charged therewith.[79] Such a statute prevents an action of deceit for false and fraudulent representations, not in writing and signed, made by one person to another concerning the financial condition or credit of a third person, to whom the person to whom the representation is made is thereby induced to extend credit to his damage;[80] but it does not affect the right to maintain an action for oral false representations concerning third persons or their property, which do not affect their credit, or are not made with intent to give them credit.[81]

§ 4. *Misrepresentation by conduct.*—A false representation of fact may be made, both for the purpose of avoidance of a contract and for the purpose of an action of deceit, by conduct as well as by words. Any act intentionally done, which naturally and distinctly conveys an impression that a particular fact does or does not exist, is as much a representation that such fact does or does not exist as an express representation in words.[82]

Thus one who assumes to accept a bill, or make any other contract as agent

76. Dobell v. Stevens, 3 Barn. & C. 623; Picard v. McCormick, 11 Mich. 68, 76; Hanger v. Evins, 38 Ark. 334; Newell v. Horn, 45 N. H. 421; Cobb v. O'Neal, 2 Sneed (Tenn.) 438.

77. Foss v. Newbury, 20 Or. 257, 25 Pac. 669. See, also, Catalain v. Catalain, 124 Ind. 54, 19 Am. St. Rep. 73.

78. Pasley v. Freeman, 3 Term R. 51, 2 Smith's Lead. Cas. 94, Bigelow's Cas. 1; Hamar v. Alexander, 2 Bos. & P. (N. R.) 241; Upton v. Vail, 6 Johns. (N. Y.) 181, 5 Am. Dec. 210; Ewins v. Calhoun, 7 Vt. 79. See, also, Lahay v. City Nat. Bank, 15 Colo. 339, 25 Pac. 704, 22 Am. St. Rep. 407.

Contra Newsom v. Jackson, 26 Ga. 241, 71 Am. Dec. 206.

The clause of the statute requiring a promise to answer for the debt of another to be in writing does not prevent an action of deceit against an officer of a bank by a depositor for false representations as to the condition of the bank, by reason of which the depositor has suffered loss—Kemp v. National Bank of Republic (C. C. A.) 109 Fed. 48.

79. The original statute in England was the statute of 9 Geo. IV. c. 14, known as Lord Tenderden's Act.

80. Haslock v. Fergusson, 7 Adol. & E. 86; Kimball v. Comstock, 14 Gray (Mass.) 510; Mann v. Blanchard, 2 Allen (Mass.) 386; McKinney v. Whiting, 8 Allen (Mass.) 208; Hearn v. Waterhouse, 39 Me. 96; Nevada Bank v. Portland Nat. Bank, 59 Fed 338; Cook v. Churchman, 104 Ind. 141. Compare, however, Ball v. Farley, 81 Ala. 292; Warren v. Barker, 2 Duv. (Ky.) 156.

81. Medbury v. Watson, 6 Met. (Mass.) 246, 39 Am. Dec. 726; Norton v. Huxley, 13 Gray (Mass.) 287; Stannard v. Kingsbury, 179 Mass. 174; Hess v. Culver, 77 Mich. 598, 18 Am. St. Rep. 421; Lahay v. City Nat. Bank, 15 Colo. 339, 25 Pac. 704, 22 Am. St. Rep. 407.

An action against a person for fraudulently signing his name as a witness to a false signature of a letter of credit, whereby the plaintiff was induced to sell goods on credit to the person named in the letter, is not founded on an oral representation as to the solvency or credit of another, within a statute providing that no action shall be maintained to charge a person by reason of any representation made concerning the credit, ability, trade, or dealings of any other person, unless made in writing and signed by the party to be charged—Mendenhall v. Stewart, 18 Ind. App. 262.

Such statute applies to false representations as to the condition and property of a corporation, whereby a person is induced to purchase shares of stock directly from it—Heintz v. Mueller, 19 Ind. App. 240. Compare Hubbard v. Long, 105 Mich. 442.

82. Polhill v. Walter, 3 Barn. & Ad. 114; West London Com. Bank v. Kitson, 13 Q. B. Div. 360; Mudsill Min. Co. v. Watrous (C. C. A.) 61 Fed. 163; Croyle v. Moses, 90 Pa. 250, 35 Am. Rep. 654; Swift v. Rounds, 19 R. I.

for another, impliedly represents that he has authority to do so, and if he knows that he has no such authority, he is liable in an action of deceit for any damages sustained by the other party.[83] In like manner officers of a corporation, who accept a bill in its name and put the same in circulation, thereby represent that the corporation has power under its charter to accept the bill.[84] Persons who issue bills or notes in the name of a pretended corporation impliedly represent that there is such a corporation, and if the representation is known to be false, they are liable to purchasers in an action of deceit.[85]

There is also a false representation by conduct for which an action of deceit will lie, where a person fraudulently draws a check on a bank knowing that he has no funds to meet it, or where the holder of a check transfers it, or fraudulently presents it and obtains payment or credit, knowing that the drawer has no funds;[86] where a person fraudulently procures a minor to indorse a note, and then sells the note or authorizes it to be sold to one who relies on such indorsement;[87] where a person purchases goods on credit with the fraudulent intent not to pay for them;[88] where a person selling grain by measurement or weight puts a foreign substance therein to increase the bulk or weight;[89] where the seller of land pours petroleum thereon to give it a deceptive appearance as oil land;[90] where the seller of a mine mixes silver in samples of ore taken from the mine;[91] where a seller of goods fraudulently packs them in such a way as to present a favorable exterior not truly representing the character of the goods;[92] where a broker selling property, and having knowledge of a defect in his principal's title, directs an investigation to a place where he knows that no satisfactory information can be obtained, instead of to another place where the truth can be ascertained.[93]

§ 5. *Nondisclosure and concealment of facts.*—As between parties who have entered into a contract, and particularly in the case of sales of real or personal property, a failure of one of the parties to disclose facts within his knowledge, and not within the knowledge of the other party, is frequently relied upon as constituting fraud, not only for the purpose of avoiding the transaction, but also for the purpose of an action of deceit; but it is well settled that it does not amount to fraud for either purpose except under special circumstances. The general rule is that the mere failure of one of the parties to a sale of real or personal property, or other contract, to disclose facts within his knowledge, and which, if disclosed to the other party, might prevent him from entering into the contract, does not amount to fraud, either for the purpose of avoiding the contract or for the purpose of maintaining an action of deceit, unless the nature of the transaction or the relation of the parties is such as to impose a duty to disclose the facts.[94] As applied to nondisclosure by the vendor of property, the rule is expressed in the maxim, *caveat emptor.*

527, 61 Am. St. Rep. 791; Mizner v. Kussell, 29 Mich. 229; Chisolm v. Gadsden, 1 Strobh. L. (S. C.) 220, 47 Am. Dec. 550; Paddock v. Strobridge, 29 Vt. 470.

83. Polhill v. Walter, 3 Barn. & Ad. 114.

84. West London Com. Bank v. Kitson, 13 Q. B. Div. 360.

85. Bartholomew v. Bentley, 15 Ohio, 659, 45 Am. Dec. 596.

86. Peterson v. Union Nat. Bank, 52 Pa. 206, 91 Am. Dec. 146; True v. Thomas, 16 Me. 36.

87. Lobdell v. Baker, 1 Met. (Mass.) 193, 35 Am. Dec. 358.

88. Swift v. Rounds, 19 R. I. 527, 61 Am. St. Rep. 791. See supra, § 2 C.

89. West v. Bradley, 6 Ind. 394.

90. Chester v. Dickerson, 52 Barb. (N. Y.) 349.

91. Mudsill Min. Co. v. Watrous (C. C. A.) 61 Fed. 163.

92. Singleton's Adm'r v. Kennedy, 9 B. Mon. (Ky.) 222.

93. Chisolm v. Gadsden, 1 Strobh. L. (S. C.) 220, 47 Am. Dec. 550.

94. Peek v. Gurney, L. R. 6 H. L. 403; Hadley v. Clinton County Importing Co., 13 Ohio St. 502, 82 Am. Dec. 454; Laidlaw v. Organ, 2 Wheat. (U. S.) 178; Cleaveland v. Richardson, 132 U. S. 318; Dambman v. Schulting, 75 N. Y. 55; Harris v. Tyson, 24 Pa. 347, 64 Am. Dec. 661; Butler's Appeal, 26 Pa. 63; Smith v. Beatty, 2 Ired. Eq. (N. C.) 456, 40 Am. Dec. 435; Beninger v. Corwin, 24 N. J. Law, 257; Crowell v. Jackson, 53 N. J. Law, 656; Iron City Nat. Bank v. Anderson, 194 Pa. 205.

The difficulty in applying the rule is in determining what circumstances impose the duty to disclose facts.

All of the courts no doubt agree that where the parties are dealing at arm's length, and do not occupy a confidential relation, the vendor of land is under no duty to disclose to the purchaser facts affecting the condition or value of the land, which the purchaser might ascertain for himself by inquiry or examination, and his failure to disclose such facts, where there is nothing more, does not amount to fraud.[95] The same is true of mere nondisclosure of facts by a lessor of premises,[96] or by a seller of personal property.[97] And it is only where a special relation of confidence exists, or where inquiry is made, that a purchaser of real or personal property is under any duty to disclose facts known to him, and not known to the seller, enhancing the value of the property.[98] Failure of a purchaser of goods on credit to disclose his insolvency is not such fraud as will sustain an action of deceit, where he is not asked as to his financial condition.[99]

When the general rule does not apply.—The general rule that mere nondisclosure of facts is not fraud does not apply where there is a special relation of trust and confidence between the parties, or where, for any other reason, the circumstances are such as to impose as a matter of good faith, a duty to disclose the facts.[1]

95. Long v. Warren, 68 N. Y. 426, Chase's Cas. 263; Hall v. Thompson, 1 Smedes & M. (Miss.) 443, 481. Failure of vendor of land to disclose the fact that the boundary is in dispute—Baker v. Sherman, 71 Vt. 439.

96. In Keates v. Earl of Cadogan, 10 C. B. 591, it was held that a lessee of premises could not maintain an action of deceit against the lessor because of the latter's failure to disclose the fact that the premises were in a ruinous condition and unfit for habitation, although he knew that they were leased for immediate occupation.

"It is not pretended," said Jervis, C. J., "that there was any warranty, express or implied, that the house was fit for immediate occupation, but it is said that because the defendant knew that the plaintiff wanted it for immediate occupation, and knew that it was in an unfit and dangerous state, and did not disclose that fact to the plaintiff, an action of deceit will lie. The declaration does not allege that the defendant made any misrepresentation, or that he had reason to suppose that the plaintiff would not do what any man in his senses would do, namely, make proper investigation and satisfy himself as to the condition of the house before he entered upon the occupation of it. There is nothing amounting to deceit." See, also, Foster v. Peyser, 9 Cush. (Mass.) 242, 57 Am. Dec. 43; Lucas v. Coulter, 104 Ind. 81.

97. Kohl v. Lindley, 39 Ill. 195, 89 Am. Dec. 294; Beninger v. Corwin, 24 N. J. Law, 257; Hadley v. Clinton County Importing Co., 13 Ohio St. 502, 82 Am. Dec. 454; Brown v. Gray, 6 Jones L. (N. C.) 103, 72 Am. Dec. 563; West v. Anderson, 9 Conn. 107, 21 Am. Dec. 737; Paul v. Hadley, 23 Barb. (N. Y.) 521.

"Caveat emptor is the general rule of the common law. If defects in the property sold are patent, and might be discovered by the exercise of ordinary attention, and the buyer has an opportunity to inspect the property, the law does not require the vendor to point out defects"—Grigsby v. Stapleton, 94 Mo. 423, Chase's Cas. 258.

98. Thus it is not a fraud for the purchaser of goods at the market price to disclose facts which if known generally would greatly enhance the price—Laidlaw v. Organ, 2 Wheat. (U. S.) 178.

And the purchaser of land is not guilty of fraud in failing to disclose the fact known to him only, that there is a mine on the land—Fox v. Mackreth, 2 Brown Ch. 420; Harris v. Tyson, 24 Pa. 347, 64 Am. Dec. 661; Butler's Appeal, 26 Pa. 63; Smith v. Beatty, 2 Ired. Eq. (N. C.) 456, 40 Am. Dec. 435.

99. People v. Healy, 128 Ill. 9, 15 Am. St. Rep. 90; Hennequin v. Naylor, 24 N. Y. 139; Nichols v. Pinner, 18 N. Y. 295; Talcott v. Henderson, 31 Ohio St. 162, 27 Am. Rep. 501; Rodman v. Thalheimer, 75 Pa. 232; Le Grand v. Eufaula Nat. Bank, 81 Ala. 123, 60 Am. Rep. 140.

It is otherwise, as we have seen, where goods are purchased with fraudulent intent not to pay for them. See ante, § 2 C.

1. Mallory v. Leach, 35 Vt. 156, 82 Am. Dec. 625; Bennett v. McMillin, 179 Pa. 146, 57 Am. St. Rep. 591; Stewart v. Wyoming Cattle Ranche Co., 128 U. S. 383, Erwin's Cas. 430; Thomas v. Murphy, 87 Minn. 358.

Concealment by purchaser of superior knowledge of value is not fraud—Pratt Land & Imp. Co. v. McClain, 135 Ala. 452. Failure of broker to disclose facts to his principal held fraudulent—Holmes v. Cathcart, 88 Minn. 213; Rank v. Garvey (Neb.) 92 N. W. 1025.

And there is a relation of confidence within this rule if a person knows that another relies upon his knowledge and permits him to do so, although their relation is not otherwise a confidential one—Bennett v. McMillin, 177 Pa. 146, 57 Am. St. Rep. 591.

Where an executor who had sold stock belonging to the estate of his father, and considered worthless, for a nominal sum, and afterwards received a letter directed to the decedent offering a certain amount for the stock, repurchased it from the purchaser, stating to him that he wanted it because it belonged to his father, and that it was of no value, it was held that he was liable to the purchaser in an action of deceit—Edelman v. Latshaw, 180 Pa. 419.

While it is not fraud for the vendor of land to fail to disclose facts affecting its value, which the purchaser might ascertain for himself, it is a fraud for him to fail to disclose a defect in his title not apparent on the face of the title deeds, or other material facts peculiarly within his own knowledge, and which he knows are not within the knowledge or equal means of knowledge of the purchaser.[2] And while the lessor of premises is under no duty to disclose the fact that they are unfit for habitation because of want of repair, a fact which the lessee can ascertain for himself, it is a fraud for him to fail to disclose that they are infected with a contagious disease or otherwise subject to a nuisance prejudicial to health.[3]

In like manner, a seller of personal property, while he is under no duty to disclose defects which are patent or other facts which the purchaser may ascertain for himself by the exercise of ordinary diligence, is bound, according to the great weight of authority, to disclose latent defects within his knowledge, which he knows are not within the knowledge of the purchaser, and which render the property unfit, or less fit than it would otherwise be, for the purposes for which it is purchased; and if he intentionally remains silent as to such defects, he is guilty of a fraud,[4] unless the sale is expressly made "with all faults."[5] This rule has been applied, for example, to a sale of cattle, known by the vendor to be infected with a contagious disease, without disclosing this fact;[6] to the sale of a horse without disclosing the fact that it is affected by a secret malady of a fatal character;[7] to the sale of a cow, known to be purchased for breeding purposes, without disclosing a latent defect rendering her unfit for such purpose;[8] to the sale of provisions for domestic use with knowledge that they are unwholesome;[9] to the sale of hay without disclosing

2. 1 Sugd. Vend. 564; Bryant's Ex'r v. Boothe, 30 Ala. 311, 68 Am. Dec. 117; Peebles v. Stephens, 3 Bibb (Ky.) 324, 6 Am. Dec. 660; Burns v. Dockray, 156 Mass. 135. See, also, Camp v. Camp, 2 Ala. 632, 36 Am. Dec. 423.

3. Minor v. Sharon, 112 Mass. 477, 17 Am. Rep. 122; Cesar v. Karutz, 60 N. Y. 229, 19 Am. Rep. 164. Compare Erskine v. Adeane, 8 Ch. App. 756.

4. Hoe v. Sanborn, 21 N. Y. 552, 78 Am. Dec. 163; Brown v. Montgomery, 20 N. Y. 287, 75 Am. Dec. 404; Waters v. Mattingley, 1 Bibb (Ky.) 244, 4 Am. Dec. 631; French v. Vining, 102 Mass. 132, 3 Am. Rep. 440; Cecil v. Spurger, 32 Mo. 462, 82 Am. Dec. 140; Grigsby v. Stapleton, 94 Mo. 423, Chase's Cas. 258; Hadley v. Clinton County Importing Co., 13 Ohio St. 502, 82 Am. Dec. 454; Paddock v. Strobridge, 29 Vt. 470; Graham v. Stiles, 38 Vt. 578; Maynard v. Maynard, 49 Vt. 297; Cardwell v. McClelland, 3 Sneed (Tenn.) 150; Downing v. Dearborn, 77 Me. 457; Dowling v. Lawrence, 58 Wis. 282; Brown v. Gray, 6 Jones L. (N. C.) 103, 72 Am. Dec. 563; Marsh v. Webber, 13 Minn. 109; Johnson v. Wallower, 18 Minn. 288; Patterson v. Kirkland, 34 Miss. 423.

Compare, however, Hill v. Balls, 2 Hurl. & N. 299; Paul v. Hadley, 23 Barb. (N. Y.) 521; Beninger v. Corwin, 24 N. J. Law, 257.

In a North Carolina case in which an action of deceit was brought against the seller of an unsound slave, Pearson, C. J., stated the law as follows: "In the sale of a chattel, the rule of our law is caveat emptor, and if the thing be unsound, to entitle the purchaser to maintain an action he must prove either a warranty of soundness or a deceit. In regard to deceit, the distinction is, where the unsoundness is patent, that is, such as may be discovered by the exercise of ordinary diligence, mere silence on the part of the vendor is not sufficient to establish the deceit, although he knows of the unsoundness, because the thing speaks for itself, and it is the folly of the purchaser not to attend to it. So that in such a case he will not be heard to say he was deceived, unless the vendor made a false statement, or resorted to some artifice, in order to prevent an examination, or to hide the unsoundness, so as to make the examination of no avail. Where the unsoundness is latent, that is, such as could not be discovered by the exercise of ordinary diligence, mere silence on the part of the vendor is sufficient to establish the deceit, provided he knows of the unsoundness; for as the thing is not what it appears to be, and diligence does not enable the purchaser to discover its unsoundness, he is deceived unless the fact is disclosed; so that in such a case, without what the law considers laches on the part of the purchaser, the deceit is accomplished by the suppressio veri." Brown v. Gray, 6 Jones L. (N. C.) 103, 72 Am. Dec. 563.

5. Baglehale v. Walters, 3 Camp. 154; Ward v. Hobbs, 3 Q. B. Div. 150, 4 App. Cas. 13; West v. Anderson, 9 Conn. 107, 21 Am. Dec. 737; Whitney v. Boardman, 118 Mass. 242.

6. Grigsby v. Stapleton, 94 Mo. 423, Chase's Cas. 258; Jeffrey v. Bigelow, 13 Wend. (N. Y.) 518, 28 Am. Dec. 476; Badger v. Nicholls, 28 Law T. (N. S.) 441; Mullett v. Mason, L. R. 1 C. P. 559. Compare Ward v. Hobbs, 3 Q. B. Div. 150, 4 App. Cas. 13.

7. Paddock v. Strobridge, 29 Vt. 470.

8. Hadley v. Clinton County Importing Co., 13 Ohio St. 502, 82 Am. Dec. 454.

9. Van Bracklin v. Fonda, 12 Johns. (N.

the fact that poison has been spilled upon it;[10] to the sale of commercial paper without disclosing the fact that the maker has failed and is insolvent,[11] and in many other cases.

The general rule that failure of a party to a sale or other contract to disclose facts known to him and not known to the other party does not amount to fraud does not apply where the party, instead of merely remaining silent, says or does anything to mislead the other party, or to induce him to forego making inquiry or examination which would result in discovery of the facts, or to prevent an inquiry or examination which would result in such discovery.[12] Nor does the general rule apply where a partial statement of facts is made, which, although no fact stated is untrue in itself, is rendered false or misleading as a whole by the intentional suppression or nondisclosure of other facts. This is expressed in the maxim, *suppressio veri, suggestio falsi,*— "a suppression of the truth may amount to a suggestion of falsehood."[13] "Mere silence is quite different from concealment. *Aliud est tacere, aliud celare,*—a suppression of the truth may amount to a suggestion of falsehood. And if, with intent to deceive, either party to a contract of sale conceals or suppresses a material fact which he is in good faith bound to disclose, this is evidence of, and equivalent to a false representation, because the concealment or suppression is, in effect, a representation that what is disclosed is the whole truth. The gist of the action is fraudulently producing a false impression upon the mind of the other party, and if this result is accomplished, it is unimportant whether the means of accomplishing it are words or acts of the defendant, or his

Y.) 468, 7 Am. Dec. 339; Moses v. Mead, 1 Denio (N. Y.) 378, 43 Am. Dec. 676; Hoe v. Sanborn, 21 N. Y. 552, 78 Am. Dec. 163; Emerson v. Brigham, 10 Mass. 197, 6 Am. Dec. 109; French v. Vining, 102 Mass. 132, 3 Am. Rep. 440.

10. French v. Vining, 102 Mass. 132, 3 Am. Rep. 440.

11. Brown v. Montgomery, 20 N. Y. 287, 75 Am. Dec. 404; Gordon v. Irvine, 105 Ga. 144.

12. Udell v. Atherton, 7 Hurl. & N. 172; Laidlaw v. Organ, 2 Wheat. (U. S.) 178; Stewart v. Wyoming Cattle Ranche Co., 128 U. S. 383, Erwin's Cas. 430; Henderson v. Henshall (C. C. A.) 54 Fed. 320; Hadley v. Clinton Importing Co., 13 Ohio St. 502, 82 Am. Dec. 454; Chisolm v. Gadsden, 1 Strobh. L. (S. C.) 220, 47 Am. Dec. 550; Bowman v. Bates, 2 Bibb (Ky.) 47, 4 Am. Dec. 677; Croyle v. Moses, 90 Pa. 250, 35 Am. Rep. 654; Matthews v. Bliss, 22 Pick. (Mass.) 48; Nysewander v. Lowman, 124 Ind. 584; Firestone v. Werner, 1 Ind. App. 293; Kenner v. Harding, 85 Ill. 264, 28 Am. Rep. 615.

The purchaser of land is guilty of fraud where, instead of merely remaining silent as to the existence of a mine or other facts which he has discovered, he prevents the agent of the vendor from giving information thereof, and resorts to artifice to conceal the facts from the vendor—Bowman v. Bates, 2 Bibb (Ky.) 47, 4 Am. Dec. 677.

Directing an investigation at a place where it is known that information cannot be obtained—Chisolm v. Gadsden, 1 Strobh. L. (S. C.) 220, 47 Am. Dec. 550.

13. Stewart v. Wyoming Cattle Ranche Co., 128 U. S. 383, Erwin's Cas. 430. See, also, Corbett v. Brown, 8 Bing. 33; Central Ry. Co. v. Kisch, L. R. 2 H. L. 99; Peek v. Gurney, L. R. 6 H. L. 377; Rhode v. Alley, 27 Tex. 443; Mitchell v. McDougall, 62 Ill. 501; Howard v. Gould, 28 Vt. 523, 67 Am. Dec. 728; Mallory v. Leach, 35 Vt. 156, 82 Am. Dec. 625; Bowman v. Bates, 2 Bibb (Ky.) 47, 4 Am. Dec. 677; Atwood v. Chapman, 68 Me. 38, 28 Am. Rep. 5; George v. Johnson, 6 Humph. (Tenn.) 36, 44 Am. Dec. 288; Newell v. Randall, 32 Minn. 171, 50 Am. Rep. 562; Kidney v. Stoddard, 7 Metc. (Mass.) 252; Burns v. Dockray, 156 Mass. 135; Coles v. Kennedy, 81 Iowa, 360, 25 Am. St. Rep. 503; Lomerson v. Johnston, 47 N. J. Eq. 312; Busch v. Wilcox, 82 Mich. 315.

Where a person desiring credit, being asked "how he stood," correctly stated his means, but was silent as to the fact that he owed two-thirds as much as his capital, it was held that there was a false and fraudulent representation—Newell v. Randall, 32 Minn. 171, 50 Am. Rep. 562. And see Browning v. National Capital Bank, 13 App. D. C. 1.

Representation by the vendor of land which had been set off to him on a judgment execution, that his title was good, without disclosing the fact that a petition to reverse the judgment was pending—Atwood v. Chapman, 68 Me. 38, 28 Am. Rep. 5.

Statement that the title of land is good, without disclosing the insanity of a person affecting the title—Burns v. Dockray, 156 Mass. 135.

Representation by the seller that a horse has the distemper, without disclosing the fact, known to him, that it also has the glanders—George v. Johnson, 6 Humph. (Tenn.) 36, 44 Am. Dec. 288; Howard v. Gould, 28 Vt. 523, 67 Am. Dec. 728.

Representation by the purchaser of stock in a corporation from one who confides in his knowledge, that a large assessment is about to be levied upon the stock, without disclosing other facts enhancing the value of the stock—Mallory v. Leach, 35 Vt. 156, 82 Am. Dec. 625.

concealment or suppression of material facts not equally within the knowledge or reach of the plaintiff."[14]

If a purchaser of real or personal property makes inquiry of the seller as to facts within the seller's knowledge, the seller must either decline to give any answer and thus let the purchaser know that he must rely on his own examination and judgment and take all risks, or else he must disclose the truth and the whole truth. If he expresses or intimates doubt or ignorance as to facts which he knows, or if he discloses a part of the truth only and suppresses the rest, and the purchaser is thereby deceived, it is deceit.[15]

As we shall hereafter see, knowledge that a representation is false and an intent to deceive, or what is equivalent thereto, is necessary to support an action of deceit, and this applies where a failure to disclose facts is relied upon as constituting fraud. Therefore, one is not liable for failure to disclose facts in the absence of knowledge and an intent to deceive.[16]

§ 6. *The representation must be false.*—In order that a representation may constitute fraud it must be in fact false, and the plaintiff must prove this. If it is in fact true it cannot be fraudulent, although it may have been made in the belief that it was false and with intent to deceive.[17] An action will lie, however, for a representation which is literally true, if it is calculated and intended to convey a false impression, and does convey such an impression.[18] "In order to establish a case of false representation, it is not necessary that something which is false should have been stated as if it were true. If the presentation of that which is true creates an impression which is false, it is, as to him who seeing the misapprehension seeks to profit by it, a case of false representation."[19] On the other hand, if a statement operates as an estoppel so as to make it true in law it is not false.[20] As we have seen, a statement which is literally true as far as it goes is rendered false and misleading by the suppression of other facts.[21]

Representations subsequently discovered to be untrue.—It has been held that where a false representation is innocently made in the belief that it is true, but the person making it discovers that it is false before it is acted upon by the person to whom it was made, and suffers the latter to continue in error and act upon the representation, a court of equity will treat the representation as fraudulent from the time the mistake is discovered, for the purpose of setting aside a deed.[22] There seems to be no good reason why the same rule should not apply in an action of deceit.[23]

§ 7. *Knowledge that representation is false, and intent to deceive. A. Knowledge in general.*—Relief is frequently granted in equity, and under some circum-

14. Stewart v. Wyoming Cattle Ranche Co., 128 U. S. 383, Erwin's Cas. 430.

15. Baker v. Seahorn, 1 Swan (Tenn.) 54, 55 Am. Dec. 724; Howard v. Gould, 28 Vt. 523, 67 Am. Dec. 728; James v. Crosthwait, 97 Ga. 673.

16. Kirtley's Adm'x v. Shinkle, 24 Ky. L. R. 608, 69 S. W. 723. And see post, § 7.

17. Arkwright v. Newbold, 17 Ch. Div. 301; Richardson v. Smith, 1 Camp. 277; Potts v. Chapin, 133 Mass. 276; Allison v. Jack, 76 Iowa, 205; Lunn v. Shermer, 93 N. C. 164; Grosjean v. Galloway, 82 App. Div. (N. Y.) 380; Hart v. Waldo (Ga.) 43 S. E. 998.

Evidence held insufficient to show that an agreement alleged to have been concealed from plaintiff was in existence at the time—Willock v. Dilworth, 204 Pa. 492.

18. Central Ry. Co. v. Kisch, L. R. 2 H. L. 99; Aaron's Reefs v. Twiss [1896] App. Cas. 273; Stewart v. Wyoming Ranche Co., 128 U. S. 383, Erwin's Cas. 430; Howard v. Gould, 28 Vt. 523, 67 Am. Dec. 523; Busch v. Wilcox, 82 Mich. 315.

19. Lomerson v. Johnston, 47 N. J. Eq. 312, 24 Am. St. Rep. 410.

20. Hart v. Waldo (Ga.) 43 S. E. 998.

21. Ante, § 5.

22. Reynell v. Sprye, 1 De Gex, M. & G. 660, 709. The same is true of a representation which, although true when made, ceases to be true by the happening of some event within the knowledge of the party making it—Traill v. Baring, 4 De Gex, J. & S. 318.

In a late Michigan case it was held that if, after a merchant has made a statement to a commercial agency as to his financial condition, there is a change for the worse therein, it is his duty to notify the agency—Mooney v. Davis, 75 Mich. 188, 13 Am. St. Rep. 425. Morse, J., dissented.

23. Pollock, Torts (Webb's Ed.) 366.

stances it has been held that contracts may be avoided at law, because of false representations made in the honest belief that they were true and without any intent to deceive,[24] and an action *ex contractu* to recover damages for breach of a warranty, express or implied, may be maintained without alleging or proving that the defendant knew that the warranty was false.[25] But it is very different where a false representation is treated as a tort, and made the ground of an action of deceit. In such a case the law requires that there shall have been some degree of moral wrong, and something more than mere negligence. There must have been actual fraud. It is sometimes said that an action of deceit will not lie for a false representation unless it was made by the defendant with knowledge that it was false and with intent to deceive, but, as we shall hereafter see,[26] this is not strictly true. It is true, however, that the representation must have been made, either with actual knowledge that it was false, or under circumstances which are equivalent to knowledge in the contemplation of law. In this sense, knowledge of the falsity of the representation is essential, and must be both alleged and proved.[27] This is true, not only where a person is induced to enter into a contract with another by the false representations of a third person who is not interested in the transaction, as in the case of false representations as to the credit of another, but also where one of the parties to a contract is deceived by the false representations of the other party.[28]

24. Davis v. Heard, 44 Miss. 50; Snyder v. Findley, 1 N. J. Law, 78, 1 Am. Dec. 193; East v. Matheny, 1 A. K. Marsh. (Ky.) 192, 10 Am. Dec. 721; Tyson v. Passmore, 2 Pa. 122, 44 Am. Dec. 181; Woodruff v. Garner, 27 Ind. 4, 89 Am. Dec. 477. And see Hammon, Cont. § 106.

25. As to the distinction between warranty and deceit in this respect, see Pollock, Torts (Webb's Ed.) 372; Mahurin v. Harding, 28 N. H. 128, 59 Am. Dec. 401; Kingsbury v. Taylor, 29 Me. 508, 50 Am. Dec. 607; Erie City Iron Works v. Barber, 106 Pa. 125, 51 Am. Rep. 508; Bartholomew v. Bushnell, 20 Conn. 271, 52 Am. Dec. 338.

26. See infra, this section.

27. Taylor v. Ashton, 11 Mees. & W. 401; Derry v. Peek, 14 App. Cas. 337, Chase's Cas. 249; Emerson v. Brigham, 10 Mass. 197, 6 Am. Dec. 109; Tryon v. Whitmarsh, 1 Metc. (Mass.) 1, 35 Am. Dec. 339; Cole v. Cassidy, 138 Mass. 437, 52 Am. Rep. 284; Nash v. Minnesota Title Ins. & Trust Co., 163 Mass. 574, 47 Am. St. Rep. 489; Kountze v. Kennedy, 147 N. Y. 124, 49 Am. St. Rep. 651; Meyer v. Amidon, 45 N. Y. 169; Salisbury v. Howe, 87 N. Y. 128; Unckles v. Hentz, 19 App. Div. (N. Y.) 165; Cowley v. Smyth, 46 N. J. Law, 380, 50 Am. Rep. 432, Erwin's Cas. 405; Boddy v. Henry, 113 Iowa, 462; Bartholomew v. Bentley, 15 Ohio, 659, 45 Am. Dec. 596; Lamm v. Port Deposit Homestead Ass'n, 49 Md. 233, 33 Am. Rep. 246; Erie City Iron Works v. Barber, 106 Pa. 125, 51 Am. Rep. 508; Hexter v. Bast, 125 Pa. 52, 11 Am. St. Rep. 874; Griswold v. Gebbie, 126 Pa. 353, 12 Am. St. Rep. 878; Mahurin v. Harding, 28 N. H. 128, 59 Am. Dec. 401; Bartholomew v. Bushnell, 20 Conn. 271, 52 Am. Dec. 338; Elwell v. Russell, 71 Conn. 462; Munro v. Gairdner, 3 Brev. (S. C.) 31, 5 Am. Dec. 531; Cooley v. King, 113 Ga. 1163; Hiner v. Richter, 51 Ill. 299; Merwin v. Arbuckle, 81 Ill. 501; Holdom v. Ayer, 110 Ill. 448; Hanger v. Evins, 38 Ark. 334; Anderson v. McPike, 86 Mo. 293; Dunn v. White, 63 Mo. 181; Hutchinson v. Gorman (Ark.) 73 S. W. 793; Live Stock Remedy Co. v. White, 90 Mo. App. 498; Grosjean v. Galloway, 82 App. Div. (N. Y.) 380; Warfield v. Clark, 118 Iowa, 69; Summers v. Metropolitan Life Ins. Co., 90 Mo. App. 691. But see Hitchcock v. Gothenburg Water Power Co. (Neb.) 95 N. W. 638.

And this applies equally to concealment of facts—Kirtley's Adm'x v. Shinkle, 24 Ky. L. Rep. 608, 69 S. W. 723.

28. The rule has been applied to the following representations, among others: False representations as to the solvency or credit of another—Haycraft v. Creasy, 2 East, 92; Tryon v. Whitmarsh, 1 Metc. (Mass.) 1, 35 Am. Dec. 339; Young v. Covell, 8 Johns. (N. Y.) 19, 5 Am. Dec. 316; Marsh v. Falker, 40 N. Y. 562; Lord v. Colley, 6 N. H. 99, 25 Am. Dec. 445; Fooks v. Waples, 1 Harr. (Del.) 131, 25 Am. Dec. 64; Einstein v. Marshall, 58 Ala. 153, 29 Am. Rep. 729; Tift v. Harden, 22 Ga. 623, 68 Am. Dec. 512.

Representations by directors of a corporation or other persons, inducing persons to subscribe for or purchase its stock or bonds —Taylor v. Ashton, 11 Mees. & W. 401; Derry v. Peek, 14 App. Cas. 337, Chase's Cas. 249; Cole v. Cassidy, 138 Mass. 437, 52 Am. Rep. 284; Kountze v. Kennedy, 147 N. Y. 124, 49 Am. St. Rep. 651; Wakeman v. Dalley, 51 N. Y. 27, 10 Am. Rep. 551; Morgan v. Skiddy, 62 N. Y. 319; Utley v. Hill, 155 Mo. 232, 78 Am. St. Rep. 569. Compare other cases cited in 3 Clark & M. Corp. p. 2265.

Representation by a third person as to title or value of mortgaged property inducing others to purchase bonds of a corporation secured by the mortgage—Nash v. Minnesota Title Ins. & Trust Co., 163 Mass. 574, 47 Am. St. Rep. 489; Kountze v. Kennedy, 147 N. Y. 124, 49 Am. St. Rep. 651.

Representations by the directors of a bank or others as to its condition, inducing persons to make or leave deposits—Cole v. Cassidy, 138 Mass. 437, 52 Am. Rep. 284; Cowley v. Smyth, 46 N. J. Law, 380, 50 Am. Rep. 432, Erwin's Cas. 405.

(§ 7) *B. Negligence. Unreasonable belief.*—In England, after some difference of opinion among the judges, it has been settled by a decision of the House of Lords.[29] that an action of deceit will not lie for a false representation, if it was made by the defendant in the honest belief that it was true, even though his belief may not have been founded on such grounds as would produce such belief in the mind of a prudent and competent man. In other words, the negligence of the defendant in coming to an honest belief, or the unreasonableness of such belief, is no ground for holding him liable, as a matter of law, in an action of deceit, although it is evidence to be considered in determining, as a fact, whether he entertained such a belief.[30]

In this country some of the courts have followed the decision of the House of Lords, or adopted the same doctrine on the authority of earlier cases.[31] Other courts, however, have considered that the moral wrong is sufficient to support an action of deceit where a person makes, as of his own knowledge, a false representation of a fact susceptible of actual knowledge, when he does not know it to be true, although he may believe it to be true, and may have no intent to deceive. Until recently this was understood to be the settled doctrine in Massachusetts, not only with respect to representations made by one of the parties to a contract inducing the other to enter into it, but also with respect to representations by third persons. "It is well settled in this Commonwealth," said the Massachusetts court, "that the charge of fraudulent intent, in an action for deceit, may be maintained by proof of a statement made, as of the party's own knowledge, which is false, provided the thing stated is not merely a matter of opinion, estimate, or judgment, but is susceptible of actual knowledge; and in such case it is not necessary to make any further proof of an actual intent to deceive. The fraud consists in stating that the party knows the thing to exist when he does not know it to exist; and if he does not know it to exist, he must ordinarily be deemed to know that he does not. Forgetfulness of its existence after a former knowledge, or a mere belief of its existence, will not warrant or excuse a statement of actual knowledge."[32] There are decisions to substantially the same effect in some of the other states.[33] In a later Massachusetts case, however, this

Representations by the seller of personal property, or by his agent, or by a third person, as to the title, condition, soundness, etc. —Irwin v. Sherril, Tayl. (N. C.) 1, 1 Am. Dec. 574; Erie City Iron Works v. Barber, 106 Pa. 125, 51 Am. Rep. 508; Staines v. Shore, 16 Pa. 200, 55 Am. Dec. 492; Emerson v. Brigham, 10 Mass. 197, 6 Am. Dec. 109; French v. Vining, 102 Mass. 132, 3 Am. Rep. 440; Bartholomew v. Bushnell, 20 Conn. 271, 52 Am. Dec. 338; Mahurin v. Harding, 28 N. H. 128, 59 Am. Dec. 401; Campbell v. Hillman, 15 B. Mon. (Ky.) 508, 61 Am. Dec. 195; Kingsbury v. Taylor, 29 Me. 508, 50 Am. Dec. 607; Lewark v. Carter, 117 Ind. 206, 10 Am. St. Rep. 40.

Representations by the vendor of real property, or his agent, or a third person, as to the title, value, condition, number of acres, etc.—Williams v. McFadden, 23 Fla. 143, 11 Am. St. Rep. 345; Griswold v. Gebbie, 126 Pa. 353, 12 Am. St. Rep. 878.

29. Derry v. Peek, 14 App. Cas. 337, Chase's Cas. 249.

30. Pollock, Torts (Webb's Ed.) 362, 363; Derry v. Peek, 14 App. Cas. 337, Chase's Cas. 249; Lord Cranworth in Western Bank v. Addie, L. R. 1 Sc. 145, 168; Taylor v. Ashton, 11 Mees. & W. 401; Glasier v. Rolls, 42 Ch. Div. 436; Angus v. Clifford [1891] 2 Ch. 449; Low v. Bouverie [1891] 3 Ch. 82; Le Lievre v. Gould [1893] 1 Q. B. 491.

31. Cowley v. Smyth, 46 N. J. Law, 380, 50 Am. Rep. 432, Erwin's Cas. 405; Townsend v. Felthousen, 156 N. Y. 618; Kountze v. Kennedy, 147 N. Y. 124, 49 Am. St. Rep. 651; Griswold v. Gebbie, 126 Pa. 353, 12 Am. St. Rep. 878; Boddy v. Henry, 113 Iowa, 462; Allison v. Jack, 76 Iowa, 205; Pieratt v. Young, 20 Ky. L. R. 1815, 49 S. W. 964.

32. Chatham Furnace Co. v. Moffatt, 147 Mass. 403, 9 Am. St. Rep. 727, Burdick's Cas. 237, Erwin's Cas. 437; Litchfield v. Hutchinson, 117 Mass. 195, Chase's Cas. 257.

33. Munroe v. Pritchett, 16 Ala. 785, 50 Am. Dec. 203; Foster v. Kennedy's Adm'r, 38 Ala. 359, 81 Am. Dec. 56; Cabot v. Christie, 42 Vt. 121, 1 Am. Rep. 313; Braley v. Powers, 92 Me. 203; Bird v. Kleiner, 41 Wis. 134; Davis v. Nuzum, 72 Wis. 439; Krause v. Busacker, 105 Wis. 350; West v. Wright, 98 Ind. 335; Kirkpatrick v. Reeves, 121 Ind. 280; Mendenhall v. Stewart, 18 Ind. App. 262; Bullitt v. Farrar, 42 Minn. 8, 18 Am. St. Rep. 485; Hedin v. Minneapolis Med. & Surg. Inst., 62 Minn. 146, 54 Am. St. Rep. 628; Holcomb v. Noble, 69 Mich. 396; Totten v. Burhans, 91 Mich. 495. See, also, Lahay v. City Nat. Bank, 15 Colo. 339, 25 Pac. 704, 22 Am. St. Rep. 407.

doctrine has in effect been limited to representations made by one of the parties to a contract to induce the other party to enter into it, and it has been held that where one merely answers inquiries of a stranger or volunteers information in a matter which does not concern him, although he may know that his statements will be acted upon by the person or persons to whom they are made, he is guilty of no breach of duty if he makes the statements honestly to the best of his ability, and cannot be held liable in an action of deceit because of ignorance or stupidity.[34]

In this country some of the courts hold that a person may be in such a relation to the subject-matter of a representation and to the person or persons to whom it is made, as to impose upon him a duty to know whether the representation is true, and that in such a case an action of deceit may be maintained against him if the representation was false, and he could have known that it was so, although he may have believed it to be true and may have had no fraudulent intent. This doctrine has been applied, for example, to false statements issued by directors of banks, and relied upon by depositors, or purchasers of stock, on the ground that their relation to the bank and to the public is such as to impose a duty to know the truth of statements as to the condition of the bank which they may publish.[35] Other courts, however, do not recognize this doctrine, but require that the representations shall be made fraudulently, or at least recklessly, in order that an action of deceit may be maintained.[36] This is the better view. If the directors of a bank, or others owing a duty to ascertain the truth of representations which they make to the public, violate this duty by making representations in good faith but without having used due care to ascertain their truth, an action against them by persons who are damaged by relying on the representations may and should be based on the ground of negligence, and not on the ground of deceit.[37]

(§ 7) *C. Reckless ignorance.*—Not only in this country, but in England as well, reckless ignorance of one who makes a false statement of fact may be equivalent to knowledge that it is false. "If a man states as fact what he does not believe to be fact, he speaks at his peril; and this whether he knows the contrary to be true or has no knowledge of the matter at all, for the pretence of having certain information which he has not is itself a deceit,"[38]—and in such a case he is just as much liable in an action of deceit as if he knew that his statement was false.[39] "If persons take upon themselves," said Lord Cairns in a leading English case, "to make assertions as to which they are ignorant whether they are true or untrue, they must, in a civil point of view, be held as responsible as if they had asserted

34. Nash v. Minnesota Title Ins. & Trust Co., 163 Mass. 574, 47 Am. St. Rep. 489.

35. Prewitt v. Trimble, 92 Ky. 176; Seale v. Baker, 70 Tex. 283, 8 Am. St. Rep. 592; Tate v. Bates, 118 N. C. 287, 54 Am. St. Rep. 719; Solomon v. Bates, 118 N. C. 311, 54 Am. St. Rep. 725; Houston v. Thornton, 122 N. C. 365, 65 Am. St. Rep. 699.

36. Derry v. Peek, 14 App. Cas. 337, Chase's Cas. 249; Cowley v. Smyth, 46 N. J. Law, 380, 50 Am. Rep. 432, Erwin's Cas. 405; Cole v. Cassidy, 138 Mass. 437, 52 Am. Rep. 284; Wakeman v. Dalley, 51 N. Y. 27, 10 Am. Rep. 551; Kountze v. Kennedy, 147 N. Y. 124, 49 Am. St. Rep. 651; Utley v. Hill, 155 Mo. 232, 78 Am. St. Rep. 569.

37. See Delano v. Case, 121 Ill. 247, 2 Am. St. Rep. 81; Houston v. Thornton, 122 N. C. 365, 65 Am. St. Rep. 699.

38. Pollock, Torts (Webb's Ed.) 367.

39. Taylor v. Ashton, 11 Mees. & W. 401; Evans v. Edmonds, 13 C. B. 777; Derry v. Peek, 14 App. Cas. 337, Chase's Cas. 249; Angus v. Clifford [1891] 2 Ch. 449; Cooper v. Schlesinger, 111 U. S. 148; Bennett v. Judson, 21 N. Y. 238; Hadcock v. Osmer, 153 N. Y. 604, Erwin's Cas. 440; Kountze v. Kennedy, 147 N. Y. 124, 49 Am. St. Rep. 651; Frank v. Bradley & C. Co., 42 App. Div. (N. Y.) 178; Lahay v. City Nat. Bank, 15 Colo. 339, 25 Pac. 704, 22 Am. St. Rep. 407; Aetna Ins. Co. v. Reed, 33 Ohio St. 283; Hedin v. Minneapolis Med. & Surg. Inst., 62 Minn. 146, 54 Am. St. Rep. 628; Griswold v. Gebbie, 126 Pa. 353, 12 Am. St. Rep. 878; Scholfield Gear & Pulley Co. v. Scholfield, 71 Conn. 1; Dunn v. White, 63 Mo. 181; Dulaney v. Rogers, 64 Mo. 201; Caldwell v. Henry, 76 Mo. 254; Chase v. Rusk, 90 Mo. App. 25; Riley v. Bell (Iowa) 95 N. W. 170; Johnson v. Cate, 75 Vt. 100.

Deceit will lie on a false warranty though the maker did not know of its falsity—Piche v. Robbins, 24 R. I. 325.

Evidence of defendant's knowledge that horses were unsound held insufficient—Postal v. Cohn, 83 App. Div. (N. Y.) 27.

that which they knew to be untrue."[40] The ignorance referred to is conscious ignorance,—the state of mind of a man who asserts his belief in a fact "when he is conscious that he knows not whether it be true or false, and when he has therefore no such belief."[41]

(§ 7) *D. Intention to deceive.*—In order that an action of deceit may be maintained for false representation, the representation must have been made with intent to deceive, and it must therefore have been made with intent that it should be acted upon by the person to whom it was made.[43] But it is not always necessary to prove by direct evidence that there was such an intent. An intent to deceive is to be implied if a false representation was made with knowledge of its falsity or recklessly, and if the circumstances were such that it would naturally be relied upon and have the effect of deceiving, for persons are presumed to intend the natural and probable consequence of their voluntary acts.[44]

If a representation is made with knowledge that it is false, or recklessly, and with intent that it shall be acted upon, it is no defense, in an action of deceit, that the defendant did not intend to injure the plaintiff or to obtain any gain for himself,—or, in other words, it is no defense that he did not make the representation from any bad motive.[45] "It is a fraud in law if a party makes representations which he knows to be false, and injury ensues, although the motives from which the representations proceeded may not have been bad."[46]

(§ 7) *E. Failure to disclose facts.*—The rule that a fraudulent intent is necessary to support an action of deceit applies where a failure to disclose facts[47] is relied upon as constituting the deceit, as well as in the case of false representations of fact. An action on an implied warranty may be maintained without proof of fraud, but an action of deceit cannot be maintained because of a failure to disclose facts, unless it is alleged and proved that the defendant knew the facts and intended to deceive.[48] An intent to deceive may be implied, however, if it appears that he knew

40. Reese River Min. Co. v. Smith, L. R. 4 H. L. 64, 79.

41. Lord Herschell, in Derry v. Peek, 14 App. Cas. 337, 359, Chase's Cas. 249, 254.

43. Pollock, Torts (Webb's Ed.) 355, 372; Munro v. Gairdner, 3 Brev. (S. C.) 31, 5 Am. Dec. 531; Mahurin v. Harding, 28 N. H. 128, 59 Am. Dec. 401; Griswold v. Sabin, 51 N. H. 167, 12 Am. Rep. 76; Humphrey v. Merriam, 32 Minn. 197; Young v. Covell, 8 Johns. (N. Y.) 19, 5 Am. Dec. 316; Addington v. Allen, 11 Wend. (N. Y.) 374; Zabriskie v. Smith, 13 N. Y. 322, 64 Am. Dec. 551; Tucker v. White, 125 Mass. 344; Thorp v. Smith, 18 Wash. 277, 51 Pac. 381; Terrell v. Bennet, 18 Ga. 404; Sims v. Eiland, 57 Miss. 83; Holdom v. Ayer, 110 Ill. 448; Lebby v. Ahrens, 26 S. C. 275; Clement, Bane & Co. v. Swanson, 110 Iowa, 106. And see post, § 8.

44. Foster v. Charles, 6 Bing. 396; Boyd's Ex'rs v. Browne, 6 Pa. 310, Burdick's Cas. 242; Cowley v. Smyth, 46 N. J. Law, 380, 50 Am. Rep. 432, Erwin's Cas. 405; Collins v. Denison, 12 Metc. (Mass.) 549; Whiting v. Price, 169 Mass. 576, 61 Am. St. Rep. 307; Munro v. Gairdner, 3 Brev. (S. C.) 31, 5 Am. Dec. 531; Humphrey v. Merriam, 32 Minn. 197; Claflin v. Commonwealth Ins. Co., 110 U. S. 81; Judd v. Weber, 55 Conn. 267; Endsley v. Johns, 120 Ill. 469, 60 Am. Rep. 572; Hudnut v. Gardner, 59 Mich. 341.

45. Foster v. Charles, 7 Bing. 105; Corbett v. Brown, 8 Bing. 33; Polhill v. Walter, 3 Barn. & Ad. 114; Langridge v. Levy, 2 Mees. & W. 519, 4 Mees. & W. 337; Boyd's Ex'rs v. Browne, 6 Pa. 310, Burdick's Cas. 242; French v. Vining, 102 Mass. 132, 3 Am. Rep. 440; Whiting v. Price, 169 Mass. 576, 61 Am. St. Rep. 307; Hedin v. Minneapolis Med. & Surg. Inst., 62 Minn. 146, 54 Am. St. Rep. 628.

46. Tindal, C. J., in Foster v. Charles, 7 Bing. 105.

"Willfully to tell a falsehood, intending that another shall act upon it as if it were the truth, may well be termed fraudulent, whatever the motive which induces it, though it be neither gain to the person making the assertion nor injury to the person to whom it is made"—Lord Herschell, in Derry v. Peek, 14 App. Cas. 337, Chase's Cas. 249.

"The scienter as well as the falsehood being proved, proof of the fraudulent intent is regarded as conclusive. Evidence that the defendant intended no fraud will not be received and the jury will be instructed to find for the plaintiff, though they should be of opinion that the defendant was not instigated by a corrupt motive of gain for himself, or by a malicious motive of injury to the plaintiff"—Depue, J., in Cowley v. Smyth, 46 N. J. Law, 380, 50 Am. Rep. 432.

47. Ante, § 5.

48. Emerson v. Brigham, 10 Mass. 197, 6 Am. Dec. 109; Wilde v. Gibson, 1 H. L. Cas. 605; Chisolm v. Gadsden, 1 Strobh. L. (S. C.) 220, 47 Am. Dec. 550; Hanson v. Edgerly, 29 N. H. 343; Poag v. Charlotte Oil & Fert. Co., 61 S. C. 190; Cowan v. Sapp, 81 Ala. 525; Dowling v. Lawrence, 58 Wis. 282; Sheldon v. Davidson, 85 Wis. 138; Brooke v. Cole, 108 Ga. 251.

the facts, and the circumstances were such that he was under a duty to disclose them.[49]

§ 8. *The representation must be made to the plaintiff. A. In general.*—A false representation, to sustain an action of deceit, must not only have been made with intent to deceive, but it must have been made, at least in contemplation of the law, with intent to deceive the plaintiff, and therefore it must have been made with the intention that he should act upon it.[50] In other words, if a false and fraudulent representation is made to one person, with intent that he only shall act upon it, and a third person acts upon it, the latter cannot maintain an action.[51]

It is not necessary, however, that the representation shall have been made directly to the plaintiff. It is enough if it was made with intent that it should be communicated to and acted upon by him.[52] "Every man must be held liable for the consequences of a false representation made by him to another upon which a third person acts, and so acting is injured or damnified, provided it appear that such false representation was made with the intent that it should be acted upon by such third person in the manner that occasions the injury or loss;"[53] and provided the injury is the immediate or proximate, and not the remote consequence of the representation.[54] Thus where a dealer sold a gun to a man, knowing that it was to be used by the purchaser and his sons, and falsely represented that it was safe and sound, he was held liable in an action of deceit brought by a son of the purchaser, who was injured by the bursting of the gun.[55]

49. See the cases above cited. And see ante, § 5, and cases there cited.

50. Peek v. Gurney, L. R. 6 H. L. 377 (as to which see infra, note 52); Wells v. Cook, 16 Ohio St. 67, 88 Am. Dec. 436; Buschman v. Codd, 52 Md. 202; Munro v. Gairdner, 3 Brev. (S. C.) 31, 5 Am. Dec. 531; Henry v. Dennis, 95 Me. 24, 85 Am. St. Rep. 365; Carter v. Harden, 78 Me. 528; Butterfield v. Barber, 20 R. I. 99; Hunnewell v. Duxbury, 154 Mass. 286; Hindman v. First Nat. Bank, 86 Fed. 1013.

51. One who has been damaged by acting upon false and fraudulent representations made to him as the agent of another, but not intended to be acted upon by him, cannot maintain an action of deceit against the person making the representations—Wells v. Cook, 16 Ohio St. 67, 88 Am. Dec. 436.

Where the defendant had made false representations to the plaintiff to be communicated to the defendant's creditor to obtain extension of time on a claim which was subsequently transferred to the plaintiff, but he did not know that a note given in payment of the claim was to be taken by the plaintiff, it was held that the defendant was not liable to the plaintiff in an action of deceit, as the false representations were not made with intent that they should be acted upon by him—Butterfield v. Barber, 20 R. I. 99.

The seller of a horse, who has falsely represented it to be gentle, is not liable in an action of deceit brought by the wife of the purchaser, for personal injury sustained by her in driving the horse, where he did not know the horse was intended for her use—Carter v. Hardin, 78 Me. 528.

52. Langridge v. Levy, 2 Mees. & W. 519, 4 Mees. & W. 338; Chubbuck v. Cleveland, 37 Minn. 466, 5 Am. St. Rep. 864; Henry v. Dennis, 95 Me. 24, 85 Am. St. Rep. 365; Eaton v. Avery, 83 N. Y. 31, 38 Am. Rep. 389, Burdick's Cas. 245; Waterbury v. Andrews, 67 Mich. 281; Stoney Creek Woolen Co. v. Smalley, 111 Mich. 321; Salmon v. Richardson, 30 Conn. 360, 79 Am. Dec. 255; Bartholomew v. Bentley, 15 Ohio, 659, 45 Am. Dec. 596; Nash v. Minnesota Title Ins. & Trust Co., 159 Mass. 437; James v. Crosthwait, 97 Ga. 673, and cases cited in the notes following.

See the extensive note on this question in 85 Am. St. Rep. 368, et seq.

One is liable to a partnership for a false representation made to one of the partners, although not made to him as such, if he relying thereon, induces the firm to act to its damage—Henry v. Dennis, 95 Me. 24, 85 Am. St. Rep. 365.

Where a person made false representation to others to induce them to form a corporation and to have the corporation enter into a contract with him when organized, which was done, it was held that he was liable to the corporation in an action of deceit, although he had no direct communication with it prior to the contract—Scholfield Gear & Pulley Co. v. Scholfield, 71 Conn. 1.

53. Lord Hatherly, in Barry v. Crosky, 2 Johns. & H. 1, 23.

54. Barry v. Crosky, 2 Johns. & H. 1, 23. See, also, post, § 12.

55. Langridge v. Levy, 2 Mees. & W. 519, 4 Mees. & W. 338.

On the same principle, where a husband purchases a preparation for washing the hair, and the seller, knowing that it is intended for such use by the purchaser's wife, falsely and fraudulently represents that it is fit for the purpose, the wife may maintain an action against the seller for injuries sustained in using it—George v. Skivington, L. R. 5 Exch. 1.

And if a druggist fraudulently labels a noxious preparation as a harmless medicine, and sells it as such to dealers, he will be liable to any one who purchases it from a dealer and is injured by using it. The action would be for deceit or negligence according

(§ 8) *B. Representations to a class or to the public generally.*—A representation may be circulated or published with the intent that it shall be acted upon by a certain class of persons, or by any one of the public to whose hands or notice it may come. In such a case it is deemed to be made to any person, or to any person of the particular class, as the case may be, who may act upon it, and if the representation is fraudulent, and he is damaged, he may maintain an action of deceit.[56] Thus a person who accepts a bill for another, knowing that he has no authority, will be liable in an action of deceit to anyone who may become the holder of the bill in reliance on the acceptance.[57] And where a merchant, for the purpose of obtaining credit, makes a false and fraudulent statement of his financial condition to a commercial agency, he will be liable to customers of the latter who are defrauded by extending credit to him in reliance thereon.[58] A railroad company issuing a timetable thereby represents, unless it is otherwise stated, to any persons meaning to travel by its trains, that it will use reasonable diligence to run trains as therein specified, and if a train which has been taken off is announced as still running, there is a false representation, for which any person who has sustained loss by relying on the representation may sustain an action of deceit.[59]

A prospectus or other statement issued by the directors or promoters of a corporation for the purpose of inducing persons to subscribe for or purchase its stock or bonds, and containing representations which they know to be false, will render them liable to any person who subscribes or purchases in reliance on the representations.[60] And a statement issued by the directors of a bank, containing statements as to its financial condition or other material facts, known by them to be false, will render them, or the bank, or both, liable to any person who is thereby induced to make deposits, or not to withdraw deposits, and loses the same by reason of the bank's insolvency.[61] The same is true of a statement issued by the of-

to the circumstances—Thomas v. Winchester, 6 N. Y. 397, 57 Am. Dec. 455, Chase's Cas. 65, Bigelow's Cas. 567. And see Wellington v. Downer Kerosene Oil Co., 104 Mass. 64.

56. Pollock, Torts (Webb's Ed.) 373; Peek v. Gurney, L. R. 6 H. L. 337; Bartholomew v. Bentley, 15 Ohio, 659, 45 Am. Dec. 596; Hadcock v. Osmer, 153 N. Y. 604, Erwin's Cas. 440; Rohrschneider v. Knickerbocker Life Ins. Co., 76 N. Y. 216, 32 Am. Rep. 290; Eaton v. Avery, 83 N. Y. 31, 38 Am. Rep. 389, Burdick's Cas. 245; Hindman v. First Nat. Bank (C. C. A.) 98 Fed. 562; Stoney Creek Woolen Co. v. Smalley, 111 Mich. 321, and other cases cited in the notes following. And see the valuable note in 85 Am. St. Rep. 368 et seq.

General letter of recommendation—Hadcock v. Osmer, supra. False receipt given by vendor of land to enable the purchaser to deceive others to whom he may afterwards sell—Stoney Creek Woolen Co. v. Smalley, 111 Mich. 321.

57. Polhill v. Walter, 3 Barn. & Ad. 114.

58. Eaton v. Avery, 83 N. Y. 31, 38 Am. Rep. 389, Burdick's Cas. 245. See, also, Converse v. Sickles, 161 N. Y. 666; Bradley v. Seaboard Nat. Bank, 167 N. Y. 427; Gainesville Nat. Bank v. Bamberger, 77 Tex. 48, 19 Am. St. Rep. 738; Mooney v. Davis, 75 Mich. 188, 13 Am. St. Rep. 425; Genesee Sav. Bank v. Michigan Barge Co., 52 Mich. 164; Hinchman v. Weeks, 85 Mich. 535; Furry v. O'Connor, 1 Ind. App. 573.

59. Denton v. Great Northern R. Co., 5 El. & Bl. 860.

60. Peek v. Gurney, L. R. 6 H. L. 377; Clarke v. Dickson, 6 C. B. (N. S.) 453; Bedford v. Bagshaw, 4 Hurl. & N. 538; Andrews v. Mockford [1896] 1 Q. B. 372; Tyler v. Savage, 143 U. S. 79; Morgan v. Skiddy, 62 N. Y. 325; Vreeland v. New Jersey Stone Co., 29 N. J. Eq. 188; Paddock v. Fletcher, 42 Vt. 389; Hubbard v. Weare, 79 Iowa, 678; Gerner v. Mosher, 58 Neb. 135.

It has been held that the office of a prospectus of a new company setting forth matters of fact concerning the position and prospects of the undertaking, while it is to be deemed to be addressed to all persons who apply for shares on the original allotment in the formation of the company, is exhausted when the shares have once been allotted, and that it is not to be deemed to be addressed to persons who may afterwards purchase shares from the original allottees or their transferees—Peek v. Gurney, L. R. 6 H. L. 377. But this does not apply where a prospectus is issued, not merely for the purpose of inviting persons to subscribe for shares, but also for the purpose of inducing them to purchase shares in the market—Andrews v. Mockford [1896] 1 Q. B. 372.

Directors of a national or state bank are liable for false and fraudulent representations as to its financial condition published by them, whereby persons are induced to purchase its stock—Gerner v. Mosher, 58 Neb. 135; Gerner v. Yates, 61 Neb. 100; Houston v. Thornton, 122 N. C. 365, 65 Am. St. Rep. 699.

61. Westervelt v. Demarest, 46 N. J. Law, 37, 50 Am. Rep. 400, Burdick's Cas. 236; Brady v. Evans (C. C. A.) 78 Fed. 558; Zinn v. Mendel, 9 W. Va. 580; Seale v. Baker, 70 Tex. 283, 8 Am. St. Rep. 592; Tate v. Bates, 118 N. C.

ficers of an insurance company by which persons are induced to take out insurance.[62] Officers of a corporation who knowingly sign and issue fictitious certificates of stock are liable in an action of deceit to purchasers or pledgees who are damaged by relying on the certificate as genuine.[63] And directors or other officers who fraudulently cause bonds of the corporation to be falsely indorsed "first mortgage bonds," and place them in the hands of agents for sale, or the corporation itself, will be liable to purchasers of the bonds in reliance on the indorsement.[64]

§ 9. *Necessity for reliance on representations.*—In order that a person may treat a false representation as fraudulent, for the purpose either of avoiding a contract or of an action of deceit, he must have been deceived by it, and one is not deceived by a representation unless he relies upon it and is thereby induced to act.[65] It is clear, therefore, that one cannot maintain an action of deceit for a false and fraudulent representation which he knew to be false or did not believe to be true,[66] or which had not been communicated to him at all.[67] Nor can he maintain such an action if he made and acted solely upon the result of an independent inquiry or investigation, and not at all upon the false representation.[68]

287, 54 Am. St. Rep. 719; Solomon v. Bates, 118 N. C. 311, 54 Am. St. Rep. 725; Stuart v. Bank of Staplehurst, 57 Neb. 569. And see Cole v. Cassidy, 138 Mass. 437, 52 Am. Rep. 284; Cowley v. Smyth, 46 N. J. Law, 380, 50 Am. Rep. 432, Erwin's Cas. 405; Delano v. Case, 121 Ill. 247, 2 Am. St. Rep. 81.

False publication by savings bank directors that directors and stockholders are personally liable to depositors—Westervelt v. Demarest, 46 N. J. Law, 37, 50 Am. Rep. 400.

62. Salmon v. Richardson, 30 Conn. 360, 79 Am. Dec. 255; Pontifex v. Bignold, 3 Scott N. R. 390, 3 Man. & G. 63; Warfield v. Clark, 118 Iowa, 69.

63. Windram v. French, 151 Mass. 547; Bruff v. Mali, 36 N. Y. 200; Huntington v. Attrill, 118 N. Y. 365.

64. Clark v. Edgar, 84 Mo. 106, 54 Am. Rep. 84; Bank of Atchison County v. Byers, 139 Mo. 627.

65. Pollock, Torts (Webb's Ed.) 375, 376; Horsfall v. Thomas, 1 Hurl. & C. 90; Ming v. Woolfolk, 116 U. S. 599; Southern Development Co. v. Silva, 125 U. S. 247; Taylor v. Guest, 58 N. Y. 262, Erwin's Cas. 445; Brackett v. Griswold, 112 N. Y. 454, Erwin's Cas. 416; Wakeman v. Dalley, 51 N. Y. 27, 10 Am. Rep. 551; Zabriskie v. Smith, 13 N. Y. 322, 64 Am. Dec. 551; Tindle v. Birkett, 57 App. Div. (N. Y.) 450; Bennett v. Gibbons, 55 Conn. 450; Flanders v. Cobb, 88 Me. 488, 51 Am. St. Rep. 410; Roscoe v. Sawyer, 71 Vt. 367; Tuck v. Downing, 76 Ill. 71; Holdom v. Ayer, 110 Ill. 448; Dady v. Condit, 163 Ill. 511; Hagee v. Grossman, 31 Ind. 223; Whiting v. Hill, 23 Mich. 399; Page v. Parker, 43 N. H. 363, 80 Am. Dec. 172; Priest v. White, 89 Mo. 609; Anderson v. McPike, 86 Mo. 293; Cole v. Smith, 26 Colo. 506, 58 Pac. 1086; Grosjean v. Galloway, 82 App. Div. (N. Y.) 380; Burnett v. Hensley, 118 Iowa, 575.

The fact that one who rented certain premises for a certain price had been falsely told by the landlord that it had previously rented at that figure does not show that he acted on such statements—Powell v. F. C. Linde Co., 171 N. Y. 675.

The purchaser of a note who relied solely upon the seller's indorsement, and not upon his false representations as to the solvency of the maker, cannot, after failure to take the proper steps to charge the seller as indorser, maintain an action of deceit for the false representations—Flanders v. Cobb, 88 Me. 488, 51 Am. St. Rep. 410.

Reliance on guaranty, and not on false representations—Holdom v. Ayer, 110 Ill. 448.

One who has lost his deposit in a bank by reason of its insolvency cannot hold the directors or other officers liable in an action of deceit because of their false representations as to its condition, if he was not induced thereby to make or leave the deposit—Brady v. Evans (C. C. A.) 78 Fed. 558.

66. Cowen v. Simpson, 1 Esp. 290; Whiting v. Hill, 23 Mich. 399; Bennett v. Gibbons, 55 Conn. 450; Adams v. Sage, 28 N. Y. 103; Cloutman v. Bailey, 62 N. H. 44; Proctor v. McCoid, 60 Iowa, 153; Hooper v. Whitaker, 130 Ala. 324; Anderson v. Burnett, 5 How. (Miss.) 165, 35 Am. Dec. 425; Davis v. Hawkins, 163 Pa. 228; Crehore v. Crehore, 97 Mass. 330, 93 Am. Dec. 98; Marshall v. Gilman, 52 Minn. 88.

67. Horsfall v. Thomas, 1 Hurl. & C. 90; Brackett v. Griswold, 112 N. Y. 454, Erwin's Cas. 416; Lindsey v. Lindsey, 34 Miss. 432.

A purchaser of defective goods who has made no inspection at all cannot maintain an action of deceit against the seller because he patched up a flaw in the goods to prevent the defect from being seen—Horsfall v. Thomas, 1 Hurl. & C. 90.

68. Redgrave v. Hurd, 20 Ch. Div. 1; Farnsworth v. Duffner, 142 U. S. 43; Southern Development Co. v. Silva, 125 U. S. 247; Hagee v. Grossman, 31 Ind. 223; Hall v. Thompson, 1 Smedes & M. (Miss.) 443; Grauel v. Wolfe, 185 Pa. 83; Boyd v. Shiffer, 156 Pa. 100; Crocker v. Manley, 164 Ill. 282, 56 Am. St. Rep. 196; Adams v. Sage, 28 N. Y. 103; Anderson v. McPike, 86 Mo. 293; Lee v. Burnham, 82 Wis. 209; Colton v. Stanford, 82 Cal. 351, 23 Pac. 16, 16 Am. St. Rep. 137.

This does not apply, of course, where the party to whom the representation is made, and who makes an investigation, is prevented by the other party from ascertaining the truth, or the circumstances are such that he cannot ascertain the truth, and he in fact is influenced after all partly by the representation—Smith v. Land & House Property Corp., 28 Ch. Div. 7, Bigelow's Cas. 26.

It is not necessary, however, that the representation complained of shall have been the sole inducement to the plaintiff's action, or even the principal inducement; but it is sufficient if it was a material inducement, although there may have been others.[69] And if this is so, it is not necessary to show that the plaintiff would not have acted if the representation had not been made.[70]

When it is said that a person cannot maintain an action for false and fraudulent representations unless he *acted* upon them, it is not meant that he must have done some positive act, as distinguished from a forbearance to act. One who refrains from doing what he would otherwise have done, in reliance on a false and fraudulent representation made for the purpose of inducing him to do so, acts on the representation within the meaning of the law, and if damaged thereby, may maintain an action.[71]

The fact that a sale of personal property is "with all faults," or a sale and assignment of commercial paper or a mortgage, etc., is "without recourse," is no bar to an action of deceit for false and fraudulent representations of fact by the seller or assignor, if they were relied upon by the purchaser or assignee.[72]

§ 10. *Representations upon which one has a right to rely.*—Whether or not a person has a right to rely upon representations made by another depends upon the character of the representations and the circumstances under which they are made. The courts have recognized the fact that sellers of property and other persons, to induce another to enter into a contract, will resort to commendatory and extravagant expressions and representations as to value, quality, and the like, and have held, within limits, that such representations, although known to be false, and in fact relied upon by the other party, cannot be made the basis of a charge of fraud, either for the purpose of rescinding the contract, or for the purpose of maintaining an action of deceit, unless the representations relate to facts as to which the parties have not equal means of knowledge, or the party making them induces the other to forego making inquiry or examination for himself. The reason is that such representations may be expected, and the party to whom they are made is not supposed to rely upon them. If he does so it is his own folly, and he cannot complain. This principle is expressed in the maxims, *simplex commendatio non obligat*

69. Peek v. Derry, 37 Ch. Div. 541, 14 App. Cas. 337; Clarke v. Dickson, 6 C. B. (N. S.) 453; Safford v. Grout, 120 Mass. 20; Windram v. French, 151 Mass. 547; Roberts v. French, 153 Mass. 60, 25 Am. St. Rep. 611; Morgan v. Skiddy, 62 N. Y. 319; Strong v. Strong, 102 N. Y. 69; Lebby v. Ahrens, 26 S. C. 275; Hicks v. Stevens, 121 Ill. 186; Cabot v. Christie, 42 Vt. 121, 1 Am. Rep. 313; Braley v. Powers, 92 Me. 203; Scholfield Gear & Pulley Co. v. Scholfield, 71 Conn. 1; Lee v. Burnham, 82 Wis. 209; Shaw v. Gilbert, 111 Wis. 165, 184; James v. Crosthwait, 97 Ga. 673; Dashiel v. Harshman, 113 Iowa, 283.

"It was not necessary," said the court in a late Maine case, "that the defendant's false representation should have been the sole, or even the principal inducement for the plaintiff to enter into the contract. If it exerted a material influence upon his mind, although it was only one of several motives acting together, which produced the result, it would be sufficient to render the defendant liable"—Braley v. Powers, 92 Me. 203.

70. "What the plaintiff would have done, but for the false representations, is often a mere speculative inquiry, and is not the test of the plaintiff's right. If the false representations were material and relied upon, and were intended to operate, and did operate, as one of the inducements to the trade, it is not necessary to inquire whether the plaintiff would or would not have made the purchase without this inducement"—Cabot v. Christie, 42 Vt. 121, 1 Am. Rep. 313.

71. Fottler v. Moseley, 179 Mass. 295, (holding that an action could be maintained against a broker for false and fraudulent representations by which the plaintiff was induced to refrain from selling stock, and was thereby damaged); Alexander v. Church, 53 Conn. 561, (holding that a subcontractor on a building could maintain an action against the owner for a false and fraudulent representation by which he was induced not to perfect his lien). Compare Bradley v. Fuller, 118 Mass. 239, where it was held that a creditor could not maintain an action for false representations inducing him not to attach property of his debtor, on the ground that there was no damage. As to this see post, § 12.

72. Schneider v. Heath, 3 Camp. 506; Hexter v. Bast, 125 Pa. 52, 11 Am. St. Rep. 874; West v. Anderson, 9 Conn. 107, 21 Am. Dec. 737. See George v. Johnson, 6 Humph. (Tenn.) 36, 44 Am. Dec. 288.

and *caveat emptor.*[73] "If the buyer trusts to representations which were not calculated to impose upon a man of ordinary prudence, or if he neglects the means of information easily within his reach, it is better that he should suffer the consequences of his own folly than to give him an action against the seller."[74] It may be laid down as a general rule, therefore, that false representations by the vendor of real property to the purchaser, as to the condition, situation, or value of the property, will not support an action of deceit, although known by the vendor to be false, unless the purchaser had no reasonable present means of ascertaining the truth, or was fraudulently induced by the vendor not to make inquiry or examination, or unless there was a special confidential relation between the parties.[75] And the same is true of false representations as to quality or value made by the seller of personal property, stock of corporations, or bonds, notes, and other choses in action.[76]

This principle does not apply, however, to false representations by the seller of property as to extrinsic facts affecting its value, or even to false representations as to value, condition, quality, etc., where the representations are made as statements of fact, and with intent that they shall be relied upon, and the means of ascertaining the truth are not equally open to the purchaser, or he is induced not to make inquiry or examination for himself. In such a case the purchaser has a right to rely upon the representations, and if he does so, and is damaged, he may maintain an action.[77]

Under such circumstances an action of deceit may be maintained, in the case of sales of real property, for a false and fraudulent representation by the vendor or a third person as to the amount of rental or income from the property,[78] or as to

73. Harvey v. Young, Yelv. 21; Stewart v. Stearns, 63 N. H. 99, 56 Am. Rep. 496, Burdick's Cas. 233; Parker v. Moulton, 114 Mass. 99, 19 Am. Rep. 315; Long v. Warren, 68 N. Y. 426, Chase's Cas. 263; Chrysler v. Canaday, 90 N. Y. 272, 43 Am. Rep. 166, Bigelow's Cas. 17.

The leading case is Harvey v. Young, Yelv. 21. In that case the plaintiff in an action of deceit alleged that the defendant stated that a certain term of years which he proposed to sell to him was worth one hundred and fifty pounds, when it was in fact worth but one hundred pounds. After a verdict for the plaintiff judgment was arrested upon the ground that it was the plaintiff's folly to give credit to such an assertion.

74. Page v. Parker, 43 N. H. 363, 80 Am. Dec. 172.

75. Harvey v. Young, Yelv. 21; Long v. Warren, 68 N. Y. 426, Chase's Cas. 263; Chrysler v. Canaday, 90 N. Y. 272, 43 Am. Rep. 166, Bigelow's Cas. 17; Gordon v. Parmelee, 2 Allen (Mass.) 212; Parker v. Moulton, 114 Mass. 99, 19 Am. Rep. 315; Messer v. Smyth, 59 N. H. 41; Gustafson v. Rustemeyer, 70 Conn. 125; Williams v. McFadden, 23 Fla. 143, 11 Am. St. Rep. 345.

76. Davis v. Meeker, 5 Johns. (N. Y.) 354; Ellis v. Andrews, 56 N. Y. 83, 15 Am. Rep. 379; Chrysler v. Canaday, 90 N. Y. 272, 43 Am. Rep. 166, Bigelow's Cas. 17; Salem India Rubber Co. v. Adams, 23 Pick. (Mass.) 256; Brown v. Leach, 107 Mass. 364, Bigelow's Cas. 33; Poland v. Brownell, 131 Mass. 138, 41 Am. Rep. 215; Collins v. Jackson, 54 Mich. 186; Mamlock v. Fairbanks, 46 Wis. 415, 32 Am. Rep. 716; Leavitt v. Fletcher, 60 N. H. 182; Buschman v. Codd, 52 Md. 202.

77. Ekins v. Tresham, 1 Lev. 102; Stewart v. Stearns, 63 N. H. 99, 56 Am. Rep. 496, Burdick's Cas. 233; Chrysler v. Canaday, 90 N. Y. 272, 43 Am. Rep. 166, Bigelow's Cas. 17; Townsend v. Felthousen, 156 N. Y. 618; Cottrill v. Krum, 100 Mo. 397, 18 Am. St. Rep. 549.

Value of territorial rights under patent—Coulter v. Clark (Ind.) 66 N. E. 739.

An inexperienced person is entitled to rely on the representations of a promoter as to the value of corporate stock—Hess v. Draffen (Mo. App.) 74 S. W. 440.

And see the cases more specifically cited in the notes following. "If the rule caveat emptor," said the New Hampshire court, "was of universal application, an action of deceit for false representations in a sale could never be maintained by the purchaser. It may be difficult to draw the line which separates cases within the rule from those to which it does not apply, as each case depends to some extent upon its peculiar circumstances; but it applies generally to cases free from actual fraud, where the parties deal upon an equal footing and with equal means of knowledge; and it is not applicable, as a general rule, where false and fraudulent representations of material facts are made by the vendor, and the parties have not equal facilities for ascertaining the truth. In such cases the purchaser has a right to rely upon the statements of the vendor; and when the purchaser is justified in relying upon the representations of the vendor, the rule caveat emptor does not apply"—Stewart v. Stearns, 63 N. H. 99, 56 Am. Rep. 496, Burdick's Cas. 233.

78. Ekins v. Tresham, 1 Lev. 102; Dobel v. Stevens, 3 Barn. & C. 623; Hecht v. Metzler, 14 Utah, 408, 48 Pac. 37, 60 Am. St.

its quality or condition,[79] the frequency of the arrival and departure of trains,[80] the title,[81] incumbrances,[82] location or boundaries,[83] number of acres,[84] annexation of particular privileges,[85] rights of way or other easements or appurtenances.[86] And the circumstances may be such as to permit the vendor of land to maintain an action for false representations as to land made by the purchaser.[87] So also, where the circumstances are as above stated, an action may be maintained by the purchaser of personal property for false and fraudulent representations as to the quality or condition,[88] or as to the quantity,[89] or the title,[90] etc.; or by the purchaser of a note or bond for a false and fraudulent representation that it is good, or the maker or obligor solvent,[91] or that it is secured by a mortgage on real estate,[92] or that such bonds have sold in the market at a certain price;[93] or by the purchaser of shares of stock for a false and fraudulent representation that it has always paid a certain dividend;[94] or by the purchaser of a patent right for false representations as to what is covered by the patent, or what is not covered by an earlier patent;[95] or as to the cost of manufacturing the article covered by the patent, it being a novel device with no established market price.[96]

Even a representation as to the value of property, real or personal, may be relied upon, and will support an action of deceit, if the parties occupy a special relation of trust and confidence, or if they have not equal means of knowledge, and if the representation is made as a statement of fact and with intent that it shall be relied upon.[97]

Rep. 906; Griffing v. Diller, 21 N. Y. Supp. 407; Wise v. Fuller, 29 N. J. Eq. 257.

79. Van Epps v. Harrison, 5 Hill (N. Y.) 63, 40 Am. Dec. 314; Caldwell v. Henry, 76 Mo. 254; Oakes v. Miller, 11 Colo. App. 374; Holcomb v. Noble, 69 Mich. 396; Smith v. Myers, 56 Neb. 503; Dinwiddie v. Stone, 21 Ky. L. R. 584, 52 S. W. 814; Hecht v. Metzler, 14 Utah, 408, 48 Pac. 37, 60 Am. St. Rep. 906.

80. Holst v. Stewart, 161 Mass. 516, 42 Am. St. Rep. 442.

81. Bostwick v. Lewis, 1 Day (Conn.) 250, 2 Am. Dec. 73; Wardell v. Fosdick, 13 Johns. (N. Y.) 325, 7 Am. Dec. 383; Culver v. Avery, 7 Wend. (N. Y.) 380, 22 Am. Dec. 586; Ward v. Wiman, 17 Wend. (N. Y.) 193; Haight v. Hoyt, 19 N. Y. 464; Atwood v. Chapman, 68 Me. 38, 28 Am. Rep. 5; Reynolds v. Franklin, 39 Minn. 24, 44 Minn. 30, 20 Am. St. Rep. 540; Hunt v. Barker, 22 R. I. 18, 84 Am. St. Rep. 812; Wilson v. Allen (Wis.) 93 N. W. 807.

But see Peabody v. Phelps, 9 Cal. 213; Andrus v. St. Louis Smelting & Ref. Co., 130 U. S. 643.

82. Weber v. Weber, 47 Mich. 569; West v. Wright, 98 Ind. 335; Hutchinson v. Gorman (Ark.) 73 S. W. 793; Riley v. Bell (Iowa) 95 N. W. 170.

83. Foster v. Kennedy's Adm'r, 38 Ala. 359, 81 Am. Dec. 56; Munroe v. Pritchett, 16 Ala. 785, 50 Am. Dec. 203; Caldwell v. Henry, 76 Mo. 254; Hecht v. Metzler, 14 Utah, 408, 48 Pac. 37, 60 Am. St. Rep. 906; Baker v. Sherman, 71 Vt. 439; Gunther v. Ullrich, 82 Wis. 222, 33 Am. St. Rep. 32; Davis v. Nuzum, 72 Wis. 439; Newell v. Horn, 45 N. H. 421; Roberts v. Holliday, 10 S. D. 576; Smith v. Myers, 56 Neb. 503.

84. Starkweather v. Benjamin, 32 Mich. 305; Griswold v. Gebbie, 126 Pa. 353, 12 Am. St. Rep. 878; Lovejoy v. Isbell, 73 Conn. 368; Coon v. Atwell, 46 N. H. 510; Hill v. Brower, 76 N. C. 124; Whitney v. Allaire, 1 N. Y. 305. Compare, however, Gordon v. Parmelee, 2 Allen (Mass.) 212; Mooney v. Miller, 102 Mass. 217; Credle v. Swindell, 63 N. C. 305.

Such a representation is ordinarily not actionable, if a mere expression of opinion or estimate—Bankson v. Lagerlof (Iowa) 75 N. W. 661. See ante, § 2 B.

85. Monell v. Colden, 13 Johns. (N. Y.) 395, 7 Am. Dec. 390.

86. Durkin v. Cobleigh, 156 Mass. 108, 32 Am. St. Rep. 436; Fenley v. Moody, 104 Ga. 790.

87. Where the purchaser of land falsely represented its condition to the vendor, who was his sister, and who lived in another state and was ignorant of its condition, he was held liable to her in an action of deceit—Akers v. Martin (Ky.) 61 S. W. 465.

88. Stewart v. Stearns, 63 N. H. 99, 56 Am. Rep. 496, Burdick's Cas. 233; Stiles v. White, 11 Metc. (Mass.) 356, 45 Am. Dec. 214; Townsend v. Felthousen, 156 N. Y. 618; Trice v. Cochran, 8 Grat. (Va.) 442, 56 Am. Dec. 151; Buschman v. Codd, 52 Md. 202.

89. An action will lie against a seller of carpets laid on the floors of a house for a false representation of fact as to the number of yards therein—Lewis v. Jewell, 151 Mass. 345, 21 Am. St. Rep. 454.

90. Barney v. Dewey, 13 Johns. (N. Y.) 224, 7 Am. Dec. 372; Campbell v. Hillman, 15 B. Mon. (Ky.) 508, 61 Am. Dec. 195.

91. Safford v. Grout, 120 Mass. 20; Andrews v. Jackson, 168 Mass. 266, 60 Am. St. Rep. 390; Binghampton Trust Co. v. Auten, 68 Ark. 299, 82 Am. St. Rep. 295.

92. Whiting v. Price, 172 Mass. 240, 70 Am. St. Rep. 262.

93. Manning v. Albee, 11 Allen (Mass.) 520.

94. Handy v. Waldron, 18 R. I. 567, 49 Am. St. Rep. 794.

95. David v. Park, 103 Mass. 501, Burdick's Cas. 247.

96. Bralcy v. Powers, 92 Me. 203.

A false statement, if made by the seller of property, as to what it cost, or as to what it has sold for or he has been offered for it, etc., has been held by some courts to be in the category of mere dealer's talk, and not to constitute the basis of a charge of fraud,[98] while other courts have held the contrary.[99] Such a representation if made by a third person, and not by the seller, is actionable.[1] And it is actionable even when made by the seller, if there is a special relation of confidence between the parties,[2] or if the price to be paid is based upon the cost, and the cost is falsely misrepresented.[3]

It has been held that an action of deceit will not lie against one for a false and fraudulent representation merely that he is "a person safely to be trusted and given credit to," on the ground that such a representation is mere dealer's talk upon which a person is not supposed to rely,[4] and some courts seem to have gone further and to have held that an action will not lie for false representations by a person that he is solvent or that he has certain resources, fraudulently made for the purpose of procuring credit.[5] The latter proposition, however, is not sustained by the weight of authority. Most of the courts in which the question has arisen have held that a false and fraudulent representation by a purchaser of goods, or other person, that he is solvent, or that he has certain property or resources, made for the purpose of procuring credit, and relied upon by the party to whom it is made in giving credit, is such a fraudulent representation of fact as will support an action of deceit.[6]

An action of deceit lies by a creditor against his debtor for a false and fraudulent representation by the latter that he is insolvent, whereby the creditor is induced to discharge a note or other debt on payment of less than the full amount,[7] or to release claims and accept a note in settlement of pending actions,[8] or whereby he is induced to forbear his efforts to collect the debt until after it has become barred by the statute of limitations.[9]

97. Simar v. Canaday, 53 N. Y. 298, 13 Am. Rep. 523; Chrysler v. Canaday, 90 N. Y. 272, 43 Am. Rep. 166, Bigelow's Cas. 17; Townsend v. Felthousen, 156 N. Y. 618; Manley v. Felty, 146 Ind. 194; Handy v. Waldron, 18 R. I. 567, 49 Am. St. Rep. 794; Picard v. McCormick, 11 Mich. 68; Holcomb v. Noble, 69 Mich. 396.

98. Medbury v. Watson, 6 Metc. (Mass.) 246, 39 Am. Dec. 726; Cooper v. Lovering, 106 Mass. 79; Boles v. Merrill, 173 Mass. 491, 73 Am. St. Rep. 308; Holbrook v. Connor, 60 Me. 578, 11 Am. Rep. 212; Martin v. Jordan, 60 Me. 531; Bishop v. Small, 63 Me. 12; Cole v. Smith, 26 Colo. 506, 58 Pac. 1086.

99. Van Epps v. Harrison, 5 Hill (N. Y.) 63, 40 Am. Dec. 314; Fairchild v. McMahon, 139 N. Y. 290, 36 Am. St. Rep. 701; McAleer v. Horsey, 35 Md. 439; Page v. Parker, 43 N. H. 363, 80 Am. Dec. 172; Ives v. Carter, 24 Conn. 392; Morehead v. Eades, 3 Bush (Ky.) 121; Strickland v. Graybill, 97 Va. 602.

Representation by attorney to client—Manley v. Felty, 146 Ind. 194. See, also, Stoney Creek Woolen Co. v. Smalley, 111 Mich. 321.

1. Medbury v. Watson, 6 Metc. (Mass.) 246, 39 Am. Dec. 726; Kenner v. Harding, 85 Ill. 264, 28 Am. Rep. 615.

2. Teachout v. Van Hoesen, 76 Iowa, 113, 14 Am. St. Rep. 206.

3. Where a person contracts to sell to another a share in property at cost price and falsely states the cost price, the misrepresentation is a fraud—Pendergast v. Reed, 29 Md. 398, 96 Am. Dec. 539.

If a person induces another to join with him in the purchase of land, each to pay one-half of the purchase price, and by falsely representing the purchase price to be greater than it really is obtains from the latter more than one-half of the actual price paid, the deceit is actionable—Bergeron v. Miles, 88 Wis. 397, 43 Am. St. Rep. 911. See, also, Bunn v. Schnellbacher, 163 Ill. 328.

4. Lyons v. Briggs, 14 R. I. 222, 51 Am. Rep. 372.

5. Fisher v. Brown, 1 Tyler (Vt.) 387, 4 Am. Dec. 726. See, also, Dyer v. Tilton, 23 Vt. 313.

Contra, where there was an intention not to pay—Swift v. Rounds, 19 R. I. 527, 61 Am. St. Rep. 791. As to this see ante, § 2 C.

6. Eaton v. Avery, 83 N. Y. 31, 38 Am. Rep. 389; Cain v. Dickinson, 60 N. H. 371; Strong v. Strong, 102 N. Y. 69. See, also, Morse v. Shaw, 124 Mass. 59; Newell v. Randall, 32 Minn. 171, 50 Am. Rep. 562; Mooney v. Davis, 75 Mich. 188, 13 Am. St. Rep. 425. This does not apply to a buyer's false representation as to his financial condition, if it is a mere statement of opinion—Syracuse Knitting Co. v. Blanchard, 69 N. H. 447. As to the right to maintain an action for false representations as to financial condition made to a mercantile agency, see ante, § 8, note 58.

7. Edwards v. Owen, 15 Ohio, 500; Wessels v. Carr, 15 App. Div. (N. Y.) 360.

8. Strong v. Strong, 102 N. Y. 69.

§ 11. *Negligence in relying on representations.*—As we have seen in the preceding section, it is a general rule that a purchaser of real or personal property, or a party to any other contract, has no right to rely upon representations by the seller, or other party, as to value, quality, condition, etc., when he himself has equal means of ascertaining the truth, and no artifice is resorted to in order to prevent him from doing so.[10] And even when a false representation is not connected with a contract, and is made with intent to deceive, and does in fact deceive, the negligence of the person to whom it is made in relying upon it may be so great as to preclude him from maintaining an action of deceit. It is a general principle "that false statements furnish no cause of action, if they relate to matters concerning which the persons to whom they are made, by the use of ordinary care and attention, can obtain full and accurate information. The law will not relieve those who suffer damages by reason of their own negligence or folly."[11]

It is well settled, however, that this principle "does not call for more than reasonable diligence" under all the circumstances of the particular case.[12] It does not apply, therefore, where false representations are fraudulently made with intent that they shall be relied upon, and are in relation to facts as to which the parties have not equal present means of knowledge, or are of such a character, or made under such circumstances, as to reasonably induce the party to whom they are made to forego making an inquiry or examination which he might otherwise make, although such inquiry or examination, if made, would result in discovery of the truth. In such a case the party to whom the representations are made has a right to rely upon them, and if he does so, and is deceived, the other party cannot escape liability for the fraud by saying that he was negligent in relying on the representations instead of making an investigation or examination for himself.[13] "Where one assumes to have knowledge upon a subject of which another may well be ignorant, and knowingly makes false statements regarding it, upon which the other relies, to his injury, we do not think it lies with him to say that the party who took his word and relied upon it as that of an honest and truthful man was guilty of negligence in so doing, so as to be precluded from recovering compensation for the injury which was inflicted upon him under cover of the falsehood."[14]

9. Marshall v. Buchanan, 35 Cal. 264, 95 Am. Dec. 95.

10. Negligence induced by defendant's act is no defense—Leicher v. Keeney (Mo. App.) 72 S. W. 145. Knowledge possessed by plaintiff's agent will not be imputed to him—Lee v. Tarplin, 183 Mass. 52. A statement by a third person that he claimed part of the land sold is sufficient to put plaintiff on inquiry as to defendant's title—Grosjean v. Galloway, 82 App. Div. (N. Y.) 380. Ante, § 10, notes 73 et seq.

11. Silver v. Frazier, 3 Allen (Mass.) 382, 81 Am. Dec. 662. In this case it was held that the owner of land whose agent was induced to erect a house at a different place on the land than he had been directed, by the false representation of a third person as to the boundary of the land, could not maintain an action of deceit against such third person, where there was nothing to show that the true boundary was peculiarly within the knowledge of the latter. See, also, Holst v. Stewart, 161 Mass. 516, 42 Am. St. Rep. 442.

12. Holmes, J., in Whiting v. Price, 172 Mass. 240, 70 Am. St. Rep. 262. See, also, Cottrill v. Krum, 100 Mo. 397, 18 Am. St. Rep. 549, where it was held error for the court to charge the jury that the plaintiff in an action of deceit was required to make "diligent inquiry."

13. Pollock, Torts (Webb's Ed.) 377, 378; Dobell v. Stevens, 3 Barn. & C. 623; Central Ry. Co. v. Kisch, L. R. 2 H. L. 99; Stewart v. Stearns, 63 N. H. 99, 56 Am. Rep. 496, Burdick's Cas. 233; Mead v. Bunn, 32 N. Y. 275; Chrysler v. Canaday, 90 N. Y. 272, 43 Am. Rep. 166, Bigelow's Cas. 17; Frank v. Bradley & C. Co., 42 App. Div. (N. Y.) 178; Townsend v. Felthousen, 156 N. Y. 618; Eaton v. Winnie, 20 Mich. 156, 4 Am. Rep. 377; Linington v. Strong, 107 Ill. 295; Endsley v. Johns, 120 Ill. 469, 60 Am. Rep. 572; Holland v. Anderson, 38 Mo. 55; Caldwell v. Henry, 76 Mo. 254; Clark v. Edgar, 84 Mo. 106, 54 Am. Rep. 84; Cottrill v. Krum, 100 Mo. 397, 18 Am. St. Rep. 549; David v. Park, 103 Mass. 501, Burdick's Cas. 247; Roberts v. French, 153 Mass. 60, 25 Am. St. Rep. 611; Durkin v. Cobleigh, 156 Mass. 108, 32 Am. St. Rep. 436; Holst v. Stewart, 161 Mass. 516, 42 Am. St. Rep. 442; Bean v. Herrick, 12 Me. 262, 28 Am. Dec. 176; Wilson v. Nichols, 72 Conn. 173; Camp v. Camp, 2 Ala. 632, 36 Am. Dec. 423; Lahay v. City Nat. Bank, 15 Colo. 339, 25 Pac. 704, 22 Am. St. Rep. 407; Gunther v. Ullrich, 82 Wis. 222,

Illustrations.—Thus one who subscribes for shares of stock in a corporation on the faith of false representations in a prospectus is not precluded from treating the representations as a fraud because he could have ascertained the truth by examining the records of the corporation.[15] And a purchaser of real or personal property may treat as a fraud false and fraudulent representations as to title, incumbrances, location, etc., made by the vendor or by a third person, if they were intended to be relied upon and were in fact relied upon, although he might have disregarded them and ascertained the truth by examining the public records.[16] If the seller of a business falsely and fraudulently overstates the amount of the business and returns, the buyer is not precluded from maintaining an action of deceit by the fact that he might have examined the books.[17] The purchaser of a large number of carpets in a furnished house is not precluded from maintaining an action of deceit for false representations of the seller as to the number of yards, made as of his own knowledge, because he might have ascertained the truth by a measurement.[18] And the purchaser of a house in the vicinity of a city is not precluded, by the fact that he might have made independent inquiry, from maintaining an action against a broker for false and fraudulent representations as to the frequency of the arrival and departure of trains, where the broker falsely purported to read from a time-table.[19]

A person cannot be held negligent in relying upon representations instead of making inquiry or investigation, where he has no reasonable present opportunity to do so.[20]

Impossibility.—The fact that representations were incapable of being made good does not prevent them from constituting a fraud for which an action of deceit may be maintained, if the plaintiff did not know of the impossibility, and in fact relied upon them.[21]

§ 12. *The necessity for damage.*—To maintain an action for deceit, the plaintiff must show, not only that he relied upon the false and fraudulent representations of the defendant, but also that he has sustained damage by reason of his doing so.[22]

33 Am. St. Rep. 32; Hoock v. Bowman, 42 Neb. 80, 47 Am. St. Rep. 691; Smith v. Myers, 56 Neb. 503; Hunt v. Barker, 22 R. I. 18, 84 Am. St. Rep. 812; Strand v. Griffith (C. C. A.) 97 Fed. 854; Roberts v. Holliday, 10 S. D. 576.

14. Cooley, J., in Eaton v. Winnie, 20 Mich. 156, 4 Am. Rep. 377.

15. Central Ry. Co. v. Kisch, L. R. 2 H. L. 99.

16. Parham v. Randolph, 4 How. (Miss.) 435, 35 Am. Dec. 403; David v. Park, 103 Mass. 501, Burdick's Cas. 247; Grimes v. Kimball, 3 Allen (Mass.) 518; Holland v. Anderson, 38 Mo. 55; Clark v. Edgar, 84 Mo. 106, 54 Am. Rep. 84; Kiefer v. Rogers, 19 Minn. 32; Hunt v. Barker, 22 R. I. 18, 84 Am. St. Rep. 812; Dodge v. Pope, 93 Ind. 481; West v. Wright, 98 Ind. 335; Evans v. Forstall, 58 Miss. 30; Weber v. Weber, 47 Mich. 569; Fenley v. Moody, 104 Ga. 790.

"It is established law that a false representation made for a fraudulent purpose may be relied upon by the party to whom it is made, although the representation is of a fact contained in a public record"—Backer v. Pyne, 130 Ind. 288, 30 Am. St. Rep. 231. See, also, Hoock v. Bowman, 42 Neb. 80, 47 Am. St. Rep. 691.

In Campbell v. Hillman, 15 B. Mon. (Ky.) 508, 61 Am. Dec. 195, it was held that an agent was not relieved from liability for a false and fraudulent representation as to the title of his principal to property sold, by the fact that he informed the purchaser that his principal derived title under a will, which the purchaser had sufficient time and opportunity to examine, where the purchase was made on the faith of the representation, and it was calculated to induce belief and prevent further inquiry. And in Clark v. Edgar, 84 Mo. 106, 54 Am. Rep. 84, it was held that the purchaser of mortgage bonds of a corporation was not precluded from maintaining an action of deceit against the directors for a false and fraudulent representation that the bonds were secured by a first mortgage by the fact that he could have known the truth if he had examined the records.

17. Dobell v. Stevens, 3 Barn. & C. 623.

18. Lewis v. Jewell, 151 Mass. 345, 21 Am. St. Rep. 454.

19. Holst v. Stewart, 161 Mass. 516, 42 Am. St. Rep. 442.

20. Failure to examine records in a distant place—David v. Park, 103 Mass. 501, Burdick's Cas. 247.

Compare, however, Saunders v. Hatterman, 2 Ired. L. (N. C.) 32, 37 Am. Dec. 404.

Failure to examine land which is covered by snow or water—Martin v. Jordan, 60 Me. 531; Jackson v. Armstrong, 50 Mich. 65.

21. McGar v. Williams, 26 Ala. 469, 62 Am. Dec. 739; Kendall v. Wilson, 41 Vt. 567 (sale of perpetual motion machine).

22. Vernon v. Keys, 12 East, 632, 4 Taunt. 488; Smith v. Chadwick, 9 App. Cas. 187;

"Fraud without damage, or damage without fraud, gives no cause of action, but where these two concur, an action lies."[23] It is also necessary that the damage sustained by the plaintiff shall have been the natural and proximate, and not the remote consequence of the false and fraudulent representations,[24] and such as can be clearly defined and ascertained.[25]

It has been held that, in legal contemplation, a creditor sustains no damage from false representations by which he is induced not to attach property of his debtor; although another creditor afterwards attaches the same, and the opportunity of thereby collecting his debt is thus lost to the first creditor.[26] But the soundness of this decision may well be doubted.[27] Where a person is prevented from fulfilling a contract with another, by which he would have profited, by the false and fraudulent representations of a third person made for such purpose, he sustains a damage for which he may maintain an action against the latter; and this is true though the contract may have been unenforceable under the statute of frauds.[28]

§ 13. *Actions.*[29]—A vendee may waive his right of rescission and sue for deceit.[30]

Ming v. Woolfolk, 116 U. S. 599; Hutchins v. Hutchins, 7 Hill (N. Y.) 104, Bigelow's Cas. 76; Alden v. Wright, 47 Minn. 225; Freeman v. Venner, 120 Mass. 424; Dawe v. Morris, 149 Mass. 188, 14 Am. St. Rep. 404; Gilfillen v. Moorhead, 73 Conn. 710; Bartlett v. Blaine, 83 Ill. 27, 25 Am. Rep. 346; Byard v. Holmes, 34 N. J. Law, 296; Jordan v. Pickett, 78 Ala. 331; Fuller v. Hodgdon, 25 Me. 243; Nye v. Merriam, 35 Vt. 438; Bank of Atchison County v. Byers, 139 Mo. 627; Freeman v. McDaniel, 23 Ga. 354; Grosjean v. Galloway, 82 App. Div. (N. Y.) 380.

The Michigan Statute (Comp. L. § 10421) giving a remedy in assumpsit does not dispense with the necessity of resultant damage—In re Pennewell (C. C. A.) 119 Fed. 139.

It is sufficient and proximate damage that goods were obtained long after a credit was induced by misrepresentations—Levy v. Abramson, 81 N. Y. Supp. 344.

A false representation by the seller of property that there is no mortgage thereon will not sustain an action where he has the mortgage released as soon as his attention is called to it, and no injury results—Johnson v. Seymour, 79 Mich. 156.

A stockholder of a corporation suffers no actionable wrong in being induced by false representations to surrender a part of his stock at less than its actual value, where all the other stockholders have surrendered a proportionate amount of their stock at the same valuation—Potter v. Necedah Lumber Co., 105 Wis. 25.

A person who is induced by false and fraudulent representations to indorse a promissory note is not damaged if the maker pays the same, or if he is not compelled to pay it; and it has been held, therefore, that he cannot maintain an action of deceit until he has paid it. Freeman v. Venner, 120 Mass. 424.

But it has been held that an action to recover damages for fraudulently procuring a loan on inadequate security may be maintained as soon as the loan is made, the measure of damages being the difference between the amount of the loan and the value of the securities at the date of the loan, with interest—Briggs v. Brushaber, 43 Mich. 330, 38 Am. Rep. 187.

A wife sustains damage for which she may maintain an action of deceit where she is induced by false and fraudulent representations to join with her husband in a conveyance releasing her inchoate right of dower—Simar v. Canaday, 53 N. Y. 298, 13 Am. Rep. 523.

A man who is induced to marry a pregnant woman by the false and fraudulent representation of the man by whom she is pregnant, sustains a damage in the loss of consortium, if for no other reason, which will support an action of deceit—Kujek v. Goldman, 150 N. Y. 176, 55 Am. St. Rep. 670.

A party is not defrauded when induced by artifice to do that which the law would have compelled him to do—Deobold v. Oppermann, 111 N. Y. 531, 7 Am. St. Rep. 760.

23. Croke, J., in Baily v. Merrell, 3 Bulst. 95.

24. Barry v. Croskey, 2 Johns. & H. 1; Smith v. Chadwick, 9 App. Cas. 187; Silver v. Frazier, 3 Allen (Mass.) 382, 81 Am. Dec. 662; Lamb v. Stone, 11 Pick. (Mass.) 527; Bradley v. Fuller, 118 Mass. 239; Dawe v. Morris, 149 Mass. 188, 14 Am. St. Rep. 404; Jex v. Straus, 122 N. Y. 293.

25. Dawe v. Morris, 149 Mass. 188, 14 Am. St. Rep. 404.

26. Bradley v. Fuller, 118 Mass. 239. See, also, Austin v. Barrows, 41 Conn. 287.

27. See Kelsey v. Murphy, 26 Pa. 78, 84. See, also, Alexander v. Church, 53 Conn. 561, sustaining an action for deceit for false representations by the owner of a building that he had paid in full under a building contract, whereby a subcontractor was induced not to perfect his lien.

If a creditor who has actually levied an execution or attachment upon his debtor's property is induced by the false and fraudulent representations of the debtor or a third person to release the same and forbear enforcement of his claim, and thereby loses his opportunity to collect the same, he may maintain an action of deceit—Marshall v. Buchanan, 35 Cal. 264, 95 Am. Dec. 95; Bradley v. Fuller, 118 Mass. 239.

28. Benton v. Pratt, 2 Wend. (N. Y.) 385, 20 Am. Dec. 623. See, also, Rice v. Manley, 66 N. Y. 82, 23 Am. Rep. 30.

29. An exhaustive treatment of practice in actions for deceit is impracticable be-

Conditions precedent.—It is not usually necessary to put defendant in statu quo,[31] nor repudiate the transaction.[32]

Pleading.—The declaration must show that the representation was of a matter of fact,[33] that defendant knew of its falsity,[34] and that plaintiff relied thereon.[35]

Evidence.—Rulings as to admissibility of evidence are found in the note.[36]

Question for jury.—Whether plaintiff relied on the representations,[37] whether he was justified in so doing,[38] and whether he was negligent therein,[39] are for the jury. Comparatively slight circumstances authorize the submission of the issue to the jury.[40]

Instructions.—Instructions passed on are found in the note.[41]

Damages.—The measure of damages for fraud inducing a purchase is the difference between the value of the property and what it would have been worth had the representations been true.[42]

DEDICATION.

§ 1. Dedication or Conveyance.
§ 2. Who May Dedicate.
§ 3. Mode of Dedication.—In General; Intention; Acceptance; Sale with Reference to Plat; Plats and Maps; By Corporations; Evidence.
§ 4. Effect of Dedication.

§ 1. *Dedication or conveyance.*—A deed with full warranties of title reciting that it is given in consideration for the location of a county seat thereon and in fulfillment of the promise of the grantors to make the conveyance in case such location should be adopted conveys the property in fee simple, and is not a dedication of the land to the use of the public in general.[43]

§ 2. *Who may dedicate.*—A dedication by the state is as binding as a dedication by individuals.[44] School commissioners in Alabama may plat school lands and

cause including so much that belongs in general practice heads. The current cases are here presented to preserve the uniform practice of presenting all current cases. A suit to recover purchase price and expenses alleging that the goods were worthless though fraudulently represented to be valuable is in deceit within statute regulating venue—Howe Grain & Mercantile Co. v. Galt (Tex. Civ. App.) 73 S. W. 828.

30. Leicher v. Keeney (Mo. App.) 72 S. W. 145.

31. Brown v. Lyon (Miss.) 33 So. 284; Hurlbert v. Kellogg Lbr. Co., 115 Wis. 225.

32. Foreclosure of a mortgage given in a trade procured by fraud is not an accord and satisfaction—Lee v. Tarplin, 183 Mass. 52. Acceptance of a deed does not waive false representations as to amount of a mortgage to be assumed by purchaser—Hutchinson v. Gorman (Ark.) 73 S. W. 793.

33. Declaration sufficient as a whole. Fraudulent representations as to title to logs—Hurlbert v. Kellogg Lbr. Co., 115 Wis. 225. Fraudulent representations as to existence of tax title—Koepke v. Winterfield, 116 Wis. 44. Fraudulent representations as to size of tract of land—Leicher v. Keeney (Mo. App.) 72 S. W. 145.

34. Declaration insufficient—Northwestern S. S. Co. v. Dexter Horton & Co., 29 Wash. 565, 70 Pac. 59.

35. Oliver v. Hubbard, 29 Ind. App. 639. Circumstances showing relation between representations and damage should be alleged—Northwestern Mut. Life Ins. Co. v. Breautigam (N. J. Sup.) 54 Atl. 228. A general averment that plaintiff relied on the representations is sufficient—Quinby v. Ayre (Neb.) 95 N. W. 464.

36. Evidence depreciating the value of the goods given by plaintiff in exchange is inadmissible in the absence of a counterclaim—Chase v. Rusk, 90 Mo. App. 25. The possibility of their condition being the inducing motive rather than the representations being speculative—Lee v. Tarplin, 183 Mass. 52. Defendant may show that he acted under advice of counsel—Warfield v. Clark, 118 Iowa, 69. **Variance:** Conspiracy may be proved though not alleged—Butler v. Duke, 39 Misc. (N. Y.) 235.

37. Warfield v. Clark, 118 Iowa, 69.

38. Chase v. Rusk, 90 Mo. App. 25.

39. Lee v. Tarplin, 183 Mass. 52.

40. Mosby v. McKee, etc., Com. Co., 91 Mo. App. 500.

41. An instruction leaving the sufficiency of the declaration to the jury is erroneous—Samuels v. Fuller, 104 Ill. App. 623. Instructions held not to confine truth of representations too closely to time of making them—Von Boeckmann v. Loepp (Tex. Civ. App.) 73 S. W. 849.

42. Warfield v. Clark, 118 Iowa, 69; Lee v. Tarplin, 183 Mass. 52.

43. First German Reformed Church v. Summit County Com'rs, 23 Ohio Circ. R. 553.

44. In this case the state of Pennsylvania laid out the town of Allegheny under an Act which provided that the streets, lanes and alleys should be common highways forever, and some fifty years later issued a patent covering some of the streets—Snowden v. Loree, 122 Fed. 493.

dedicate the streets to the public.[45] A valid dedication may not be made by a mortgagor,[46] or lessor leasing same with the right in the lessee to purchase.[47] A corporation may dedicate some of its land to public use for a highway, if it do not materially interfere with the accomplishment of the purposes of its incorporation.[48]

§ 3. *Mode of dedication. In general.*—Land may be dedicated to public use either in accordance with the statute or by common-law dedication.[49] The following steps are necessary to the latter,—first, a survey or other segregation of the land intended to be devoted to public use; second, the making of a plat representing the division of the tract; and third, the sale of land so surveyed by reference to such plat. As a condition precedent to a common-law dedication which is implied from the sale of lots by reference to a plat thereof, exhibited or improperly recorded, there must, in the absence of an acceptance, have been either a survey of the land or some physical evidence upon the ground, to indicate the location and extent of the easement intended by the donor to be devoted to the use of the public.[50]

Intention.—Dedication of ground to the public is a question of intention,[51] and this is particularly the case where it is sought to establish a common-law dedication.[52] Acts of the owner clearly manifesting an intention to dedicate are sufficient.[53] The intention may sometimes be inferred from the shape of the land, its situation, dimensions, and the like.[54]

The mere fact that landowners acquiesce in or omit to protest against the use of a highway by travelers,[55] or put down sidewalks either voluntarily or by order of the city, to enable persons passing on the street to use it, is not conclusive evidence of intent to dedicate.[56] Where the boundaries of a village include all land to the low-water mark on a navigable stream, the owner of land platting an addition

45. Laws Ala. 1828, p. 31—Roberts v. Matthews (Ala.) 34 So. 624.

46. Newport News & O. P. Ry. & Elec. Co. v. Lake (Va.) 43 S. E. 566.

47. Town of Manitou v. International Trust Co. (Colo.) 70 Pac. 757.

48. Hast v. Piedmont & C. R. Co., 52 W. Va. 396.

49. Nodine v. City of Union, 42 Or. 613, 72 Pac. 582.

50. Nodine v. City of Union, 42 Or. 613, 72 Pac. 582. There is an insufficient common law dedication of streets where the plat does not show the size of lots or the width of the streets, and does not refer to a survey or any natural object nor fix an initial point from which a survey could be extended and there was no acceptance for over 30 years—Id. Public user and control must be long enough to presume a gift—Georgia R. & Banking Co. v. City of Atlanta (Ga.) 45 S. E. 256.

51. Lonaconing, M. & F. Ry. Co. v. Consolidation Coal Co., 95 Md. 630; Guttery v. Glenn, 201 Ill. 275; Langan v. Whalen (Neb.) 93 N. W. 393.

52. Russell v. City of Lincoln, 200 Ill. 511.

53. Lonaconing, M. & F. Ry. Co. v. Consolidation Coal Co., 95 Md. 630; Guttery v. Glenn, 201 Ill. 275; Langan v. Whalen (Neb.) 93 N. W. 393; Town of Manitou v. International Trust Co. (Colo.) 70 Pac. 757. Correspondence of unmarked strip with similar strip, which as they lie parallel form a street—Thompson v. Maloney, 199 Ill. 276. Laying out a cut off and closing up an old road—Lonaconing, M. & F. Ry. Co. v. Consolidation Coal Co., 95 Md. 630.

Deed referring to a street held to show no intent to dedicate an extension of such street—Atlantic City v. Groff, 68 N. J. Law, 670. Claiming compensation disproves intent—Langan v. Whalen (Neb.) 93 N. W. 393. Where the plat of a public square intersecting streets did not show that the streets should cross the square, there was no intent to dedicate streets within the square—Guttery v. Glenn, 201 Ill. 275. The word "reserved" written in a plat shows an intent not to dedicate the part so marked—Cleveland v. Bergen Bldg. & Imp. Co. (N. J. Eq.) 55 Atl. 117. Where a railroad company occupies a street which is a public highway in an unincorporated village, and acquires a lot with intent to open through it a way in place of the street, but does nothing more to evince a dedication than to tear down the fence around the lot and allow its use by the public for a way, this does not constitute an irrevocable dedication—Hast v. Piedmont & C. R. Co., 52 W. Va. 396. An intention that streets on a plat should not be dedicated to the public, is shown where the plat itself contains a statement that the streets were merely for convenience in description and without intent to dedicate same to the public, and this effect is not changed by a later contrary declaration, as a mere declaration of a grantor cannot add to or take from the subject matter of a grant—In re City of New York, 83 App. Div. (N. Y.) 513.

54. Coe College v. Cedar Rapids (Iowa) 95 N. W. 267.

55. Postal v. Martin (Neb.) 95 N. W. 8. A dedication of a road by the proprietor is not shown by fifteen years use of the road by the public with the knowledge and acquiescence of the land owner—Hartley v. Vermilion (Cal.) 70 Pac. 273.

along such stream and laying out the road along the banks thereof will be presumed to have intended to dedicate all the land lying between the street and the river.[57] The question of intention to dedicate is for the jury, where the fact is to be determined from the disputed circumstances.[58]

Acceptance.—The rights of the public resting in a dedication depend on acceptance express or implied by the public,[59] which must be within a reasonable time.[60] An acceptance of a street is peculiarly necessary since it may be a public burden.[61] Until there has been an acceptance, the act of the proprietor in selling lots with reference to the dedication amounts to a mere offer to dedicate and may be withdrawn,[62] and lot owners may close streets included in their premises, where they allow other lot owners necessary ingress and egress to their property.[63] A city is estopped to accept a dedication, where it levied assessments against the property.[64] After the acceptance of a dedication, it is irrevocable.[65] Where there is a good common-law dedication, the grantor may not withdraw the dedication, though there has been no acceptance of it.[66]

There is a good acceptance, where the public authorities take possession of lands dedicated to the public,[67] or where there is a recognition,[68] though not a formal one,[69] of the public rights. Where the land is dedicated by allowing the public use of the property, acceptance and user by the public is sufficient.[70] In Ohio, the ac-

56. Webber v. City of Toledo, 23 Ohio Circ. R. 237.

57. City of Uniontown v. Berry, 24 Ky. L. R. 1692, 72 S. W. 295; rehearing 24 Ky. L. R. 2248, 73 S. W. 774.

58. Langan v. Whalen (Neb.) 93 N. W. 393.

59. Town of Manitou v. International Trust Co. (Colo.) 70 Pac. 757; Georgia R. & Banking Co. v. City of Atlanta (Ga.) 45 S. E. 256; Hast v. Piedmont & C. R. Co., 52 W. Va. 396. Ky. Acts 1902, p. 172, c. 76—Schuster v. Barber Asphalt Pav. Co., 24 Ky. L. R. 2346, 74 S. W. 226; Pease v. Patterson & S. L. Traction Co. (N. J. Law) 54 Atl. 524; Lunkenheimer v. Cincinnati, 23 Ohio Circ. R. 617.

60. Town of Manitou v. International Trust Co. (Colo.) 70 Pac. 757. Where a dedication of lands for street purposes was not accepted by the city for thirty years, the city will then be estopped to assert any right to open streets that have been fenced in for a good share of the period—Schooling v. City of Harrisburg, 42 Or. 494, 71 Pac. 605.

61. Georgia R. & Banking Co. v. City of Atlanta (Ga.) 45 S. E. 256.

62. Town of Manitou v. International Trust Co. (Colo.) 70 Pac. 757.

63. State v. Hamilton (Tenn.) 70 S. W. 619.

64. Lunkenheimer v. Cincinnati, 23 Ohio Circ. R. 617. Where it was not shown that a town ever claimed a certain park containing mineral springs but had required payment of taxes thereon, the fact that the town contributed money to keep the springs in repair because the public was permitted to use them will not amount to a dedication and acceptance of the land as a public park—Town of Manitou v. International Trust Co. (Colo.) 70 Pac. 757.

65. Spring v. Pittsburg, 204 Pa. 530; Oettinger v. District of Columbia, 18 App. D. C. 375.

66. Russell v. City of Lincoln, 200 Ill. 511; Alden Coal Co. v. Challis, 200 Ill. 222. There is an acceptance of an implied dedication of a street, where the owners of land in a city graded the street, built the sidewalk, had telegraph poles strung along it and erected a hotel fronting on the street which had been used as such for two or three years—City of Hammond v. Maher, 30 Ind. App. 286.

67. Town of Manitou v. International Trust Co. (Colo.) 70 Pac. 757. The attempt of a city to open a street embraced in a dedication amounts to an acceptance thereof.

68. Uhlefelder v. City of Mt. Vernon, 76 App. Div. (N. Y.) 349; Russell v. City of Lincoln, 200 Ill. 511.

69. Heffron v. Galveston (Tex. Civ. App.) 75 S. W. 370. There is a valid dedication of land for a public market where a plat dividing the city into lots designates a square for that purpose and the city for more than 40 years cared for and preserved the property and lots were sold with reference to the plat though there was no formal acceptance. Ib. If a landowner dedicate a highway over his land for public use by a valid dedication binding on him, and it is accepted by the public by general use of the way, it becomes a highway, as between the dedicator and public, beyond his revocation of the dedication, though the dedication is not accepted by the county court; but this does not charge the county with maintenance or repair of the highway—Hast v. Piedmont & C. R. Co., 52 W. Va. 396.

70. Wright v. Oberlin, 23 Ohio Circ. R. 509. There is an acceptance of an owner's implied dedication of a street without proof of a formal acceptance, where the owner of the land in a city graded a street, built sidewalks, had telegraph poles strung along it and erected a hotel fronting on the street, which had been used extensively for a number of years—City of Hammond v. Maher, 30 Ind. App. 286. Where the public used a cut off laid out instead of an old road, with the knowledge of the owner and without any objection on his part and same was improved at the public expense, there was a sufficient dedication of the cut off to the

ceptance of a dedication by an ordinance general in its terms is held insufficient, as more than a general acceptance must be shown.[71] The laying out of an extension of a street under legislative authority does not amount to an acceptance of a way previously dedicated, where the land used is not identical with that actually laid out.[72] There is a refusal to accept a way previously dedicated not identical with that actually laid out, where the city on laying out the way allows substantial damages to the abutting owner.[73] On the acceptance of a dedicated way by a city, nominal damages only may be allowed to the abutting owners.[74]

Sale with reference to plat.—If an owner of land lays it out into streets, lots, and alleys, and sells lots with reference to such streets and alleys, by plat or otherwise, it is a dedication of such streets and alleys irrevocable by him, and makes them public as to all lot owners, and consequently as to the general public.[75] Where the contract for the sale of property refers to a map on which streets are shown, there is an assurance by the vendor that the streets have been dedicated to public use,[76] which estops the grantor of land to deny the dedication of a street along the side of a lot conveyed.[77]

Plats and maps.—Statutes governing dedication generally require the making of a plat and provide for its acknowledgment, certification, and record.[78] A statutory plat should mark the corners of the lots and show the width of streets.[79] The plat should be acknowledged by the owner,[80] and not by his agent.[81] An approval by a clerk in a public office is insufficient where the law requires approval by his principal.[82] In New York, it is held that the filing of maps on which a street was laid out will not make the street a public highway so far as the public is concerned.[83]

A mere plat of land upon paper laying off streets, blocks, and houses in a city is not itself a dedication of the street to public use.[84] To constitute a common-law dedication of land to public purposes by means of a plat, the same certainty of description is required as in other forms of conveyance.[85] Long use of an unacknowl-

public and acceptance thereof—Lonaconing, M. & F. Ry. Co. v. Consolidation Coal Co., 95 Md. 630.

71. Cox v. City of Lancaster, 24 Ohio Circ. R. 265.

72, 73, 74. Chapin v. Maine Cent. R. Co., 97 Me. 151.

75. Hast v. Piedmont & C. R. Co., 52 W. Va. 396; Town of Manitou v. International Trust Co. (Colo.) 70 Pac. 757; Nodine v. City of Union, 42 Or. 613, 72 Pac. 582; Schooling v. City of Harrisburg, 42 Or. 494, 71 Pac. 605. Where the inhabitants of a town acquire property interests with reference to streets duly laid out and establish homes and build up trade within the town, the owner of the property may not thereafter deny the dedication either as against the inhabitants or the public at large though no plat of the town was made and title remained in the original owner—Alden Coal Co. v. Challis, 200 Ill. 222. The laying out of lots fronting on streets connecting with public highways and renting the same to inhabitants of a village, amounts to a dedication of the streets to the public use during the time the lots are so rented and occupied —Alden Coal Co. v. Challis, 103 Ill. App. 52. Where a camp meeting association has platted its grounds showing lots and the roads and streets to be used for access thereto and has leased same for a long term of years, there is a dedication of the streets and roads to the use of the lessee, and the association cannot maintain trespass against a person using one of the roads to deliver merchandise to lessees at their request—Thousand Island Park Ass'n v. Tucker, 173 N. Y. 203.

76. Cleveland v. Bergen Bldg. & Imp. Co. (N. J. Eq.) 55 Atl. 117.

77. Davis v. Morris, 132 N. C. 435.

78. Gen. St. Kan. § 4364—Garfield Tp. v. Herman (Kan.) 71 Pac. 517.

79. Coe College v. Cedar Rapids (Iowa) 95 N. W. 267. Courts will not take judicial notice of the width of streets even in cities organized under special charters—Id. There is a complete dedication where the owner makes a plat laying the land out into blocks and lots with intervening streets clearly indicated on the plat and the streets cannot be closed up except where legally authorized—Price v. Stratton (Fla.) 33 So. 644.

80. Deady & Lane's Gen. Laws Or. p. 776, c. 59—Nodine v. City of Union, 42 Or. 613, 72 Pac. 582.

81. Russell v. City of Lincoln, 200 Ill. 511.

82. Approval signed in the officer's name by the clerk (Comp. Laws Mich. § 3372)—City of St. Joseph v. Schulz (Mich.) 93 N. W. 432.

83. Loughman v. Long Island R. Co., 83 App. Div. (N. Y.) 629.

84. Nodine v. City of Union, 42 Or. 613, 72 Pac. 582.

85. Sanders v. Village of Riverside (C. C. A.) 118 Fed. 720; Coe College v. Cedar Rapids (Iowa) 95 N. W. 267.

edged plat by the public will bind the dedicator.[86] Where the owners of land platted it and laid out streets and afterwards by numerous conveyances recognized a later plat by the city engineer, showing the street in a changed position, and made no objection to the public use of the street as so changed, there was a valid dedication of the street not only as platted originally but as changed by the engineer's plat.[87]

Sufficiency of dedication by corporation.—A dedication by a corporation, to bind the corporation beyond revocation, must be made by the directors, or recognized by them in some way, or be expressly ratified by them, or by such public use for such time and under such circumstances as to justify the inference of such ratification. The mere act of officers and agents making such dedication without authority from the directors will not make a valid dedication, unless by such express or implied ratification.[88]

Evidence of dedication.—In every case of an implied dedication, it must appear that the property has been in the exclusive control of the public for a period long enough to raise the presumption of a gift.[89] Claiming compensation negatives a dedication.[90] A deed insufficient in law to amount to a dedication of land for a street may be submitted as a circumstance on the question of dedication.[91] Evidence of dedication is sufficient where the testimony shows that the buildings on a farm had been in existence for more than 100 years and that the only way to reach them from the main highway was by the road in question.[92]

§ 4. *Effect of dedication.*—An acknowledgment and recording of a plat is equivalent to a deed in fee simple of the portion of land set apart to the public use.[93] Where the grantor conveying land retained title to land used for street, it made no difference to the grantee whether the land was used by the public under common law or statutory dedication.[94]

A dedication is binding on remote grantees of the party executing a plat,[95] and purchasers at a judicial sale of platted premises.[96]

Municipal authorities are without power to appropriate property dedicated to the public to the individual use of corporations.[97] In Louisiana, it has been held that although property has been dedicated to the public use, the city may make reasonable changes therein.[98] Where there is a valid dedication of land for highway purposes, an adjoining owner may not invade a portion of the highway on the ground that more space for road purposes was dedicated than was used.[99]

Where there is a conveyance of land to town trustees for a street, the land will revert to the grantor on its abandonment.[100]

86. Wright v. Oberlin, 23 Ohio Circ. R. 509.

87. Sweatman v. Bathrick (S. D.) 95 N. W. 422.

88. Hast v. Piedmont & C. R. Co., 52 W. Va. 396. Oral evidence of a general manager of a railroad company that the company purchased a lot of land for the purpose of dedicating it to public use as a street, and tore down the fences around it, and threw it open to public use, does not prove such dedication of it as to render the dedication irrevocable—Id.

89. Georgia R. & Banking Co. v. City of Atlanta (Ga.) 45 S. E. 256.

90. Admitting existence of highway by claim of damages which is ignored is not conclusive—Langan v. Whalen (Neb.) 93 N. W. 393.

91. Atlantic City v. Groff, 68 N. J. Law, 670.

92. Town of Clarendon v. Rutland R. Co., 75 Vt. 6.

93. Coe College v. Cedar Rapids (Iowa) 95 N. W. 267; Blennerhassett v. Town of Forest City, 117 Iowa, 680.

94. Sweatman v. Bathrick (S. D.) 95 N. W. 422.

The right to use streets dedicated as at common law extends to the general public—Alden Coal Co. v. Challis, 200 Ill. 222.

95. Faller v. Town of Latonia, 24 Ky. L. R. 2476, 74 S. W. 287.

96. Thompson v. Maloney, 199 Ill. 276.

97. First German Reformed Church v. Summit County Com'rs, 23 Ohio Circ. R. 553.

98. Capdevielle v. New Orleans & S. F. R. Co. (La.) 34 So. 868.

99. State v. Thompson, 91 Mo. App. 329.

100. Downes v. Dimock & Fink Co., 75 App. Div. (N. Y.) 513.

DEEDS OF CONVEYANCE.

§ 1. *Nature, form, and requisites. Deeds distinguished from other instruments.*—In determining whether an instrument taking effect on the grantor's death is a deed or a will, the intent of the grantor as to whether it is the passing of title or merely the enjoyment which is thus postponed is the test. This intention is usually determinable from the retention of a power of recall.[1] An instrument in form a contract for deed is sometimes held to be a conveyance.[2] An instrument in form an absolute deed may be held a mortgage, if it appears that it was the intention of the parties that it should stand as security only,[3] and this intent may appear either by parol,[4] in the absence of a statute to the contrary,[5] or by a separate written defeasance.[6] A conveyance of lands upon declared trusts may embody both a conveyance and a declaration of trust in the same writing. The latter phase of the instrument will be properly discussed in a later title.[7] In many if not all particulars the formal requisites of mortgages correspond to those of deeds. Such cases as apply the law to mortgages will be collected under the article on mortgages.

1. Mere nondelivery during the life time of grantor if no power of recall is reserved does not constitute the instrument a will—Phillips v. Phillips (Colo.) 71 Pac. 363; Seifert v. Seifert (Kan.) 71 Pac. 271; Bogan v. Swearingen, 199 Ill. 454. A deed is not testamentary because it provides that grantor shall retain possession during his life time—Christ v. Kuehne, 172 Mo. 118; Adair v. Craig, 135 Ala. 332. Or reserves a rental during grantor's life—Cone v. Cone, 118 Iowa, 458. Conveyance to one for life and remainder to others, the instrument not to take effect till grantor's death, is a will—Coulter v. Shelmadine, 204 Pa. 120. Lost instrument proved merely to be a conveyance to take effect on grantor's death held to be a will—Lincoln v. Felt (Mich.) 92 N. W. 780. An instrument executed as a deed and delivered, stating that grantor "has given" to grantee certain land to belong to him at grantor's death is a deed and not a will—Brice v. Sheffield (Ga.) 44 S. E. 843. Where power of recall is retained the instrument is not a deed—Tarlton v. Griggs, 131 N. C. 216; Johnson v. Johnson, 24 R. I. 571; White v. Watts, 118 Iowa, 549. An instrument in form a deed reciting that grantor was to retain possession of the instrument until his death and to have the use of the property during his life is a will not a deed—Griffin v. McIntosh (Mo.) 75 S. W. 677.

2. Agreements without operative words of conveyance held deeds, the conditions devolving on the purchaser having been performed—Cone v. Cone, 118 Iowa, 458; Yeary v. Crenshaw (Tex. Civ. App.) 70 S. W. 579.

3. A deed absolute in form but given to secure the payment of a debt will be regarded as a mortgage—Fahay v. State Bank (Neb.) 95 N. W. 505. The intent may be inferred, inadequacy of consideration, retention of premises by grantor and a debt to be secured being the principal indicia—Tuggle v. Berkeley (Va.) 43 S. E. 199; Dillon v. Dillon, 24 Ky. L. R. 781, 69 S. W. 1099; Anglin v. Conley, 24 Ky. L. R. 1551, 71 S. W. 926; Thacker v. Morris, 52 W. Va. 220. An agreement that when the land was resold all surplus over a certain debt should be paid to grantor does not make the deed a mortgage—Moran v. Munhall, 204 Pa. 242. An absolute deed with an agreement back giving control and use to grantor during his life is not testamentary—Durand v. Higgins (Kan.) 72 Pac. 567. An agreement for a reconveyance on making certain payments does not make a deed absolute on its face a mortgage—Pumilia v. De George (Tex. Civ. App.) 74 S. W. 813.

4. The rule against parol evidence to vary a writing is not applicable—Brown v. Johnson, 115 Wis. 430; Ross v. Howard, 31 Wash. 393, 72 Pac. 74; Stafford v. Stafford (Tex. Civ. App.) 71 S. W. 984; Hurlbert v. Kellogg Lumber Co., 115 Wis. 225; Northern Assur. Co. v. Chicago Mut. Bldg. & Loan Ass'n, 198 Ill. 474; Beebe v. Wisconsin Mortg. Loan Co. (Wis.) 93 N. W. 1103. But it has been held that in an action at law such proof is inadmissible—Billingsley v. Stutler, 52 W. Va. 92.

Sufficiency of evidence: The evidence that a deed absolute on its face was in fact a mortgage must be clear and convincing—Heaton v. Gaines, 198 Ill. 479; Evans v. Thompson (Minn.) 94 N. W. 692; Carveth v. Winegar (Mich.) 94 N. W. 381; Rose v. Gandy (Ala.) 34 So. 239; Cassem v. Heustis, 201 Ill. 208; Holladay v. Willis (Va.) 43 S. E. 616; In re Holmes, 79 App. Div. (N. Y.) 264; Little v. Braun, 11 N. D. 410. Testimony of grantor alone insufficient by express terms of statute—Schwartz v. Lieber (Miss.) 32 So. 954. Evidence held not to show that a deed absolute on its face was designed as a mortgage—Miller v. Price, 66 S. C. 85.

Bona fide purchasers: A parol defeasance may in the absence of statute be asserted against a bona fide purchaser—Carveth v. Winegar (Mich.) 94 N. W. 381. And an insurer is not a bona fide purchaser within a statute protecting such purchasers—Wolf v. Theresa Village Fire Ins. Co., 115 Wis. 402.

5. Moran v. Munhall, 204 Pa. 242.

6. Wolf v. Theresa Village Fire Ins. Co., 115 Wis. 402. But see Bates v. Sherwood, 24 Ohio Circ. R. 146. Defeasance held to refer to same property as deed—Turner v. Cochran (Tex. Civ. App.) 70 S. W. 1024. A proviso that the deed shall be void if a certain debt is paid makes it a mortgage—Thacker v. Morris, 52 W. Va. 220.

7. See Trusts.

Requisites.—Instruments affecting the title to realty are required to be in writing,[8] and in the proof of their existence the general rules as to best and secondary evidence apply.[9] Holding as to sufficiency of evidence of existence and execution are found in the note.[10] To constitute a valid conveyance by deed, there must be some title in the grantor,[11] words of description identifying the property,[12] apt words of conveyance,[13] execution according to the statutes,[14] delivery[15] during the life of the grantor,[16] and acceptance thereof.[17] As between the parties, a consideration is unnecessary.[18]

8. See article on Frauds, Statute of.

9. See Evidence.

10. Uncontradicted evidence that ancestor of witness had executed a deed held sufficient—Jones v. Bright (Miss.) 33 So. 655. Evidence of execution held sufficient notwithstanding denial by grantor—Royals v. Lacey (Tex. Civ. App.) 73 S. W. 1062. Evidence held sufficient to show that deed was a forgery—Parlin & Orendorff Co. v. Hutsor, 198 Ill. 389; Crate v. Strong, 24 Ky. L. R. 710, 69 S. W. 957. Evidence of forgery held insufficient—Riviere v. Wilkens (Tex. Civ. App.) 72 S. W. 608. See, also, article on Lost Instruments as to sufficiency of evidence on proceeding to establish lost deed.

11. Jordan v. Fennacy, 24 Ky. L. R. 1636, 71 S. W. 900.

At common law, and in most of the states the rule is still in force, a deed to lands of which the grantor was at the time disseised is void being in effect a transfer of a litigious right. This doctrine is treated in the article Champerty and Maintenance.

12. Huntress v. Portwood, 116 Ga. 351. Description sustained though extrinsic evidence was necessary—Gates v. Paul (Wis.) 94 N. W. 55. "Frye's" instead of "Smith Frye's" addition sufficient where there was but one Frye's addition—Langlois v. Cameron, 201 Ill. 301. Description supplemented by reference to other recorded deeds sufficient—Sheafer v. Mitchell, 109 Tenn. 181. But not where the deed referred to is misdescribed as to date—Rountree v. Thompson (Tex. Civ. App.) 71 S. W. 574, 72 S. W. 69. Description by metes and bounds the measures being in blank insufficient—Ellis v. LeBow (Tex. Civ. App.) 71 S. W. 576. If otherwise adequately described the fact that part of land was in another county than description states does not invalidate—Morrison v. Casey (Miss.) 34 So. 145. A date line at the top giving city and state may be referred to in aid of a description—Horton v. Murden (Ga.) 43 S. E. 786.

13. Technical words of conveyance are not necessary in Georgia—Horton v. Murden (Ga.) 43 S. E. 786. Instruments held to be deeds and not mere agreements to convey—Cone v. Cone, 118 Iowa, 458; Yeary v. Crenshaw (Tex. Civ. App.) 70 S. W. 579.

14. **Signature:** In Georgia a signature in the recitals is sufficient—Horton v. Murden (Ga.) 43 S. E. 786. Parol authorization of agent to sign followed by acquiescence sufficient between parties—Saunders v. King (Iowa) 93 N. W. 272. **Seal:** Not required in New York—Leask v. Horton, 39 Misc. (N. Y.) 144. **Acknowledgment** is not necessary to the validity of the deed as between the parties. See Acknowledgment No. 1, p. 17.

15. Manual tradition unnecessary if parties intended to deliver and believed they had done so (Hildebrand v. Willig, 64 N. J. Eq. 249); and e converso obtaining and recording contrary to the intent of grantor (Schaefer v. Purviance [Ind.] 66 N. E. 154; McNicholas v. Moran, 204 Pa. 165); or in violation of a condition on which the deed was given to grantee (Kenney v. Parks, 137 Cal. 527, 70 Pac. 556) is no delivery. Recordation by grantor with intent to deliver is a sufficient delivery—Ford v. Boone (Tex. Civ. App.) 75 S. W. 353. Where deed was given to third person with right to recall and grantor exercised rights of ownership thereafter and the deed was not delivered until after his death there was no sufficient delivery—Johnson v. Johnson, 24 R. I. 571. Unconditional delivery to a third person for grantee is sufficient—Callahan v. James (Cal.) 71 Pac. 104; Marshall v. Hartzfelt (Mo. App.) 71 S. W. 1061; Oliver v. Wilhite, 201 Ill. 552.

Presumptions and evidence as to delivery: A deed in the possession of grantee is presumed to have been delivered—Inman v. Swearingen, 198 Ill. 437. On the day when it bears date—Atlantic City v. New Auditorium Pier Co., 63 N. J. Eq. 644. Recording by grantor raises presumption of delivery—Luckhart v. Luckhart (Iowa) 94 N. W. 461; Tarlton v. Griggs, 131 N. C. 216; Hildebrand v. Willig, 64 N. J. Eq. 249. But acknowledgment raises no presumption of delivery—Tarlton v. Griggs, 131 N. C. 216. Evidence held sufficient to rebut presumption arising from recordation—Smith v. Smith, 116 Wis. 570. Or presumption arising from possession by grantee—Barron v Mercure (Mich.) 93 N. W. 1071. Evidence of delivery held sufficient—Inman v. Swearingen, 198 Ill. 437; Kuhn's Adm'r v. Kuhn, 24 Ky. L. R. 787, 69 S. W. 1077. Evidence held sufficient though deed was unrecorded and in possession of grantor—McGuire v. McGuire, 81 N. Y. Supp. 1134.

16. Delivery to a third person to be given to grantee after grantor's death is sufficient if grantor relinquishes all control—Bogan v. Swearingen, 199 Ill. 454. But otherwise if right of recall is retained by grantor—Tarlton v. Griggs, 131 N. C. 216; Johnson v. Johnson, 24 R. I. 571. The fact that at grantor's direction one of the deeds was delivered before his death does not show that he retained control—White v. Watts, 118 Iowa, 549. Delivery to grantee with direction to record after grantor's death is sufficient—Seifert v. Seifert (Kan.) 71 Pac. 271.

17. Wells v. Hobson, 91 Mo. App. 379. Acts of ownership after delivery constitute an acceptance—White v. Watts, 118 Iowa, 549; Williams v. Van Geison, 76 App. Div. (N. Y.) 592; Ewing v. Stanley, 24 Ky. L. R. 633, 69 S. W. 724.

18. See article on Fraudulent Conveyances for effect of want of consideration as to creditors.

Validity of assent.[19]—As in all other contracts, the parties must be competent to contract,[20] and must be free from fraud,[21] mistake,[22] and undue influence.[23]

§ 2. *Recordation.*[24]—The recording of a deed is unnecessary as between the parties,[25] but under the registry laws an unrecorded deed is of no effect against a subsequent purchaser in good faith,[26] and a judgment creditor is a purchaser within

19. This subject will be more fully treated in forthcoming articles on Incompetency, Duress, Fraud and Undue Influence and Mistake. Proceedings to set aside are treated in Cancellation of Instruments. Ante, page 413.

20. Man of 73 held competent—Stringfellow v. Hanson, 25 Utah, 480, 71 Pac. 1052. Woman of 73 held competent—Dean v. Dean, 42 Or. 290, 70 Pac. 1039. Woman of 76 held incompetent—Chadd v. Moser, 25 Utah, 369, 71 Pac. 870. Habitual drunkard held incompetent—Hardy v. Dyas, 203 Ill. 211. Ability to understand the nature and consequences of the transaction is the test of competency —Stringfellow v. Hanson, 25 Utah, 480, 71 Pac. 1052. If grantor was able to understand the nature and value of his property and how he wanted to dispose of it he is competent—Hayman v. Wakeham (Mich.) 94 N. W. 1062.

21. Deed set aside where there was great disparity of intelligence and grantor reposed confidence in grantee—Cannon v. Gilmer, 135 Ala. 302. False representation as to purpose for which property was to be used held sufficient to set aside—Brett v. Cooney, 75 Conn. 338. Transfers by which the attorney in fact of an insane person obtained his principal's land held fraudulent—Clay v. Hammond, 199 Ill. 370. Conveyance by way of compromise where grantee's claim was fraudulently made set aside—Dashner v. Buffington, 170 Mo. 260. Evidence of fraud held insufficient—Stewart v. Dunn, 77 App. Div. (N. Y.) 631; Haynes v. Harriman (Wis.) 92 N. W. 1100; Simon's Estate, 20 Pa. Super. Ct. 450. Evidence of fraud sufficient —Barry v. Murphy, 24 Ky. L. R. 953, 70 S. W. 276; Wilson v. Winsor, 24 Ky. L. R. 1343, 71 S. W. 495; Highland v. Highland, 24 Ky. L. R. 2242, 73 S. W. 791. The burden of proving fraud is on the party alleging it—Simon's Estate, 20 Pa. Super. Ct. 450. Conveyance by old and illiterate woman to her pastor (McClellan v. Grant, 83 App. Div. [N. Y.] 599); or physician (Norfleet v. Beall [Miss.] 34 So. 328) held presumptively fraudulent.

22. Mistake must be mutual—Stewart v. Dunn, 77 App. Div. (N. Y.) 631. Evidence held insufficient to show that deed by an old woman to her son was induced by mistake as to her duty to support him—Chadd v. Moser, 25 Utah, 369, 71 Pac. 870.

23. Influence arising from affection is unobjectionable—Adair v. Craig, 135 Ala. 332. Relationship of brother and sister raises no presumption—Reeves v. Howard, 118 Iowa, 121. Conveyance from wife to husband without consideration presumptively invalid —Wilson v. Winsor, 24 Ky. L. R. 1343, 71 S. W. 495. Evidence of undue influence as between principal and agent held insufficient—Adair v. Craig, 135 Ala. 332. As between relatives—Chowning v. Howser, 24 Ky. L. R. 1951, 72 S. W. 748; Ryan v. Ryan (Mo.) 73 S. W. 494; Chadd v. Moser, 25 Utah, 369, 71 Pac. 870; Vance v. Davis (Wis.) 95 N. W. 939; Stringfellow v. Hanson, 25 Utah, 480, 71 Pac. 1052; Reeves v. Howard, 118 Iowa, 121; Dean v. Dean, 42 Or. 290, 70 Pac. 1039; Apland v. Pott (S. D.) 92 N. W. 19. Evidence of undue influence held sufficient—Highland v. Highland, 24 Ky. L. R. 2242, 73 S. W. 791; Babcock v. Clark, 79 App. Div. (N. Y.) 502; Barry v. Murphy, 24 Ky. L. R. 953, 70 S. W. 276.

24. This subject will be more fully treated in the forthcoming article on Notice and Record of Tittle. See, also, Adverse Possession record as color of title and Evidence admissibility of certificate of record in evidence.

25. Whalon v. North Platte Canal & Colonization Co. (Wyo.) 71 Pac. 995.

26. Goosby v. Johnson, 24 Ky. L. R. 610, 69 S. W. 697; Waggoner v. Dodson (Tex. Civ. App.) 71 S. W. 400.

Who is a bona fide purchaser: To take as against a prior deed the purchaser must have had no actual knowledge thereof—Michigan Trust Co. v. City of Red Cloud (Mich.) 92 N. W. 900; Buchholz v. Leadbetter, 11 N. D. 473. Though in a few states the states do not require good faith and admit of no substitute for the record—Collins v. Davis, 132 N. C. 106. And must not have been in possession of information putting him on inquiry—Truth Lodge v. Barton (Iowa) 93 N. W. 106; Atlantic City v. New Auditorium Pier Co., 63 N. J. Eq. 644; Albany Exch. Sav. Bank v. Brass, 171 N. Y. 693; Bigelow v. Brewer, 29 Wash. 670, 70 Pac. 129; Beebe v. Wisconsin Mortg. Loan Co. (Wis.) 93 N. W. 1103. Such as possession of the premises—Storthz v. Chapline (Ark.) 70 S. W. 465; Allen v. Moore, 30 Colo. 307, 70 Pac. 682; Kirkham v. Moore, 30 Ind. App. 549; Gillespie v. Buffalo, R. & P. Ry. Co., 204 Pa. 107; Gray v. Zelmer (Kan.) 72 Pac. 228; Linder v. Whitehead, 116 Ga. 206. Under the North Carolina act possession under an unrecorded deed gives no rights against a subsequent grantee—Collins v. Davis, 132 N. C. 106. Payment of value is essential to constitute one a bona fide purchaser—Grove v. Grove (Va.) 42 S. E. 312; Mackey v. Gabel, 117 Fed. 873; Sullivan v. McLane (Tex.) 70 S. W. 949; Trice v. Comstock (C. C. A.) 121 Fed. 620. "A valuable consideration" means a fair and reasonable price—Collins v. Davis, 132 N. C. 106. One who had agreed to purchase and had begun a suit for specific performance at the time of recording the deed is not a "subsequent purchaser"—Noyes v. Crawford, 118 Iowa, 15. Where one buys property described generally as all the land owned by grantor in a certain state he is entitled to the protection of the registry laws as to all land which grantor appeared by the records to own—Boynton v. Haggart (C. C. A.) 120 Fed. 819.

Sufficiency of record as notice: A record not indexed is not notice—Koch v. West (Iowa) 92 N. W. 663. But under a statute providing that a deed takes effect from the time it is filed for record, it has been held that a

this rule.[27] As a prerequisite to recording, it is generally provided that a deed shall be executed with certain formalities not essential to the mere passing of title between the parties,[28] or as a substitute, proved by a subscribing witness.[29]

§ 3. *Interpretation and effect.*[30] *General rules.*—The interpretation of a deed is for the court.[31] A deed will be construed against the grantor,[32] but reservations are to be construed in his favor.[33]

Designation of parties.[34]—The word "administratrix" affixed to the name of grantee is descriptio personae.[35] "Heirs" in designation of grantees is frequently held to mean "issue."[36]

Description of property conveyed.—A deed ordinarily conveys only such land as is clearly within its terms,[37] but passes without mention all that is appurtenant,[38] or affixed to the realty[39] and a reservation of a building has been held to include land inclosed with it.[40] On the other hand latent equities will not diminish the property clearly conveyed.[41] In case of conflict, metes and bounds control statement of quantity,[42] but statement of quantity prevails over a reference to the land as that obtained by grantor from a certain source.[43]

deed is effective against a third person without notice though recorded in the wrong book—Durrence v. Northern Nat. Bank (Ga.) 43 S. E. 726. In some states the statute allows a specified time for recording deeds, after which they shall be void as to bona fide purchasers. Under such a statute a deed not recorded within such time is nevertheless notice after it is recorded (Blackwell v. British American Mortg. Co., 65 S. C. 105); but if neither of two deeds is recorded within the time limited that first recorded takes precedence—McLeod v. Lloyd (Or.) 71 Pac. 795. The record of a deed by the grantee to another is no notice of the deed to him—Goosby v. Johnson, 24 Ky. L. R. 610, 69 S. W. 697; Hart v. Gardner (Miss.) 33 So. 442; Boynton v. Haggart (C. C. A.) 120 Fed. 519. But reference in a recorded deed to other deeds puts purchasers on inquiry as to the same—Mitchell v. D'Olier, 68 N. J. Law, 375; Waggoner v. Dodson (Tex.) 73 S. W. 517. The fact that one deed in the chain is a quit claim is no notice of outstanding unrecorded deeds—Boynton v. Haggart (C. C. A.) 120 Fed. 819.

Evidence of recording held sufficient—Riviere v. Wilkens (Tex. Civ. App.) 72 S. W. 608.

27. Gary v. Newton, 201 Ill. 170.

28. See, also, article on Acknowledgment, ante, p. 17, and forthcoming article on Mortgages. Certificate of acknowledgment held sufficient though it did not show whether notary was appointed by court or governor—Durrence v. Northern Nat. Bank (Ga.) 43 S. E. 726. Deed with but one subscribing witness may be recorded, under Hart, Dig. art. 2760—Riviere v. Wilkens (Tex. Civ. App.) 72 S. W. 608.

29. The affidavit of a subscribing witness who did not in fact see the grantor execute the deed is insufficient—Baxley v. Baxley, 117 Ga. 60.

30. Only the interpretation of the language of deeds is here treated. The nature of estates and rights incident thereto will be discussed in forthcoming articles on Real Property and Life Estates, Remainders and Reversions.

31. Holmes v. Weinheimer (S. C.) 44 S. E. 82. Interpretation of the language of the deed is for the court but application of the description to the land when extraneous evidence has been admitted is for the jury—Snooks v. Wingfield, 52 W. Va. 441.

32. Van Winkle v. Van Winkle, 39 Misc. (N. Y.) 593.

33. Sears v. Ackerman, 138 Cal. 583, 72 Pac. 171.

34. A deed reciting receipt of consideration from "Mrs. S" and with grant and habendum to "said S" conveys to Mrs. S, not to her husband—Day v. Shiver (Ala.) 33 So. 831.

35. Richardson v. Biglane (Miss.) 33 So. 650.

36. So held where a life estate was given to grantor's wife with remainder to the heirs of grantor and his wife—Beedy v. Finney, 118 Iowa, 276.

37. The burden is on grantee to show that a deed embraces lands not clearly covered by its terms—Peery v. Elliott (Va.) 44 S. E. 919.

38. Railroad embankment and rails—Van Husan v. Omaha Bridge & T. Ry. Co., 118 Iowa, 366. Easement of drainage—Overton v. Moseley, 135 Ala. 599. Right to obtain water through pipes laid in street—Mulrooney v. Obear, 171 Mo. 613.

39. See forthcoming article on Fixtures.

40. A reservation of a chapel together with the land on which the same stood has been held to include stables 40 feet from the chapel and inclosed with it—Weed v. Woods, 71 N. H. 581.

41. Where a husband supplied a deficiency in the purchase price of lands bought by executors as an investment of a legacy to the wife and a deed was made to her with his consent she took the entire tract and not merely the proportion represented by the amount paid by the executors—Clay v. Clay's Guardian, 24 Ky. L. R. 2016, 72 S. W. 810.

42. Seeders v. Shaw, 200 Ill. 93.

See also title Boundaries ante, p. 346.

43. A deed of an undivided interest in 2,500 acres "to which I am entitled as widow," etc., conveys an interest in 2,500 acres only though the widow's share was a larger tract—Laufer v. Powell (Tex. Civ. App.) 71 S. W. 549. A deed of an undivided three-sevenths "being the interest I hold

Quantum of estate conveyed.—A quitclaim deed conveys only such interest as grantor may have,[44] but where one conveys with warranty, title subsequently acquired by him accrues to his grantee.[45] The rule in Shelley's Case, though abolished in some states, is followed in others.[46] Limitations of the estate conveyed must be in the granting or habendum clause,[47] but these clauses will be construed together.[48] A deed to several without designation of interest ordinarily makes them joint tenants at common law, but the rule by statute in many states makes them tenants in common only.[49]

A reservation of timber reserves title thereto and not merely the right to remove within a reasonable time.[50] A reserved right may be sold if so provided in the deed.[51]

Conditions and restrictions.[52]—A breach of a condition does not work a forfeiture in the absence of words to that effect,[53] but where a forfeiture is stipulated it may be enforced though there is a remedy at law,[54] but where the failure to perform was due to mistake, grantee will be allowed to pay damages.[55] Where the condition is severable, the forfeiture will be proportioned to the breach.[56] Grantor can-

as heir at law," etc., conveys a three-sevenths interest though grantor's interest as heir was less—Johnson v. Johnson, 170 Mo. 34. A conveyance of all grantor's right, title and interest is not limited by a recital of his interest which states it as less than it is—Murphy v. Murphy (N. C.) 43 S. E. 922. But a conveyance of all grantor's interest will be restricted to his interest by purchase only where such intent appears—Curtis v. Zutavern (Neb.) 93 N. W. 400.

44. Curtis v. Zutavern (Neb.) 93 N. W. 400. Subject to previous deeds by grantor—Wetzstein v. Largey, 27 Mont. 212, 70 Pac. 717. Equitable interests pass—Uihlein v. Matthews, 172 N. Y. 154; Cauble v. Worsham (Tex.) 70 S. W. 737; Sowles v. Lewis, 75 Vt. 59.

45. The rule that where one without title attempts to convey in fee subsequently acquired title inures to the benefit of grantee (Rev. St. § 4591) does not make such subsequent title accrue to purchasers at sales for taxes levied against the grantee, but grantor retains such title—Wilson v. Fisher, 172 Mo. 10. Where land was adversely held at the time of a conveyance with warranty, the conveyance is void and an after acquired title does not accrue to the grantee—Altemus v. Nichols (Ky.) 74 S. W. 221. After acquired title does not inure to the grantee unless the deed contains covenants of seisin or warranty—Altemus v. Asher, 24 Ky. L. R. 2401, 2416, 74 S. W. 245. A quitclaim deed with habendum to grantee and his heirs forever will convey an after acquired title—West Seattle Land & Imp. Co. v. Novelty Mill Co., 31 Wash. 435, 72 Pac. 69.

See, also, Estoppel.

46. A deed to one and his heirs with reversion on failure of heirs—Davis v. Sturgeon, 198 Ill. 520. Or of a life estate to one with remainder to his heirs, vests the fee in grantee—Shapley v. Diehl, 203 Pa. 566. But it is otherwise as to a grant to one and his "bodily heirs"—Utter v. Sidman, 170 Mo. 284. Or "heirs of his body"—Mattison v. Mattison (S. C). 43 S. E. 874. And a grant of a life estate with habendum in fee to his "heirs" has been held not to vest the fee in grantee—Christ v. Kuehne, 172 Mo. 118.

47. Humphrey v. Potter, 24 Ky. L. R. 1264, 70 S. W. 1062. And a grant of a life estate to a married woman is not enlarged by an added clause that she is to hold the same free from her husband's "control, liabilities, curtesy and all other interest"—Chew v. Kellar, 171 Mo. 215. Nor does a clause granting power to grantee to appoint remainderman among his heirs—Taylor v. Adams, 93 Mo. App. 277.

48. Grant without limitation with habendum to heirs on death of grantee gives life estate to grantee—Beedy v. Finney, 118 Iowa, 276. As does a grant to one and habendum to him and his "bodily heirs" though the covenant of warranty runs to "heirs and assigns"—Utter v. Sidman, 170 Mo. 284. Or a grant to one of a life estate with habendum to his heirs in fee—Christ v. Kuehne, 172 Mo. 118.

49. A grant to one and his children makes them joint tenants—Hallam v. Ashford, 24 Ky. L. R. 870, 70 S. W. 197. Where one and his "children" are named as parties of the second part they take as tenants in common though the granting and habendum clauses run to the "party" of the second part—Tyler v. Lilly (Miss.) 33 So. 445. A deed providing that a dooryard adjacent to the granted premises should be used by grantor and grantee in common gives grantee an easement and not a tenancy in common—Deavitt v. Washington County (Vt.) 53 Atl. 563. Where the grant is to two persons jointly, with habendum to them, their heirs and assigns, a clause that one should not come into possession until the death of the other does not make the person whose enjoyment is deferred a mere remainderman—Pickett v. Garrard, 131 N. C. 195.

50. Sears v. Ackerman, 138 Cal. 583, 72 Pac. 171.

51. Right to use wall of granted building for party wall—Alexander v. Parks, 24 Ky. L. R. 2113, 72 S. W. 1105.

52. See article on Buildings, ante, p. 404 for restrictions and character of erections and use thereof.

53. Rankin Regular Baptist Church v. Edwards, 204 Pa. 216.

54. Wanner v. Wanner, 115 Wis. 196.

55. Laking v. French, 183 Mass. 9.

not claim a forfeiture because he was permitted by grantee to break the condition.[57] Holdings as to breach of particular conditions are found in the notes.[58] On condition broken, grantor need not demand performance,[59] and delay in suing is no bar.[60] Grantor is entitled to rents and profits from time of suit.[61] No language in the deed will permit others than the grantor or his heirs to re-enter for condition broken.[62]

Extinguishment of rights.—Title is not divested by a return of the deed to the grantor.[63]

DEFAULTS.

§ 1. *Elements and indicia of default.*—The party must have been delinquent in appearance or pleading.[64] Jurisdiction must have attached.[65] In an action begun by attachment, pleading under a rule may be equivalent to an appearance.[66] If service be constructive, every requirement of the statute must be fulfilled.[67] A court exercising a special jurisdiction in a statutory remedy must not enter a default without showing facts in the record supporting its jurisdiction.[68]

The pleadings and proceedings must sustain the judgment if it be given,[70] and there must be no responsive pleadings if the default is in pleading,[71] and those which are not responsive may be disregarded.[72] The full time to plead must be

56. Condition against incumbrances; only part incumbered held to be forfeited—Fouts v. Millikan, 30 Ind. App. 298.

57. First Presbyterian Church v. Elliott, 65 S. C. 251.

58. A condition that grantee shall not incumber applies only to voluntary incumbrances, not to lien for taxes—Fouts v. Millikan, 30 Ind. App. 298. A condition to build within a reasonable time is broken by failure to build within ten years—Union College v. City of New York, 173 N. Y. 38. Evidence held to show performance of condition to support grantor—Hilgar v. Miller, 42 Or. 552, 72 Pac. 319.

59. Union College v. City of New York, 173 N. Y. 38.

60. Fifteen years delay in suing where condition was to erect building in reasonable time—Union College v. City of New York, 173 N. Y. 38.

61. Union College v. City of New York, 173 N. Y. 38.

62. The right before breach is not subject of assignment—First Presbyterian Church v. Elliott, 65 S. C. 251.

63. Goodwin v. Tyrrell (Ariz.) 71 Pac. 906; McClendon v. Brockett (Tex. Civ. App.) 73 S. W. 854. The deed may be reformed or cancelled. See Cancellation of Instruments; Reformation of Instruments.

64. Entry of default judgment after appearance is mere error but not void—Culbertson v. Salinger (Iowa) 97 N. W. 99.

65. Ault v. Cowan, 20 Pa. Super. Ct. 628; Russell v. Butler (Tex. Civ. App.) 71 S. W. 395. Constructive service against one named by initials is bad—Gillian v. McDowell (Neb.) 92 N. W. 991. Serving two parties in two actions not consolidated does not put both in default—Swift v. Dixon, 131 N. C. 42. An original return held not invalid for slight misnomer of corporation defendant—Southern Bell Tel. Co. v. Earle (Ga.) 45 S. E. 319. Default cannot be taken on action by attachment if attachment affidavits are assailed—J. H. Mohlman Co. v. Landwehr, 83 N. Y. Supp. 1073.

66. Myler v. Wittish, 204 Pa. 180.

67. The order appointed no attorneys for nonresidents—Jones v. Griffin, 25 Ky. L. R. 117, 74 S. W. 713.

68. Default in answering interrogatories as on discovery—Goodwater Warehouse Co. v. Street (Ala.) 34 So. 903.

70. Tremblay v. Aetna Life Ins. Co., 97 Me. 547. Contracts and bonds securing performance need not be exhibited in action against sureties—Fidelity & Deposit Co. v. United States, 187 U. S. 315, 47 Law. Ed. 194. Plaintiff must show performance on his part of a contract exhibited for payment of money—Hibbert v. Guardian Sav. & Loan Ass'n, 3 Pen. (Del.) 591. Petition founded on a note and mortgage held sufficient to pray personal judgment against original makers in favor of another defendant who as assignor of the debt as collateral to plaintiff adopted the petition as a cross-petition—Crist v. Davidson (Wis.) 93 N. W. 532. If they are not and default judgment is erroneously taken the remedy is by motion to set aside and not by oral demurrer—Gillian v. Gillian, 65 S. C. 129.

71. Demurrer remained undisposed of—Warford v. Temple, 24 Ky. L. R. 2268, 73 S. W. 1023. Judgment as on default is harmless when entered a month after overruling demurrer defendant not having answered over—Lane v. Dowd (Mo.) 72 S. W. 632. Under the Texas practice a firm is brought in by serving members and hence cannot be defaulted though each answers as an individual—Owen v. Kuhn, Loeb & Co. (Tex. Civ. App.) 72 S. W. 432.

72. Glens Falls Ins. Co. v. Porter (Fla.) 33 So. 473.

allowed.[73] A cross petition filed after time does not put the plaintiff in default if he fails to answer.[74] If pleadings be amended, the time for answer is reckoned anew,[75] unless the amendment be not material.[76] Continuing the cause with time to plead may also make an answer at the succeeding term timely.[77] The affidavit required by many statutes must supply the statutory requirements.[78] Action against principal and surety is "ex contractu" so that want of an affidavit of defense may be a default.[79]

A default may be waived.[80]

The practice fixing time to plead,[81] or the term at which trial is set down[82] is elsewhere shown and additional cases are there cited.

§ 2. *Default by part of co-defendants.*—All must be impleaded or brought into one action.[83] One co-defendant may answer after others have compelled an amendment of the complaint.[84]

§ 3. *Procedure on default; taking judgment.*—Plaintiff must promptly move to enter judgment lest he become chargeable with laches.[85] Proof must be taken of such facts as are not admitted,[86] and is usually required on all the facts in divorce,[87] or in actions against infants,[88] or to guard generally against a fraud on the court or the parties.[89] Clerks cannot as a rule enter final judgment where further proof than the admitted allegations is necessary to ascertain the liability.[90] The plaintiff may properly be required to prove the taking in replevin, that not being for recovery of money only wherein judgment is entered by the clerk on the verified complaint.[91] Scire facias on a judgment is ex contractu in form within default statutes.[92]

Under the West Virginia practice of taking an office judgment, defendant must, in ex contractu actions when there is no order for inquiry of damages, plead to issue at the next term or defense will be barred at the expiration of the term and plaintiff may then have judgment absolute on his filing affidavit as to amount due and unpaid which affidavit he may file later than the term succeeding office judgment. If there is an order for inquiry the plea may be filed at the next or at a later

73. Removing cause before time to put in affidavit and recalling it afterwards prevents default—Muir v. Preferred Acc. Ins. Co., 203 Pa. 338.

74. Koehler v. Reed (Neb.) 96 N. W. 380. On error demurrer presumed to have been too late—Grant v. Commercial Nat. Bank (Neb.) 93 N. W. 185.

75. Demurrant must have service of amended complaint drawn out by motions of co-defendants in tort—Merrill v. Thompson, 80 App. Div. (N. Y.) 503. If an entirely new cause of action be pleaded by amendment there must be new process or its equivalent—Cope v. Slayden, 24 Ky. L. R. 1734, 72 S. W. 284.

76. O'Connor v. Brucker (Ga.) 43 S. E. 731.

77. White v. Lokey, 131 N. C. 72.

78. Affidavit held not sufficient to verify account sued on—Reybold v. Denny, 3 Pen. (Del.) 589.

79. Rule 73 Sup. Ct. D. C.—Fidelity & Deposit Co. v. United States, 187 U. S. 315, 47 Law. Ed. 194.

80. Muir v. Preferred Acc. Ins. Co., 203 Pa. 338. By appearing to later proceedings without objection—In re F. W. Myers & Co., 123 Fed. 952.

Stipulation that pleadings should be deemed filed in time void for want of consideration—Southern Bell Tel. Co. v. Earle (Ga.) 45 S. E. 319.

81. Pleading.

82. Dockets, Calendars and Trial Lists.

83. Swift v. Dixon, 131 N. C. 42. Railroad party not served is not in default to suit resulting in judgment against receiver—Ault v. Cowan, 20 Pa. Super. Ct. 628.

84. Merrill v. Thompson, 80 App. Div. (N. Y.) 503.

85. Eight years, too late—Coleman v. Akers, 87 Minn. 492. Final judgment may be taken any time after default is entered in City Court of Macon—O'Connell Bros. v. Friedman (Ga.) 45 S. E. 668.

86. See § 5 post as to what is admitted. The burden of proving substantial damage remains on plaintiff—Osborn v. Leach (N. C.) 45 S. E. 783.

87. Kline v. Kline, 104 Ill. App. 274. And see generally Divorce.

88. See Infants.

89. See Equity.

90. Liability under the mortgage clause in an insurance policy must be sent out to jury not being money demand on a money contract—Glens Falls Ins. Co. v. Porter (Fla.) 33 So. 473.

91. Sibley v. Weinberg, 116 Wis. 1.

92. For "recovery of money arising out of contract"—Marstiller v. Ward, 52 W. Va. 74.

term, either in tort or contract. When there has been no order and plaintiff has put in his affidavit which must state what is "unpaid" as well as "due" he is, on defendant's failure to plead, entitled to judgment and may compel its entry by the court.[93]

The burden of proof of damages is on plaintiff generally but defendant must prove facts relieving him from liability.[94] Under the Connecticut practice, a defaulting defendant reserving the right to disprove material allegations has the burden.[95]

The judgment must follow the issues.[96] Judgment by default does not "deny" trial by jury.[97]

§ 4. *Opening defaults.*—When the default has passed into judgment, the judgment may for certain causes be opened or vacated either by a statutory proceeding on motion or action or by a bill or equitable action. The grounds are usually fraud, accident, or mistake or some vital defect of jurisdiction. The fact in such cases that there was a default is of persuasive but not controlling force and since the remedies do not depend on default they are relegated to another title for consideration.[98]

The right to relief is lost by one who parts with all interest in the subject-matter of the action.[99] A garnishee defendant has an interest entitling him to relief.[1]

Mistake of fact,[2] or excusable[3] neglect or absence, is generally a ground to

93. Marstiller v. Ward, 52 W. Va. 74 construing Code, 1899, c. 125, § 46.

94. Bernhard v. Curtis, 75 Conn. 476.

In tort defendant must prove contributory negligence—Nelson v. Branford Lighting & Water Co., 75 Conn. 548. While the facts alleged cannot be disproved, defendant may cross-examine on the trial of damages and may move to dismiss for insufficiency of petition or may request a peremptory charge—O'Connor v. Brucker (Ga.) 43 S. E. 731.

95. Upton v. Town of Windham, 75 Conn. 288.

96. In action against partnership default cannot run against members individually—Williams v. Hurley, 135 Ala. 319.

97. Fidelity & Deposit Co. v. United States, 187 U. S. 315, 47 Law. Ed. 194.

98. See Judgments. Prior to Acts 1902, p. 117 the judge of the City Court of Atlanta could not allow a defense to be put in after default—Southern Bell Tel. Co. v. Earle (Ga.) 45 S. E. 319.

99. Browne v. Palmer (Neb.) 92 N. W. 315.

1. Sprague v. Auffmordt, 183 Mass. 7.

2. Between general officers of a corporation as to which one was to employ attorneys to defend an action is excuse—Barto v. Sioux City Elec. Co. (Iowa) 93 N. W. 268. Evidence held sufficient to disprove intention to default—Id. Mistake in trying to serve notice of appearance due to illegible signature of plaintiff's attorney on summons is sufficient—Wheeler v. Castor, 11 N. D. 347. Illiteracy does not excuse the confounding of the case with a pending one and consequent default where the summons was read to defendant at his request—Dean v. Noel, 24 Ky. L. R. 969, 70 S. W. 406. Mistaken belief that service was invalid because not made by officer is of law and not fact—Plano Mfg. Co. v. Murphy (S. D.) 92 N. W. 1072.

3. "Reasonable excuse" must satisfy discretion of court—Deering Harvester Co. v. Thompson, 116 Ga. 418. Misunderstanding which misled associate counsel to forbear putting in defense held sufficient—MacCall v. Looney (Neb.) 96 N. W. 238. Absence of attorney subpoenaed by another court—Hopkins v. Meyer, 76 App. Div. (N. Y.) 365. Neglect to appear due to being misled by summons to wrong term is excused—Patterson v. Yancey, 97 Mo. App. 681. Reliance on settlement pendente lite held sufficient excuse for default—McBride v. McGinley, 31 Wash. 573, 72 Pac. 105. Permanent departure of attorney from state without notice and his subsequent failure to oppose dismissal excuses plaintiff's default in prosecuting—Atkinson v. Abraham, 78 App. Div. (N. Y.) 498. Allowance of insufficient time (two days) to answer application for mandamus while attorney was absent held sufficient—People v. Brett, 79 App. Div. (N. Y.) 631. Neglect may be attorney's if excusable—O'Brien v. Leach, 139 Cal. 220, 72 Pac. 1004.

Erroneous extension of time to answer to a day out of term is no excuse—Deering Harvester Co. v. Thompson, 116 Ga. 418. Default after service on local agent who merely informed plaintiff and the serving officer that the general agent should be served but received no intimation that it would be done is not excused—Morris v. Liverpool, L. & G. Ins. Co., 131 N. C. 212. Reliance on clerk's statement that he would not send over transcript on change of venue until payment of costs is not excusable when statute obliges him to immediately send it and gives remedy to collect costs—Patterson v. Yancey, 97 Mo. App. 681. Failure of attorney to inform one employed in his stead of pendency of action is no excuse—Welch v. Mastin (Mo. App.) 71 S. W. 1090. Party denied relief who had not relied wholly on counsel who was absent at hearing on cross-complaint—Harlow v. First Nat. Bank, 30 Ind. App. 160. Neglect held inexcusable

open a default, and good cause must be shown,[4] since the discretion of the court will ultimately control.[5] Neglect is not excused in one who relied on counsel to the extent of withholding all personal attention.[6] Existence of a meritorious defense is not alone sufficient but merely persuasive,[7] and mere error is not sufficient.[8]

The proposed defense must show merit and not be merely technical.[9]

Conditions may be imposed,[10] but should not be where plaintiff has procured the default by fraud,[11] or where the default could not be entered.[12] Costs are frequently imposed as a condition.[13] Times to plead or for hearing on the issues may be accelerated on reinstating the cause.[14]

Motion or application must be at the same term,[15] or within the time prescribed,[16] unless the default was one that the court could not enter.[17] Everything necessary to support the opening should be shown,[18] including a copy of the pro-

though party claimed to have mailed pleadings—Osborn v. Leach (N. C.) 45 S. E. 783. Party not excused whose agent had actual notice—Turner v. J. I. Case T.-M. Co. (N. C.) 45 S. E. 781.

4. Lasswell v. Kitt (N. M.) 70 Pac. 561. Opening refused on application of one bearing a name variant from judgment and against whom its enforcement is not sought —Meurer v. Berlin, 80 App. Div. (N. Y.) 294.

5. Welch v. Mastin (Mo. App.) 71 S. W. 1090; O'Brien v. Leach, 139 Cal. 220, 72 Pac. 1004.

6. Evidence held insufficient to show defendant's inability to appear, his counsel having been remiss in arranging for a continuance—Pepper v. Clegg, 132 N. C. 312. Compare Osborn v. Leach (N. C.) 45 S. E. 783.

7. Welch v. Mastin (Mo. App.) 71 S. W. 1090; Osborn v. Leach (N. C.) 45 S. E. 783; Calvert, W. & B. V. Ry. Co. v. Driskill (Tex. Civ. App.) 71 S. W. 997; Turner v. J. I. Case Threshing Mach. Co. (N. C.) 45 S. E. 781. It is required in Iowa if opened after term—Culbertson v. Salinger (Iowa) 97 N. W. 99.

8. Such as published service when defendant was not nonresident but only absent—Smothers v. Meridian Fertilizer Factory (Ala.) 33 So. 898. Clerical errors and omissions—Acklen v. Fink, 95 Md. 655; Shelby v. St. James Asylum (Neb.) 92 N. W. 155.

9. Sutherland v. Mead, 80 App. Div. (N. Y.) 103; Johnson v. Richardson (Kan.) 73 Pac. 113; Childs v. Ferguson (Neb.) 93 N. W. 409. Allegations of contributory negligence, assumed risk, denial of negligence and of injuries complained of is meritorious—Barto v. Sioux City Elec. Co. (Iowa) 93 N. W. 268. Limitation is meritorious—Wheeler v. Castor, 11 N. D. 347. Defense of fraud which he failed to make by defaulting after general denial will not avail—Hoffman v. Loudon, 96 Mo. App. 184. Must be adjudged meritorious—Waters v. Raker (Neb.) 96 N. W. 78.

If sufficient to defeat the judgment it may suffice though technical as where the case cannot be made for lack of witnesses and there is testimony available to make defense—Culbertson v. Salinger (Iowa) 97 N. W. 99.

10. Chicago v. English, 198 Ill. 211. Reasonable to require immediate filing of pleadings and trial in three days—Id.

11. Defendant wife not required to submit to interrogation where her husband as co-defendant colluded with plaintiff—Rauer's Law & Collection Co. v. Gilleran, 138 Cal. 352, 71 Pac. 445.

12. Payment of counsel fee and undertaking to pay judgment not proper on excusable default of answering defendant—Hopkins v. Meyer, 76 App. Div. (N. Y.) 365.

13. Atkinson v. Abraham, 78 App. Div. (N. Y.) 498. Items enumerated—Randall v. Shields, 80 App. Div. (N. Y.) 625.

14. Hearing on demurrer in three days and trial a week later without time to plead over held proper—Chicago v. English, 198 Ill. 211. When a cause is reinstated and demurrer filed it need not be sent to the contested motion calendar but may be argued sooner—Id.

15. Leavitt v. Bolton, 102 Ill. App. 582; First Nat. Bank v. Flynn, 117 Iowa, 493. It will be deemed timely if filed at term though not heard till day of next term and though record does not show that motion was called and continued—Donaldson v. Copeland, 201 Ill. 540. The judgment became absolute where while standing before an assessor a motion in court for continuance was not prosecuted and judgment of neither party was entered—Green v. Fitchburg R. Co., 116 Fed. 928.

16. If within 60 days "after the party has notice" it matters not that summons was "served" eight years before—Coleman v. Akers, 87 Minn. 492, construing Sp. Laws 1889, c. 351. In city court of Macon not after final judgment—O'Connell Bros. v. Friedman (Ga.) 45 S. E. 668. Two years time "after notice" when service is by mail —Atkinson v. Abraham, 78 App. Div. (N. Y.) 498, reconciling Code Civ. Proc. §§ 724, 798.

17. Default pending bankruptcy—First Nat. Bank v. Flynn, 117 Iowa, 493. Such a default (entered prematurely) is an irregularity remediable by motion to set aside judgment within three years—Reed v. Nicholson, 93 Mo. App. 29.

18. Excuse for default—Childs v. Ferguson (Neb.) 93 N. W. 409. Allegations of mistake as excuse for neglect held sufficient—MacCall v. Looney (Neb.) 96 N. W. 238. Refused in divorce to wife personally served and who did not deny guilt except to say that she had a "good defense" and presented no affidavit of merits or answer—Maguire v. Maguire, 75 App. Div. (N. Y.) 534. Objection that petition did not show that term had ended when petitioner first knew of judgment must be taken below—MacCall v. Looney (Neb.) 96 N. W. 238.

posed answer,[19] or its equivalent.[20] There should be an affidavit of merits,[21] unless the court dispenses with one[22] or the judgment is irregular on its face.[23]

If the petition to open a judgment be not diligently prosecuted and proved it will be denied.[24] The moving party has the burden of proof.[25]

The judgment should ordinarily be opened and not stricken off,[26] and may be retained as security.[27] A judgment which is joint and several need not be vacated as to answering co-parties of the applicant.[28] Extension of time to plead may be granted on notice of motion only to open default.[29] The order is sometimes required to embody findings.[30] If it is still pending, an order opening default may itself be set aside.[31]

§ 5. *Operation and effect of default.*—Generally speaking the defaulting party admits every issuable allegation,[32] but may assail the judgment for fundamental defects,[33] and may appear and cross-examine on an issue to try damages.[34] Statutes sometimes provide for saving defenses by timely notice.[35] A default judgment is a conclusive adjudication.[36]

DEPOSITIONS.

§ 1. *Occasion or necessity; right to take.*—Where the only witness who could testify as to the main point in issue resided in another state and was unwilling to

19. Childs v. Ferguson (Neb.) 93 N. W. 409; Waters v. Raker (Neb.) 96 N. W. 78; Meyer v. City of New York, 80 App. Div. (N. Y.) 584. Copy of proposed pleading should be annexed to motion papers—Schumpp v. Interurban St. Ry. Co., 81 App. Div. (N. Y.) 576.

20. Court may take affidavit in lieu—Wheeler v. Castor, 11 N. D. 347.

21. The affidavit or verification must be positive. Not on information and belief—Smothers v. Meridian Fertilizer Factory (Ala.) 33 So. 898. It must be objected to below for defects—Headings v. Gavette, 83 N. Y. Supp. 1017.

22. Crane v. Sauntry (Minn.) 96 N. W. 794.

23. Hence one is required where there was an answer, though filed without authority, but no process—Chambers v. Gallup (Tex. Civ. App.) 70 S. W. 1009.

24. It was improperly verified and petitioner did not appear on hearing—Smothers v. Meridian Fertilizer Factory (Ala.) 33 So. 898.

25. Of diligence—Wheeler v. Castor, 11 N. D. 347. If there is a conflict in affidavits relief will be denied—Hoffman v. Loudon, 96 Mo. App. 184. Affidavits denying service held sufficient against sheriff's return—Parker v. Van Dorn Iron Works, 23 Ohio Circ. R. 444.

Evidence. Actual notice to agent is presumed to have passed to defaulting principal unless the contrary is shown—Turner v. J. I. Case Threshing Mach. Co. (N. C.) 45 S. E. 781. Record held sufficient to show no service on one partner—Ricaud v. Alderman, 132 N. C. 62. Facts held sufficient on review though not strongly preponderating—Crane v. Sauntry (Minn.) 96 N. W. 794.

26. Davidson v. Miller, 204 Pa. 223.

27. In Municipal Court—Long Branch Pier Co. v. Crossley, 40 Misc. (N. Y.) 249.

28. Patterson v. Yancey, 97 Mo. App. 681.

29. Headings v. Gavette, 83 N. Y. Supp. 1017.

30. The New York Municipal Court must recite the grounds on which it acted (Consol. Act, § 1367)—Johnson v. Manning, 80 App. Div. (N. Y.) 368. Finding of neglect without excuse sustains refusal without finding on merit of defense—Turner v. J. I. Case Threshing Mach. Co. (N. C.) 45 S. E. 781. Justice's findings not binding on Superior or reviewable in Supreme Court—Id.

31. Reed v. Nicholson, 93 Mo. App. 29. When the case is ordered set down for a certain day the court to which it is sent cannot move it forward without notice—Martin v. Universal Trust Co., 76 App. Div. (N. Y.) 320.

32. Chicago v. English, 198 Ill. 211. Only cause of action and not substantial damages—Osborn v. Leach (N. C.) 45 S. E. 783. Execution of mortgage is admitted by default of a verified answer—Downing North Denver Land Co. v. Burns, 30 Colo. 283, 70 Pac. 413. The only question not admitted in action for unliquidated damages is amount—Southern Bell Tel. Co. v. Earle (Ga.) 45 S. E. 319. In an action for rent it is needless to show when it accrued—Chicago v. English, 198 Ill. 211.

33. Wolfe v. Murray, 96 Md. 727.

34. O'Connor v. Brucker (Ga.) 43 S. E. 731.

35. In an action for damages for failure to put a lessee in possession, the wrongful holding over of a former tenant as a defense is admitted away unless saved by the statutory notice—Bernhard v. Curtis, 75 Conn. 476.

36. See generally Former Adjudication. Judgment. Party as "trustee" is not barred by judgment against it not designated as trustee—Farmers' Loan & Trust Co. v. Essex (Kan.) 71 Pac. 268. In support of it a demurrer was presumed to have been filed too late—Grant v. Commercial Nat. Bank (Neb.) 93 N. W. 185.

appear on the trial, a commission to take his testimony was properly issued,[37] and he may be examined on oral questions where he is likely to testify unfairly.[38] A busy physician is not within the words,—"a witness about to depart or who by reason of age, sickness 'or other causes'" shall be unable or unlikely to attend.[39] The Federal practice allows depositions where the witness lives over one hundred miles by the shortest route usually traveled.[40]

An application to take a deposition under a dedimus postestatem as authorized by U. S. Rev. Sts. § 866, cannot be granted under section 863, which relates only to the taking of depositions de bene esse and which section is expressly excluded from the operation of section 866.[41]

Under the chancery rule in Alabama, a deposition cannot be taken until the case is at issue by sufficient answer or decree pro confesso and should be suppressed where taken before such time.[42] Depositions may not be taken by a person before he has properly become a party to the suit particularly where there are nonresident defendants who have only been served by publication and have not appeared.[43]

A deposition may be taken for use on motion for a new trial,[44] and in proceedings in probate and administration.[45]

An order for the examination of witnesses to preserve testimony is properly vacated where it does not appear that the applicant is in hazard of losing such testimony.[46] The proceeding to perpetuate testimony may be terminated by stipulation allowing another to give the evidence of the party subsequently deceased.[47]

§ 2. *Procedure to obtain deposition.* In Nebraska there is no code provision requiring leave of court to entitle one to take a second deposition of the same witness for use in the same case.[49]

A California superior court sitting in probate may issue a commission.[50] The issuance of a commission to take testimony is a matter of judicial discretion in New York, to be exercised on the facts presented in a given case.[51] Where the opposing party files cross interrogatories and takes out a commission for the witness' deposition, the party initiating proceedings for the deposition is entitled to a commission, though the full time has not elapsed since the service of notice and precept on the opposite party.[52]

37. Frounfelker v. Delaware, L. & W. R. Co., 81 App. Div. (N. Y.) 67.

38. Witness was in the employ of party against whom his testimony was sought—Frounfelker v. Delaware, L. & W. R. Co., 81 App. Div. (N. Y.) 67.

39. Code, Miss, 1892, § 1747—American Exp. Co. v. Bradford (Miss.) 33 So. 843.

40. Not by a "short line" or air line—Jennings v. Menaugh, 118 Fed. 612.

41. North American Transp. & Trading Co. v. Howells (C. C. A.) 121 Fed. 694.

42. Henderson v. Hall, 134 Ala. 455.

43. Riviere v. Wilkens (Tex. Civ. App.) 72 S. W. 608.

44. Code Civ. Proc. N. Y. § 885—O'Connor v. McLaughlin, 80 App. Div. (N. Y.) 305.

45. Code allows it in "any action in any court"—Reformed Presbyterian Church v. McMillan, 31 Wash. 643, 72 Pac. 502. The brother of an intestate living in a foreign country not cited to appear at the accounting of the administrator is entitled to an order for a commission issued with interrogatories for his examination on a proceeding by him for an accounting in which proceeding all the parties who were cited and did appear on the original accounting may join in the application for the commission and be represented in the execution thereof—In re Killan's Estate, 172 N. Y. 547.

46. In re Fulton, 75 App. Div. (N. Y.) 623.

47. A stipulation that plaintiff might testify as to what decedent said was the cause and extent of his injury as a consideration for the abandonment of the proceeding to perpetuate deceased's testimony, is broad enough to admit evidence that deceased stated on returning home that he was a passenger on defendant's freight train and that when at a certain station the trainmen caused the car in which he was riding to give a violent jerk which threw him from his seat against a door causing injuries to his head, shoulder, side and back—Thompson v. Fort Worth & R. G. Ry. Co. (Tex. Civ. App.) 73 S. W. 29.

49. Peycke v. Shinn (Neb.) 94 N. W. 135.

50. Reformed Presbyterian Church v. McMillan, 31 Wash. 643, 72 Pac. 502.

51. Frounfelker v. Delaware, L. & W. R. Co., 81 App. Div. (N. Y.) 67.

52. St. Louis & S. F. Ry. Co. v. Skaggs (Tex. Civ. App.) 74 S. W. 783.

On the issuance of an open commission to take testimony, both parties should have the right to name witnesses whose examination is desired,[53] and the order should name the witnesses to be examined.[54] A case for the granting of an open commission to examine witnesses upon oral questions exists in the contest of a will where the testator and all the witnesses to capacity and influences surrounding testator reside in a distant state.[55] Where the first commission is an open one allowing the examination of witnesses that might be called by either party in a foreign country, a court may properly refuse a second commission when the affidavits of the proposed testimony showed no contradiction of testimony already taken.[56]

Interested parties should have notice of the taking[57] unless their interests are represented by other parties,[58] but where parties are numerous or interest is remote, code provisions sometimes dispense with service on all of them.[59]

In some states the notice cannot be served by a party to the action.[60] Notice "not less" than ten days excludes the day of service and the tenth day thereafter.[61]

§ 3. *Taking the testimony or evidence adduced.*—A commissioner to take testimony for use in a case in another state derives his authority from the foreign state and court,[62] and where the commission names a particular person to take the deposition, it cannot be taken by another, though the person named is absent and cannot act.[63] The commissioner to take testimony for use in a foreign court may be a resident of the foreign state.[64] The deposition may not be taken by a commissioner or notary who is the attorney of one of the parties, and this though there is no statutory provision against such practice.[65]

Where a deposition is taken at the place designated it is not important that there is a variance between the notice and certificate as to the name of the occupant of the office.[66] In New Jersey, formal proof of the commission need not be presented to support an order for subpoena,[67] nor is such an order a rule which must be entered within ten days.[68] A motion to the court to quash it and the writ when made by a judge does not require a certiorari since it is already before the court.[69] Such an order is illegal so far as it directs the production of the documents if the commission does not require them.[70] There is no authority to issue

53, 54. Corbin v. Anderson, 82 N. Y. Supp. 683.

55. Code Civ. Proc. N. Y. § 897—Corbin v. Anderson, 82 N. Y. Supp. 683.

56. O'Callaghan v. O'Brien, 116 Fed. 934.

57. Vaught v. Murray, 24 Ky. L. R. 1587. 71 S. W. 924.

58. In taking a deposition in support of a claim against an estate, it is sufficient to notify the executor and any other person who may have appeared to resist the claim, but it is not necessary to notify every person who has an ultimate interest in the disposition of the property—Deuterman v. Ruppel, 103 Ill. App. 106.

59. A code provision that depositions may be taken on notice to the adverse party if there be only one, if there be several, to any one of them who is a real party in interest, does not authorize one of two defendants to take depositions by service of notice on the sole plaintiff and thereby upon his co-defendant (Burns' Rev. St. Ind. 1901, § 423)— Black v. Marsh (Ind. App.) 67 N. E. 201.

60. Deposition taken thereunder inadmissible (Rev. Laws Mass. c. 175, § 29)—O'Connell v. Dow, 182 Mass. 541.

61. Code, S. C. § 2881—Williams v. Halford (S. C.) 45 S. E. 207.

62. In re Canter, 40 Misc. (N. Y.) 126.

63. Provident Sav. Life Assur. Soc. v. Cannon, 103 Ill. App. 534.

64. In re Canter, 40 Misc. (N. Y.) 126.

65. Swink v. Anthony, 96 Mo. App. 420; Hacker v. United States, 37 Ct. Cl. 86. Where the commissioner certified that he was not of counsel or kin to either of the parties in said cause, an objection to the certificate on the ground that it did not certify that the commissioner was of counsel or of kin to any one or either of the parties to the cause was without merit—Bickley v. Bickley, 136 Ala. 548.

66. Particularly where the objector was present by representative at the taking of the deposition—Henry Sonneborn & Co. v. Southern Ry. Co., 65 S. C. 502.

67. In re Edison, 68 N. J. Law, 494.

68. Rule 40 of New Jersey Supreme Court not applicable—In re Edison, 68 N. J. Law, 494.

69. It is filed with the clerk—In re Edison, 68 N. J. Law, 494.

70. In re Edison, 68 N. J. Law, 494. Query if it can be allowed at all (Statute allows only "subpoena")—Id.

a subpoena where there is nothing in the application, order, or commission showing whether the commission was to be executed within or without the state in which the action was pending.[71] There is no abuse of discretion in refusing a continuance for want of a witness, where the commission for the taking of his deposition was issued in time, but was not placed in the hands of an officer to be executed.[72]

In Illinois, a commissioner may within reasonable limitations and for reasonable cause adjourn the taking of a deposition.[73]

Commissioners usually have ample means to compel witness to testify.[74]

A witness on a second examination may read over a copy of his testimony given on a previous examination and subscribe such testimony as his deposition.[75]

Cross-examination must not be unreasonably interfered with by the commissioner.[76] One allowed to appear after depositions have been taken is bound by the depositions, but may, on application, cross-examine the witnesses,[77] or on depositions taken by a new party original parties may also examine.[78]

A certificate that a deposition was reduced to writing by a specified person and subscribed by the witness in the presence of the notary shows sufficiently that the deposition was both reduced to writing and subscribed to in the presence of the notary.[79] A misrecital that exhibits are attached may be disregarded if they are fully identified.[80] In South Carolina a witness is not required to sign in the presence of the officer.[81]

A commissioner is not to be denied reasonable compensation for his services by the fact that there is no express statutory provision allowing such compensation.[82] The party at whose instance the deposition is taken is chargeable with the fees allowed to the commissioner, who may recover if the losing party fails to pay them as costs taxed.[83] In Georgia such fees are not to be regarded as taxable costs.[84] A continuance may be granted where the commissioner withholds a deposition on an illegal claim of fees.[85]

§ 4. *Returning and filing.* A deposition withdrawn from a case must be refiled to entitle it to be read on the trial.[86]

§ 5. *Suppression before trial.*—As a deposition may be used by either party and if suppressed may be retaken, trivial objections not promptly made will not be considered sufficient for their suppression, where no harm will result.[87] The motion must be made within the time fixed by statute,[88] and before the cause is called for trial.[89] The deposition will not be suppressed because taken during term in

71. Code Civ. Proc. N. Y. § 914—In re Canter, 82 App. Div. (N. Y.) 103.

72. St. Louis & S. F. Ry. Co. v. Skaggs (Tex. Civ. App.) 74 S. W. 783.

73. Bueb v. Dreessen, 104 Ill. App. 409.

74. Bernard v. Guidry, 109 La. 451.

75. Samuel Bros. Co. v. Hostetter Co. (C. C. A.) 118 Fed. 257.

76. Hacker v. United States, 37 Ct. Cl. 86.

77. Deuterman v. Ruppel, 103 Ill. App. 106.

78. All parties interested who appeared on an administrator's accounting may join in application for, and take part in examination under a commission which issues in a further accounting taken at the instance of an absent heir—In re Killan's Estate, 172 N. Y. 547.

79. Bobilya v. Priddy, 68 Ohio St. 373.

80. Black v. Webber (Neb.) 96 N. W. 606.

81. The genuineness of the evidence in the deposition certified to by the officer is sufficient—J. Harzburg & Co. v. Southern Ry. Co., 65 S. C. 539. Code S. C. 1902, § 2881—Henry Sonneborn & Co. v. Southern Ry. Co., 65 S. C. 502.

82, 83. Paxson v. MacDonald, 97 Mo. App. 165.

84. Almand v. Atlantic Coast Line R. Co. (Ga.) 45 S. E. 302.

85. The moving party need not pay the fees demanded to make out a case of proper diligence—Hall v. Hale's Estate, 202 Ill. 326.

86. Peycke v. Shinn (Neb.) 94 N. W. 135.

87. Hughes v. Humphreys, 102 Ill. App. 194.

88. Under a code provision, expressly providing that if depositions are not filed during the term, exceptions, other than for incompetency, must be filed by noon of the third day after such filing, a motion to suppress ten days after the depositions were filed was properly overruled (Code, § 4712)—Casley v. Mitchell (Iowa) 96 N. W. 725.

89. Samuel Bros. Co v. Hostetter Co. (C. C. A.) 118 Fed. 257; Pittsburg, C., C. & St. L.

which case is pending in the absence of a statute against such practice,[90] nor because the party received no notice of its taking where the notice was served on his attorney who sent it through the mail to his client who did not receive it,[91] nor because improperly opened by the clerk without a special order of the court where no harm has resulted,[92] nor because answers are not responsive where questions were not comprehended,[93] or the evidence immaterial.[94] Where the deposition considered as a whole showed that a question was substantially answered, the deposition will be admitted though the party refused to answer the question on cross-examination and this particularly where the witness died before the trial.[95] Where a party has secured a commission to take a witness' deposition on cross interrogatories propounded by him subsequent to a commission issued to the opposite party, and this deposition is on file but is not used, the refusal to quash the deposition taken by the opposite party on account of the premature issuance of his commission is not ground for reversal.[96]

§ 6. *Opening and objections; use as evidence.*—A deposition may not be opened for further examination as to a matter not material or not disputable.[97]

Objections to depositions should be made in writing,[98] and where based on other grounds than incompetency or irrelevancy should be presented to the court before the commencement of the trial,[99] and passed on before the trial begins.[1] Generally a party may not object to testimony adduced by himself,[2] or to depositions admitted under his stipulation.[3] Appearance before the commission and cross-examination of witnesses without taking any exceptions waives an objection as to the regularity

Ry. Co. v. Storey, 104 Ill. App. 132. In this case nearly two months elapsed after the erroneous opening—Hughes v. Humphreys, 102 Ill. App. 194.

90. Donovan v. Hibbler (Neb.) 92 N. W. 637.

91. Party should have asked a postponement and opportunity to cross examine—Diedrich v. Diedrich (Neb.) 94 N. W. 536.

92. Hughes v. Humphreys, 102 Ill. App. 194.

93. Galveston, H. & S. A. Ry. Co. v. Baumgarten (Tex. Civ. App.) 72 S. W. 78; Houston & T. C. R. Co. v. Bell (Tex. Civ. App.) 73 S. W. 56.

94. Where a witness whose deposition was taken was one of the complainants in the suit and the only object in asking for a contract was to show interest of witness, his refusal to produce same was no ground for striking his deposition—Bullock Elec. Mfg. Co. v. Crocker Wheeler Co., 121 Fed. 200.

95. Shannon v. Castner, 21 Pa. Super. Ct. 294.

96. St. Louis & S. F. Ry. Co. v. Skaggs (Tex. Civ. App.) 74 S. W. 783.

97. To show that deponent who is a party and in court has an interest—Bullock Elec. Mfg. Co. v. Crocker Wheeler Co., 121 Fed. 200.

98. Willeford v. Bailey, 132 N. C. 402.

99. Woodard v. Cutter (Neb.) 96 N. W. 54; Shannon v. Castner, 21 Pa. Super. Ct. 294. Where an entire deposition is not asked to be suppressed, the customary method of procedure is to wait until the deposition is offered in evidence before objections to certain questions and answers contained in the deposition are passed upon, but this is not an inflexible rule, and where nothing but irrelevant and improper testimony is stricken from the deposition, the action is without prejudice, whether done before or after it is actually offered in evidence—Stull v. Stull (Neb.) 96 N. W. 196.

Where depositions are filed but not used in a case pending in a county court, exceptions may be filed at any time before the deposition is used at trial on appeal—Collier v. Gavin (Neb.) 95 N. W. 842.

1. Willeford v. Bailey, 132 N. C. 402.

2. A party taking a deposition and having copies of papers attached thereto as exhibits may not by a general objection prevent their introduction as evidence by his opponent—George Adams & Frederick Co. v. South Omaha Nat. Bank (C. C. A.) 123 Fed. 641. Where a witness in response to interrogatories filed by the objector said he had received certain instructions by letter and the answer was offered in evidence by the other parties, the answer being responsive and called for by the objector, his objection on the ground that the letter itself was not produced was properly overruled—Curtis v. Parker, 136 Ala. 217. Under a code provision that a deposition shall have the same effect as the oral testimony of the witness and objections to the competency of questions or answers may be made as if the witness was personally examined, a defendant at whose instance plaintiff's deposition was taken, though indorsing part of it, may object to other parts as hearsay (Code Civ. Proc. N. Y. § 883)—Kramer v. Kramer, 80 App. Div. (N. Y.) 20.

3. Under a stipulation allowing the use of a deposition taken in a former suit and that either party should have the right to use such additional evidence as either might desire and should be competent under the pleas, no objection could be raised on the trial to the admissibility of depositions, but only to the additional evidence—Parlin v. Hutson, 198 Ill. 389.

of the commission.[4] In Nebraska, it is no objection to the reading of a deposition that the officer before whom it is taken does not certify that the witnesses were sworn as well after as before testifying.[5] The fact that a stranger to a deposition might have introduced it in evidence as against those who were parties to it does not affect his right to object to its introduction by them as against him.[6]

A deposition taken and filed is for the use of either party to the action,[7] and where one party has offered a part of a deposition taken by him, the other party may offer other parts thereof.[8] A deposition de bene esse for one trial is competent for any subsequent trial of the case.[9] A second deposition is admissible within the discretion of the court like the recall of a witness for second examination.[10] A deposition which has been quashed is inadmissible for any purpose[11] until the order has been set aside.[12] A deposition is not competent against one not present at the time it was taken and to whom no notice was given where he properly objects to it.[13] A showing of nonresidence of deponent is sufficient, where the notice states that he is a nonresident and witness has previously stated that he lived in another state and the deposition so states as does also the return.[14] There is a presumption that the witness continued to reside in a distant state where he was at the time a deposition was taken and the fact of his residence at a greater distance than one hundred miles need not be proved.[15]

A party taking a deposition may read the deposition, though the witness is present at the trial for his opponent, defendant being allowed to fully cross-examine the witness before the jury.[16] A deposition incompetent because not filed as required by statute or because the party is present in court may be introduced as his written admission.[17] The deposition of a witness is admissible where he is physically unable to attend.[18]

Exhibits sufficiently identified by markings of the notary and testimony of witnesses who saw them issued may be considered in connection with depositions, though not attached as recited.[19]

DESCENT AND DISTRIBUTION.

§ 1. *Law governing descent.*—The law of the state[20] in force at the time of intestate's death governs the descent of his estate.[21]

4. Willeford v. Bailey, 132 N. C. 402.
5. Donovan v. Hibbler (Neb.) 92 N. W. 637.
6. Black v. Marsh (Ind. App.) 67 N. E. 201.
7, 8. Curtis v. Parker, 136 Ala. 217.
9. Oliver v. Columbia, M. & L. R. Co., 65 S. C. 1.
10. Fredonia Nat. Bank v. Tommei (Mich.) 92 N. W. 348.
11. Joy v. Liverpool, L. & G. Ins. Co. (Tex. Civ. App.) 74 S. W. 822. A deposition which had been quashed was not admissible at the instance of the party procuring its suppression to impeach the testimony of the witness as contained in a deposition subsequently taken, where no foundation had been laid by asking the witness whether he had not said or done the things specified in the deposition and an opportunity offered him to explain—Id.
12. Long v. Fields (Tex. Civ. App.) 71 S. W. 774.
13. Black v. Marsh (Ind. App.) 67 N. E. 201.
14. Oliver v. Columbia, M. & L. R. Co., 65 S. C. 1.
15. Texas & P. Ry. Co. v. Reagan (C. C. A.) 118 Fed. 815.
16. Louisville & N. R. Co. v. Steenberger, 24 Ky. L. R. 961, 69 S. W. 1094. Under a code provision allowing a party to summon the witness whose deposition has been taken who may be examined as if summoned by the party taking the deposition, the party taking the deposition may read the deposition or examine the witness orally or decline to do either at his election, but in either event the other party may examine the witness as to all matters, whether brought out in the deposition or not—Sherrod v. Hughes (Tenn.) 75 S. W. 717.
17. Profile & Flume Hotels Co. v. Bickford (N. H.) 54 Atl. 699.
18. Under the North Carolina code, a deposition of a witness adjudged unable to talk and physically unable to remain in court is admissible in evidence (Code, N. C. 1883, § 1358 [4])—Willeford v. Bailey, 132 N. C. 402. Where a deposition is taken under the stipulation that it is to be used only in case witness is unable to attend, the deposition is properly admitted on the affidavits of the witness showing physical inability, which is

§ 2. *Persons entitled to share or inherit.*—Persons claiming, have the burden of proving heirship.[22]

The common law rule as to inheritance by aliens has been changed in some states. An adopted child is likewise enabled under some laws to inherit the same as if born to decedent in lawful wedlock,[24] provided it has been legally adopted,[25] and if adopted after the execution of a will which made no provision for it and showed no intention to disinherit will share as an after-born child;[26] and this may sometimes result from an adoption by parol.[27] Legitimacy by recognition may be conferred by an alien on his natural son so as to enable the son to inherit.[28]

An intentional omission to provide for a child in the will will disinherit him.[29]

§ 3. *Inheritable and distributable property.*—The heir claiming a share in certain property has the burden of proving it a part of the distributable estate.[30]

To be a part of the distributable estate, it is essential that decedent have title in the property.[31]

Property ineffectually devised will pass as intestate estate,[32] or in case of lapsed legacies,[33] or on failure to dispose of the remainder after termination of the life estate.[34] Where the property by the will is equitably converted into personalty, it will be distributed as such.[35]

A recovery for death of decedent by wrongful act is not generally a part of the estate though sometimes sued for by an administrator for the benefit of "heirs" or "children." Who can share depends on the wording of the statute. Generally decedent's minor children are entitled to share, but not adult children whose family relations with decedent had been severed,[36] nor grandchildren.[37] That the beneficiary was not named in the complaint in the action to recover the damages will not affect his right to share.[38]

contradicted only by unsworn statements of attorneys—Styles v. Village of Decatur (Mich.) 91 N. W. 622.

19. Black v. Webber (Neb.) 96 N. W. 606.

20. Moen v. Moen (S. D.) 92 N. W. 13; McCune v. Essig (C. C. A.) 122 Fed. 588.

21. Evans' Adm'r v. Evans, 24 Ky. L. R. 2421, 74 S. W. 224.

22. Pleading held not such an admission as to shift the burden—Sorenson v. Sorenson (Neb.) 94 N. W. 540. Sufficiency of evidence of heirship—O'Callaghan v. O'Brien, 116 Fed. 934; Crumley v. Worden, 201 Ill. 105.

23. In Nebraska he may inherit lands within corporate limits of a municipality (Comp. St. c. 73, §§ 70-73)—Dougherty v. Kubat (Neb.) 93 N. W. 317.

24. Flannigan v. Howard, 200 Ill. 396, 59 L. R. A. 664. Compare Adoption of Children, ante, p. 26.

25. A child taken into decedent's family but not legally adopted is not a legal heir—Merchant v. White, 77 App. Div. (N. Y.) 539.

26. Flannigan v. Howard, 200 Ill. 396, 59 L. R. A. 664.

27. Lynn v. Hockaday, 162 Mo. 111. Sufficiency of evidence to show agreement by deceased to make child in his custody his heir—Merchant v. White, 77 App. Div. (N. Y.) 539.

28. Though the recognition was made prior to the taking effect of Comp. Laws, § 3403—Moen v. Moen (S. D.) 92 N. W. 13.

29. Omission held not due to inadvertence or mistake—In re McMillen's Estate (N. M.) 71 Pac. 1083. Will construed and held to sufficiently mention a child to prevent such child from sharing as though decedent died intestate—Smith v. Smith (N. H.) 54 Atl. 1014. Compare Wills.

30. In re Ruchizky's Estate, 205 Pa. 105.

31. Goods sold by decedent but not delivered until after his death are not part of the distributable estate—Warner v. Warner, 30 Ind. App. 578. If a homestead settler has not completed the term of residence entitling him to make final proof before death he has no descendible interest in the land. The widow on making final proof has absolute title—McCune v. Essig (C. C. A.) 122 Fed. 588. Only lands to which a patent had been issued to the deceased Indian will pass to his heirs. The land only having been allotted remains tribal property—Sloan v. United States, 118 Fed. 283.

32. Shumaker v. Grammer, 200 Ill. 48; Dodsworth v. Dam, 38 Misc. (N. Y.) 684.

33. In re Woolley, 78 App. Div. (N. Y.) 224.

34. Torrey v. Peabody, 97 Me. 104.

35. Hutchings v. Davis, 68 Ohio St. 160.

36. Lewis v. Hunlock's Creek & M. Turnpike Co., 203 Pa. 511.

A minor son held not emancipated and an adult crippled daughter entitled to share—Duzan v. Myers, 30 Ind. App. 227.

The next of kin have no legal title to a cause of action for the wrongful or negligent death of the ancestor; hence an order authorizing the compromise of an action by the widow as administratrix, to recover for the wrongful death of her husband, will not be vacated merely because of the birth of a posthumous child—In re Anderson's Estate 82 N. Y. S. 763.

37. Walker v. Vicksburg, S. & P. Ry. Co. (La.) 34 So. 749.

38. Duzan v. Myers, 30 Ind. App. 227; Oyster v. Burlington Relief Dept. (Neb.) 91 N. W. 699, 59 L. R. A. 291.

§ 4. *Course of descent and distribution.*—Property inherited from the mother passes to her relatives on the child's death without lawful descendants,[39] but a deceased child's share in the mother's estate which passed to another child was not inherited by the latter from the mother and passes on his death without lawful descendants to the surviving father.[40] A child has no present interest to furnish a stock of descent in the land inherited by his step-mother from the deceased father.[41] A half-brother will, under the laws of Indian Territory, take the land of the deceased sister leaving surviving a maternal uncle and the deceased father's third wife.[42] Nieces, nephews, uncles, and aunts take the entire personalty as against cousins.[43]

§ 5. *Quantity of estate or share acquired.*—Nieces, nephews, uncles, and aunts share equally.[44] Property conveyed to an infant on his death, intestate leaving no children or their descendants, passes to his parents equally in Kentucky.[45] In Texas in the distribution of the paternal moiety, children of deceased aunts will take per stirpes.[46]

§ 6. *Husband or wife as heirs.*[47]—The widow's share in the husband's estate will be governed by the statute in force at the time of the husband's death.[48] In case of intestacy leaving no issue or parent the survivor takes the entire estate,[49] and the property given to the surviving widow by statute on intestacy of the husband without issue vests in her absolute.[50] In Minnesota, as against a testamentary disposition of personalty, the surviving wife has no interest,[51] but in Ohio she is entitled to her share irrespective of any testamentary disposition,[52] and if the will affects an equitable conversion of the realty into personalty, the widow will take her distributive share though she has been paid her dower.[53] In computing the widow's share of the personalty under the North Carolina statute, she should receive one-half after deducting expenses of administration less the amount paid her for a year's support.[54] A post-nuptial contract procured by fraud will not affect the widow's inheritance.[55]

DETINUE.[56]

Non detinet puts in issue defendant's possession of the chattels at the time of suit,[57] but evidence of possession three days before is prima facie sufficient.[58] A verdict need not separately find the value of articles of the same class.[59] The right of defendant to a judgment for return of the goods or for their value on nonsuit must be sought during the term.[60]

See Death by Wrongful Act.

39. Facts held to show that the property had been conveyed absolutely to the mother and not in trust by the deceased father—Shires v. Shires, 76 App. Div. (N. Y.) 621.

40. Such son did not take directly from the mother within Laws 1896, c. 547, § 284—Righter v. Ludwig, 39 Misc. (N. Y.) 416.

41. Under Rev. St. 1881, §§ 2483, 2486, 2487—Bateman v. Bennett (Ind. App.) 67 N. E. 713.

42. Finley v. Abner (Ind. T.) 69 S. W. 911.

43, 44. In re Davenport, 172 N. Y. 454.

45. Ky. St. § 1893. Though one of the parents paid the purchase money—Guier v. Bridges, 24 Ky. L. R. 945, 70 S. W. 288.

46. Rev. St. 1895, art. 1695, does not apply to the distribution of the paternal moiety—Jernigan v. Lauderdale (Tex. Civ. App.) 73 S. W. 39.

47. See Husband & Wife for rights of survivor in community property. See Homesteads for rights of survivor in land exempted as homestead. See Estates of Decedents for widow's quarantine and allowance. See Curtesy and Dower for such interest of survivor.

48. Evans' Adm'r v. Evans, 24 Ky. L. R. 2421, 74 S. W. 224.

49. Burns' Rev. St. § 2651—Haugh v. Smelser (Ind. App.) 66 N. E. 506; McCarthy v. McCarthy, 20 App. D. C. 195.

50. Code Civ. Proc. § 2713—Crawford v. Nassoy, 173 N. Y. 163.

51. Laws 1889, c. 46, § 70, amended Laws 1893, c. 116—In re Robinson's Estate, 88 Minn. 404.

52, 53. Hutchings v. Davis, 68 Ohio St. 160.

54. Baptist Female University v. Borden, 132 N. C. 476.

55. Palmer v. Palmer (Utah) 72 Pac. 3.

56. Statutory substitutes are treated under Replevin.

57, 58, 59. Downs v. Bailey, 135 Ala. 329.

60. Ex parte Bolton, 136 Ala. 147.

DIRECTING VERDICT AND DEMURRER TO EVIDENCE.

§ 1. *Directing verdict.*[61]—The court should direct a verdict without hesitancy in a case where the duty is plain though it should not do so if in doubt as to the propriety of the action.[62] A motion for a directed verdict is to be regarded as a demurrer to the evidence, admitting not only all the evidence proves but all that it tends to prove, and the judge cannot consider any modifying or countervailing evidence, the sole question being whether there is or is not evidence legally tending to prove the fact affirmed.[63] The most favorable view which is authorized by the law of evidence must be taken in favor of the party against whom verdict is directed.[64] His evidence with all inferences fairly deducible from it must be assumed to be true though contradicted in every particular.[65] Evidence erroneously admitted in his favor over objection and exception may be disregarded,[66] so also evidence at variance with the pleadings.[67] As against one defendant, evidence preventing a direction may be introduced by a co-defendant.[68]

Rules as to quantum of evidence. Generally.—In some jurisdictions, evidence amounting to more than a scintilla demands submission to the jury;[69] in others, the rule is that any evidence tending to support the plaintiff's cause of action is sufficient,[70] or any competent evidence which if believed would support a verdict for plaintiff,[71] and conversely on motion by plaintiff.[72]

Elsewhere, the question is not whether or not there is any evidence but whether or not there is any substantial evidence on which a jury can properly render a verdict in favor of the party who produced it.[73] Such evidence may be

61. See, also, Dismissal and Nonsuit for nonsuit on failure of proof. Discharge of jury and trial by court where no facts are in dispute see articles Jury; Trial. Necessity to request directed verdict in order that errors may be reviewed is treated in article Saving Questions for Review.

62. U. P. Steam Baking Co. v. Omaha St. Ry. Co. (Neb.) 94 N. W. 533.

63. Cohen v. Chicago & N. W. Ry. Co., 104 Ill. App. 314; Chadbourne v. Illinois Cent. R. Co., 104 Ill. App. 333; Wetherell v. Chicago City R. Co., 104 Ill. App. 357; Hartung v. North Chicago St. R. Co., 102 Ill. App. 470. Plaintiff's evidence alone should be considered and all questions on which there was a substantial conflict of testimony dismissed from consideration, since on such questions defendants are entitled to have judgment of a jury—Chesley v. Rocheford (Neb.) 96 N. W. 241.

64. From that evidence and inferences justified to be drawn therefrom the judge must say whether there is any evidence which would reasonably justify a finding for that party—Milwaukee Mech. Ins. Co. v. Rhea (C. C. A.) 123 Fed. 9. Verdict should not be directed unless the facts testified to can be said to admit of no rational inference but that of absence of negligence on the part of defendant railroad company, or the presence of negligence on the part of plaintiff's decedent or the plaintiff has failed to furnish a scintilla of evidence on all essential points to sustain his claim—Ham v. Lake Shore & M. S. Ry. Co., 23 Ohio Circ. R. 496; Cogan v. Cass Ave. & F. G. Ry. Co. (Mo. App.) 73 S. W. 738.

65. Newbold v. Hayward. 96 Md. 247.

66. Townsend v. Greenwich Ins. Co., 86 App. Div. (N. Y.) 323; Mallory v. Fitzgerald's Estate (Neb.) 95 N. W. 601.

67. Winchester v. Joslyn (Colo.) 72 Pac. 1079.

68. Bopp v. New York Elec. Vehicle Transp. Co., 78 App. Div. (N. Y.) 337.

69. Plaintiff's case—Coble v. Huffines, 132 N. C. 399.

70. Gladstone Baptist Church v. Scott (Ky.) 74 S. W. 1075; Chesapeake & N. R. Co. v. Ogles, 24 Ky. L. R. 2160, 73 S. W. 751; Chicago & E. I. R. Co. v. Huff, 104 Ill. App. 594; Illinois Cent. R. Co. v. Crady, 24 Ky. L. R. 643, 69 S. W. 706; Heman v. Larkin (Mo. App.) 70 S. W. 907; Nelson v. Fehd. 203 Ill. 120. In conversion to recover the value of grain unlawfully cut, a verdict should not be directed for defendant if there is evidence as to the value of the standing grain, though it is not very specific—Mueller v. Olsen (Minn.) 97 N. W. 115. Evidence "fairly tending to prove"—Hartrich v. Hawes, 202 Ill. 334. Circumstantial evidence—Caris v. Nimmons, 92 Mo. App. 66. In an action for malicious prosecution where the evidence fairly tended to show want of probable cause for the arrest and malice, the cause should not be taken from the jury—Lasher v. Littell, 202 Ill. 551. Verdict should not be directed for defendant in an action for false imprisonment where there is evidence tending to show defendant's bad faith—Burbanks v. Lepovsky (Mich.) 96 N. W. 456. A reasonable inference of actionable negligence will prevent a directed verdict for defendant—Board v. Chesapeake & O. R. Co., 24 Ky. L. R. 1079. 70 S. W. 625.

71. Allen v. Cerny (Neb.) 94 N. W. 151.

72. An instruction for plaintiff may be refused where defendant has introduced evidence tending to support a counterclaim—New Orleans Coffee Co. v. Cady (Neb.) 95 N. W. 1017.

direct or inferential,[74] but slight evidence which is suspicious and uncertain is not sufficient.[75]

Absence of evidence.—An instruction should be given for defendant where there is no testimony to support plaintiff's contention on a material and essential point;[76] so verdict should be directed on such counts in the declaration as are wholly unsupported,[77] and where there is no evidence whatever an issue may be withdrawn.[78] A verdict is properly directed for plaintiff where defendant having assumed the burden of proof offers no evidence as to material facts.[79]

Necessity that verdict if given should be set aside.—Where the evidence with all the inferences which the jury could justifiably have drawn from it is insufficient to support a verdict for one party so that it would be the duty of the court to set aside such verdict if it had been rendered, the court may direct a verdict for the opposite party.[80] To justify a court in directing a verdict or changing the answer of the jury from affirmative to negative, the finding of the jury must be contrary to the undisputed credible evidence.[81] The evidence must demand a finding in accordance with the verdict.[82]

Undisputed or conclusive evidence.—Though a question of fact is involved, a verdict may be directed if the evidence is clear and uncontradicted,[83] such that all reasonable men in the exercise of an unprejudiced judgment must reach the same conclusion,[84] but not when the court cannot say that the jury, without acting

73. Cole v. German Sav. & Loan Soc. (C. C. A.) 124 Fed. 113.

74. Rosenbaum v. Gilliam (Mo. App.) 74 S. W. 507.

75. Chicago, R. I. & P. Ry. Co. v. Sporer (Neb.) 94 N. W. 991.

76. Cogan v. Cass Ave. & F. G. Ry. Co. (Mo. App.) 73 S. W. 738. If at the close of the testimony in a trial for personal injuries there is no substantial evidence on which a jury can properly find that the negligence charged was the proximate cause of the hurt sustained, it is the duty of the court, as it is in a like condition of the evidence in the trial of every other issue of fact, to instruct the jury to return a verdict for defendant—Cole v. German Sav. & Loan Soc. (C. C. A.) 124 Fed. 113. Where no competent admissible evidence of negligence is produced—Thomas v. Star & C. Milling Co., 104 Ill. App. 110.

77. Chicago & A. R. Co. v. O'Leary, 102 Ill. App. 665.

78. Tague v. John Caplice Co. (Mont.) 72 Pac. 297.

79. Boughn v. Security State Bank (Neb.) 95 N. W. 680. In a suit on a contract, where no evidence is introduced in support of the only defense properly pleaded, the court should construe the contract, determine the measure of damages and direct the jury to return a verdict accordingly—School Dist. v. McDonald (Neb.) 94 N. W. 829.

80. Day v. Boston & M. R. R., 97 Me. 528; Webster Mfg. Co. v. Goodrich, 104 Ill. App. 76; Sherwood v. Rieck, 104 Ill. App. 368; Palmer v. Fidelity Mut. Fire Ins. Co. (Neb.) 92 N. W. 575; Chaffee v. Park Falls Lumber Co. (Neb.) 96 N. W. 495; Lynch v. Englehardt, etc., Merc. Co. (Neb.) 96 N. W. 524; Marquardt v. Ball Engine Co. (C. C. A.) 122 Fed. 374; Heisch v. Bell (N. M.) 70 Pac. 572; Wall v. Brewer, 115 Ga. 1021.

Note.—New York has departed from the rule that the court may direct a verdict at the close of all the evidence where it would be compelled to set aside a verdict in favor of the opposing party, and holds that where an actual issue of fact is presented the case must go to the jury—McDonald v. Metropolitan St. Ry. Co., 167 N. Y. 66.

81. Blohowak v. Grochoski (Wis.) 96 N. W. 551.

82. Verdict for a particular amount should not be directed unless demanded by the evidence—Pritchett v. Moore, 116 Ga. 757.

83. Residence of a corporation was involved—Nester v. Baraga Tp. (Mich.) 95 N. W. 722; Wagoner v. Landon (Neb.) 95 N. W. 496. Issue as to whether defendant was plaintiff's agent—Midville, S. & R. B. R. Co. v. Bruhl (Ga.) 43 S. E. 717; Bryson v. Wallace (Ind. T.) 69 S. W. 814; McCleneghan v. Norton (Neb.) 93 N. W. 695. Instruction for attorney's fees—New York Life Ins. Co. v. English (Tex. Civ. App.) 70 S. W. 440. Where value of goods sought in trover is undisputed, verdict in such amount may be directed—Rogers v. Dutton, 182 Mass. 187. Action on notes for farm machinery—Winterringer v. Warder (Neb.) 95 N. W. 619.

84. Chicago & N. W. Ry. Co. v. De Clow (C. C. A.) 124 Fed. 142. Defense of usury—McCall v. Herring (Ga.) 45 S. E. 442; City of Chanute v. Higgins, 65 Kan. 680, 70 Pac. 638; Merchant v. South Chicago City Ry. Co., 104 Ill. App. 122; Linton v. Baker (Neb.) 96 N. W. 251. Issue as to whether certain cattle were covered by a chattel mortgage—Adams v. South Omaha Nat. Bank (C. C. A.) 123 Fed. 641. Where all reasonable minds would be compelled to conclude that plaintiff encountered danger with concurrent injury under circumstances and surroundings showing that in so doing he acted rashly, recklessly or unreasonably—Illinois Cent. R. Co. v. Finfrock, 103 Ill. App. 232. Verdict may be directed for defendant in an action for injuries at a railroad crossing, where the undisputed evidence when construed most favorably to plaintiff is insufficient to warrant the inference of negligence—Hajsek v. Chicago, B. & Q. R. Co. (Neb.) 97 N. W. 327.

unreasonably, might come to a different conclusion from the evidence,[85] as where two equally plausible conclusions may be deduced from the circumstances,[86] or where a reasonable inference against the moving party exists.[87] It is error to direct a verdict where the evidence would authorize a finding for either party.[88]

On conflicting evidence as to a material issue of fact, a verdict cannot be directed.[89] Immaterial questions of fact need not be submitted.[90] The rule that defendant must admit all of the facts essential to plaintiff's case, or they must be established by documentary evidence which he is estopped to deny, is not applicable if there is no evidence tending to prove the defenses which he pleads and the facts on which plaintiff's cause of action is based are undisputed.[91]

Evidence of contributory negligence should not be withdrawn by direction of a verdict.[92]

Preponderance of the evidence will not warrant a direction if an issue of fact is presented,[93] which is supported by any credible evidence.[94]

Credibility of witnesses is a question for the jury,[95] though they are uncontradicted,[96] or though they have made contradictory statements out of court;[97] but where the undisputed circumstances show that a witness' version cannot be by any possibility true, or if it is inherently impossible, the rule demanding the submission of the credibility of the witness to the jury does not apply.[98] A sufficient contradiction of the witness may arise from the nature of the facts to which he testifies, though the witness is not directly contradicted.[99] The question of intentional false testimony and its effect on other portions of the evidence is for the jury.[1] Where if experts whose evidence was properly received are believed by the jury, plain-

85. Standard Life & Acc. Ins. Co. v. Sale (C. C. A.) 121 Fed. 664; Howard v. Indianapolis St. Ry. Co., 29 Ind. App. 514. Plaintiff's negligence—Palmer v. Kinlock Tel. Co., 91 Mo. App. 106.

86. Chicago, R. I. & P. Ry. Co. v. Wood (Kan.) 72 Pac. 215. Action to establish a will—Hagan v. Sone, 174 N. Y. 317; Otstot v. Indiana, I. & I. R. Co., 103 Ill. App. 136; Whalen v. Utica Hydraulic Cement Co., 103 Ill. App. 149. Contract for shipment of coal —Hocking v. Hamilton (C. C. A.) 122 Fed. 417.

87. Peters v. Southern Ry. Co., 135 Ala. 533.

88. Cunningham v. Central of Ga. Ry. Co. (Ga.) 45 S. E. 246.

89. Moore v. Nashville, C. & St. L. Ry. (Ala.) 34 So. 617; Morrill v. McNeill (Neb.) 91 N. W. 602; Matheson v. City of Tennille, 115 Ga. 999; Central Ry. Co. v. Mehlenbeck, 103 Ill. App. 17; Peters v. Southern Ry. Co., 135 Ala. 533; Pope v. Whitcomb (Neb.) 93 N. W. 947. Action for logs—Griffin v. Brock (Miss.) 33 So. 968. Action on note given for legal services—McWhorter v. Bluthenthal, 136 Ala. 568. Error to direct a verdict in a proceeding to set aside a tax sale on account of an excessive levy where there is a wide variance between the evidence of plaintiff and defendant as to the value of the property levied on—Stark v. Cummings (Ga.) 45 S. E. 722. On failure of an affirmative defense, there being positive evidence to the contrary by plaintiffs, verdict for defendant should not be directed—Webb v. Hicks (Ga.) 43 S. E. 738. Evidence that a person does not remember having authorized a message is not so contradictory of evidence that it was authorized as to require a submission to the jury—Norman v. Western Union Tel. Co., 31 Wash. 577, 72 Pac. 474.

90. Stokes v. Foote, 172 N. Y. 327.

91. Mosby v. McKee, etc., Commission Co., 91 Mo. App. 500.

92. See generally Negligence and articles dealing with particular phases thereof such as Carriers, Master and Servant.

Chicago, B. & Q. R. Co. v. Lilley (Neb.) 93 N. W. 1012.

93. Philips v. Philips, 77 App. Div. (N. Y.) 113; Daggett v. Webb (Tex. Civ. App. 70 S. W. 457; Rosenkranz v. Saberski, 40 Misc. (N. Y.) 650.

94. Morton v. Smiley (Wis.) 96 N. W. 534.

95. Quincy Gas & Elec. Co. v. Bauman, 104 Ill. App. 600. Sufficiency of resolution authorizing municipal contracts to take the place of ordinances for such purpose required by charter, must be submitted to the jury where established by parol evidence—Dalton v. City of Poplar Bluff, 173 Mo. 39. In replevin where plaintiff alone testifies to value of property, the jury should not be instructed that in finding for plaintiff, they should assess the value at such sum—Dysart v. Terrell (Tex. Civ. App.) 70 S. W. 986.

96. City of Poplar Bluff v. Hill, 92 Mo. App. 17; Hugumin v. Hinds, 97 Mo. App. 346.

97. McCoy v. Munro, 76 App. Div. (N. Y.) 435.

98. Blumenthal v. Boston & M. R. R., 97 Me. 255.

99. Van Gaasbeek v. Staples, 85 App. Div. (N. Y.) 271.

1. Bankers' Union v. Schiverin (Neb.) 92 N. W. 153.

tiff is entitled to substantial damages it is error to direct a verdict for nominal damages.[2]

Variance.—A directed verdict on the ground that a theory presented by the pleadings is not supported by the evidence may be denied where in his evidence plaintiff expressly repudiates such theory.[3]

Insufficiency in law.—The court should so instruct the jury when the evidence offered is not sufficient in law to make out the case of the party who has offered it.[4]

The federal courts hold that where plaintiff is not entitled to recover and does not ask leave to take a voluntary nonsuit and there is no motion by defendant for a compulsory nonsuit, verdict is properly directed for defendant,[5] but in other courts it has been held that though plaintiff has failed to prove his case and should be nonsuited, defendant is not entitled to have a verdict directed in his favor which will be a final bar to plaintiff's right of action.[6]

Right as dependent on the state of the pleadings.—A verdict cannot be directed based on pleadings bad in substance.[7] Where the answer contains no substantial defense, verdict may be properly directed for plaintiff.[8] A verdict should not be directed in favor of a surety entitled to a partial release where its effect will be to release him entirely.[9]

Time for motion or direction.—A verdict may be directed at any time before the jury's verdict is announced and recorded in open court.[10] A prayer for an instruction that evidence is insufficient to entitle plaintiff to recover may be granted at the close of plaintiff's evidence.[11] In Florida, a directed verdict after all the evidence is in cannot be requested before the argument.[12]

Duty of court to first announce rulings on evidence.—If objections to evidence and motions to strike the same are reserved, the court cannot direct a verdict without special ruling on the objections and motion made.[13]

Effect of motion on moving party.—The New York rule that after a motion to direct a verdict in his favor a party is not entitled to reserve exceptions to a refusal to send the case to the jury at his request after the motion to direct a verdict was denied is not followed in the circuit court of appeals of the second circuit.[14]

Motion by both parties.—Where both parties move for a directed verdict, it is a virtual submission of the issue to the judge.[15] The court may determine the case on its merits,[16] and its decision on the facts is equivalent in effect to a verdict.[17]

2. Bjerrum v. Springfield Breweries Co., 83 App. Div. (N. Y.) 172.

3. Alleged joint contract in declaration against connecting carriers—Texas & P. Ry. Co. v. Hall (Tex. Civ. App.) 72 S. W. 1052.

4. Hill v. Pitt (Neb.) 96 N. W. 339. Undisputed evidence of probable cause warrants a direction for defendant in malicious prosecution—Bechel v. Pacific Exp. Co. (Neb.) 91 N. W. 853. Though some of the facts bearing on that issue may be in dispute—Figg v. Hanger (Neb.) 96 N. W. 658.

5. Gibboney v. Board of Chosen Freeholders (C. C. A.) 122 Fed. 46.

6. Rosenkranz v. Saberski, 40 Misc. (N. Y.) 650. Plaintiff should be reserved the right to institute a subsequent action for the same cause (Civ. Code, 1895, § 5347)—Hines v. McLellan (Ga.) 45 S. E. 279.

7. Kelly v. Strouse, 116 Ga. 872.

8. Sloan Commission Co. v. Fry (Neb.) 95 N. W. 862.

9. Trial of an illegality filed by a surety on whose property a fi. fa. had been levied reciting that the plaintiff in fi. fa. had released property of the principal defendant for the sum of $90.00 which was credited on the fi. fa. but which property was averred to be worth $200—Ward v. McLamb (Ga.) 45 S. E. 688.

10. Prior to such time the judge may recall all instructions and direct a verdict—Garrett v. Farwell, 102 Ill. App. 31.

11. Proceedings under a caveat to a will—Schwanteck v. Berner, 96 Md. 138.

12. Rev. St. § 1088—Florida Cent. & P. R. Co. v. Seymour (Fla.) 33 So. 424.

13. McDermott v. Mahoney (Iowa) 93 N. W. 499.

14. One Pearl Chain v. United States (C. C. A.) 123 Fed. 371.

15. Cullinan v. Fidelity & Casualty Co., 82 N. Y. Supp. 695.

16. Snow v. Modern Woodmen, 24 Ohio Circ. R. 142.

Each party is concluded as to the findings of fact.[18] Though the only evidence on an issue is given by an interested witness, such issue need not be submitted unless requested where both parties have moved for a directed verdict.[19] The New York rule that a motion by both parties for direction of a verdict is a submission of questions of fact to the court is not followed in Wisconsin.[20]

On appeal, every reasonable intendment of the facts will be indulged in favor of the party in whose behalf the verdict is directed.[21]

Waiver of motion.—A motion at the close of plaintiff's case is waived by introduction of evidence by defendant on his own behalf,[22] and must be renewed at the close of all the evidence.[23] Where after the close of evidence against one defendant he moves for a directed verdict in his favor, there being no evidence against him, but the motion is denied and he remains in the case, and his co-defendant presents evidence which tends to show his liability, the case against him may properly be submitted to the jury.[24]

§ 2. *Demurrers to evidence.*[25]—A demurrer to the evidence admits the truth of plaintiff's testimony together with reasonable inferences to be drawn therefrom most favorable to plaintiff.[26] It is to be regarded as a waiver by demurrant of all evidence introduced by it that is contradictory to that for the demurree.[27] The court cannot weigh contrary inferences.[28] If the evidence supports the issue made by the pleadings, a demurrer to the evidence should be overruled,[29] or if there is any evidence from which the essential facts may be inferred.[30] A demurrer to plaintiff's evidence may be sustained when, considered with the whole evidence, reasonable persons could not differ as to the failure to establish a prima facie case,[31] or where it totally fails to support the pleadings.[32] A joinder in demurrer may be compelled unless the court doubts the facts to be reasonably inferred though the evidence is plainly against the demurrant. A mere conflict in the evidence does not warrant a refusal since it may be determined by rejecting the parol evidence of the demurrant. The existence of the right is to be determined in the judicial discretion of the trial court.[33]

When demurrer should be made.—The production of other portions of the record on cross-examination of a witness as to a record testified to by him, and the reading of such portions of the record to the jury, does not amount to the introduction of original evidence forfeiting the right to demurrer.[34]

17. Leggat v. Leggat, 79 App. Div. (N. Y.) 141.

18. Bradley Timber Co. v. White (C. C. A.) 121 Fed. 779.

19. W. P. Fuller & Co. v. Schrenk, 171 N. Y. 671.

20. National Cash Register Co. v. Bonneville (Wis.) 96 N. W. 558.

21. Birnstein v. Stuyvesant Ins. Co., 39 Misc. (N. Y.) 808; Appel v. Aetna Life Ins. Co., 86 App. Div. (N. Y.) 83.

22. Western Md. R. Co. v. State, 95 Md. 637.

23. Anthony Ittner Brick Co. v. Ashby, 198 Ill. 562.

24. Bopp v. New York Elec. Vehicle Transp. Co., 78 App. Div. (N. Y.) 337.

25. See definition and historical sketch in Cyc. Law Dict. "Demurrer (In Practice)."

26. In seduction it presents the question whether plaintiff's testimony is sufficient on which to base a finding of such loss of services as is necessary to maintain the action—Snider v. Newell, 132 N. C. 614. Evidence held sufficient to authorize a verdict for plaintiff injured at a railroad crossing—Vance v. Ravenswood, S. & G. Ry. Co. (W. Va.) 44 S. E. 461; Creighton v. Modern Woodmen, 90 Mo. App. 378.

27. Glasscock v. Swofford Bros. Dry Goods Co. (Mo. App.) 74 S. W. 1039; Chinn v. Chicago & A. Ry. Co. (Mo. App.) 75 S. W. 375; Geiser Mfg. Co. v. Lee (Ind. App.) 66 N. E. 701.

28. Morrow v. Pullman Palace Car Co., 98 Mo. App. 351.

29. Kelly v. Strouse, 116 Ga. 872.

30, 31. Morrow v. Pullman Palace Car Co., 98 Mo. App. 351.

32. Sustained on failure of evidence to discharge burden of proving alleged waiver of forfeiture in action on insurance policy—Cottom v. National Fire Ins. Co., 65 Kan. 511, 70 Pac. 357. Sustained where evidence shows right of action on contract without evidence of tort, the sole ground of action alleged—Ellis v. Flaherty, 65 Kan. 621, 70 Pac. 586. Not sustained on failure of evidence as to injury to land, where injury to land and crops was alleged—Coleman v. Bennett (Tenn.) 69 S. W. 734.

33. University of Virginia v. Snyder (Va.) 42 S. E. 337.

Proceedings after demurrer.—Defendant after a decision against him on demurrer to plaintiff's evidence may introduce evidence in his own behalf.[35]

DISCOVERY AND INSPECTION.

§ 1. Discovery in Equity.
§ 2. Production and Examination of Books, etc.; Examination of Party.—A. Right to Examination or Inspection. B. Persons, Books, and Papers Liable. C. Procedure; Use at Trial. D. Order, and Time or Manner of Examination. E. Physical Examination to Prepare for Trial or to Prepare Evidence.

Discovery is a remedy for the disclosure of facts or the production of instruments in the possession or power of the adverse party which are necessary to maintain the right or title of the party asking it. It was originally a chancery proceeding ancillary to another suit but is sometimes asserted as a common-law right. Its remedial features are preserved in code remedies for examination of parties or inspection of documents.[36]

§ 1. *Discovery in equity.*—The right to have discovery must pertain to material facts relating to complainant's own case and cannot be extended to the manner in which, or the evidence by which, the adversary's case is to be established.[37] It is refused when unnecessary to make a prima facie case,[38] or when the complainant fails to show a right to be protected.[39] A suit in equity cannot be brought in the federal courts to discover evidence to enforce a purely legal demand, provable by process at law.[40] In an equitable suit by judgment creditors of a corporation to obtain discovery of names of stockholders to sue them, it cannot be urged that a statute providing for production of documents in possession of an adverse party gave an adequate remedy, since that statute applies only when a suit has already been commenced.[41] In a creditor's suit against the defendant and his alleged debtor, if the debt is purely legal and is denied by the alleged debtor, the question of its existence cannot be tried, but complainant may obtain a discovery from such alleged debtor as to his indebtedness, and the right to an equitable lien by his joinder, with a provision in the decree that the lien may become effective when the debt is established at law, and may also have a receiver appointed with authority to bring such an action.[42] If the bill waives a sworn answer discovery

34. Cooley v. Galyon, 109 Tenn. 1, 60 L. R. A. 139.

35. Riley v. Missouri Pac. Ry. Co. (Neb.) 95 N. W. 20.

36. Cyc. Law Dict. "Discovery." As a preliminary to the introduction of secondary evidence of documents a notice to produce them may be given. See Evidence (Documentary Evidence). Compare also Trial (Reception and Exclusion of Evidence).

Examination of a party by way of taking his deposition for use as evidence is treated in the article Depositions. Subpoena duces tecum see Evidence. Witnesses.

37. Denied to cross complainant—Sunset Telephone & Telegraph Co. v. City of Eureka, 122 Fed. 960.

38. Where, in a suit to enjoin infringement of a patent, the validity and infringement are not disputed, and claimant claims as an assignee and proves his assignment, his case is prima facie complete without proving defendant's knowledge of the assignment—Arnold Monophase Elec. Co. v. Wagner Elec. Mfg. Co., 118 Fed. 653.

39. The creditor of an insolvent railroad company cannot have a discovery of prices paid for claims against the company by the president, in a purchase for a third person who had full right to buy them, unless he shows a conspiracy to defraud stockholders and creditors, especially where a master has previously allowed such claims—Cassidy Fork Boom & Lumber Co. v. Roaring Creek & C. R. Co., 119 Fed. 425.

40. Bill based on agreement for use of patented device for discovery and accounting as to the use of such device as a basis of royalty will not lie since defendant is entitled to a jury trial, and under Rev. St. U. S. § 724, plaintiff may compel production of the evidence at law—Safford v. Ensign Mfg. Co. (C. C. A.) 120 Fed. 480.

41. A demurrer by defendant on the ground that the claims of the judgment creditors not having been proven in the insolvency proceedings they thereby lost their remedy against the corporation, cannot be sustained where it appears that complainants were non-residents and under the statute governing insolvency proceedings the claims of nonresidents who have not appeared voluntarily in the proceedings are not affected (Gen. Laws, c. 274)—Clark v. Rhode Island Locomotive Works (R. I.) 53 Atl. 47.

42. Hudson v. Wood, 119 Fed. 764.

cannot be had,[43] but the rule is not extended to a creditor's suit in which the creditors are endeavoring to discover assets.[44] In a suit against a corporation by a judgment creditor to compel discovery of the names of stockholders, the bill is not liable to demurrer for failure to allege that the stockholders had not protected themselves from liability; if it alleges that complainants did not know their names and residences and the amount of stock held by them, that the treasurer had been requested to give them such information but had neglected to do so, and that they had no means of learning the facts necessary to prosecute an intended action at law, it is sufficient as to allegations of want of knowledge.[45] It is not necessary to discovery that a bill against stockholders to subject equitable assets of the corporation to a judgment against it, asking discovery as incidental relief, should be verified.[46] On a bill for partition asking discovery and alleging that defendants have in their possession a will under which complainant claims title, and which they refuse to produce or prove, or permit complainant to use for that purpose, the court will construe the will on the issue as to whether complainant has a right to discovery.[47] An order for the inspection of books by a party litigant before trial where the books contained entries which have no concern with his transaction and which he is not entitled to inspect must require deposit of books in the clerk's office and attendance of a representative of the other party, and that the clerk shall determine the relevancy of contested entries as to their inspection, the judge being empowered to review such determination at chambers on summary application.[48]

§ 2. *Production and inspection of books, papers, and documents; examination of party.*[49] *A. Right to examination or inspection.*—Production and inspection of books may be had in the Federal courts before trial at law,[50] and in Montana.[51] The granting of the order is in the discretion of the trial court and it may exclude such books or papers on trial, if the inspection is not allowed.[52] The application must conform to the statute.[53] It must appear that the examination of a party,[54] or the inspection of books, papers, or documents,[55] is necessary

43. Tillinghast v. Chace, 121 Fed. 435; Excelsior Wooden Pipe Co. v. Seattle (C. C. A.) 117 Fed. 140.

44. Hudson v. Wood, 119 Fed. 764.

45. Under Gen. Laws, c. 180, § 14—Clark v. Rhode Island Locomotive Works (R. I.) 53 Atl. 47.

46. Montgomery Iron Works v. Capital City Ins. Co. (Ala.) 34 So. 210.

47. Hanneman v. Richter, 63 N. J. Eq. 803.

48. Gray v. Schneider, 119 Fed. 474.

49. The discretion of the court on an application for production of books, papers and documents to enable a party to prepare for trial should be liberally exercised (Hart v. Ogdensburg & L. C. R. Co., 69 Hun [N. Y.] 497, cf. Richmond's Appeal, 59 Conn. 226, 21 Am. St. Rep. 85); but they must contain evidence relative to the merits of the case (Keeler v. Dusenbury, 1 Duer [N: Y.] 660); and the party applying must show this to be the fact to the satisfaction of the court or officer by stating facts and circumstances (Davis v. Dunham, 13 How. Pr. [N. Y.] 425; New England Iron Co. v. New York Loan & Imp. Co., 55 How. Pr. [N. Y.] 351; Lienan v. Dinsmore, 10 Abb. Pr. [N. S.; N. Y.] 212; Ely v. Mowry, 12 R. I. 570); and show enough facts to raise a presumption that the documents exist and are in the possession and control of the other party (Hoyt v. American Exch. Bank, 1 Duer [N. Y.] 655; Ahlymeyer v. Healy, 12 N. Y. State Rep. 677). Curiosity alone is insufficient (Bien v. Hellman, 2 Misc. [N. Y.] 168); books of no use when produced are not subject to the order (Whitman v. Weller, 39 Ind. 515). "Fishing for evidence," or "drawing the fire" of the opposite party will not be allowed (Arnold v. Pawtuxet Valley Water Co., 18 R. I. 189); if the applicant can gain access to the books without an order it will not be allowed (McAllister v. Pond, 6 Duer [N. Y.] 702, 15 How. Pr. 299). See extended note in 41 Am. St. R. 392.

50. Especially if their existence has been disclosed by discovery (under Rev. St. U. S. 724, providing that in actions at law the federal courts may require production of books or writings in the possession or power of parties, on motion and notice, which contain evidence pertinent to the issue under circumstances allowing such production in chancery)—Gray v. Schneider, 119 Fed. 474.

51. Where an action at law is pending, the court may order an inspection of books, papers and documents in possession of the other party containing evidence relating to the merits of the action or defense (Code Civ. Proc. § 1810)—State v. District Ct., 27 Mont. 441, 71 Pac. 602. Since the statute enumerates the reasonable grounds for it, it is not an "unreasonable search or seizure."—Id.

52. Under Code Civ. Proc. § 394—Chamberlain v. Chamberlain Banking House (Neb.) 93 N. W. 1021.

53. Under Code Civ. Proc. c. 8, art. 4—Romer v. Kensico Cemetery, 79 App. Div. (N. Y.) 100.

54. Hunt v. Sullivan, 79 App. Div. 119, 12 N. Y. Ann. Cas. 328. Plaintiff cannot have an

to the other party in the preparation of his case for trial. Mere "fishing excursions" to probe the other party for possible grounds of an action or defense are not allowable.[56] It must appear that the information sought is peculiarly within the

examination of defendant before trial to obtain information to enable him to ask recovery of a specific amount if he can state the amount without such examination with reasonable accuracy and his demand is not complicated with other matters—Boeck v. Smith, 85 App. Div. (N. Y.) 575. An order for examination of certain defendants to enable plaintiff to frame his pleadings will not be allowed unless he shows a cause of action by affidavit and the necessity of the examination; that he has insufficient information to draw his complaint, and that defendants have such necessary information to the obtaining of his relief—Butler v. Duke, 39 Misc. (N. Y.) 235. Where the grounds of complaint in an action by a minority stockholder against the directors was that under certain agreements they were mismanaging the corporation to their own advantage and to the injury of the stockholders, the latter are not entitled to an examination of the directors before joinder of issues, since the exact terms of the agreement as to which the plaintiffs were ignorant need not be alleged—Elmes v. Duke, 39 Misc. (N. Y.) 244. Where it appears in an action to reach part of the income from a trust fund that the beneficiary was entitled to as much as was necessary for his support, plaintiff may have an examination of the trustees before trial to determine the amount of income and surplus, if any, and to find in whose possession books relating to the trust are kept—Corn Exch. Bank v. Lorillard, 84 App. Div. (N. Y.) 194. Where a stockholder who had exchanged his common stock for bonds of a consolidated company alleged in an affidavit asking examination of the directors who were defendants, together with the other corporations constituting the consolidated company, that they had deceived him as to the value of his stock, and had retained for their own benefit, the difference between the interest paid on the bonds he had received and the earning capacity of the stock he had surrendered, and that he had been damaged as an individual, he will not be allowed to examine certain of the directors of his company before trial, since he is able to frame a complaint for deceit and damages based on the alleged misrepresentations from an injury resulting therefrom—Butler v. Duke, 39 Misc. (N. Y.) 235. An affidavit by a minority stockholder of a corporation alleging that its directors controlled three similar corporations and a consolidated company embracing all of them; that they agreed to divert business of the company to other corporations and afterwards to the consolidated company; that they withheld from stockholders, dividends earned, and had benefited individually by large profits, will entitle him to sue for an accounting of profits and enable him to draw his complaint so that an examination of the directors before trial will not be allowed; the extent of the damages cannot be made a subject for examination of the directors; nor can a director be required to disclose what has been done with the property of the corporation, merely because of his fiduciary relation to the stockholder, where the affidavit for such examination shows that plaintiff has sufficient information to draw his complaint—Elmes v. Duke, 39 Misc. (N. Y.) 244.

55. It will not be allowed to enable plaintiff to form its complaint where it has the necessary information without such order—Snow, Church & Co. v. Snow-Church Surety Co., 80 App. Div. (N. Y.) 40. Where in an action by customers of stock brokers to surcharge accounts rendered because certain items are false and fraudulent and the pretended transactions fictitious, it is alleged that the information cannot be obtained except from the stock brokers, plaintiffs are entitled to examination of such persons before trial to determine who are the buyers and sellers in the alleged transactions—Caldwell v. Labaree, 40 Misc. (N. Y.) 564. Where defendant in an action to recover services for transactions on the stock exchange and for advancements, did not allego that any particular account or entry sought to be examined was necessary to enable him to prepare his answer or prove his defense, or that any account or entry in the book would be of value to him, an order giving him the general right to inspect plaintiff's books to discover defects in the latter's proof or matter justifying a defense or counterclaim, is improper—Seligsberg v. Schepp, 79 App. Div. (N. Y.) 626. In an action by an insurer to recover additional premiums on indemnity policies providing that the premium should be based on an estimate of the compensation paid by the insured to its employes during the existence of the policy, and that such premium should be raised if greater compensation was paid, and a certain amount thereof refunded if less compensation was paid, and as to other policies, they were based on the number of employes under certain conditions, both policies giving plaintiff the right to examination of books of the insured in so far as relating to the number of employes and the matter of their wages, in which the complaint alleged that the number of employes and the amount of wages was greater than appeared in the representations of assured, plaintiff is entitled to an order for examination of defendant's books (Code Civ. Proc. § 803)—Fidelity & Casualty Co. v. Seagrist, 79 App. Div. (N. Y.) 614. Where defendants do not show that the books of plaintiff contain entries which they wish and do not excuse their own failure in not obtaining the necessary information from persons whom they say informed them as to the books, they cannot compel plaintiff to produce his books in order to support a counterclaim—Russell v. McSwegan, 39 Misc. (N. Y.) 306.

56. Interrogatories for discovery and written answers under oath, such as seek exclusively matter for the other side which amount to a fishing excursion and are unreasonable and irrelevant or seek to establish a forfeiture to contradict written instruments or answers privileged on the ground of public interest, are not allowable—Volusia County Bank v. Bigelow (Fla.) 33 So. 704.

knowledge of the other party,[57] and that the party seeking it intends to use it at the trial.[58] The nature of the pending action in which the information is sought to be used and the nature of relief sought must appear to the court,[59] and the petition must show expressly or impliedly that the court has acquired, or would have, jurisdiction in the action in which an examination is sought.[60] The books and papers sought must be within the state.[61] Where complainant alleged injury by libel in a newspaper, an examination before suit to enable him to ascertain from the person in control who is the proprietor of the paper was denied though in former suits certain persons who were alleged to be the editors or proprietors filed answers denying such allegation.[62] It is no defense to a motion for discovery and inspection of the books of a firm that it has dissolved and has turned its books and papers over to a corporation succeeding to its business, where it appears that the members of the firm have become the officers of the corporation and it is not shown that they did not have control of the books and could not produce them for inspection.[63]

Under the Florida statute, plaintiff may propound interrogatories to a claimant of property seized under execution to discover affirmative evidence, disprove good faith of her claim, or to rebut a prima facie title asserted by her by showing fraud. The statute was intended to enable a party to secure admissions by the other party before trial to relieve the necessity of producing evidence to prove particular issues thus admitted. Such answers are admissible, though they may expose the persons answering them to actions or to penalties, also where the defendant in ejectment seeks to learn the character in which plaintiff claims, or seeks secondary evidence of lost written documents, or seeks to ascertain the character of confidential communications which the other party would not be privileged from disclosing, or to disprove the good faith of a prima facie defendant, or to show fraud on the part of the defendant.[64]

Plaintiff cannot be accused of laches in delaying an application for inspection of books of defendant where it alleges that defendant made statements regarding the facts sought to be discovered, which plaintiff believed to be true, and that on discovery of the falsity thereof plaintiffs at once applied for the examination, which statement was not denied by defendant.[65]

One suing a municipality may inspect public records and documents pertinent and material to the issues in possession of defendant, but cannot have a peremptory order requiring the latter on motion after notice to defendant in its corporate capacity, to exhibit such records and documents to his inspection at certain times and places; he may make a motion, designating the record or document he wishes to inspect, for a rule on the officer or agent of the municipality having custody of it,

57. An affidavit for examination of directors of a corporation before issue joined in an action by a stockholder, must show that the information desired is peculiarly within the knowledge of the directors and cannot be obtained by plaintiff in any other way, and that he demanded such information from the directors—Elmes v. Duke, 39 Misc. (N. Y.) 244.

58. Where it is alleged as a reason for asking examination of plaintiff before trial that it is necessary, in order that defendant may properly prepare for trial, but it does not appear that he intends to use the evidence at the trial, the examination will be denied without prejudice to a renewal of the motion on proper grounds—Dudley v. New York Filter Mfg. Co., 80 App. Div. (N. Y.) 164.

59. State v. District Ct., 27 Mont. 441 71 Pac. 602.

60. 61. Snow, Church & Co. v. Snow-Church Surety Co., 80 App. Div. (N. Y.) 40

62. The court observes that under the authority of Matter of Weil, 25 App. Div. (N. Y.) 173 this examination would be allowed, but "in this department" the rule is otherwise—In re Singer, 40 Misc. (N. Y.) 561.

63. Fidelity & Casualty Co. v. Seagrist, 80 App. Div. (N. Y.) 625.

64. Volusia County Bank v. Bigelow (Fla.) 33 So. 704.

65. Five years delay—Fidelity & Casualty Co. v. Seagrist, 80 App. Div. (N. Y.) 625.

to show cause why the inspection should not be allowed, and if the rule is made absolute on the return and disobeyed, it may be enforced by attachment.[66]

(§ 2) *B. Persons, books, and papers liable to examination.*—All of joint or successive parties should be examined if no one of them can make full disclosure.[67] The books and documents to be examined must be limited to those pertaining to the matter in controversy.[68] A provision in an order allowing inspection of letters written to defendant concerning a claim is too broad since defendant cannot be bound by statements written by strangers to the transaction.[69]

(§ 2) *C. Procedure; use at trial.*—Motion or application for physical examination should be made before trial if pleadings apprise defendant of nature of injury.[70] A "petition" to inspect books and papers in the hands of defendant cannot be joined with a "motion" for an order for examination of a party before trial.[71] A demand for inspection of papers is waived by the opposing party's appearance to oppose an order after service of an order to show cause.[72] That a petition for discovery and inspection of papers in possession of defendant was subscribed to by plaintiff's attorney instead of himself is not material where he verified the petition.[73] The petition[74] must show expressly or by implication that the court has acquired or would have jurisdiction, in the action in aid of which an examination of books and papers is sought to enable plaintiff to frame his complaint, and that the books and papers are within the state.[75]

The affidavit for examination of defendant before trial must show facts rendering the examination necessary, or why it will not suffice to bring out the facts at the trial.[76] On application for an order for examination of defendant's books

66. District of Columbia v. Bakersmith, 18 App. D. C. 574.

67. Trustees appointed at different times no one of whom could establish all the facts (order for examination of such trustees before trial to discover in whose possession the books were kept and the amount of the income and surplus properly included all the trustees)—Corn Exch. Bank v. Lorillard, 84 App. Div. (N. Y.) 194.

68. Where the order requires defendant to produce ledgers, cash books, time books, time sheets, and all other books showing the amount of wages paid to employes during period covered by policies, it is too broad since only the number of employes and the amount of money paid to them is sought to be discovered, and it must be modified to require only producing of cash books, time books and time sheets during the period. It should be limited to books of original entry showing payments to employes—Fidelity & Casualty Co. v. Seagrist, 79 App. Div. (N. Y.) 614. The inspection given under an order to investigate the books of account of the other party concerning a certain transaction, must be limited to the particular items showing the facts mentioned and cannot relate to the entire books of the other party; it cannot be limited to books and records of one year; where the order authorizes him to inspect all letter press copy books of defendant containing letters written by its officers, to ascertain letters relating to the claim, a provision which enables inspection of copies of maps of all workings made by defendant in a certain year, was too broad—State v. District Ct., 27 Mont. 441, 71 Pac. 602. An order requiring officers of a defendant corporation to produce all books of the corporation for examination is too broad and must be restricted to the corporate minute books and by-laws pertaining to the instrument set out in the complaint and relating to contracts annexed to and made a part thereof—De Brunoff v. McClure-Tissot Co., 83 App. Div. (N. Y.) 640.

69. State v. District Ct., 27 Mont. 441, 71 Pac. 602.

70. Examination of plaintiff's urine refused during trial where the petition pleaded injury to his kidneys—Austin & N. W. R. Co. v. Cluck (Tex. Civ. App.) 73 S. W. 569.

71. Under Code Civ. Proc. § 805—Boeck v. Smith, 85 App. Div. (N. Y.) 575.

72, 73. Hallett v. American Law Book Co., 40 Misc. (N. Y.) 652.

74. Sufficiency of showing of need for examination. Plaintiff suing on a life policy providing that the amount thereof could be realized from the death fund existing at the time of the insured's death, the proceeds of the assessment levy and the reserve fund in excess of a certain amount of outstanding bonds, is entitled to an examination of the insurance company's books and officers before trial to ascertain its financial condition on a complaint alleging on information and belief that sufficient funds existed in the hands of defendant company to pay the policy which was denied by defendant, and averring that the only proof plaintiffs had concerning such facts were certain reports made by the company to the insurance commissioner and published statements which were not in proper form or sufficient to justify plaintiff in relying upon them—McCoy v. Mutual Reserve Life Ins. Co., 84 App. Div. (N. Y.) 315.

75. Snow, Church & Co. v. Snow-Church Surety Co., 80 App. Div. (N. Y.) 40.

76. Hunt v. Sullivan, 79 App. Div. 119, 12 N. Y. Ann. Cas. 328. See, also, McCoy v.

and papers, the affidavit in support must show that an action is pending and advise the court of the nature of the action, the relief sought,[77] and the necessity of the examination.[78] The affidavit for examination of a witness before suit to discover who is proprietor of a newspaper to bring an action against him for libel must name definitely the proposed defendant and show a cause of action against him in favor of the plaintiff.[79]

Where the entire series of interrogatories propounded under the Florida practice was objected to as improper and certain ones as incompetent and irrelevant, a ruling of the court sustaining the objection is wrong if any interrogatory proves competent.[80]

After an order for examination of defendants before trial was granted, and one of them left the jurisdiction before an application was made to reverse the order, but after advice that it could not be sustained, his action will not justify continuance of the order as to him where proceedings were begun for reversal within a few days after the order was granted.[81]

A party may contradict answers to interrogatories introduced by him,[82] and this by parol where the parol evidence is otherwise admissible.[83]

(§ 2) *D. Order, and time and manner of examination.*—An order for examination of defendant's books and papers by plaintiff must limit the time within which inspection shall be made.[84] It may allow inspection of papers in possession of defendant on a particular date and at such other times as the referee may appoint.[85] An ex parte order which requires the secretary of a corporation to appear at a certain time and place before a referee and submit to examination and produce books and papers relating to a fire insurance policy issued by the company is not defective as failing to comply with the statute governing proceedings for inspection of books where the order is for the examination of the secretary before trial; it does not authorize inspection of the corporate books and papers but only the production of them for the examination to enable the officer to refer to them for refreshment of his recollection.[86]

Jurisdictional facts must be embodied in the order if any special jurisdictional power be exercised.[87] If an order for examination of defendant's books and papers is made without a proper showing, or embraces inspection of papers which could contain no evidence relevant to the issue under the circumstances, or fails to limit

Mutual Reserve Life Ins. Co., 84 App. Div. (N. Y.) 315. An examination of defendants will not be allowed plaintiff before trial in order to state the amount of his damages accurately in an action for deceit, since such statement is not required, and his information of the fraud may be alleged on information and belief—Butler v. Duke, 39 Misc. (N. Y.) 235.

77. Butler v. Duke, 39 Misc. (N. Y.) 235. Sufficiency of affidavit—Elmes v. Duke, 39 Misc. (N. Y.) 244.

78. State v. District Ct., 27 Mont. 441, 71 Pac. 602.

79. In re Singer, 40 Misc. (N. Y.) 561.

80. Interrogatories submitted under Rev. Sts. § 1116—Volusia County Bank v. Bigelow (Fla.) 33 So. 704.

81. Boeck v. Smith, 85 App. Div. (N. Y.) 575.

82. Under 2 Ballinger's Ann. Codes & St. § 6012—Sawdey v. Spokane Falls & N. R. Co., 30 Wash. 349, 70 Pac. 972.

83. Under Code Pr. art. 354—Le Bleu v. Savoie, 109 La. 680.

84. State v. District Ct., 27 Mont. 441, 71 Pac. 602.

85. Hallett v. American Law Book Co., 40 Misc. (N. Y.) 652.

86. Under Code Civ. Proc. § 872, subd. 7, and §§ 803-809—Mauthey v. Wyoming County Co-op. Fire Ins. Co., 76 App. Div. (N. Y.) 579.

87. The Circuit Court of Alabama, though of general jurisdiction is of limited jurisdiction in the terms of the statute allowing either party to a civil suit at law, a discovery on interrogatories propounded to the adverse party as in courts of equity, so that the existence of the jurisdictional facts must affirmatively appear in the record on the granting of a judgment by default when the answers are not full or are evasive, and the requirement is not satisfied by a recital in the judgment that the court sustains plaintiff's motion for judgment by default or because defendants failed to answer properly such interrogatories (Under Code, 1896, § 1856. See, also, §§ 1850 et seq.)—Goodwater Warehouse Co. v. Street (Ala.) 34 So. 903.

the time of inspection, certiorari will lie on the ground that the court has exceeded its jurisdiction.[88]

(§ 2) *E. Physical examination to prepare for trial or to prepare evidence.*—The later cases as to allowance of examination of the person of plaintiff in personal injury cases to enable plaintiff to prepare his defense are, like the earlier cases, in conflict, but by the weight of authority the rule may be said to be that such examination may be allowed whenever, in the discretion of the court, the ends of justice demand it.[89] Kentucky[90] and North Dakota[91] allow the examination, and Illinois[92] and Texas[93] refuse it. The consequences of refusal to submit to a rule for such examination are various in different states.[94]

88. State v. District Ct., 27 Mont. 441, 71 Pac. 602.

89. **Note.** The leading authority against allowing the examination is Union Pac. Ry. Co. v. Botsford, 141 U. S. 250, 35 Law. Ed. 734, which is influenced by the federal statute quoted in the opinion, as preventing any other manner of examination or discovery than that prescribed by itself; and there is a strong dissenting opinion by Justice Brewer refusing to assent to the doctrine that such examination is not sanctioned at common law; the courts of various states have refused to accept the ruling in this case, the North Dakota Supreme Court remarking that no such limitation on the court there exists either by statute or under the Constitution of the State. See Brown v. Chicago, M. & St. P. Ry. Co. (N. D.) 95 N. W. 153 (this case reviews the conflicting authorities and cites many cases from different states). For other states in accord with the latter case, see Lane v. Spokane Falls & N. Ry. Co., 21 Wash. 119, 57 Pac. 367; City of Ottawa v. Gilliland, 63 Kan. 165, 65 Pac. 252; Belt Elec. Line Co. v. Allen, 102 Ky. 551 (see this case for a statement of the rule according to the weight of authority); Schroeder v. Chicago, R. I. & P. R. Co., 47 Iowa, 375; Sibley v. Smith, 46 Ark. 275; Sidekum v. Wabash, St. L. & P. Ry. Co., 93 Mo. 400; Atchison, T. & S. F. R. Co. v. Thul, 29 Kan. 466; Graves v. Battle Creek, 95 Mich. 266; Alabama G. S. R. Co. v. Hill, 90 Ala. 71; King v. State, 100 Ala. 85; Hatfield v. St. Paul & D. R. Co., 33 Minn. 130; Richmond & D. R. Co. v. Childress, 82 Ga. 719; Miami & M. Turnpike Co. v. Baily, 37 Ohio St. 104. The lower courts of Pennsylvania have acquiesced in the rule—Hess v. Lake Shore & M. S. R. Co., 7 Pa. Co. Ct. R. 565. The court of Civil Appeals in Texas has heretofore held the contrary—Austin & N. W. R. Co. v. Cluck (Tex. Civ. App.) 73 S. W. 569; Gulf, C. & S. F. Ry. Co. v. Brown (Tex. Civ. App.) 75 S. W. 807. But the same court recognizes the weight of authority, and observes in another case (Gulf, C. & S. F. Ry. Co. v. Gibbs [Tex. Civ. App.] 76 S. W. 71) that the supreme court of the state is inclined to allow such examination, citing I. & G. N. Ry. Co. v. Underwood, 64 Tex. 463 and Missouri Pac. R. Co. v. Johnson, 72 Tex. 95. In Indiana the right to such examination is now recognized in South Bend v. Turner, 156 Ind. 418, which directly overrules former cases, (Pennsylvania Co. v. Newmeyer, 129 Ind. 401 particularly) and shows that conflict has existed within the state, citing Graves v. Battle Creek, 95 Mich. 266, as showing the rule in the Federal courts to be against the weight of authority. The latest Kentucky case (Louisville Ry. Co. v. Hartlege [Ky.] 74 S. W. 742) is in accord but emphasizes the condition that the right to examination is not absolute but addressed to the sound discretion of the court. Massachusetts, Illinois, and New York do not allow examination in absence of statute, holding with the Federal Court that it has no sanction at the common law—Stack v. New York, N. H. & H. R. Co., 177 Mass. 155; McQuigan v. Delaware, L. & W. R. Co., 129 N. Y. 50; Parker v. Enslow, 102 Ill. 272; Peoria, D. & E. Ry. Co. v. Rice, 144 Ill. 227. But in New York it is now allowed by statute—Lyon v. Manhattan Ry. Co., 142 N. Y. 298; Laws 1893, c. 721. See extended note on this subject in 41 Am. St. Rep. 392 (The changes since publication of this note will be found in the later cases here noticed).

90. Louisville Ry. Co. v. Hartlege (Ky.) 74 S. W. 742.

91. Brown v. Chicago, M. & St. P. Ry. Co. (N. D.) 95 N. W. 153, containing a resume of the conflicting authorities on personal examination.

92. Pittsburgh, C., C. & St. L. Ry. Co. v. Story, 104 Ill. App. 132, citing 144 Ill. 227, as the leading case in Illinois.

93. Austin & N. W. R. Co. v. Cluck (Tex.) 77 S. W. 403, exhaustively reviewing the authorities pro and con and affirming Austin & N. W. R. Co. v. Cluck (Tex. Civ. App.) 73 S. W. 569, citing Union Pac. Ry. Co. v. Botsford, 141 U. S. 250 and Galveston, H. & S. A. Ry. Co. v. Sherwood (Tex. Civ. App.) 67 S. W. 776; Gulf, C. & S. F. Ry. Co. v. Brown (Tex. Civ. App.) 75 S. W. 807. Examination not allowed because it was undisputed that plaintiff received no external injuries, it did not appear that the examination would throw any light on the extent or character of her injuries, and no suspicion appeared that the alleged suffering was unreal—Gulf, C. & S. F. Ry. Co. v. Gibbs (Tex. Civ. App.) 76 S. W. 71, citing I. & G. N. Ry. Co. v. Underwood, 64 Tex. 463 and Missouri Pac. R. Co. v. Johnson, 72 Tex. 95 as seeming to support the doctrine of allowing the examination when demanded by the ends of justice.

94. The order requiring a person to submit to inspection of the person may be enforced by an order dismissing the action (South Bend v. Turner, 156 Ind. 418, 83 Am. St. Rep. 200). Some courts enforce the order by contempt (Schroeder v. Chicago, R. I. & P. R. Co., 47 Iowa, 375; cited with approval in Atchison, T. & S. F. R. Co. v. Thul, 29 Kan. 466, 44 Am. Rep. 664). Contra, see dissenting opinion by Brewer, J., in Union Pac. Ry. Co. v. Botsford, 141 U. S.

DISMISSAL AND NONSUIT.[95]

§ 1. Voluntary Nonsuit or Discontinuance.—Authority to Dismiss; In Case of Counterclaim; Submission of Controversy; Conditions; Effect; Reinstatement.

§ 2. Involuntary Dismissal or Nonsuit.—Time; Grounds; Defect in Process; Parties; Pleading; Dismissal on Merits; On Failure of Proof; Prosecution; Waiver of Right; Effect; Opening and Setting Aside.

§ 1. *Voluntary nonsuit or discontinuance.*—Where defendant does not ask affirmative relief, plaintiff at common law may, as a matter of right, discontinue at any time before trial.[96]

Authority to dismiss.—A general employment of an attorney to prosecute an action does not confer on him the power to dismiss it.[97] A defendant may, without the assent of his attorney, enter into a stipulation with plaintiff's attorneys for a dismissal of the action with prejudice and without costs.[98] Where a committee for the reorganization of a corporation takes a nonsuit in a suit by it on a contract which it has entered into, a stockholder may at the discretion of the court be allowed to have the nonsuit set aside on the ground of collusion,[99] but if a majority of a committee had power to act, failure of one member to act will not vitiate the right to take a nonsuit,[1] and if the purpose of the intervenor is to protect his individual interests and not of all those in similar status, the committee may take a nonsuit subject only to the intervenor's right to be heard on his claim for affirmative relief.[2]

In case of counterclaim or cross complaint.—Where defendant sets off a demand, plaintiff may take a nonsuit without prejudice as to his own demand, and a judgment, if entered for defendant, should protect plaintiff,[3] but after a plea of set-off, plaintiff in assumpsit cannot take a voluntary nonsuit so as to prevent defendant from further prosecuting his plea.[4] A second cause of action may be withdrawn though there has been a counterclaim, if the first is sufficient to meet the counterclaim.[5] Where a cross complainant has been given jurisdiction by the act of the plaintiff in commencing an action in a certain forum, he is not deprived of the right to maintain the cross complaint by the act of the original complainant in dismissing.[6] Notice of an intention to dismiss given by an intervenor to the judge after an adjournment has been granted for the purpose of enabling a party to prepare an additional answer of set-off will not operate as a dismissal, preventing the filing of the answer as against the intervenor.[7]

After submission of controversy to court or jury.—The court may, at its discretion, permit a dismissal after final submission to the court or jury, but plaintiff

250; South Bend v. Turner, 156 Ind. 418, 83 Am. St. Rep. 200. The case of Austin & N. W. R. Co. v. Cluck (Tex. Civ. App.) 73 S. W. 569 cites the Indiana case approvingly. The result is the discrediting of the refusing party's evidence—Austin v. N. W. R. Co. v. Cluck (Tex.) 77 S. W. 403. Motion must be promptly made—Austin & N. W. R. Co. v. Cluck (Tex. Civ. App.) 73 S. W. 569.

95. Dismissal in equity is treated in the article Equity, dismissal on reference in Reference, limitation of time to bring new action Limitation of Actions, question of costs Costs, effect of dismissal as adjudication Former Adjudication.

96. United States v. Norfolk & W. Ry. Co. (C. C. A.) 118 Fed. 554.

97. Steinkamp v. Gaebel (Neb.) 95 N. W. 684.

98. Paulson v. Lyson (N. D.) 97 N. W. 533.

99, 1, 2. Bangs v. Sullivan (Tex. Civ. App.) 73 S. W. 74.

3. Rev. St. 1810, 1812—Samahaw v. Samahaw, 18 App. D. C. 76.

4. Samahaw v. Samahaw, 18 App. D. C. 76.

5. Collin v. Farmers' Alliance Mut. Fire Ins. Co. (Colo. App.) 70 Pac. 698.

6. Action brought by a judgment creditor in the county in which the judgment was rendered under Code, § 70, to subject land to the judgment—Chinn v. Curtis, 24 Ky. L. R. 1563, 71 S. W. 923.

7. On an intervention in a receivership, where it is agreed that matters of set-off may be proved under a general denial, if the receiver, on the close of the evidence, is directed to file an answer of set-off and counterclaim against the intervenor and an adjournment granted for that purpose, the counterclaim may be received and filed before hearing a motion by the intervenor to dismiss, notice of a desire to dismiss having been first given to the judge after he left the bench on adjournment—Whitcomb v. Stringer (Ind.) 66 N. E. 443.

may no longer dismiss as of right.[8] After demurrer and the due submission by both parties of the issues to the court, plaintiff is not entitled as a matter of right to dismiss;[9] hence dismissal without prejudice cannot be allowed after a demurrer on the ground of limitations is sustained.[10]

After submission on a demurrer to the evidence, plaintiff's absolute right to dismiss without prejudice is lost.[11]

Submission to the jury is the submission of an issue of fact which the jury may decide in favor of either party,[12] so plaintiff may dismiss without prejudice, if before final submission of the case to the jury, though the court has announced its intention to give a peremptory instruction for defendants,[13] but the giving of a supplementary instruction that three-fourths of the jury may render a verdict does not affect a previous submission so as to authorize plaintiff to take a nonsuit before such supplementary instruction is given.[14] After verdict on an issue of fact, plaintiff cannot take a nonsuit.[15]

In case of a trial by the court, plaintiff cannot dismiss without prejudice after the court has announced its conclusion and directed the terms of the judgment to be entered.[16] On a trial to the court in Missouri if the plaintiff desires to save his right to take a nonsuit until after decision of the questions of law he should request a special finding thereon before the issues of fact are submitted.[17]

Where discontinuance may be had as to a joint defendant at any time before final judgment, there may be a discontinuance as to the executrix in a suit on a bond against the sureties and the executrix of the principal before confirmation of an assessor's report determining the amount for which execution should issue, though there has been a finding assessing the damages at the penal sum of the bond.[18]

Conditions to dismissal without prejudice.—If after various postponements complainant dismisses, defendants should as far as possible be indemnified for expenses in preparing for trial at the times when it was regularly called as a condition for setting aside the dismissal.[19] An ex parte order on complainant's motion dismissing a bill at complainant's cost without prejudice to the right to begin a reserved cause of action is not conditional on payment of costs.[20] Complainant's motion to dismiss without prejudice may be allowed on condition that defendant's evidence, which he has been at great pains to get together, be perpetuated and placed so as to be available in future controversies over the subject-matter between the parties or their privies.[21]

8. Bee Bldg. Co. v. Dalton (Neb.) 93 N. W. 930.

9. Day v. Mountain (Minn.) 94 N. W. 887.

10. Action to recover realty—Dunham v. Harvey (Tenn.) 69 S. W. 772.

11. Fronk v. Evans City Steam Laundry (Neb.) 96 N. W. 1053; Bee Bldg. Co. v. Dalton (Neb.) 93 N. W. 930. Where demurrer to the evidence is interposed at the close of plaintiff's evidence, and at the close of defendant's evidence by defendant in a cause tried to the court and the cause is taken under advisement and the parties required to furnish briefs, there is a final submission (Rev. St. 1899, § 639)—Lawyers' Co-op. Pub. Co. v. Gordon, 173 Mo. 139.

12. Code Civ. Proc. § 430—Bee Bldg. Co. v. Dalton (Neb.) 93 N. W. 930.

13. Civ. Code Pr. § 371—Wilson v. Dupree, 24 Ky. L. R. 1456, 71 S. W. 645.

14. Rev. St. 1899, § 639, permits plaintiff to take a nonsuit at any time before the cause is finally submitted to the jury and not afterward—McCauley v. Brown (Mo. App.) 74 S. W. 464.

15. Code, 1883, § 936. Too late where the jury after returning a verdict is sent out to place its verdict in proper form—Strause v. Sawyer (N. C.) 45 S. E. 346.

16. Code, §§ 3764, 3765—Carney v. Reed, 117 Iowa, 508.

17. Rev. St. 1899, § 695—Lawyers' Co-op. Pub. Co. v. Gordon, 173 Mo. 139.

18. Pub. St. c. 167, § 42; St. 1885, c. 384, § 12—McKim v. Titus, 182 Mass. 393.

19. McEwen v. Dimond, 81 App. Div. (N. Y.) 626.

20. Dismissal of a bill for infringement of a patent without prejudice to the right to commence a suit for infringement of a re-issued patent obtained pending the suit by surrender of the patent sued on—Kellogg Switchboard & Supply Co. v. Glenn Tel. Co., 121 Fed. 174.

21. American Steel & Iron Co. v. Mayer, 123 Fed. 204. Leave to discontinue was denied on a mere showing of desire to relitigate—American Steel & Iron Co. v. Mayer, 121 Fed. 127.

Effect of discontinuance.—A discontinuance does not bar another action, though there has been an agreement as to the facts and a submission to the court for its opinion.[22] Where independent causes of action were joined, a dismissal of one does not abate the other,[23] but where a person has brought an action in two forms on the same facts, he cannot, after a voluntary dismissal of one action, have a reinstatement of the other.[24]

Where a proceeding for a money judgment is joined with one for the foreclosure of a lien, on the sustaining of exceptions to such portions of the petition as sought to foreclose a lien on land conveyed before suit and on land not leased to plaintiff, plaintiff may dismiss his claim for a money judgment and as to the consideration of a sale of the land to others without dismissing his action for foreclosure.[25]

Where there is a dismissal as to one defendant, the court is without jurisdiction to reinstate the case as to him or render judgment against him.[26]

Where plaintiff is erroneously allowed to dismiss as of right after demurrer and submission of the issues to the court, a judgment rendered on the order is nevertheless valid until vacated, and such judgment cannot be granted by the court against objections so as to make it a dismissal on the merits.[27]

As between co-defendants.—Where defendants are jointly liable, a discontinuance as to one is fatal as to the rest.[28] An objection by one defendant to a dismissal as against the other, places the plaintiff on his guard, and if he fail to amend his declaration charging joint liability, he cannot have judgment against the remaining defendant alone.[29]

In an action against the principals and sureties on the bond of a partnership if the bond binds the sureties to liability for the members of the partnership as individuals, a dismissal as to one of the principals not served who is insolvent is permissible, and a judgment may be rendered against the other and against the surety.[30] Where a note is executed jointly, a petition thereon which is discontinued as to one maker should not be dismissed as to the other.[31]

Reinstatement or setting aside nonsuit.—The ex parte entry of an order of dismissal on complainant's motion if irregular on account of lack of notice must be questioned by motion to set aside.[32] A petition for new trial on the ground of newly-discovered evidence which has been dismissed voluntarily will not be reinstated on the ground of surprise, after an adverse decision on a motion for rehearing in the supreme court which plaintiff had supposed would be favorable to him.[33]

22. Such a discontinuance is not a retraxit—Wilson v. Smith, 117 Fed. 707.

23. Dismissal of an action to recover damages for trespass on mining property, does not abate a statutory action under Code Civ. Proc. § 13, to quiet title and for an injunction against trespass—Montana Ore Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co., 27 Mont. 288, 70 Pac. 1114.

24. Action brought in assumpsit and in equity, with a dismissal as to the action in assumpsit—Jones v. Kennedy (Miss.) 33 So. 287.

25. Industrial Lumber Co. v. Texas Pine Lands Ass'n (Tex. Civ. App.) 72 S. W. 875.

26. On dismissal of the wife of one also a defendant in an action for conversion on the ground that the evidence does not show possession in her, she cannot be reinstated on a subsequent disclosure that she has possession—Blumenthal v. Lewy, 82 App. Div. (N. Y.) 535.

27. Plaintiff is entitled to the benefit of due process of law which proceeds on inquiry of the matter it adjudicates—Day v. Mountain (Minn.) 94 N. W. 887.

28. Discontinuance as to one director in an action to enforce limited liability of directors of an insolvent corporation—Bauer v. Parker, 82 App. Div. (N. Y.) 289.

29. Harris v. Humphrey & Co., 103 Ill. App. 45.

30. Rev. St. 1895, §§ 1256, 1257, 1259—Scalfi v. Graves (Tex. Civ. App.) 74 S. W. 795.

31. It was held in this case that where a note was signed on its face by one person and on the back by another, it was a joint civil undertaking, and on discontinuance as to the party signing on the face, the petition should not be dismissed on the ground that the one signing on the back was a surety only—Brooks v. Thrasher, 116 Ga. 62.

32. Kellogg Switchboard & Supply Co. v. Glenn Tel. Co., 121 Fed. 174.

33. Tighe v. Winger (Neb.) 95 N. W. 1052

An unauthorized dismissal by an attorney may be set aside especially where pending the action the cause has become barred by limitations and the fact that another attorney who represented plaintiff asked that the order be made without prejudice will not be necessarily construed as showing plaintiff's assent, an exception having been taken and allowed.[34] A discontinuance without costs made under a written stipulation signed by defendant will not be set aside in the absence of fraud for the mere purpose of protecting the rights of defendant's attorney who was to receive, as fees for defending the action, the costs taxable to defendant in case he was successful.[35]

§ 2. *Involuntary dismissal or nonsuit. Time for Dismissal.*—Where the court has submitted the case to the jury and received a general verdict for plaintiff, it cannot dismiss on the merits,[36] but a motion for nonsuit in the nature of a motion to dismiss for want of jurisdiction may be made after verdict,[37] and where the case should never have been submitted to the jury because of failure of plaintiff's evidence, the complaint may be dismissed notwithstanding the previous submission to the jury.[38] Dismissal after death of a party is unwarranted before expiration of the time in which an action may be revived by his personal representative.[39]

Questions which may be presented.—The question of jurisdiction may be raised by motion to dismiss.[40] A motion for nonsuit is not a proper way in which to test the validity of a statute or the legal sufficiency of compliance therewith.[41] On an exception raising the statute of limitations if all of plaintiff's complaint is barred save a sum too small to bring it within the jurisdiction of the court, the petition is properly dismissed.[42]

Defect in process.—Dismissal may be had on failure to return summons, though an affidavit of service on one of defendants and a copy of the summons is filed,[43] and though the summons is for a time lost.[44]

Defect in parties.—Where, in an action on tort, a defendant is joined who was not connected with the tort, a nonsuit may be entered as to him or a verdict directed for him and the case submitted as to the other defendants.[45] On motion by a sole defendant served, for a dismissal unless the other defendants are brought in, he should not be allowed costs to indemnify him against expense of answering.[46]

Defect in pleadings.[47]—Defendant is entitled to consideration of a motion

34. Steinkamp v. Gaebel (Neb.) 95 N. W. 684.

35. Garvin v. Martin (Wis.) 93 N. W. 470.

36. Though Code Civ. Proc. § 1187, provides for opening a motion to non-suit, the jury may be required to assess damages or any question of fact raised by the pleadings to be submitted to it—Levy v. Grove Mills Paper Co., 80 App. Div. (N. Y.) 384.

37. Parker v. Southern Exp. Co., 132 N. C. 128.

38. Failure of plaintiff in an action for death by negligence to offer any evidence of negligence of defendant—Glennon v. Erie R. Co., 86 App. Div. (N. Y.) 397.

39. See article Abatement and Revival. Code, § 38. Dismissal of suit on death of party interposing claim to property levied on under execution—Bauer v. Word, 135 Ala. 430.

40. City of Windsor v. Cleveland, C., C. & St. L. Ry. Co., 105 Ill. App. 46.

41. Where the action is for failure of a carrier to comply with an application to trace freight, it cannot be urged as ground for nonsuit that the evidence failed to show noncompliance with plaintiff's application by defendant and that it showed that the damage was due to plaintiff's negligence—Savannah, F. & W. Ry. Co. v. Elder (Ga.) 43 S. E. 379.

42. Roller v. Zundelowitz (Tex. Civ. App.) 73 S. W. 1070.

43. Code Civ. Proc. § 582—Grant v. McArthur, 137 Cal. 270, 70 Pac. 88.

44. Code Civ. Proc. provides that if a paper is lost, the court may authorize the use of a copy in place of the original—Grant v. McArthur, 137 Cal. 270, 70 Pac. 88.

45. Action against two street railway companies and a construction company to recover injuries from the construction and operation of a street railroad in which it appeared that one of the railway companies having leased its property was no longer liable for negligent operation—Minnich v. Lancaster & L. Elec. Ry. Co., 203 Pa. 632.

46. Error to grant $50.00 costs in addition to $10.00 motion costs—Geoghegan v. Luchow, 75 App. Div. (N. Y.) 581.

47. Dismissal of a bill asking reconveyance of land alleged to have been conveyed

for judgment on the pleadings only when there is no demurrer or reply to new matter stated by him as a defense or counterclaim;[48] an insufficient reply is not ground.[49] A judgment of dismissal will be entered where the pleadings fail to show a right of recovery in plaintiff,[50] but where a petition contains several counts, the whole case should not be dismissed on the ground that one of them is bad,[51] and judgment on the pleadings cannot be rendered where they present a material issue of fact.[52]

A successful demurrer to a supplemental petition setting up facts estopping defendants from asserting a defense does not authorize a dismissal,[53] nor does a demurrer sustained as to a portion of the claim.[54]

Where plaintiffs sue in an individual and representative capacity on successful exceptions to the right to sue as representatives, there should not be a dismissal.[55]

A stipulation as to reference reserving a right to move to dismiss on the ground of no cause of action does not save a right to seek dismissal on the ground of variance of proof from the pleadings.[56]

A dismissal for an inadvertent failure to file copies of instruments forming the basis of the proceeding should be set aside, where the substance of the papers was fully set out in the petition, and a copy should be allowed to be subsequently filed.[57]

Where variance between pleading and proof is by statute made immaterial unless the adverse party has been misled to his prejudice, a dismissal will not be granted in the absence of prejudice on a showing that labor and material was furnished on an express contract where the complaint is on a quantum meruit.[58]

Amendable defects.—Dismissal should not be granted for insufficiency of an affidavit in forcible entry and detainer, the affidavit being amendable.[59] Filing an unverified complaint is not ground for dismissal.[60]

Dismissal on merits.[61]—Every material fact in issue must be found for plaintiff on dismissing complaint at the close of the opening address,[62] and judgment on the opening statement should be denied unless it admits facts precluding recovery.[63] Though the court is authorized in his discretion to set aside a verdict it should not enter a judgment dismissing the complaint on the merits.[64] Under the New York municipal court act a judgment of dismissal on the merits can be granted only where at the close of the whole case the court is of the opinion that the plaintiff is

in trust, will be sustained, where the answer denies the trust and a finding is made below on sufficient evidence that no trust was contemplated—Jackson v. Thomson, 203 Pa. 622.

48. Alaska Code, § 69; 31 St. 343, c. 786—Walton v. Wild Goose Min. & Trading Co. (C. C. A.) 123 Fed. 209.

49. Walton v. Wild Goose Min. & Trading Co. (C. C. A.) 123 Fed. 209.

50. Original action in the supreme court—Territory v. Jacobs (Okl.) 70 Pac. 197.

51. Woodbridge v. Drought (Ga.) 45 S. E. 266.

52. Swinehart v. Pocatello Meat & Produce Co. (Idaho) 70 Pac. 1054.

53. Allegation of sale through an agent and supplemental petition setting up an estoppel of defendant to deny an agency—Owens v. Hughes (Tex. Civ. App.) 71 S. W. 783.

54. Ingham v. Ryan (Colo. App.) 71 Pac. 899.

55. Trespass to try title by plaintiffs in their own right and as foreign executors—Hayden v. Kirby (Tex. Civ. App.) 72 S. W. 198.

56. Lake v. Anderson, 76 App. Div. (N. Y.) 189.

57. Failure to file certified copy of the proceedings as required by Ky. St., § 2838 with a petition to enforce liens on said apportionment warrants—Kremer v. Leathers, 24 Ky. L. R. 1149, 70 S. W. 843.

58. Code Civ. Proc. § 2943—Lundine v. Callaghan, 82 App. Div. (N. Y.) 621.

59. Mansfield's Dig. §§ 5102, 5083, 2285 (Ind. Ter. Ann. St. 1899, §§ 3307, 3288, 2285)—Smith v. Bush (Ind. T.) 69 S. W. 934.

60. Expressly so provided by Mansfield's Dig. § 5086; Ind. T. Ann. St. 1899, § 3291, if the complaint is verified on or before calling of the action for trial—Hargrove v. Cherokee Nation (Ind. T.) 69 S. W. 823.

61. Nonsuit held properly granted on the ground that in an action on an insurance policy plaintiff's interest was not properly stated in the policy—Alberts v. Insurance Co. (Ga.) 45 S. E. 282.

62. Hoffman House v. Foote, 172 N. Y. 348.

63. Coffeyville Min. & Gas Co. v. Carter, 65 Kan. 565, 70 Pac. 635.

64. Rosenstock v. Dessar, 85 App. Div. (N. Y.) 501.

not entitled to recover as a matter of law or where the court sustains a demurrer and no leave to plead over is granted.[65] The order of dismissal must state the ground on which the issues have been dismissed.[66] In trover, a nonsuit should not be granted on failure of demand before suit where such demand is not necessary.[67] Plaintiff in an action for damages cannot be nonsuited for the reason that he has failed to repay or tender money paid him for a release.[68]

Failure of proof.[69]—While the rule of law is the same, the practical restrictions upon the court are even greater in the case of a motion for nonsuit than they are upon the motion to direct a verdict after all the evidence is in.[70] The overruling of a demurrer to the evidence or a motion for a nonsuit is not an adjudication as to the sufficiency of the pleadings to authorize a recovery.[71] In Georgia a nonsuit corresponds to a demurrer to the evidence and the only question is as to the sufficiency of the evidence without regard to defects in the pleadings.[72] The common-law practice does not there prevail which authorizes a nonsuit when it is clear that the action in point of law is not maintainable, though the objection appear on the face of the record and may be taken advantage of by motion in arrest of judgment.[73]

On motion for nonsuit, plaintiff's evidence is to be taken as true, and all the evidence should be construed most favorably toward him.[74] The case should not be taken from the jury when recovery may be had on any view reasonably drawn from the facts which the evidence tends to establish,[75] or where there is more than a scintilla of evidence tending to prove plaintiff's contention.[76] If made after defendant has introduced evidence, his evidence is not to be considered.[77] Nonsuit should not be ordered where plaintiff states a good case in his declaration and sustains it by his evidence.[78] Plaintiff can be nonsuited when the allegations are sustained by the testimony only in cases where the complaint is subject to a demurrer.[79]

A nonsuit should be granted on failure of evidence to support plaintiff's allegations,[80] but a motion to dismiss for failure to establish one branch of the com-

65. Laws 1902, p. 1561, c. 580, § 249. Dismissal should be without prejudice on failure of plaintiff in an action to recover commissions for sale to prove that he was the procuring cause of the sale—Wakefield v. Street, 83 N. Y. Supp. 765.

66. Under Code Civ. Proc. § 1022, an order is insufficient which states the ground to be that plaintiff has failed to establish a cause of action and that he is not entitled to the relief demanded in the complaint—Gein v. Little, 86 App. Div. (N. Y.) 503.

67. Civ. Code, 1895, § 3887. Trover by a vendor against a vendee based on a conditional bill of sale reserving title until payment of the purchase money—Scarboro v. Goethe (Ga.) 45 S. E. 413.

68. Austin v. Piedmont Mfg. Co. (S. C.) 45 S. E. 135.

69. See for other procedure for taking case from jury Directing Verdict and Demurrer to Evidence.

70. In an action based on negligence, if any reasonable probability of negligence may account for the event by inference from the evidence within plaintiff's control, defendant should be put to its proofs to supply the facts as to its own conduct and plaintiff should not be nonsuited merely because he has not fully established those acts of which he can acquire knowledge only from the defendant or those in its interest—Hupfer v. National Distilling Co. (Wis.) 96 N. W. 809.

71, 72, 73. Kelly v. Strouse, 116 Ga. 872.

74. House v. Seaboard Air Line R. Co., 131 N. C. 103; Hopkins v. Norfolk & S. R. Co., 131 N. C. 463. Evidence held not to authorize a nonsuit in an action against a distillery company by one scalded by the bursting of a vat of slops.—Hupfer v. National Distilling Co. (Wis.) 96 N. W. 809. Nonsuit held properly granted where the evidence of plaintiff showed that by ordinary care he could have avoided the injuries for which he sued—Barfield v. Southern Ry. Co. (Ga.) 45 S. E. 282.

75. Cain v. Gold Mountain Min. Co., 27 Mont. 529, 71 Pac. 1004.

76. Butts v. Atlantic & N. C. R. Co. (N. C.) 45 S. E. 472.

77. Though acts 1897, c. 109 provides for motion for non-suit at the end of plaintiff's evidence—Brown v. Atlantic & C. Air Line R. Co., 131 N. C. 455.

78. Beck Duplicator Co. v. Fulghum (Ga.) 45 S. E. 675; Southern Bauxite Mineral & Mfg. Co. v. Fuller, 116 Ga. 695.

79. Austin v. Piedmont Mfg. Co. (S. C.) 45 S. E. 135.

80. Failure to prove an agreement to pay for work and labor sued for—Briggs v. Collins, 27 Mont. 405, 71 Pac. 307. Failure to establish an essential part of a contract

plaint should be denied where the complaint states another cause of action on which plaintiff may recover without amendment.[81] Where a special plea of former adjudication is made in connection with denial of all material terms of the complaint and a finding is made for defendant on the issue of former adjudication on its submission to the court after a jury is impaneled, the complaint is properly dismissed if no evidence has been offered in support of the controverted allegations.[82]

Where negligence established is not as to a matter alleged as negligence, a nonsuit is properly granted,[83] but where negligence and willful negligence are both alleged, nonsuit cannot be granted on failure of evidence as to willful negligence merely,[84] and the same is true of failure to prove an intention of wrong alleged in connection with negligence.[85] A motion for a nonsuit based on an assumed state of facts which may be properly determined by the jury only should be denied.[86]

Failure of prosecution.[87]—A complaint is properly dismissed by default on failure of plaintiff's counsel to take up the case when called for trial,[88] and a nonsuit may be properly entered on a statement of no evidence, where a postponement has been denied a representative of an attorney in the case.[89]

A statute authorizing dismissal of actions not brought to trial is not intended to authorize dismissal of a litigant who though ready to proceed seasonably has consented to delay in order to accommodate opposing counsel,[90] and while dismissal of a cause for want of prosecution is within the discretion of the court, an excusable neglect to present facts to the court on the hearing of the motion controls the discretion.[91]

If plaintiff refuses to prosecute, the suit should be dismissed for want of

—United States Fidelity & Guaranty Co. v. Donnelly, 68 N. J. Law, 654.

81. Action for damages from failure to keep a cold storage warehouse at the proper temperature, and failure to prove an agreement in such regard also alleged—Rettner v. Minnesota Cold-Storage Co., 88 Minn. 352.

82. Rensberger v. Button (Colo.) 71 Pac. 330.

83. Action for death of a railroad employe, negligence in handling and overloading a freight train and carelessly managing the trains and in shifting the meeting point of trains, and proof that plaintiff's intestate was killed by a train going in an opposite direction from one which he was sent back to signal—Land v. Southern Ry. (S. C.) 45 S. E. 203.

84. 22 St. at Large, p. 693, provides that there need not be an election between two or more acts of negligence alleged to have caused the injury sued on—Griffin v. Southern Ry., 65 S. C. 122.

85. Young v. Western Union Tel. Co., 65 S. C. 93.

86. Based on assumption of risk by servant suing for negligent injury—Wood v. Victor Mfg. Co. (S. C.) 45 S. E. 81.

87. A case which has been at issue for nearly 13 years without plaintiffs bringing it on for trial, the reason for delay being that the parties became reconciled and neither party wished to prosecute the action, may be dismissed for want of prosecution —Rosenheim v. Rosenfield, 83 App. Div. (N. Y.) 640. Code Civ. Proc. § 822, Gen. Rule of Practice No. 36—Zafarano v. Baird, 80 App. Div. (N. Y.) 144. A dismissal for neglect is authorized where there is an unexplained delay for five years in the taking of steps to bring the issue to a hearing. Where nothing is done for seven years after filing a demurrer to the complaint, defendant is entitled to a dismissal on motion by plaintiff to strike the demurrer, though he was by statute permitted to bring the case to hearing—Langford v. Murphey, 30 Wash. 499, 70 Pac. 1112.

88. McEwen v. Dimond, 81 App. Div. (N. Y.) 626. If a plaintiff's attorney, five days before the opening of the session has notice that his case is the only cause on the trial calendar and will be called, the case is properly dismissed, though the attorney is engaged in another court, on failure to prosecute—Spokane & V. Gold & Copper Co. v. Colfelt, 30 Wash. 628, 71 Pac. 196.

89. Representative stated that the attorney was actually engaged in another case, but postponement was denied on the ground that the attorney had had ample opportunity to prepare for trial, and his client was endeavoring to delay trial—Appeal of White, 75 Conn. 314.

90. Facts held to show an abuse of the trial court's discretion in refusing to set aside a dismissal ordered under Rev. St. 1898, § 2611a—Hine v. Grant (Wis.) 96 N. W. 796.

91. A dismissal for the want of prosecution may be vacated, where it has been granted after substitution of attorneys by plaintiff, and plaintiff's new attorney alleges a failure to find the former attorney and consequent inability to procure an affidavit contradicting the allegations in support of the motion—Moore v. Thompson, 138 Cal. 23, 70 Pac. 930.

prosecution and a jury should not be empaneled over plaintiff's objection and judgment entered for defendant.[92]

Waiver of right to dismiss.—Neglect to make a motion for dismissal on the overruling of a motion for a cost bond waives a statutory right to dismissal of an action in which such bond is required, at any time before judgment.[93] Though plaintiff has performed an act which entitles defendant to a discontinuance, defendant waives his right by failing to avail himself of it promptly and by appearing and consenting to continuances.[94]

Effect.—A judgment of dismissal entered by the court on the merits is a bar to further proceedings on the facts disclosed in the pleadings.[95] Dismissal as to one not a necessary or proper party who has been on his own motion granted leave to come in as a defendant does not affect complainant's right as against original defendants.[96]

Opening and setting aside.—The denial of a motion to open a nonsuit is ordinarily discretionary, and is not governed by statutes providing for the setting aside of default judgments.[97] The motion should usually be made during the session at which judgment was rendered,[98] and may be required sooner.[99]

There must be notice to defendant before a cause dismissed for want of prosecution may be reinstated at an adjourned term.[1]

On motion to set aside a dismissal, a complaint duly verified, which states a cause of action, is a sufficient showing of merits.[2] Motion to reinstate may be based on facts outside the record.[3]

A motion to set aside an order of dismissal and judgment suspends the judgment and prevents the court from being ousted of jurisdiction by the running of time from the entry of judgment.[4]

The presumption is that the trial court's discretion as to dismissal for want of appearance to go on with the trial has not been abused.[5] Absence of a witness will not warrant the setting aside of a dismissal for failure of prosecution, if there is no showing made of diligence in procuring his attendance or statement of what his evidence was to be.[6]

A judgment denying a motion to reinstate is conclusive of all matters pleaded or which might have been pleaded including fraud or mistake in the dismissal.[7]

On reversal of an order of reinstatement, proceedings to renew must be brought within six months from the order of dismissal and not within six months from the judgment reversing the order of reinstatement.[8]

92. Anderson v. Broward (Fla.) 34 So. 897.

93. Fidelity & Casualty Co. v. Brown (Ind. T.) 69 S. W. 915.

94. Hayes v. Dunn, 136 Ala. 528.

95. Day v. Mountain (Minn.) 94 N. W. 887.

96. Citizens' Sav. & Loan Ass'n v. Bellville & S. I. R. Co. (C. C. A.) 117 Fed. 109.

97. Gen. St. 1888, § 1126, does not apply to a non-suit for failure of prosecution—Appeal of White, 75 Conn. 314.

98. Delay of six weeks until another judge is holding a session of court, authorizes a refusal—Appeal of White, 75 Conn. 314.

99. Motion not made in two days after judgment stricken when defendant was in court and had made no objection to the dismissal as to him on plaintiff's motion—Calvert, W. & B. V. Ry. Co. v. Driskill (Tex. Civ. App.) 71 S. W. 997.

1. Laun v. Ponath, 91 Mo. App. 271.

2. Hine v. Grant (Wis.) 96 N. W. 796.

3. Crawford v. Watkins (Ga.) 45 S. E. 482.

4. Kremer v. Leathers, 24 Ky. L. R. 1149, 70 S. W. 843.

5. Evidence held insufficient to show an abuse of discretion in dismissing on failure of party or attorney to be present when case was called for trial—Hall v. City of Austin (Tex. Civ. App.) 73 S. W. 32.

6. Spokane & V. Gold & Copper Co. v. Colfelt, 30 Wash. 628, 71 Pac. 196.

7. Crawford v. Watkins (Ga.) 45 S. E. 482.

8. Civ. Code, 1895, §§ 3786, 3787—Crawford v. Watkins (Ga.) 45 S. E. 482.

DISORDERLY CONDUCT.

A statute prohibiting use of profane words in the presence of a female is not violated by a profane written communication.[9] Vagrants are punishable as disorderly persons at common law.[10] Making political speeches in the street to the obstruction of traffic is a breach of the peace.[11] An ordinance declaring palmists, etc., disorderly persons, is valid.[12] An indictment for using profane language in the presence of a "woman" is sufficient.[13]

DISORDERLY HOUSES.

If disorderly persons frequent a house and unfit and unbecoming acts are there committed, it is immaterial that the peace of the neighborhood was not disturbed.[14] The penalty in Minnesota is fixed by Gen. St. 1894, § 6297, not by acts 1897, c. 108.[15]

DISTURBANCE OF PUBLIC ASSEMBLAGE.

Injury to property, while the owner was attending a religious meeting, not known to him until afterward, is not a disturbance of the meeting.[16] That one rose in a meeting and endeavored to answer criticisms by the clergyman does not show that he "willfully" disturbed the meeting.[17]

DIVORCE.[18]

§ 1. **Jurisdiction and Domicile of Parties.**
§ 2. **Causes for Divorce.**
§ 3. **Defenses and Excuses.**
§ 4. **Practice and Procedure.**—In General; Ne Exeat; Pleading; Evidence and Proof; Reference; Verdicts and Findings; New Trial; Decree, Vacation and Modification; Costs; Review.
§ 5. **Custody and Support of Children.**
§ 6. **Adjustment of Property Rights.**
§ 7. **Effect of Divorce.**
§ 8. **Foreign Divorce.**

§ 1. *Jurisdiction and domicile of parties.*—The question of residence is jurisdictional.[19] Residence once attained is not lost by temporary absences.[20] The appearance of a nonresident defendant will not give the court jurisdiction of a suit instituted by one who is without a bona fide domicile in the state.[21] If a residence is bona fide it makes no difference that plaintiff's motive was to procure a divorce.[22]

9. Williams v. State, 117 Ga. 13.
10. In re Stegenga (Mich.) 94 N. W. 385.
11. People v. Wallace, 85 App. Div. (N. Y.) 170.
12. State v. Kenilworth (N. J. Law) 54 Atl. 244.
13. Jackson v. State (Ala.) 34 So. 611.
14. State v. Ireton (Minn.) 94 N. W. 1078. Evidence held sufficient to show keeping of disorderly house where liquors were sold on Sunday and disorderly persons gathered —State v. Babcock (R. I.) 55 Atl. 685. A residence is not rendered a disorderly house by occasional acts of fornication therein by the owner—State v. Irvin, 117 Iowa, 469.
15. State v. Grosofski (Minn.) 94 N. W. 1077.
16. Cox v. State, 136 Ala. 94.
17. State v. Dahlstrom (Minn.) 95 N. W. 580.
18. Alimony, see Alimony. Separation and separate maintenance without change of status see Husband and Wife. Annulment of marriage see Marriage.
19. Branch v. Branch, 30 Colo. 499, 71 Pac. 632.
20. A wife's residence for the purpose of an action for divorce is not lost by her going into another state to work in order to support herself—Boreing v. Boreing, 24 Ky. L. R. 1288, 71 S. W. 431. A residence for one year prior to the commencement of a suit is sufficiently established by evidence that plaintiff came to the state about two years before the commencement of the suit and spent much of the time until its commencement therein, and though absent from the state for some time the absence was to seek employment, and her child remained in the state during this absence, and it was the constant intention of the plaintiff to make her home within the state—Summerville v. Summerville, 31 Wash. 411, 72 Pac. 84.
21. Andrews v. Andrews, 188 U. S. 14, 47 Law. Ed. 366.
22. Wallace v. Wallace (N. J. Law) 54 Atl. 433.
Presumption against bona fide residence arises from undue haste in suing after taking up new domicile—Hunter v. Hunter, 64 N. J. Eq. 277.

§ 2. *Causes for divorce.*—Ante-marital unchastity is not of itself a ground in Georgia.[23]

Cruelty must consist in such treatment as will meet the terms of the local statutes making it a ground.[24] The habitual use of rough language as constituting extreme cruelty depends on the character and station in life of the parties.[25]

Indignities.—It is an indignity to the wife rendering her "condition intolerable" for the husband to drink to excess and frequent evil resorts,[26] or to impute adultery to her and withdraw all marital relations.[27]

Desertion.—A refusal to accompany a husband to a new home established by him amounts to desertion.[28] In California, a refusal to consent to matrimonial intercourse when physical conditions do not warrant the refusal and there is no just cause therefor amounts to desertion.[29] The desertion must not be the result of mutual agreement,[30] and where willful and continued for the statutory time, it is not necessary that it should be malicious.[31] So long as a husband performs his duties to his wife, she is required to live with him and her separation from him is not justified either by coolness of his manner or want of expressions of affection,[32] unless accompanied with rudeness and negligence showing a loss of affection.[33]

The continued separation of complainant prosecuting a suit for divorce from bed and board for extreme cruelty of defendant cannot, during the pendency of the suit, be held to be an obstinate desertion and the time of the pendency of the suit cannot be included in the period of desertion in a suit for divorce on the ground of desertion.[34] In some states, it is the duty of a husband to seek his wife and endeavor to induce her to return before suit on the ground of desertion whether the desertion was caused by his own misconduct[35] or the wife's willfulness.[36] The offer must be sincere[37] and without unreasonable delay.[38] The wife who expects to

23. Statute names "fraud" and "pregnancy at time of marriage unknown to husband"—Stanley v. Stanley, 115 Ga. 990.

24. In Kentucky it suffices that the husband abuses and beats his wife and his temper is such that she will probably suffer great bodily harm by remaining with him—Howlett v. Howlett, 24 Ky. L. R. 974, 70 S. W. 404. Likewise where he uses unfeeling language to her, admits misconduct with other women and attempts to poison the minds of his children against their mother, thus indicating settled aversion—Zumbiel v. Zumbiel, 24 Ky. L. R. 590, 69 S. W. 708. "Repeated" cruelty is not shown by a single act of physical violence—Werres v. Werres, 102 Ill. App. 360.

25. Shuster v. Shuster (Neb.) 92 N. W. 203.

26. McCann v. McCann, 91 Mo. App. 1.

27. Besides striking her—Green v. Green, 131 N. C. 533.

28. Schuman v. Schuman, 93 Mo. App. 99.

29. Fink v. Fink, 137 Cal. 559, 70 Pac. 628.

30. The evidence warrants an inference that separation was by mutual consent and therefore insufficient to justify a decree where plaintiff testified that she lived pleasantly with defendant until a few weeks before the alleged desertion, when she discovered her husband in a falsehood and a quarrel ensued which led to the separation, and she stated that she did not care much about defendant's leaving her, and made no inquiry for him, but that she would have lived with him had he stayed at home—Walthen v. Walthen (Mo. App.) 73 S. W. 736.

31. McBride v. McBride (Tenn.) 69 S. W. 781.

32. Schuman v. Schuman, 93 Mo. App. 99.

33. A wife was justified in leaving her husband though he had used no physical violence to her and had been liberal with her in money matters, where his conduct had become so rude and negligent as to show a loss of affection and he was habitually rude to her lady visitors and often left his home for long visits without informing her of his proposed departure—Boreing v. Boreing, 24 Ky. L. R. 1288, 71 S. W. 431.

34. Weigel v. Weigel, 63 N. J. Eq. 677; Hunter v. Hunter, 64 N. J. Eq. 277.

35. On a separation caused by the drunkenness and cruelty of the husband and his failure to reform within two years and seek his wife a divorce is properly granted for desertion—Jerolaman v. Jerolaman (N. J. Eq.) 54 Atl. 166.

36. Though the desertion on the part of the wife was wrongful, yet it is the duty of the husband to seek by proper steps to cause her to return—Wood v. Wood, 63 N. J. Eq. 688.

37. A husband demanding a separation will not be entitled to a divorce on the ground that his offer of reconciliation was refused where the letter asking such return was written in cold and formal terms with no promise of affection or indication of regret for causing the separation—Woolard v. Woolard, 18 App. D. C. 326.

38. Where a husband deserted his wife against her consent he cannot 18 years after cure the desertion by an offer to return so as to entitle him to divorce for desertion

take advantage of the rule requiring a husband to seek his wife and endeavor to induce her to return must so behave herself as not to give the husband any cause to suspect her chastity.[39] A husband marrying to escape conviction for seduction is not entitled to a divorce for abandonment because she refused to live with him where she shortly afterwards retracted and offered to live with him as a wife.[40] Failure to provide must, in Colorado, continue for a year.[41]

§ 3. *Defenses and excuses.*—A divorce will not be granted where both parties are at fault.[42] The general principle which governs in a case where one party recriminates is that the recrimination must allege a cause which the law declares sufficient for divorce.[43]

Subsequent cohabitation with knowledge condones the offense.[44] A delay of 25 years after discovery of a wife's infidelity to sue for divorce on that ground is fatal in the absence of some satisfactory excuse.[45] A wife is not prevented from relying on cruelty of a husband as ground for divorce by reason of her continuing to live with him thereafter in expectation of proper treatment in which she is disappointed.[46] A husband may not excuse his cruel treatment on the ground that he was intoxicated at the time.[47] Whether the improper language of the husband was provoked by the acts of the wife, unless the language was disproportionate to the occasion, is a question for the trial court and will not be reviewed on appeal.[48] A husband cannot obtain a decree for adultery of the wife where he turns her out of the house into the streets of a large city with but a trifling sum to provide for her wants and the alleged act, if committed at all, was committed thereafter.[49] A husband is not prevented from defending on the ground of cruelty by reason of a denial of a divorce to him on the ground of the wife's adultery connived at by him, his conduct since that time having been exemplary.[50]

Where the suit is based on allegations which the party personally knew to be false, it is a fraud on the court, and the pendency of the action is no defense to a subsequent suit for desertion brought by the other spouse,[51] and this is the case

on the wife's refusal of his offer to return —McMullin v. McMullin (Cal.) 71 Pac. 108. Civ. Code Cal. § 102, allows return within one year to cure a desertion.

39. Hall v. Hall (N. J. Eq.) 53 Atl. 455.

40. Alderson v. Alderson's Guardian, 24 Ky. L. R. 595, 69 S. W. 700.

41. A decree for failure to make reasonable provisions for the support of a family, is properly refused, where the evidence shows that ample provisions had been made until less than a year before the commencement of the action and that the parties were dependent on their own labor for support—Branch v. Branch, 30 Colo. 499, 71 Pac. 632.

42. Anderberg v. Anderberg (Iowa) 91 N. W. 1071. A divorce for misconduct of a wife will be refused where the petitioner is shown to be guilty of a like offense—Knott v. Knott (N. J. Eq.) 54 Atl. 559. A divorce is properly denied on the ground of cruelty in the use of profane language where the testimony shows that both parties were guilty of using such language—Shuster v. Shuster (Neb.) 92 N. W. 203.

43. In North Carolina a wife sued for divorce on the ground of adultery may not recriminate on ground of two acts of adultery of the husband, the laws requiring in case of a husband that he should live in adultery while it gives the husband a divorce on the ground of adultery of the wife —House v. House, 131 N. C. 140.

44. A husband living with his wife after full knowledge that her representations as to her reputation before marriage were false, cannot urge such representations as a ground for divorce—Stanley v. Stanley, 115 Ga. 990. Where the husband resumed marital relations after separation and suspected unfaithfulness of his wife but had no proof thereof until after a later separation, the fact of his living with her after the first separation did not amount to such a condonation as deprived him of the right to a divorce on the ground that her acts in planning to elope with another constituted indignities to him rendering his condition intolerable—Connelly v. Connelly (Mo. App.) 71 S. W. 1111.

45. Poverty as an excuse insufficient where complainant had means to make a trip to Europe likewise the fact that she had resided abroad—Barker v. Barker, 63 N. J. Eq. 593.

46. Creyts v. Creyts (Mich.) 94 N. W. 383.

47. Harl v. Harl, 24 Ky. L. R. 2163, 73 S. W. 756.

48. Shuster v. Shuster (Neb.) 92 N. W. 203.

49. Heidrich v. Heidrich, 22 Pa. Super. Ct. 72.

50. Torlotting v. Torlotting, 97 Mo. App. 183.

51, 52. Weigel v. Weigel, 63 N. J. Eq. 677.

where the suit is begun by advice of counsel, unless it is shown that all the facts within the knowledge of the party were truly stated to the counsel.[52]

§ 4. *Practice and procedure.—Practice in general* should be as in other cases, unless there is a different provision by statute.[53] In Washington, the code allows complaint to be filed in the county in which plaintiff has lived for one year.[54] Under the divorce act giving defendant thirty days to appear and answer, a summons which gives him only twenty days is insufficient to authorize the court to proceed to judgment.[55]

Ne exeat.—Departure of a husband from the state without procuring the discharge of a writ of ne exeat and without leave of court is a breach of the bond, whether the departure occurs before or after judgment.[56] The action on a ne exeat bond is properly brought for the use and benefit of the wife.[57] An allegation that after it was given the husband left the state and had not since returned and that the wife recovered judgment against him in a certain sum shows sufficiently as against a demurrer that he left after judgment was rendered.[58]

Pleading.—An allegation that plaintiff was a bona fide resident of the state constitutes a sufficient allegation of residence to confer jurisdiction and to render the complaint amendable to conform to the proof as to residence.[59] Adultery, drunkenness, or indignities may be proved under allegations of numerous acts of drunkenness or adultery, and it is not necessary to plead them in the words of the statute.[60] Where specific acts of adultery are charged, evidence that defendant committed adultery with other women than paramour named is not admissible.[61] Defendant is entitled, in New York, to a bill of particulars showing time, place, and circumstances of each act of adultery charged.[62] A demurrer to a petition on the ground that it shows condonation of the offense will not be sustained unless averments of the petition plainly show conduct of the wife amounting to condonation.[63]

In Maryland, a supplemental bill may not be filed setting up as a ground for relief actual adultery occurring after the institution of the suit with persons not specified in the original bill.[64] Under a prayer for general relief, a divorce from bed and board may be granted where the facts shown warrant such relief though the complaint does not show the existence of the statutory grounds relied on.[65] Verification in accordance with the code is mandatory.[66] The Pennsylvania common pleas courts may require service of copies of pleadings to be made on parties within the county by the sheriff though there is nothing in the divorce act requiring service by the sheriff.[67]

Evidence and proof.—Under a code provision making a husband a competent witness to disprove the allegations of adultery, he should be allowed to deny the charge specifically.[68] In Kentucky, a wife is not competent to testify in an action brought by her for divorce on the ground of separation for five years.[69] In Indiana, the two witnesses offering to prove plaintiff's status in the county and state must be resident freeholders and householders of the state.[70]

53. Reed v. Reed (Mo. App.) 70 S. W. 505.
54. 2 Ball. Ann. Codes & St. § 5718—Bachelor v. Bachelor, 30 Wash. 639, 71 Pac. 193.
55. Mottschall v. Mottschall (Colo.) 72 Pac. 1053.
56, 57, 58. Marselis v. People (Colo. App.) 71 Pac. 429.
59. Johnson v. Johnson, 30 Colo. 402, 70 Pac. 692.
60. McCann v. McCann, 91 Mo. App. 1.
61. Goldie v. Goldie, 39 Misc. (N. Y.) 389.
62. Hunter v. Hunter, 38 Misc. (N. Y.) 672; Kirkland v. Kirkland, 39 Misc. (N. Y.) 423.
63. Diedrich v. Diedrich (Neb.) 94 N. W. 536.
64. Schwab v. Schwab, 96 Md. 592.
65. Zumbiel v. Zumbiel, 24 Ky. L. R. 590, 69 S. W. 708.
66. Code of N. C. § 1287—Hopkins v. Hopkins, 132 N. C. 22.
67. Timney v. Timney, 21 Pa. Super. Ct. 538.
68. Goldie v. Goldie, 39 Misc. (N. Y.) 389.
69. Boreing v. Boreing, 24 Ky. L. R. 1288, 71 S. W. 431.
70. Burns' Rev. St. 1901, § 1043—Becker v. Becker (Ind.) 66 N. E. 1010.

The motives of the complainant in effecting a change of residence may be inquired into.[71] Under a statute requiring proof of good conduct of plaintiff before granting him a divorce, a decree is properly refused where the evidence shows that plaintiff deserted his family shortly after the birth of a child and remained in concealment until his whereabouts were disclosed by the commencement of the suit.[72] Circumstances relevant to a charge of adultery are shown below.[73] A husband seeking divorce on the ground of desertion has the burden of proving a willful and obstinate desertion and must show affirmatively that she left of her own choice against his will and remained away when it was her duty to return.[74] Corroborative testimony to essential matters must be taken to support a decree.[75] Where evidence is equally balanced and is as capable of one construction as the other, the court will adopt the construction in favor of innocence.[76] Holdings as to sufficiency of evidence are grouped in the footnote.[77]

Reference.—A master in an undefended suit for divorce may examine the witness by leading questions, where he seems inclined to evade disclosure, but this does not allow his counsel to examine by use of leading questions.[78]

71. Hunter v. Hunter, 64 N. J. Eq. 277. Want of bona fide residence may be inferred from haste in suing upon a cause which originated in a state where such cause is not recognized—Id. Where the evidence shows that plaintiff acquired her residence in the state with intent to remain therein, the fact that she states that her object in coming to the state was to obtain a divorce will not bar her right to obtain such divorce, though her evidence will be considered in determining the bona fides of a residence—Wallace v. Wallace (N. J. Law) 54 Atl. 433.

72. Coe v. Coe (Mo. App.) 72 S. W. 707.

73. Where one testifies to seeing defendant in a compromising position it may be shown that the act could not have been seen from the place testified to—Goldie v. Goldie, 39 Misc. (N. Y.) 389. A companion of defendant at the house of prostitution may testify whether he had seen defendant have sexual intercourse with any woman on such occasion—Id. In an action for the wife's adultery a letter written to her by her alleged paramour shortly before her marriage is admissible in connection with evidence of similar acts during marriage to prove the illicit intercourse charged—Bickley v. Bickley, 136 Ala. 548.

74. Wood v. Wood, 63 N. J. Eq. 688.

75. Proof of plaintiff's status by witnesses, only one of whom possesses the qualifications, is insufficient and confers no jurisdiction on the court—Cummins v. Cummins, 30 Ind. App. 671. The Illinois laws require the cause of divorce in case of default to be proved by more than one witness (Rev. St. c. 40, § 8)—Kline v. Kline, 104 Ill. App. 274.

76. Poillon v. Poillon, 78 App. Div. (N. Y.) 127.

77. The motive cannot be established by the petitioner's own testimony as to the reason for making a change of residence and where the petitioner's testimony on that point is practically unsupported and there is no cross-examination and some of the answers indicate a mental reservation, it will be held that there was not such a residence acquired as would give the court jurisdiction—Hunter v. Hunter, 64 N. J. Eq. 277. **The statutory degrees of cruelty**—Bryan v. Bryan, 137 Cal. XIX, 70 Pac. 304; McKee v. McKee (Neb.) 96 N. W. 489; Creyts v. Creyts (Mich.) 94 N. W. 383; Harl v. Harl, 24 Ky. L. R. 2163, 73 S. W. 756. Extreme cruelty of wife—Torlotting v. Torlotting, 97 Mo. App. 183. A divorce on the ground of extreme cruelty is properly denied a husband where the evidence of a child in the father's favor showed prejudice and feeling against the mother and the evidence of neighbors showed that defendant had been a faithful wife, cleanly in her habits and there was strong evidence that plaintiff himself had been unfaithful and that her refusal to admit him to the house occurred after he had filed a bill for divorce against her which was afterwards discontinued—Parkinson v. Parkinson (Mich.) 96 N. W. 497.

Adultery—Gibson v. Gibson, 18 App. D. C. 72; Fischer v. Fischer (Mich.) 91 N. W. 633; White v. White, 64 N. J. Eq. 84. Evidence insufficient to sustain charge of adultery—Post v. Post (N. J. Eq.) 52 Atl. 1102; Goldie v. Goldie, 39 Misc. (N. Y.) 389; Poillon v. Poillon, 78 App. Div. (N. Y.) 127; Burch v. Burch, 80 App. Div. (N. Y.) 55.

Causes of separation or desertion: Evidence insufficient to show that the husband was authorized in refusing longer to live with his wife because of her misconduct—Wood v. Wood, 63 N. J. Eq. 688. Evidence held not to satisfactorily show that defendant's leaving plaintiff was without plaintiff's fault—Hale v. Hale, 24 Ky. L. R. 2203, 73 S. W. 784. Evidence sufficient to warrant a decree for desertion—Hall v. Hall (N. J. Eq.) 53 Atl. 455. Evidence insufficient to show willful separation—Wood v. Wood, 63 N. J. Eq. 688. Evidence insufficient to support a finding that the separation between plaintiff and defendant was voluntary and without defendant's consent—McMullin v. McMullin (Cal.) 71 Pac. 108. Evidence of constructive desertion of a wife by her husband held insufficient to authorize a decree—Seeley v. Seeley, 64 N. J. Eq. 1.

78. Seeley v. Seeley, 64 N. J. Eq. 1.

In New York, the court of special term will not deny judgment because of errors of the referee in the reception and exclusion of evidence, the code not allowing a judgment to be taken of course on a referee's report and requiring the testimony and other proceedings to be certified to the court by the referee with his report and judgment rendered by the court.[79]

Verdicts and findings.—A finding that plaintiff has been guilty of willful desertion is a conclusion of law and not a finding of fact.[80] Where there is no issue as to the date of a marriage, findings are unnecessary and an inconsistency on that point is harmless.[81] Consent to a verdict by eleven jurors is valid where the verdict is for defendant, though a code provision provides that no judgment in divorce shall be given in favor of plaintiff until facts have been found by the jury and under this rule the verdict would have been invalid if for plaintiff.[82]

New trial.—In North Carolina, a new trial may be granted on the issue of adultery by plaintiff without granting it on the issue of desertion by defendant.[83]

Decree, vacation, and modification.[84]—Under the New York provision that final judgment in divorce shall be made three months after the entry of the interlocutory judgment, the date of the entry and not of the filing of the referee's report is the day from which the time is to be reckoned,[85] and the interlocutory judgment must be filed with the county clerk who is a clerk of the supreme court and not with the clerk of a particular division of the supreme court.[86] A decree divorcing the husband "from his wife" is valid though the name of the wife is incorrectly given in the decree, as the inaccurate name may be rejected as surplusage.[87]

A decree will not be vacated where party was personally served and might have appealed,[88] or where he has unreasonably delayed in seeking to vacate or set it aside.[89] A statute allowing a certain time to open a decree made on publication does not apply where the party obtaining the divorce is dead at the time the application to open the decree is made.[90] Defects or irregularities in procuring published service must be such as to vitiate the jurisdiction on which the decree rests.[91] Application to vacate a decree must be made in time and present a strong case if plaintiff has since died.[92] When there are no property rights or anything but the

79. Party relegated to appeal to obtain new trial—Goldie v. Goldie, 39 Misc. (N. Y.) 389.

80. Fink v. Fink, 137 Cal. 559, 70 Pac. 628. A denial of a divorce on a finding that extreme cruelty had been proved but that defendant had refused matrimonial intercourse without finding that there was "no just cause for such refusal" as required by the code is insufficient to support the conclusion and on appeal the court could not say that the finding as to cruelty was a finding of cause for plaintiff's conduct—Id.

81. Bryan v. Bryan, 137 Cal. XIX, 70 Pac. 304.

82, 83. Hall v. Hall, 131 N. C. 185.

84. Evidence of fraud and duress sufficient to sustain judgment setting aside decree of divorce—Humphrey v. Humphrey (Neb.) 91 N. W. 856.

85. Gibson v. Gibson, 40 Misc. (N. Y.) 103.

86. Code Civ. Proc. N. Y. § 1774—Rothstein v. Rothstein, 40 Misc. (N. Y.) 101.

87. Howton v. Gilpin, 24 Ky. L. R. 630, 69 S. W. 766.

88. A defendant in a divorce suit served with citation which was explained to him on the original petition and the amended petition did not set up a new cause of action, and who knew of the decree twenty days after its rendition and paid the costs, cannot maintain the suit to set aside the decree for fraud, his remedy was by appeal—Richards v. Minster (Tex. Civ. App.) 70 S. W. 98.

89. In this case the parties were married in 1888 but never lived together. In 1892, a divorce was obtained of which the defendant in the state had knowledge the same year but made no effort to have the decree set aside until 1899 and after the marriage of her former husband—Hurley v. Hurley, 117 Iowa, 621.

90. Burns' Rev. St. 1901, § 1042—Day v. Nottingham (Ind.) 66 N. E. 998.

91. The fact that the affidavit for service by publication was made by the wife instead of by a disinterested person as required by one statute will not suffice to show more than mere error where a real doubt as to the applicability of that statute exists and the requirements of the other one are met and the notice given substantially complies with the law. (Burns' Rev. St. 1901, § 1048)—Day v. Nottingham (Ind.) 66 N. E. 998.

92. Day v. Nottingham (Ind.) 66 N. E. 998. It is not a fraud on an actual nonresident to state falsely but unnecessarily in the affidavit for published service that the place of residence is unknown, especially

right to a divorce to be relitigated, the death of one party extinguishes all right to open the decree;[93] and hence, where she dies leaving considerable property, and it is not shown that she was possessed of the property at the time she obtained the divorce, the court will hesitate to set aside the decree as the only effect of such an action will be to permit defendant to inherit the property. Defaulted parties must show merits and good cause.[94]

Costs.—In granting a husband a divorce, in Kentucky, the costs may not be adjudged against the wife, where she is without property and was not in fault. The husband should have been adjudged to pay the costs of the wife including reasonable attorney's fees.[95]

Review.—The reviewability and mode of review of divorce decrees or of the order for alimony depends on the local statutes.[96] The review of divorce suits on appeal is generally governed by rules applicable to equity cases and extends to law and facts and the courts are not bound to affirm the decrees where convinced that they are against the preponderance of the evidence.[97] On appeal the court will give great weight to the judgment of the lower court and will not reverse unless the showing of error is clear,[98] and this is especially the case where the evidence is contradictory.[99] Plaintiff in a divorce suit, having married pending the appeal from the decree granting the divorce, will not be heard on the appeal or be allowed to have the case remanded for a new trial, the case being reversed.[1] A marriage by a divorced person during the period allowed by law for commencing proceedings for reversal of the divorce decree is invalid.[2] Where the husband to whom the divorce was granted died pending an appeal, and the wife asserts no right to have the action revived to determine the property rights, the appeal will be dismissed.[3]

§ 5. *Custody and support of children.*—The question of custody should be determined by the welfare of the child,[4] and should be given to a deserting wife as against a husband who though successful married her only to escape a prosecution.[5] The custody decree allowing parents alternate custody should be so framed as not to interfere with the child's attendance at school.[6] Support of children should be awarded separately from alimony.[7] A husband is entitled to the earnings of a child and bound for his support though the custody is given to the mother.[8]

since had affiant stated the truth the service would have been allowed—Id.

93. Day v. Nottingham (Ind.) 66 N. E. 998.

94. A judgment by default will not be set aside where defendant admits personal service and does not deny the charge of adultery except by stating that she has a good and valid defense and does not present an affidavit of merits or a proposed answer—Maguire v. Maguire, 75 App. Div. (N. Y.) 534. See, also, Defaults.

95. Alderson v. Alderson's Guardian, 24 Ky. L. R. 595, 69 S. W. 700. See, also, Alimony ante, p. 70 and Costs ante, p. 808.

96. An alimony decree in Louisiana before final judgment is appealable regardless of amount (Const. 1898, art. 85)—Dale v. Hauer, 109 La. 711. An order modifying a decree by reducing alimony appealable—Davis v. Davis, 78 App. Div. (N. Y.) 500. A judgment of the appellate division reversing a decree which reduced alimony goes to the court of appeals—Livingston v. Livingston, 173 N. Y. 377. In Kentucky, the action of the chancellor in the matter of adjudging the costs and alimony, and maintenance can be reviewed, though the judgment for divorce is not subject to review on appeal—Alderson v. Alderson's Guardian, 24 Ky. L. R. 595, 69 S. W. 700. See Appeal and Review, ante, p. 85.

97. Schuman v. Schuman, 93 Mo. App. 99. The appellate courts in Missouri may review issues of fact in suits for divorce as in suits of equity—McCann v. McCann, 91 Mo. App. 1.

98. Harl v. Harl, 24 Ky. L. R. 2163, 73 S. W. 756.

99. Donaldson v. Donaldson (Mich.) 96 N. W. 448; Coe v. Coe (Mo. App.) 72 S. W. 707.

1. Branch v. Branch, 30 Colo. 499, 71 Pac. 632.

2. Eaton v. Eaton (Neb.) 92 N. W. 995.

3. Sperry v. Sperry (Mo. App.) 72 S. W. 1077.

4. Properly given to a father, where the wife's circumstances and surroundings make it doubtful whether it would be just to the child to give her its custody and the father is giving the child a fair opportunity for education in a home surrounded by good conditions—Masterson v. Masterson, 24 Ky. L. R. 1352, 71 S. W. 490.

5. Alderson v. Alderson's Guardian, 24 Ky. L. R. 595, 69 S. W. 700.

6. Van Buren v. Van Buren, 75 App. Div. 615, 11 N. Y. Ann. Cas. 381.

7. Rev. St. 1899, § 2926—Meyers v. Meyers, 91 Mo. App. 151.

Courts generally have the right to modify orders providing for the custody of the minor children,[9] and the change in custody may be made in habeas corpus proceedings.[10] Where no provision is made for the custody of the children at the time the decree is entered, the mother may at a subsequent term obtain an order compelling the father to provide her with means for their future support.[11] In California, the supreme court has no power, on appeal from an order denying a new trial, to modify the provision of the decree providing for support of a minor child until it attains its majority.[12] A decree of another state determining the custody of the child in a suit for divorce is res judicata of all questions as to the right of custody which could have been before the court at the time of the entry of the decree,[13] but the decree will not bar a subsequent proceeding in the domestic court to modify it on proof of a change in the situation of the parties.[14] Acts allowing the court to modify maintenance orders entered before the passage of such acts are unconstitutional.[15]

§ 6. *Adjustment of property rights.*—Where the court finds that the wife has been willfully absent for more than three years and that the husband is entitled to a decree on that ground, the court can, under Rev. St., Ohio, 1890, § 5700, adjudge to her such share of the husband's property as it deems just, which adjudication is binding on his estate.[16] Under a code providing that by failure to take exceptions to a misjoinder of causes of action, it shall be deemed waived, property rights not growing out of the marriage relation should be adjudicated by an action of divorce though not properly joined, where no objection was made.[17]

§ 7. *Effect of divorce.*—A husband and wife after divorce become tenants in common of the community property and either may recover the entire interest as against a trespasser.[18] After a decree of divorce, the husband has no right of possession in the wife's separate property simply because such property was occupied as a homestead while the marriage relation existed.[19] The fact that a wife obtains a divorce for desertion of husband will not bar proceedings against a husband who marries to escape prosecution for bastardy and afterwards maltreats and deserts her.[20]

§ 8. *Foreign divorce.*—The full faith and credit clause of the federal con-

8. Meyers v. Meyers, 91 Mo. App. 151.

9. Miles v. Miles, 65 Kan. 676, 70 Pac. 631; Everitt v. Everitt, 29 Ind. App. 508. Rev. St. Mo. 1899, § 2926—Meyers v. Meyers, 91 Mo. App. 151. The court has power on petition to provide for the care and custody of children born after the decree of divorce, where the decree made no provisions for such support—Shannon v. Shannon, 97 Mo. App. 119.

10. The duty of the state, as parens patriae, and the jurisdiction of a habeas corpus court are continuing and not limited to the date of a divorce—Williams v. Crosby (Ga.) 45 S. E. 282. A decree in a divorce suit awarding the child to one of the parents is prima facie evidence of the legal right to its custody, but is not conclusive in habeas corpus proceedings, where neglect or mistreatment of the child or unfitness of the parent arising since the date of the decree is involved—Id.

11. Meyers v. Meyers, 91 Mo. App. 151. Evidence sufficient on petition to modify decree as to support and maintenance of child to sustain legitimacy of child whose paternity was denied in the later proceeding—Kraus v. Kraus (Mo. App.) 72 S. W. 130.

12. Bryan v. Bryan, 137 Cal. XIX, 70 Pac. 304.

13. Wilson v. Elliott (Tex.) 73 S. W. 946. A foreign divorce decree awarding custody to the mother may not be contested by a father where he has recognized its validity by contracting a second marriage—State v. King, 109 La. 161.

14. Wilson v. Elliott (Tex.) 73 S. W. 946. In a proceeding to modify a decree of another state awarding custody of a child, evidence of a change in the situation of the parties prior to the rendition of the foreign decree is admissible in corroboration of evidence showing a similar situation or conduct since the decree relied on to effect a modification thereof—Id.

15. Livingston v. Livingston, 173 N. Y. 377.

16. Hassaurek v. Hassaurek's Adm'r (Ohio) 67 N. E. 1066.

17. Code Civ. Proc. Neb. § 96—Reed v. Reed (Neb.) 91 N. W. 857.

18. Williamson v. Gore (Tex. Civ. App.) 73 S. W. 563.

19. Cizek v. Cizek (Neb.) 96 N. W. 657.

20. State v. Lannoy, 30 Ind. App. 385. Burns' Rev. St. 1901, § 7298a et seq.

stitution is not violated by the refusal of a state to recognize a decree of another state by one who temporarily left his home and acquired a domicile in such state to obtain a divorce for an act which occurred in the former state which was not ground for a divorce there.[21] A foreign decree to a husband for desertion will be regarded as a nullity in the forum where the wife at the time had obtained a decree from bed and board in the state of the forum for his desertion.[22] Where the decree of a state rendered after personal service on the husband and notice to appear or answer requires the husband to pay alimony in certain amounts, a judicial debt of record is established which may be enforced in the courts of another state within the full faith and credit clause of the constitution.[23] One obtaining a decree in a foreign court will not thereafter be heard to deny its validity though in states not recognizing such divorces.[24]

DOCKETS, CALENDARS AND TRIAL LISTS.[25]

Placing cause on calendar.—A notice of trial is essential,[26] even where the cause is transferred from another calendar for which it has been noticed,[27] but it is otherwise where both parties move that a cause be restored to the calendar.[28] Notice of trial cannot be given while a stay is in effect.[29]

Passing or advancing causes.—The court may advance a preferred cause though the attorney has failed to comply with the statute as to notice of motion for advancement.[30] Motion to pass a cause is implied consent to trial on the day to which it is passed.[31]

Transfer, correction, or striking off.—A motion to strike off must be promptly made.[32] Modification of an order setting a cause for trial cannot be made ex parte.[33] The clerk cannot of his own motion correct his error in placing the cause on the wrong calendar.[34] Where the complaint does not authorize equitable relief, the court will transfer the cause to the law calendar e. g., in New York to trial term calendar.[35]

21. Andrews v. Andrews, 188 U. S. 14, 47 Law. Ed. 366.

22. In re Heins' Estate, 22 Pa. Super. Ct. 31.

23. Compare title Alimony ante as to when alimony award becomes enforceable as money judgment—Moore v. Moore, 40 Misc. (N. Y.) 162.

24. In re Swale's Estate, 172 N. Y. 651; Starbuck v. Starbuck, 173 N. Y. 503.

25. Calendars and dockets of appellate Courts, see Appeal and Error, ante, p. 139. Rules for determining when issues are joined, also times to plead, see Pleading.

26. The court has no power to relieve a party whose notice was served too late—Roberts v. Schaf, 76 App. Div. (N. Y.) 433. The fact that the attorney had instructed his clerk to give the notice is no excuse for failure—Hix v. Edison Elec. Light Co., 78 App. Div. (N. Y.) 384; Loftus v. Oppenheim, 84 App. Div. (N. Y.) 464. The request to put the case on the calendar required by Pub. Acts 1899, c. 187, p. 1102, must be made within thirty days after the return day when issue is joined within such time—McKay v. Fair Haven & W. R. Co., 75 Conn. 608.

In some states the practice is for the clerk to put the cause on the docket for trial in all cases where the action is begun in time to enable all issues to be formed by the first day of the term. It is then announced "for trial" or otherwise by the attorneys when the docket is "called."

27. Poerschke v. Baldwin, 83 App. Div. (N. Y.) 284.

28. Darby v. Metropolitan St. Ry. Co., 78 App. Div. (N. Y.) 631.

29. Stay under Code Civ. Proc. § 779, for failure to pay costs of motion—Roberts v. Schaf, 76 App. Div. (N. Y.) 433.

30. Code Civ. Proc. § 792, provides that unless notice be given of the particular day at which it is intended to move the cause for trial it shall not be moved out of its order except by special order of court—City of New York v. Shack, 81 App. Div. (N. Y.) 575.

31. Union Surety & Guaranty Co. v. Tenney, 102 Ill. App. 95.

32. Winterburn v. Parlow, 102 Ill. App. 368. Two and one-half months delay after notice of trial is fatal—Freund v. Huylers, 102 Ill. App. 486. And a motion when the cause is called for trial comes too late—Pierpont v. Johnson, 104 Ill. App. 27. A motion to have equitable issues sent to special term cannot be made after two years delay—Jacob v. Thompson, 80 App. Div. (N. Y.) 526.

33. Martin v. Universal Trust Co., 76 App. Div. (N. Y.) 320.

34. Noble v. Burney, 116 Ga. 626.

35. Plaintiff contended that he was entitled to go to trial at peril of dismissal if

Short cause calendars.—A case should not be put on the short cause calendar where there is reasonable doubt whether it can be tried in the prescribed short time.[36]

DOMICILE.[37]

Under the common law, the husband may select the family domicile.[38] The domicile of an infant is that of the parents and is presumed to continue at such place until proof that it has been lawfully changed.[39] After the death of the father, the domicile of the children is that of the mother.[40]

A change of domicile is accomplished by a change of residence to a new place coupled with the animus manendi.[41] The intent must be shown,[42] and there must be an actual removal, an arrangement for the change is not sufficient.[43] Domicile is not lost by temporary absence.[44] One charging a change of domicile has the burden of proving the change, as the domicile of origin continues until another is acquired.[45]

Domicile of paupers and insane persons.—A person of unsound mind is incapable of forming an intention necessary to effect a change of domicile.[46] On marriage, the woman takes the pauper settlement of her husband if he has any.[47] A settlement of a woman is not changed by her marriage induced by collusion of the pauper officers of the district of her settlement,[48] nor where the husband at the time of the marriage was mentally incapacitated to contract a marriage.[49] Though a pauper act uses the word "resides" in the sense of having a domicile and provides that a woman who resides at any place for five years altogether shall gain a settlement, yet the intention of one leaving a place to return at some in-

he failed to establish an equitable cause of action—Everett v. De Fontaine, 78 App. Div. (N. Y.) 219.

36. Uvalde Asphalt Pav. Co. v. Dunn, 77 App. Div. (N. Y.) 467. Cases requiring more than two hours should be sent to the foot of the general term calendar—Guaranty Trust Co. v. Griffiths, 81 App. Div. (N. Y.) 631.

37. Jurisdiction as dependent on domicile or citizenship of parties, see Jurisdiction.

38. Schuman v. Schuman, 93 Mo. App. 99.

39. In re Russell's Estate, 64 N. J. Eq. 313. The residence of a child at the death of the father is not changed by the fact that the mother takes the child with her to another state, unless an intent on her part to abandon the former state as a residence is shown—Id.

40. In re Russell's Estate, 64 N. J. Eq. 313. It is not necessary that the children should be removed from the state of the father's residence in order to make their domicile that of the mother in another state—Modern Woodmen of America v. Hester (Kan.) 71 Pac. 279.

41. Marks v. Germania Sav. Bank (La.) 34 So. 725. Continuous, uninterrupted declarations, especially at times not suspicious, accompanied by the fact of residence, the removal of personal property and the exercise of political rights establish a change of domicile—Id.

42. In re Russell's Estate, 64 N. J. Eq. 313; Inhabitants of Palmer v. Inhabitants of Hampden, 182 Mass. 511.

43. Inhabitants of Palmer v. Inhabitants of Hampden, 182 Mass. 511.

44. Removal for temporary purposes without intention of changing his residence will not disqualify a juror—Sikes v. State, 116 Ga. 182. A wife living separately from her husband for five years does not lose her residence in the state of his domicile for the purpose of a divorce suit while going into another state to work to support herself—Boreing v. Boreing, 24 Ky. L. R. 1288, 71 S. W. 431. A finding that a party was not a nonresident so as to allow an attachment is supported where testimony of a party and his wife shows that he left the state merely to take a temporary position and there was nothing to the contrary on which to base more than a mere suspicion—Newlon-Hart Grocer Co. v. Peet (Colo. App.) 70 Pac. 446.

An intention to return at an indefinite time not sufficient to retain domicile under pauper laws—Inhabitants of Palmer v. Inhabitants of Hampden, 182 Mass. 511.

45. Succession of Simmons, 109 La. 1095; Fidelity & Casualty Co. v. Brown (Ind. T.) 69 S. W. 915.

46. Held in a case involving a pauper settlement—Phillips v. City of Boston (Mass.) 67 N. E. 250.

47. Inhabitants of Winslow v. Inhabitants of Troy, 97 Me. 130.

48. Inhabitants of Hudson v. Inhabitants of Charleston, 97 Me. 17. Sufficiency of evidence that a marriage was procured by collusion on the part of the officers of a town liable for the support of a pauper woman—Id.

49. Inhabitants of Winslow v. Inhabitants of Troy, 97 Me. 130.

definite time is not enough to retain her domicile there so that the time before and after her leaving may be tacked to make the five year domicile.[50] The guardian of an insane person in Iowa may deny his ward's legal residence in the county of the guardian's appointment in an action to restrain collection of taxes though the laws of that state require appointment of a guardian for any "inhabitant" of the county found insane.[51]

Domicile under election laws.—Residence in an election district is acquired by moving one's personal effects thereto and by acts showing an intent that residence should commence at that time.[52] It is not lost by temporary absences.[53] It is lost by removal into another state with intent to remain there permanently, though the party afterwards changes his intention and returns.[54] A student, who at the time of voting has no fixed intention to remain in the state, is not eligible to vote therein though he has actually resided in the state for a longer period than that required.[55]

Domicile under revenue laws is often required as of a certain date as determining taxable residence.[56]

Domicile under bankruptcy act.—Under the bankruptcy act conferring jurisdiction as to persons having a domicile within the district for the preceding six months or greater portion thereof, a traveling gambler residing in a particular district for only two months is not included.[57]

Evidence as to domicile.—The statements of a party and his conduct are not conclusive of the question of intent,[58] but may be considered on that question along with other evidence,[59] and a like rule governs where domicile is sought to be proved by the appointment of an administrator and the probate of a will.[60] In the absence of evidence to the contrary, residence in the United States under the copyright law is sufficiently proved by a certificate of the librarian describing the party as of New York and the author's testimony that he was at the time of the trial a resident of New York and had mailed the copies to the librarian in New York more than ten years before.[61]

50. Inhabitants of Palmer v. Inhabitants of Hampden, 182 Mass. 511.

51. Brown v. Lambe (Iowa) 93 N. W. 486.

52. There is an acquisition of a residence in a precinct within the election laws where the party at the date necessary to fix his residence as a legal voter moves a part of his property into the house and is married on that day and the following day moves into the house with his wife—Conner v. Commonwealth, 24 Ky. L. R. 709, 69 S. W. 963.

53. An unmarried man will not lose his residence by reason of his leaving the state where he intends to return within a short time and does in fact return and lives in the state at the time of his election—Edwards v. Logan, 24 Ky. L. R. 1099, 70 S. W. 852, 25 Ky. L. R. 435, 75 S. W. 257. A voter moving into another ward for sanitary reasons only intending to return does not lose his residence by reason of the temporary removal—Finn v. Board of Canvassers, 24 R. I. 482.

But see ante, note 44.

54. Edwards v. Logan, 24 Ky. L. R. 1099, 70 S. W. 852, 25 Ky. L. R. 435, 75 S. W. 257.

55. Parsons v. People, 30 Colo. 388, 70 Pac. 689.

56. In New York, residence on July 1st determines residence for assessment—People v. Feitner, 78 App. Div. (N. Y.) 287.

57. In re Williams, 120 Fed. 34.

58. Ida County Sav. Bank v. Seidensticker (Iowa) 92 N. W. 862. An affidavit stating that a party has removed and resides in another state and does not reside in the state from which it is claimed he has removed, states a conclusion and is not sufficient proof of nonresidence—Fidelity & Casualty Co. v. Brown (Ind. T.) 69 S. W. 915.

59. While a man's act in registering himself and wife at hotels as of a certain place may be insufficient in itself to fasten upon him acknowledgment of domicile there, repeated registerings of that kind through two or three years time, and never once of another (subsequently claimed from interested motives, to be his domicile) are strong links in the chain of facts and circumstances going to establish intention to make the place of declared residence his domicile—Marks v. Germania Sav. Bank (La.) 34 So. 725.

60. Ewing v. Mallison, 65 Kan. 484, 70 Pac. 369.

61. Patterson v. J. S. Ogilvie Pub. Co., 119 Fed. 451.

DOWER.

§ 1. Nature of Right, Persons Entitled, Election.
§ 2. In What Dower may be Had.
§ 3. Extinguishment, Release or Bar and Revival of Dower.—Joinder in Conveyance; Warranty; Judicial Sale; Creditor's Suit; Adverse Possession; Title to Payments for Release.
§ 4. Liens and Charges on Dower.
§ 5. Assignment of Dower and Money Awards.
§ 6. Damages for Withholding Dower.
§ 7. Remedies and Procedure.

§ 1. *Nature of right; persons entitled; election.*—The wife's inchoate right of dower prior to the husband's death is not a vested right protected against legislative change;[62] hence a statute defining the lands in which a wife is dowable is operative as to inchoate rights of dower,[63] but after the dower estate has become vested by the death of the husband it cannot be changed by legislation to the prejudice of the heirs.[64]

A widow who prior to her husband's death abandons him and lives in adultery is not entitled to dower,[65] and though both husband and wife have been guilty of adultery, the husband first being guilty, the wife nevertheless is not entitled to dower she not being living with her husband at the time of his death.[66]

Where, on the emigration of the husband, the wife refuses to accompany him, the separation will be regarded as voluntary on her part, within the meaning of statutes depriving her of dower in the case of such separation, and she is not excused by a report that he is married to another woman.[67] Nor can she claim dower where from her actions it is apparent that she does not intend again to live with her husband.[68]

Election between dower and other rights.—Statutes allowing an election by the widow to take one-half of the land subject to the payment of the debts of the estate in lieu of dower in one-third where there are no children have been construed to be distinct from statutes providing for the order of succession in the event of intestacy without issue, so that an election to take under one of such provisions will not bar a claim under the other.[69]

There is no such inconsistency between the right of dower and the distributive share in personalty as to make the taking of one an exclusion of the other.[70] Acceptance of the provisions of the will by the widow does not bar dower unless the provisions of the will are inconsistent with such right or it expressly so provides.[71] A provision for joint occupancy of the realty by the wife and daughter, and in case they desire it, for a sale and equal division of the proceeds between the wife and two children of testator, is not so inconsistent with the widow's right of dower as to prevent her becoming an owner in fee of one-third of the land occupied though it provided that on sale the share of the proceeds should be given to the wife in lieu of dower.[72]

In New York a widow cannot have dower in addition to a testamentary provi-

62. Helm v. Board, 24 Ky. L. R. 1037, 70 S. W. 679; Bartlett v. Tinsley (Mo.) 75 S. W. 143.

63. Ky. St. § 2135—Helm v. Board, 24 Ky. L. R. 1037, 70 S. W. 679.

64. Estate vested under Code 1851, § 1394, giving the widow for life, one-third of the land of which the husband died seized—Bottorff v. Lewis (Iowa) 95 N. W. 262.

65. Rev. St. 1899, § 2953—Lyons v. Lyons (Mo. App.) 74 S. W. 467.

66. Code, § 2102; Acts 1893, c. 153—Phillips v. Wiseman, 131 N. C. 402.

67. Rev. St. 1889, § 4532—Wilson v. Craig (Mo.) 75 S. W. 419.

68. She remarried without procuring a divorce—Wilson v. Craig (Mo.) 75 S. W. 419.

69. Rights under Civ. Code, §§ 228, 236, regarded as separate from rights under section 1852—Dahlman v. Dahlman (Mont.) 72 Pac. 748.

70. Rev. St. 1892, §§ 4176, 5964—Hutchings v. Davis (Ohio) 67 N. E. 251.

71. Code, 1873, § 2452, provides that the widow's share cannot be affected by any will of the husband, unless she consent thereto within six months after notice of its provisions—Kiefer v. Gillett (Iowa) 94 N. W. 270.

72. Kiefer v. Gillett (Iowa) 94 N. W. 270.

sion for payment to her of one-third of the income of the realty during the minority of the child, and on the termination of the trust for the child a conveyance of one-third of the realty itself.[73] Where no provision is made for the widow by will except the creation of an annuity not stated to be in lieu of dower, the widow is not required to elect,[74] and where the will gives the widow nothing in lieu of dower, her acceptance of her dower is not an election between her distributive share conferred by statute and the will, though she takes the value in money.[75]

An agreement by the wife at the time of execution of a will by her husband, to take thereunder in lieu of dower or other interest, and the acceptance of a portion of the bequest from the executors, does not prevent the widow from renouncing the will if the bequest is less than the amount she would take under the statute.[76]

Ignorance of her rights will not excuse failure of the widow to renounce the husband's will within the period prescribed by statute for her election unless the time has been extended by the chancellor.[77]

The fact that the widow remains in the residence given her in lieu of dower by an antenuptial contract during assignment of dower does not show an election to take under the contract.[78] The widow's right to dower is not extinguished by merger on an acceptance from the heirs of a quitclaim deed of the premises in which dower is claimed, where a different intention may be reasonably deduced from the circumstances.[79]

Effect of assignment.—Before dower is assigned it is not subject to a transfer or conveyance by the widow,[80] though by statute it may be made so.[81] Prior to assignment, the widow has no such title to the land as will support an action at law against the administrator or heir for rents collected; her remedy is in equity.[82]

When dower is assigned, the widow's seisin relates to the date of death of her husband and the antecedent seisin of the heir is to be regarded as not having had an existence,[83] and where, before assignment, the administrator rents property in which such dower is assigned, one to whom he transfers the obligation for rent cannot enforce such obligation as against the widow's claim, such transferee being chargeable with knowledge of the limited rights of the administrator,[84] and the widow can, if the transferee receive a portion of the crop as rent, waive the tortious conversion and bring an action for money had and received.[85]

After assignment, the widow has a vested estate in that assigned to her,[86] which estate does not depend on her continued occupancy,[87] and she is not answerable to the heirs of the husband for rents received from tenants to whom she leased the premises.[88] Under statutes giving the widow a life estate, her dower estate after award is not one of inheritance and cannot be bequeathed or conveyed so as to pass an interest to her heirs or strangers after her death;[89] hence, when an heir in a conveyance of his realty reserved any interest which might accrue in

73. In re Gorden, 172 N. Y. 25, 11 Ann. Cas. 397.

74. Horstmann v. Flege, 172 N. Y. 381, 12 Ann. Cas. 163.

75. Hutchings v. Davis (Ohio) 67 N. E. 251.

76. There is no ground for estoppel and there is no consideration making the agreement binding as a valid contract—Spratt v. Lawson (Mo.) 75 S. W. 642.

77. Election must be within one year under Kentucky St. 1899, § 1404—Logsdon v. Haney (Ky.) 74 S. W. 1073.

78. The contract was on an insufficient consideration—Moran v. Stewart, 173 Mo. 207.

79. Wettlaufer v. Ames (Mich.) 94 N. W. 950.

80. She cannot by a lease transfer her interest in oil and gas rights in land from which she is entitled to be assigned dower—Haskell v. Sutton (W. Va.) 44 S. E. 533.

81. Rev. St. 1899, § 2934—Phillips v. Presson, 172 Mo. 24.

82, 83, 84, 85. Bettis v. McNider (Ala.) 34 So. 813.

86. Haugh v. Peirce, 97 Me. 281.

87. She is seized for life of a freehold estate—Rowley v. Poppenhager, 203 Ill. 434.

88. Rowley v. Poppenhager, 203 Ill. 434.

89. Code, 1851, § 1394—Bottorff v. Lewis (Iowa) 95 N. W. 262.

the estate of the widow, such reservation cannot be regarded to refer to the dower estate but merely to such other lands as might be acquired by the widow in fee simple.[90]

Where property, devised the widow for life, is on her refusal to take under the will set off as dower, the rights of the remaindermen are not affected.[91]

§ 2. *In what dower may be had.*—Possession under a mere equitable right to a conveyance is not sufficient to support an inchoate right of dower, though the husband complies with the contract of purchase but takes title in the name of a third person.[92] Under certain statutes, the widow may have dower in property of which the husband was not in actual possession.[93] Possession by the husband under an arrangement with the life tenant is not sufficient.[94] Where the husband's equity under a contract for the purchase of land is sold to satisfy a judgment for the payment of a balance due on the purchase price, the wife has no right of dower as against the purchaser who has received possession.[95]

The wife of a devisee has an inchoate right of dower in his share of lands devised, and a decree in partition which bars her of any right, title, or interest in such lands is erroneous.[96]

The wife is not entitled to dower in land which her husband holds in trust,[97] but a parol trust will not be raised to defeat a wife's claim to dower in land of which her husband was seized in favor of one taking with constructive notice of the absolute character of the conveyance to the husband.[98] The widow may have dower in the husband's lands which with him she has conveyed in trust to be conveyed by the trustee to the husband's heirs in default of an appointment during his life time or in his will, there having been no appointment,[99] but her dower is extinguished as to a portion of the land which the trustee conveyed during the husband's life at his request.[1]

Dower attaches only to such real estate of a partnership as is not required for the payment of partnership debts and for the adjustment of rights between the partners.[2]

Property conveyed before marriage.—The widow is entitled to one-third of the real property owned by her husband during coverture only, and such right cannot be extended to lands conveyed by the husband before marriage to his heirs by a former marriage by way of advancements.[3] A conveyance before marriage is not in fraud of the wife's dower right where made with her knowledge and in the absence of fraud, undue influence, or want of capacity on the part of the husband.[4] There is no right of dower in property which before his marriage the husband has conveyed by deeds placed in escrow to be recorded and delivered to the grantees after his death.[5]

90. Bottorff v. Lewis (Iowa) 95 N. W. 262.

91. Baptist Female University v. Borden, 132 N. C. 476.

92. There is no sufficient seisin where the husband has title to land which he purchases, conveyed to his brother in order to prevent the wife's right of dower from attaching—Nichols v. Park, 78 App. Div. 95, 12 N. Y. Ann. Cas. 306.

93. Rev. St. 1889, § 4535—Bartlett v. Tinsley (Mo.) 75 S. W. 143.

94. Boykin v. Springs, 66 S. C. 362.

95. Burns' Rev. St. 1901, § 2652, provides that dower shall attach to the real estate of which the husband is seized in fee simple during marriage—Schaefer v. Purviance (Ind.) 66 N. E. 154.

96. Schick v. Whitcomb (Neb.) 94 N. W. 1023.

97. His estate not being an indefeasible estate of inheritance—Gritten v. Dickerson, 202 Ill. 372.

98. Bartlett v. Tinsley (Mo.) 75 S. W. 143.

99, 1. Goodheart v. Goodheart, 63 N. J. Eq. 746.

2. Davidson v. Richmond, 24 Ky. L. R. 699, 69 S. W. 794.

3. Code, § 3366—Burgoon v. Whitney (Iowa) 95 N. W. 229.

4. Evidence held not to show fraud in the case of a conveyance before the second marriage of a man of 76 in consideration of the assumption of debts by a son and promise to make certain provisions for other children—Daniher v. Daniher, 201 Ill. 489.

Land acquired by the husband after divorce is not subject to dower in favor of the former wife.[6]

Lands subject to mortgage or vendor's lien.—The wife has no dower in land which her husband takes subject to a mortgage though he executes his own notes and mortgage to take the place of the existing indebtedness, the evidences of which are surrendered to his grantor.[7]

In Missouri, the wife is entitled to dower in land purchased by the husband subject to a mortgage, and if after the husband's death the administrator pays off the mortgage by a sale of the mortgaged and other land, the widow's dower immediately attaches, and as the purchaser does not acquire title under the mortgage he cannot be subrogated to the mortgagee's rights.[8]

In Kentucky, prior to the adoption of a statute allowing the wife dower in a surplus remaining after the sale of land of which her husband was seized, to satisfy a vendor's lien, the widow's right to dower was subordinate to the purchase money lien.[9]

Though a sale under a mortgage in which the wife has joined is after the husband's death, the widow is entitled to dower only in the surplus remaining after satisfaction of the mortgage.[10]

Land of alien.—The widow may claim dower in lands conveyed individually by her husband, though he was born in a foreign state.[11]

§ 3. *Extinguishment, release or bar, and revival of dower.*—Where before marriage the wife releases her widow's award, dower, and homestead in her future husband's property in consideration of a sum in gross, the release will be inoperative as to the dower if void as to the homestead and repudiated as to the award by the wife after the birth of a child.[12] An antenuptial relinquishment of dower cannot be renounced by the widow unless she was an infant at the time of its execution.[13] Dower is not barred by an antenuptial contract making provision for the wife's support during widowhood merely and not for life.[14]

A widow who has been given a consideration for her release of her distributive share cannot avoid such release without a return of the consideration.[15]

Effect of joinder in conveyance or incumbrance.—Statutes which provide that the wife shall not have dower in land sold to satisfy liens or encumbrances created by deed in which she joins comprehend mortgages.[16] Where the wife has, in a mortgage, released her dower, she is entitled, on a sale under the mortgage, only to compensation for the value of her dower in that part of the land not necessary

5. Yutte v. Yutte, 39 Misc. (N. Y.) 272.

6. Nichols v. Park, 78 App. Div. 95, 12 N. Y. Ann. Cas. 306.

7. Dower denied as against a purchaser on foreclosure of the second mortgage—Rhea v. Rawls, 131 N. C. 453.

8. The better rule appears to be announced in a dissenting opinion in this case, in which it is held that the husband during his lifetime never having more than an equity of redemption, there was nothing to which the inchoate right of dower could attach in excess thereof, and hence no such inchoate right could become absolute on the discharge of the mortgage by the administrator. Majority opinion construes Rev. St. §§ 2933, 2935, 2936—Casteel v. Potter (Mo.) 75 S. W. 597.

9. Under Rev. St. c. 47, art. 3, § 6, Ky. St. 2135, providing that if there is a surplus of the land or proceeds of sale, after satisfying a purchase money lien, the wife shall have dower from such surplus, the widow's right to dower must be satisfied out of the surplus proceeds where the whole land is sold and the land or its transferees are not liable—Helm v. Board, 24 Ky. L. R. 1037, 70 S. W. 679.

10. Code, § 2269, does not make any contrary provision though it provides for a dower in surplus in the sale of land during a husband's life time—Hoy v. Varner (Va.) 42 S. E. 690.

11. In the absence of evidence that he was an alien, McClain's Code, 1888, § 3646, will have no application even if it applied to resident aliens—Casley v. Mitchell (Iowa) 96 N. W. 725.

12. Zachmann v. Zachmann, 201 Ill. 380.

13. Rev. St. 1899, § 2951, allows such relinquishment in case of infancy—Moran v. Stewart, 173 Mo. 207.

14. Moran v. Stewart, 173 Mo. 207.

15. Willis v. Robertson (Iowa) 96 N. W. 900.

16. Ky. St. § 2135—Morgan v. Wickliffe, 24 Ky. L. R. 2104, 72 S. W. 1122.

to the payment of the mortgage debt though the proceeds of that part of the land are obtained by a sale of the husband's personal right of redemption.[17]

Signature and acknowledgment of a mortgage is not sufficient to bar the wife's dower if her name does not appear in the body of the instrument.[18] Particular words of release are not necessary in New Jersey.[19]

Where a wife joins in a conveyance by her husband for the purpose of releasing any inchoate right of dower which she may have in his interest in the estate of a deceased brother, she will not be regarded as conveying property owned by her.[20]

Covenants of warranty.—Where, by statute, the heirs and devisees of a person who has conveyed with covenants or agreements are made answerable on such covenants to the extent of the lands descended or devised to them, the widow is not by such statute estopped from claiming dower in land conveyed by the husband alone with warranties during marriage until claims for damage for breach of such warranty are satisfied.[21]

Foreclosure or execution sales.—A wife's right to dower is not barred by foreclosure proceedings in which she has failed to have her inchoate right adjudicated where the decree contains nothing from which it could be implied that the rights of the parties to the land in controversy were litigated or determined.[22] The right to claim dower is not barred by a default decree rendered against the wife in foreclosure proceedings instituted on a mortgage which she has signed and acknowledged, but in which she has not released dower, if neither the petition nor the decree in such proceedings mentions or seeks to bar dower.[23] A wife's dower is not divested by sale of land on execution on judgment rendered against the husband alone.[24] A decree of foreclosure which does not mention the wife of the grantor will not be extended to cut off her dower interest in the land through an application of the rule that the word "defendant" in a decree will be held to include a plural where the sense requires it.[25]

Effect of creditor's suit.—A decree in a suit by judgment creditors of the husband to marshal liens, to which the wife is an unnecessary party, does not bar her dower right since the creditors have no claim against such right, nor is such right affected by a sheriff's sale under the decree, or by judgments on answers and cross petitions in favor of mortgagees who are joined where she is not included in such judgments,[26] nor is the wife, by the fact that she is improperly made a party, bound to take notice of the claims of the mortgagees so that the decree will estop her from asserting dower.[27] If there is a sale under the decree of land in which the wife is entitled to dower and from the proceeds mortgages thereon are paid, the wife on bringing suit for dower is not bound to redeem the mortgages where they are, before such suit is brought, barred by the statute of limitations and the

17. Potter v. Skiles, 24 Ky. L. R. 910, 70 S. W. 301.

18. Beverly v. Waller, 24 Ky. L. R. 2505, 74 S. W. 264.

19. Joining with the husband in the execution and acknowledgment of a conveyance, the acknowledgment being properly certified is sufficient—Goodheart v. Goodheart, 63 N. J. Eq. 746.

20. Such deed does not pass land the equitable title to which was in the wife before the death of her husband's brother, and of which he held the legal title as trustee, and which by a succeeding trustee had been conveyed to her—Adamson v. Souder, 205 Pa. 498.

21. Construing Rev. St. 1889, § 8839—Bartlett v. Tinsley (Mo.) 75 S. W. 143.

22. Martin v. Abbott (Neb.) 95 N. W. 356.

23. Beverly v. Waller, 24 Ky. L. R. 2505, 74 S. W. 264.

24. Martin v. Abbott (Neb.) 95 N. W. 356.

25. Rev. St. 1892, § 23, provides that the singular shall be held to include the plural where the sense requires. The language of the decree was "Recover of the defendant Adams Jewett"—Jewett v. Feldheiser (Ohio) 67 N. E. 1072.

26, 27, 28. Jewett v. Feldheiser (Ohio) 67 N. E. 1072.

same reason prevents relief to the purchaser on the ground of subrogation, in addition to the fact that such purchaser was not in privity with the mortgagees.[28]

Adverse possession will not bar the wife's right to dower unless continued after the husband's death for the full period of limitations.[29]

Payments to secure release.—Creditors cannot reach a sum paid the wife of the execution debtor by the purchaser of the husband's equity of redemption, who has redeemed from execution sale, to secure a release of her dower.[30] A wife who takes conveyances of specific realty from the husband's assignee for creditors in consideration of relinquishment of dower in the remainder, and the release of a mortgage on a portion thereof, is entitled to dispose of the realty conveyed to her by will.[31]

§ 4. *Liens and charges upon dower.*—Though mortgages on the real estate are paid by a sale of a portion thereof under order of the court, the widow's dower as against the heirs is to be computed on the full value of the real estate,[32] but where a mortgage superior to the wife's dower is satisfied in part by payment by the heirs after the husband's death, the widow to be entitled to dower in the land must contribute her share of such advances.[33]

§ 5. *Assignment of dower and money awards.*—Where, under the statute, dower may be assigned in a body and need not be assigned in each tract of land owned by the decedent separately, an heir who has received a portion of the realty in full of his share of an estate and holds under a warranty deed is entitled to have the widow's dower allotted from land other than that which he has so taken.[34] The widow and heirs may make an arrangement by which the widow is allotted in a single tract of land the dower to which she is entitled in each separate lot, and a subsequent partition decree allotting the lands in severalty but finding that the widow occupies the tract mentioned as her homestead and dower interest in the real estate of her deceased husband may be regarded as intending to effectuate such assignment by agreement.[35]

Dower may be assigned from the rents of improved property, allowance being made for the rental value of the improvements in case the widow has no dower therein.[36] Where an annuity is assigned to the widow payable from the rents and profits of realty, she cannot be compelled by the owner of the realty to sell or commute such rents.[37]

Where on partition sale a third of the proceeds are assigned the widow as dower to revert to the heirs on her death, such fund when it again comes into court will be distributed under the original decree unless there have been intervening transfers.[38] An assignment of an interest in the reversion may be verbal,[39] but is not evidenced by a quitclaim deed of the land made to the purchaser after confirmation of the partition sale.[40] Where the widow has assigned the fund to one who has given a bond for its repayment into court, the owners of the land

29. Lucas v. White (Iowa) 95 N. W. 209. Limitation fixed by Code, § 3447, does not begin until the husband's death—Lucas v. Whitacre (Iowa) 96 N. W. 776.

30. It is immaterial that the amount so paid was excessive—Potter v. Skiles, 24 Ky. L. R. 1457, 71 S. W. 627.

31. She is a purchaser for value and the conveyance does not simply vest in her her inchoate dower interest so that it will pass to her husband on her death—Under Horner's Rev. St. 1901, § 2510—Willson v. Miller, 30 Ind. App. 586.

32. There was no personalty to be applied to the encumbrances—Mowry v. Mowry, 24 R. I. 565.

33. Hoy v. Varner (Va.) 42 S. E. 690.

34. Hurd's Rev. St. 1899, p. 661, § 36—Longshore v. Longshore, 200 Ill. 470.

35. Rowley v. Poppenhager, 203 Ill. 434.

36. She may be awarded one-third of the remainder after deduction from the net rent of the proportion which the improvements bear to the land, if the land has no rental value separate from the improvements and cannot be divided—Bartlett v. Ball, 92 Mo. App. 57.

37. A third part of the rents and profits assigned under the Rev. St. c. 65, § 3—Haugh v. Peirce, 97 Me. 281.

38, 39, 40, 41. Curtis v. Zutavern (Neb.) 93 N. W. 400.

as determined in partition, and the representatives of such as are deceased, may join in an action on the bond.[41]

§ 6. *Damages for withholding dower and mesne profits.*—Where the action is against heirs but as beneficiaries of a trust, they are to be regarded as strangers in fixing the time from which damages shall run for the detention of dower.[42]

§ 7. *Remedies and procedure.*—A court in the exercise of probate jurisdiction can in Montana make no orders affecting dower, but the general jurisdiction of the court must be invoked.[43]

Limitations begin to run against the action for the allotment of dower at the time of the husband's death.[44] In states where the right of dower becomes fixed in case of a divorce for extreme cruelty, an action to recover such dower is limited by the general statutes relating to real actions and not by the general limitation of actions on judgments and decrees.[45]

The widow is not guilty of laches while she remains in joint possession of the estate in which she is dowable.[46]

On election to take under the statute an undivided one-half interest in her husband's estate, the widow may have partition without waiting until the expiration of the time within which contest of the probate of the will can be made.[47]

An averment of ownership by the wife of an undivided one-third of lands of her deceased husband, seeking that title be confirmed in her, sufficiently negatives the loss of the wife's dower interest during coverture.[48]

DURESS.[49]

Arrest on a criminal charge,[50] particularly where it was at the instance of a third person,[51] or threat of such arrest,[52] or of civil proceedings,[53] are not duress; but a threat of forcible eviction from premises has been held to be duress.[54]

EASEMENTS.[55]

§ 1. **Nature and Creation.**—Grant; Implication; Estoppel; Prescription.
§ 2. **Location, Maintenance and Extent of Right.**
§ 3. **Transfer and Assignment.**
§ 4. **Extinguishment and Revival.**—Limitations in Grant; Abandonment; Merger; Adverse Possession.
§ 5. **Obstruction and Remedies.**

§ 1. *Nature and creation. Creation by grant.*[56]—In construing an ambiguous grant of a right of way of adjoining owners, obscure or ambiguous expressions will be interpreted to fulfill the common purposes of the grantors. The deed

42. Code Civ. Proc. § 1600, provides that as against heirs damages shall run from the husband's death; as against others, from demand—Gorden v. Gorden, 80 App. Div. (N. Y.) 258.
43. Code Civ. Proc. tit. 13—In re Dahlman's Estate (Mont.) 72 Pac. 750.
44. Are barred in 15 years—Winchester v. Keith, 24 Ky. L. R. 1033, 70 S. W. 664.
45. Comp. Laws, §§ 8639, 8918, 9714, 9751. Such action may be brought within 15 years after the decree of divorce—Moross v. Moross (Mich.) 93 N. W. 247.
46. Brumback v. Brumback, 198 Ill. 66.
47. Spratt v. Lawson (Mo.) 75 S. W. 642.
48. Omission to negative loss of plaintiff's inchoate interest in the property, by execution or other judicial sale, or by her own relinquishment, does not prevent her from demurring to an answer setting up adverse possession as a defense—Lucas v. Whitacre (Iowa) 96 N. W. 776.
49. The recovery back of money paid under duress will be treated in Implied Contracts.
50. Arrest on a charge of bastardy will not invalidate a settlement—Jones v. Peterson, 117 Ga. 58.
51. Bogue v. Franks, 199 Ill. 411.
52. A statement to defendant that he was liable to imprisonment because his note had no revenue stamps attached to it does not invalidate a renewal note—Reichle v. Bentele, 97 Mo. App. 52.
53. Threat to issue execution on a disputed judgment does not invalidate security thereupon given—Dispeau v. First Nat. Bank, 24 R. I. 508.
54. Iowa Sav. Bank v. Frink (Neb.) 92 N. W. 916.
55. See articles Adjoining Owners for easement of lateral support. Highways and streets for establishment of highway by prescription. See, also, Licenses to enter on Land, Waters and Water Supply.
56. Evidence held sufficient to establish

if joint will be regarded as the several grant of each owner.[57] A right of way granted need not be described or definitely located.[58] A deed conveying "rights, privileges, advantages, hereditaments, and appurtenances," passes an easement over an adjacent alley.[59]

Negative easements.—Where the owners of a portion of a building make a mutual covenant that no change in the front or main entrance shall be made without mutual consent, they create a negative easement.[60]

Public easements.—Where a strip of land is conveyed as a private easement or for street purposes only, no interest greater than an easement is conveyed,[61] so a deed conveying to a city "a perpetual easement for the purpose of a public levee" conveys nothing but an easement to the city and the grantors retain the fee, together with such right of possession and beneficial use as is not inconsistent with an exercise of the rights granted the city,[62] and, on an unwarranted lease of the lots by the city, may maintain an action against the lessee for possession.[63] An express covenant to dedicate for public highway purposes a portion of the premises embraced in a deed gives the grantor a right in common with the general public to use the strip as a public highway and insist that it be kept open as a means of access to his premises though the dedication is not accepted by the proper local authorities; and an intention to create a private right of way appurtenant to the remaining premises of the grantor is not shown.[64]

Implication from necessity.—The grant of an easement by implication does not arise for convenience, but only from necessity.[65] A right to quarry carries the right to use the land over the stone as far as necessary to make the right available.[66]

A right of way of necessity based on an estoppel is not an interest or right in land which entitles the holder to compensation on the taking of the land for a public improvement.[67]

Severance of title after creation of servitude.—If the owner of land effects an advantage for one portion as against another, the grantees of the several portions on severance of the ownership take charged with the easements and entitled to the benefits visibly attached at the time of severance,[68] and where the owner of two adjoining tracts of land sells one, the purchaser takes in the same manner as against the tract retained,[69] and where the owner of two adjoining lots conveys one on which a building has been erected encroaching on the other with the "im-

a right of way based on a deed which had been destroyed—Bright v. Allan, 203 Pa. 386.

57. Atlantic City v. New Auditorium Pier Co., 63 N. J. Eq. 644.

58. Lease conferring a right of access to a water front regarded as sufficiently definite to show a right of access to the lessor's dock which was the only water front which he owned and was separated from the leased premises merely by a private drive-way—Stolts v. Tuska, 76 App. Div. (N. Y.) 137.

59. Lowenberg v. Brown, 79 App. Div. (N. Y.) 414.

60. First Nat. Bank v. Portsmouth Sav. Bank, 71 N. H. 547.

61. Lott v. Payne (Miss.) 33 So. 948.

62, 63. Sanborn v. Van Duyne (Minn.) 96 N. W. 41.

64. Allen v. Lester, 81 App. Div. (N. Y.) 376.

65. Easement of way over other land of owner does not arise unless necessary to reach that sold—In re City of New York, 83 App. Div. (N. Y.) 513; In re East 142d St., 83 App. Div. (N. Y.) 430.

66. Bedford-Bowling Green Stone Co. v. Oman, 73 S. W. 1038, 24 Ky. L. R. 2274.

67. In re East 142d St., 83 App. Div. (N. Y.) 430.

68. Fremont, E. & M. V. R. Co. v. Gayton (Neb.) 93 N. W. 163. During his life time a testator owning lands between certain highways, kept open a passage from his dwelling-house to each of such highways; by his will he divided his land into two tracts, giving one to each of his sons, the passage or roadway going through each of such tracts. Held, that the sons were charged with the reciprocal easement—Winne v. Winne, 40 Misc. (N. Y.) 435. Where the owner of lots, after erection of a house on one, constructs a sewer across the others to a public sewer, on severance of the ownership of the lots, an easement in the use of the sewer arises in favor of the purchaser of the lot on which the house is located. Under Civ. Code, §§ 1084, 1104—Jones v. Sanders, 138 Cal. 405, 71 Pac. 506.

69. Where the owner constructs a dam across a stream on one tract causing flow-

provements, easements, rights, and privileges thereto appurtenant," he, and those claiming under him, cannot secure the removal of the encroachment,[70] but an encroachment by an owner on an adjoining lot of which he is an owner in common does not become an easement after a sale of the house and lot and acquisition by the former owner of title in severalty to the adjoining lot.[71]

A husband, by joining with his wife in a conveyance of a lot owned by her adjacent to one owned by him, does not, if he does not join in the covenants, create an easement, authorizing the continuance of an encroachment on his lot by a house erected on the wife's lot.[72]

Creation by estoppel. Description in conveyance.—A right of way is recognized by acceptance of a deed, specifically reserving it to the grantor.[73]

While in most conveyances where an easement passes as an appurtenance to the grant it is referred to as a boundary or in specific terms in the deed, that is not essential;[74] hence, the fact that a description does not refer to an alley-way along the boundary of a lot does not show an intention to discontinue the use of such alley-way, and if it is shown in a map which is referred to as evidencing the description, an easement therein passes,[75] though the map was not filed until after the execution of the deed.[76] After transfer of both title and possession, the grantor cannot create an easement by mere declarations.[77] Where a lot is described as fronting on a strip reserved for a street, the grantee acquires a private right of way,[78] but an implied covenant for a right of way will not arise out of a false description.[79]

The act of a city in accepting a plat or excluding an alley shown thereon from the city limits has no bearing on the right of a purchaser of one of the platted lots to use an alley shown on the plat as appurtenant to his land, the plat having been recorded by the owner.[80]

Though an easement of way may be created only by grant or by prescription, a purchaser of lots may recover for breach of a contract by the vendor to make certain streets in case the purchaser should erect a house, since the right to use the contemplated ways arises from an implied covenant on the part of the grantors that the ways are in existence and defendants are estopped to deny such fact.[81]

Where after a mortgage is executed the lands are platted, a release of one of the lots describing it by metes and bounds and its plat number does not carry with it the easements to use the private roads described in the plat nor do they pass as appurtenant.[82]

age of a portion of the other tract, there is, on a sale of the servient tract, an implied contract that the mutual benefits and servitudes shall remain—Znamanacek v. Jelinck (Neb.) 95 N. W. 28.

70. Frizzell v. Murphy, 19 App. D. C. 440.

71, 72. Farley v. Howard, 172 N. Y. 628.

73. Morrison v. Chicago & N. W. Ry. Co., 117 Iowa, 587.

74, 75, 76. Lowenberg v. Brown, 79 App. Div. (N. Y.) 414.

77. Land conveyed was described by reference to a plat, and both in the deed and on the plat was a statement that certain streets were referred to and shown for convenience of description only and not with intent to convey them or dedicate them to public use. Held, that a subsequent statement of the grantor that such reservation was not intended to restrict the free and uninterrupted use of said streets by the grantee for the purpose of ingress and egress to and from any of the building lots would operate to create a way by estoppel, extending only to allow the use by the lot owner of the street on which his lot abutted so far as to enable him to reach the next open street, but would give him no easement over other streets designated on the map—In re East 142d St., 83 App. Div. (N. Y.) 430; In re City of New York, 83 App. Div. (N. Y.) 513.

78. Teasley v. Stanton, 136 Ala. 641.

79. Lots described as fronting on a strip of land reserved for a street but shown by the description by metes and bounds as well as statements of facts to be some 105 ft. distant from such reserved strip—Teasley v. Stanton, 136 Ala. 641.

80. Douthitt v. Canaday, 24 Ky. L. R. 2159, 73 S. W. 757.

81. Drew v. Wiswall (Mass.) 67 N. E. 666.

82. The metes and bounds excluded the only road touching the lot—Queens County Sav. Bank v. Hudson, 83 App. Div. (N. Y.) 629.

Creation by prescription.—An easement may be established by open, visible, continuous and undisputed user during the statutory period.[83] Such user will be presumed to be under a claim or assertion of right and adverse, and not by leave or favor of the owner.[84] User must be exclusive, adverse, uninterrupted, and inconsistent with the rights of the owner to its use and enjoyment.[85] It must be adverse and not permissive.[86] Use by the public negatives the presumption of a grant.[87] A license will not furnish a basis for a prescriptive easement.[88] There must be a claim of right known to the adverse party[89] with the acquiescence of the owner of the land.[90] Facts rendering it necessary that opposing claimant should have known of the assertion of title may remove the necessity of showing actual knowledge.[91] There need not be a positive prohibitive act in order to show lack of acquiescence preventing a claimant from acquiring a right of way by prescription.[92]

The adverse user must not only be continuous in point of time, but substantially identical during the whole of the statutory period with regard to manner and extent.[93]

Where by statute it is required that there must be other evidence of adverse possession of an easement than the mere use, evidence of an understanding between the grantor and grantee that land transferred should be subject to a way is sufficient.[94]

§ 2. *Location, maintenance, and extent of right.*—Where right of way has been decreed, the location need not be expressly designated by the parties but it is sufficient that there be acquiescence in the use of a particular way.[95] A deed, if aptly expressed, may grant a new location of an easement of a way and return the

83. Use of an alley—Lowenberg v. Brown, 79 App. Div. (N. Y.) 414. Must be 20 years use—Riehlman v. Field, 81 App. Div. (N. Y.) 526. Use of a well defined track for more than 21 years to reach land owned by the claimant otherwise inaccessible—Bates v. Sherwood, 24 Ohio Circ. R. 146.

84. Winne v. Winne, 40 Misc. (N. Y.) 435. No objection or assertion of dominion to the contrary being shown—Hey v. Collman, 78 App. Div. (N. Y.) 584.

85. Exclusive use by defendant of an alley way for more than twenty years except for swinging window blinds which opened into the alley from complainant's property is not sufficient to establish an easement by prescription in complainant—Jesse French Piano & Organ Co. v. Forbes, 135 Ala. 277.

86. Use of a sluice way under a railroad bridge by an adjoining property owner as a pass way for cattle during the statutory period of limitations—Chicago, B. & Q. R. Co. v. Ives, 202 Ill. 69.

87. Reed v. Garnett (Va.) 43 S. E. 182. Evidence held insufficient to show that way was used under a lease in its inception and hence not adverse—Hey v. Collman, 78 App. Div. (N. Y.) 584.

88. License to use land for a private way, no rights being asserted in connection with the use and no consideration paid or value parted with on the faith that the license was perpetual—Kibbey v. Richards, 30 Ind. App. 101. Use of way in common with public not shown to be under an independent claim of right is regarded as exercised under an implied license—Reed v. Garnett (Va.) 43 S. E. 182. Permissive connection of private pipes with a railroad water main for more than fifteen years does not show an easement—Louisville & N. R. Co. v. Dickey, 24 Ky. L. R. 1710, 72 S. W. 332.

89. Use by complainant of an alley way which was not exclusive or inconsistent with defendant's rights—Sharpe v. Marcus (Ala.) 33 So. 821.

90. Use of a way together with the public is insufficient, though such use is greater than the usual public use and accompanied by occasional repairs—Reed v. Garnett (Va.) 43 S. E. 182.

91. An instruction that possession to be adverse must have been asserted with the knowledge and acquiescence of the opposing claimant is not erroneous if given in connection with an instruction that actual knowledge need not be shown if there are facts such that the opposing claimant should have known of the assertion of title—Allen v. McKay (Cal.) 70 Pac. 8.

92. Denial of the existence of a right of way and threats to close it up before the expiration of twenty years from the time of the first claim held sufficient—Reed v. Garnett (Va.) 43 S. E. 182.

93. That one seeking to acquire an easement for the purpose of maintaining a ditch may have had a ditch somewhere on the land for ten years, does not give him a right to maintain it in a new location, or use an extension thereof made within that period—Dunn v. Thomas (Neb.) 96 N. W. 142.

94. Code, § 3004—O'Reagan v. Duggan, 117 Iowa, 612.

95. Evidence held to show a definite selection—Dickinson v. Crowell (Iowa) 94 N. W. 495.

site of the old way to the owners of the fee,[96] but the conveyance cannot be effectual for one purpose and not the other.[97]

Ways of necessity.—Where a right of way arises from necessity, it must be chosen at such place as is reasonably necessary.[98] The choice must be such as to injure the grantees of other portions of the property as little as possible.[99] The fact that the way is impassable during a portion of the year will not allow it to be widened.[1]

Extent of use.[2]—Nothing passes as incident to a grant of a right of way except what is reasonable to the fair enjoyment thereof.[3] If appurtenant to certain land it cannot be used for the benefit of other land.[4] The purposes of use need not exist at the time of the original grant,[5] unless the burdens are increased.[6]

§ 3. *Transfer and assignment.*—Where an easement is conveyed by deed and the habendum runs to the heirs and assigns of the grantee, the easement runs with the land.[7] An easement may pass to the successors in title to the dominant estate, though the conveyance by which it is created contains no words of assignability.[8] It need not be especially mentioned to pass with the conveyance of the dominant tenement.[9] An easement to pump water from an adjacent owner's lands so long as a mine on a leasehold is operated is an easement appurtenant to the mine and passes to a purchaser of the mining company's interest.[10] An easement of way is assignable.[11] The assignee of an easement does not take subject to his grantor's liabilities to perform duties pertaining thereto.[12]

Judicial or tax sale.—Easements appurtenant pass under a sheriff's deed on foreclosure without express mention.[13] An easement of way passes by a deed of

96, 97. Atlantic City v. New Auditorium Pier Co., 63 N. J. Eq. 644.

98. Right arising from a sale of standing timber on land not bordering on a highway to pass over other land of the vendor, does not afford the purchaser choice of any way he wishes, though it affords a reasonable means of egress and ingress and is commonly used by others—Worthen v. Garno, 182 Mass. 243.

99. Where a right of way was granted for access to a dock, if the dock is subsequently leased by the grantor to two other persons in severalty and at different times, the grantee of the easement must confine his right of way to that portion of the dock last alienated, if it is sufficient—Stolts v. Tuska, 76 App. Div. (N. Y.) 137.

1. Way 16 ft. wide used for 25 years, impassable during a large part of the year on account of moisture—Dudgeon v. Bronson, 159 Ind. 562.

2. Evidence held not to show an excessive use of an easement of way—Weed v. McKeg, 79 App. Div. (N. Y.) 218.

3. The grantee of a strip of land for a right of way has no right to construct embankments in such a manner as to injure an irrigation ditch where sufficient soil could be obtained to raise the way to a height protecting it from overflowing without encroaching on or damaging the ditch—Hotchkiss v. Young, 42 Or. 446, 71 Pac. 324.

4. A railroad owning a lot abutting on a private alley appurtenant thereto which occupies such lot for a freight depot, is not entitled to insist on the alley being kept open for public use in approaching its passenger station located on a lot not abutting on such alley—West v. Louisville & N. R. Co. (Ala.) 34 So. 852.

5. Right to cart clay is not limited to beds open at the time of the grant but extended to those subsequently opened—Perth Amboy Terra Cotta Co. v. Ryan, 68 N. J. Law, 474.

6. Where a common stairway and area is established by owners of adjoining buildings one of the parties cannot interfere with the light in the other's windows by changes in the stairway or use the neighbor's walls for support of new landing, subjecting the area to an additional use by persons going to additional stories erected on his building—Allegheny Nat. Bank v. Reighard, 204 Pa. 391.

7. Conveyance of a house and lot with easement to a door-yard—Deavitt v. Washington County (Vt.) 53 Atl. 563. Conveyance of upland with privileges on waters of adjacent lake—Mitchell v. D'Olier, 68 N. J. Law, 375, 59 L. R. A. 949.

8. Easement of way to a stone quarry created by writing under seal and reserving a right in the grantor to re-enter on termination of the use of the road and working of the quarry—Stovall v. Coggins Granite Co., 116 Ga. 376.

9. Mitchell v. D'Olier, 68 N. J. Law, 375, 59 L. R. A. 949.

10. Featherston Min. Co. v. Young (Ga.) 45 S. E. 414.

11. Perth Amboy Terra Cotta Co. v. Ryan, 68 N. J. Law, 474.

12. Assignee of an easement to maintain a canal not liable for breach of assignor's covenant to maintain a dam which was the condition of the grant—Barringer v. Virginia Trust Co., 132 N. C. 409.

13. Easements of way—Richmond v. Bennett, 205 Pa. 470.

foreclosure, though created after the execution of the mortgage.[14] A sheriff's sale for taxes does not discharge an easement.[15]

§ 4. *Extinguishment and revival. Limitations in grant.*—A water privilege granted to a mining company operating on an adjacent leasehold, to continue as long as the company shall mine iron ore and use water from said location, terminates on the removal of the washer to an adjoining mine.[16] A right of way to remove timber sold granted to continue for a specified time, does not continue for the removal of other timber after the expiration of the time limit.[17]

A proviso on grant of a new right of way to a city that a former way shall revert to the grantors on acceptance and record of the deed does not postpone the acquisition of the right to the new site until the city has passed a formal resolution of acceptance.[18]

Termination of necessity.—An easement of way granted for the purpose of enabling access to certain land is not a way of necessity which becomes extinct on the acquirement of another means of access.[19]

Abandonment.—A right of way conveyed by grant does not become extinct by mere nonuser,[20] hence, the allowance of an arch over a way does not constitute an abandonment by the grantee of rights above such arch.[21] An easement does not expire merely because not mentioned in a deed of conveyance forming a portion of the chain of title.[22]

Unauthorized use will not extinguish an easement in fee.[23]

Merger.—Where the owner of the servient estate purchases the dominant estate the easement is merged and a subsequent sale of the dominant estate does not revive the easement in the absence of an express creation thereof,[24] though there may be a revivor by a subsequent conveyance of the two estates to different parties, and where the transferees of the servient estate take jointly with the owners of the dominant estate, they will be held to have taken subject to the easement if visibly in use.[25] A way of necessity so merged does not revive on severance of the estates but a new way is implied if the necessity continue.[26] If the owner of a portion of the servient estate acquires the easement there is a merger only to the extent of his interest.[27]

Conveyance of servient estate.—The purchaser of a servient estate is charged with notice by open and visible use of the easement.[28] He is not protected by recording acts.[29] Constructive notice arises from record of a lease referring to the easement,[30] or from a partition decree establishing it.[31] One claiming an easement is not estopped by silence at a public sale of the land,[32] nor does a convey-

14, 15. Richmond v. Bennett, 205 Pa. 470.

16. Featherston Min. Co. v. Young (Ga.) 45 S. E. 414.

17. Leigh v. Garysburg Mfg. Co., 132 N. C. 167.

18. Atlantic City v. New Auditorium Pier Co., 63 N. J. Eq. 644.

19, 20. Perth Amboy Terra Cotta Co. v. Ryan, 68 N. J. Law, 474.

21. The grant conveyed "free and perfect egress and ingress" over an alley and it was held that the allowance of the arch was a mere non-user—Weed v. McKeg, 79 App. Div. (N. Y.) 218.

22. Richmond v. Bennett, 205 Pa. 470.

23. Deavitt v. Washington County (Vt.) 53 Atl. 563.

24. Easement of way to spring acquired by prescription originally—Riehlman v. Field, 81 App. Div. (N. Y.) 526.

25. Easement in a hall-way—Wettlaufer v. Ames (Mich.) 94 N. W. 950.

26. Bates v. Sherwood, 24 Ohio Circ. R. 146.

27. Barringer v. Virginia Trust Co., 132 N. C. 409.

28. Use of irrigating ditch for six years—Croke v. American Nat. Bank (Colo. App.) 70 Pac. 229.

29. Easement of way, physically defined and apparent arising from prescription—Hey v. Collman, 78 App. Div. (N. Y.) 584.

30. Lease granting a right of way to a water front and dock—Stolts v. Tuska, 76 App. Div. (N. Y.) 137.

31. Though the deeds make no mention thereof, a right of way may be so established—Dickinson v. Crowell (Iowa) 94 N. W. 495.

32. Hey v. Collman, 78 App. Div. (N. Y.) 584.

ance with covenants of seisin and right to convey without reservation of an apparent easement estop the claiming of the easement by a person not a party to the deed or in privity with the grantee.[33]

If on severance of ownership of lots jointly subject to an easement for a sewer an intermediate vendee executes a grant of the easement to his vendee, such grant is conclusive evidence of his knowledge of the existence of the easement, and it is immaterial whether it is known to those holding the grant as security only.[34]

Adverse possession.—Where a way has been acquired by prescription, adverse possession to defeat it must be equivalent to that barring all rights of entry on realty.[35] The fact that a portion of an alley-way is closed up by a prior conveyance does not show an intention to close the entire alley.[36]

§ 5. *Obstruction and remedies.*—An easement of way and of light and air may be violated though the use for a way is not hindered.[37] If there is an easement of way, an adjoining owner on building a projection over such way must construct it at such height as not to interfere with the convenient use of the way by the grantee.[38]

Laches, estoppel, or acquiescence.—Where defendants have gone ahead over plaintiff's objection under a theory that they are acting within their legal rights, they cannot claim that they have been misled by plaintiff so that he is estopped.[39] There is no acquiescence to an obstruction where, at the time it is begun, the owner of the easement objects and begins a suit for injunction within a week,[40] nor is plaintiff barred by laches when he objects when the encroachment is begun but does not bring an action until the obstruction is completed.[41]

Who may enforce.—Where one of adjacent owners abandons his right of way common to several adjacent lots, he cannot enjoin an appropriation of the way by adjacent owners where it is contiguous to their land.[42]

Demand.—Before action can be brought to establish a way of necessity, complainant must show a request of the owner to locate the way and either a failure to do so or an unreasonable location, and in the event of the failure, that complainant has established a location.[43]

Form of remedy.—Where an easement is obstructed the obstruction may be removed by the person injured if he can do it peaceably.[44] The owner of the easement cannot bring ejectment or trespass to try title against the owner of the fee who is rightfully in possession.[45] Equity has jurisdiction to prevent interference with easements,[46] and a complainant may have equitable relief though his title

33. Easement of right to carry water in an irrigation ditch—Croke v. American Nat. Bank (Colo. App.) 70 Pac. 229.

34. Jones v. Sanders, 138 Cal. 405, 71 Pac. 506.

35. Clay v. Kennedy, 24 Ky. L. R. 2034, 72 S. W. 815. Easement of free passage over a bridge barred by continuous denial and compulsion of payment of toll daily for 12 years—Dupont v. Charleston Bridge Co., 65 S. C. 524.

36. Lowenberg v. Brown, 79 App. Div. (N. Y.) 414.

37. Erection of smoke stack darkening windows and heating the air in an alley mutually reserved by adjoining owners—St. Louis Safe Deposit & Sav. Bank v. Kennett Estate (Mo. App.) 74 S. W. 474.

38. Construction of a projection from a building at a height of 9 ft. above an alley, and a construction at a less height with an excavation of the existing surface to make it 9 ft., held an unlawful trespass—Weed v. McKeg, 79 App. Div. (N. Y.) 218.

39. St. Louis Safe Deposit & Sav. Bank v. Kennett Estate (Mo. App.) 74 S. W. 474.

40. Weed v. McKeg, 79 App. Div. (N. Y.) 218.

41. Erection of smoke stack where defendants have advised plaintiff that he has no right to object and have suffered no damage through the delay—St. Louis Safe Deposit & Sav. Bank v. Kennett Estate (Mo. App.) 74 S. W. 474.

42. Where an avenue thirty feet wide was abandoned and enclosed by the owners of lots fronting on it, one of such owners cannot enjoin the erection of a building by another owner on a portion of the strip on which his lot fronts—Tremberger v. Owens, 80 App. Div. (N. Y.) 594.

43. Thomas v. McCoy, 30 Ind. App. 555.

44. Keplinger v. Woolsey (Neb.) 93 N. W. 1008.

45. Cornick v. Arthur (Tex. Civ. App.) 73 S. W. 410.

46. Obstruction of right to carry water in an irrigation ditch—Croke v. American

has not been adjudicated at law, where it is clear and such that in a trial at law the judge would not be warranted in submitting the question to the jury.[47] The remedy may be by injunction.[48]

Pleading.—A bill to restrain obstruction of an easement must show the existence thereof.[49] A complaint is sufficient which states ownership of an easement without stating how it was acquired.[50] In a proceeding to establish a way of necessity, the complaint must contain a particular description of the route selected.[51]

Damages.[52]—Exemplary damages may be awarded for destruction of an easement under statutory provisions allowing such damages for malicious or oppressive breach of noncontractual obligations.[53] On obstruction of a way, the measure of damages is the difference in the rental value of the dominant estate.[54]

Review.—Where negative easements are partially extinguished, a question of whether further encroachment will be restrained becomes one of fact.[55] On seeking to restrain the use of an easement on the ground that it is more burdensome to the servient estate, it must be alleged, in order that such fact be considered on appeal, that the taking of the dominant estate for a jail site made an easement of door yard more burdensome.[56]

EJECTMENT.[57]

§ 1. **Cause of Action.**—Property Recoverable; Title of Plaintiff; Seizin of Plaintiff; Ouster by Defendant; Property Taken for Public Use.
§ 2. **Defenses.**—Rightful Possession; Injunction; Limitations and Laches.
§ 3. **Parties.**
§ 4. **Pleading.**—Complaint or Petition; Plea or Answer; Variance.
§ 5. **Evidence.**—Burden of Proof; Common Source; Admissibility; Sufficiency.
§ 6. **Trial and Judgment.**—Instructions; Taking Cases From the Jury; Conformity of Judgment with Pleadings and Evidence; Relief Granted; Effect; Writ of Possession.
§ 7. **Receivership in Ejectment.**
§ 8. **New Trial.**
§ 9. **Mesne Profits and Damages.**—Necessity of Demanding; Persons Liable; Amount; Set-Off; Measure of Damages.
§ 10. **Allowance for Improvements and Expenditures.**

§ 1. *Cause of action.*—The right to maintain ejectment may be removed by statutory provisions for other remedies.[58] In Georgia, the right to maintain an action in the common-law form of ejectment has not been removed by statutes defining the form and character of pleadings nor by the general judiciary act.[59]

Property for which action lies.—Mining rights appurtenant to land cannot be recovered in ejectment.[60]

Nat. Bank (Colo. App.) 70 Pac. 229. To restrain obstruction of a right of way though the exact width and particular location is not definitely fixed if the existence of a right of way of a certain width is admitted by the answer—Bright v. Allan, 203 Pa. 386.

47. Obstruction of way—Richmond v. Bennett, 205 Pa. 470.

48. Keplinger v. Woolsey (Neb.) 93 N. W. 1008; St. Louis Safe Deposit & Sav. Bank v. Kennett Estate (Mo. App.) 74 S. W. 474.

49. Bill held demurrable which asserts possession of land carrying with it the easement by adverse possession, where the instrument pleaded as color of title did not comprehend within its boundaries the ditch in which the easement was claimed, or show that complainant's user of the ditch was adverse or under the grantee—Overton v. Moseley, 135 Ala. 599.

50. Carter v. Wakeman, 42 Or. 147, 70 Pac. 393.

51. Thomas v. McCoy, 30 Ind. App. 555.

52. See article Damages for general questions.

53. Civil Code, § 3294. Action for destruction of a sewer—Jones v. Sanders, 138 Cal. 405, 71 Pac. 506.

54. Though the dominant estate is not rented—Hey v. Collman, 78 App. Div. (N. Y.) 584.

55. Negative easements to refrain from changing the front and entrance of a building which had been abrogated as to a change in the lower story of the building, but it was sought to enjoin a change in the upper stories—First Nat. Bank v. Portsmouth Sav. Bank, 71 N. H. 547.

56. Deavitt v. Washington County (Vt.) 53 Atl. 563.

57. See, also, Trespass.

58. Under Rev. St. D. C. § 482, providing a remedy for an encroachment of less than seven inches by a wall, ejectment cannot be maintained to recover an inch of ground occupied by an encroachment of the wall of a house on an adjoining lot—Frizzell v. Murphy, 19 App. D. C. 440.

59. Judiciary Act 1799—Georgia Iron & Coal Co. v. Allison, 116 Ga. 444.

60. An instruction that plaintiff may recover the "mineral interest and mining

Title of plaintiff.—Plaintiff must recover on the strength of his own title.[61] He must have legal title at the time action is brought.[62] An equitable title will not sustain the action[63] though it is sufficient to enable the maintenance of a suit in equity, to procure legal title.[64] A title based on equitable estoppel is not sufficient,[65] and plaintiff cannot, in ejectment, enforce equities against a grantee in good faith holding the legal title,[66] but a corporation which has acquired possession of land in payment of stock subscriptions has an equitable title allowing it to maintain ejectment without joining the holders of the legal title.[67]

The holder of a vendor's lien may maintain an action in equity to dispossess a third person in possession, though it has made a conveyance.[68]

A tenant in common may bring ejectment against third persons.[69] One who has a mere easement cannot bring ejectment against the rightful possession of the fee owner.[70] A devisee may prosecute ejectment during the pendency of probate proceedings.[71] The holder of the duplicate final receipt of the receiver of the United States land office for a homestead entry may bring ejectment.[72] Where it appears that plaintiff holds the legal title charged with certain payments to defendants, he need not make payment or tender before bringing his action, but the equities may be adjusted at the trial either by payment of the money into court or by a conditional verdict.[73] A minor whose property has been illegally seized and sold as that of another person may ignore the sale and institute a petitory action for its recovery.[74]

A grant under which title is claimed from the state must be registered at the time action is begun. Registry before trial is not sufficient,[75] and a curative statute allowing the registry of grants within a certain time, though the time originally fixed for their register may have expired, does not alter the rule that plaintiff must show title in himself at the commencement of the suit.[76]

Sufficiency of mere prior possession.—The rule varies. In some jurisdictions plaintiff must have more than a mere possessory right,[77] though defendant is only a trespasser;[78] in others, prior possession is sufficient as against a trespasser,[79] and in such case possession sufficiently establishes title,[80] and evidence thereof is sufficient to throw the burden of establishing a superior title on defendant, though it is not averred that he is a trespasser.[81] In a petitory action in Louisiana, a de-

rights" is erroneous, since such rights must include incorporeal hereditaments lying in grant but not in seisin, such as rights of way over the surface, the right to dig and drive slopes and entries and the like—Louisville & N. R. Co. v. Massey, 136 Ala. 156.

61. As against defendant's possession, plaintiff must show a better muniment of title or acquisition of title by adverse possession—Jackson Lumber Co. v. McCreary (Ala.) 34 So. 850.

62. Where defendant's grantor acquired a legal title through a foreclosure, plaintiff who had taken title as co-tenant with such grantor subject to the trust deeds which were foreclosed cannot bring the action—Nalle v. Thompson, 173 Mo. 595.

63. Nalle v. Parks, 173 Mo. 616.

64. Nalle v. Thompson, 173 Mo. 595.

65. Harrison v. Alexander, 135 Ala. 307.

66. Equities arising from a statement in a deed that the grantor was a trustee for plaintiff—De Lassus v. Winn (Mo.) 74 S. W. 635.

67. McCandless v. Inland Acid Co., 115 Ga. 968.

68. Miller v. Farmers' Bank, 25 Ky. L. R. 373, 75 S. W. 218.

69. Shelton v. Wilson, 131 N. C. 499.

70. Cornick v. Arthur (Tex. Civ. App.) 73 S. W. 410.

71. Beer v. Plant (Neb.) 96 N. W. 348.

72. McClung v. Penny (Okl.) 70 Pac. 404.

73. Howard v. Murray, 203 Pa. 464.

74. Jewell v. DeBlanc (La.) 34 So. 787.

75. Morehead v. Hall, 132 N. C. 122.

76. Acts 1901, c. 175—Morehead v. Hall, 132 N. C. 122.

77. Must show legal title and presumption of grant does not arise from possession—Cahill v. Cahill, 75 Conn. 522.

78. Under Shannon's Code Tenn. §§ 5000, 5001, plaintiff must show a perfect legal title either by conveyances by the state or by completed adverse possession—Stockley v. Cissna (C. C. A.) 119 Fed. 812.

79. One who on the face of the county records has color of title, is regarded as the owner in the neighborhood where it lies, pays the taxes for many years, disposes of the hay or other products, is regarded as in such actual possession as will maintain the action—Robinson v. Gantt (Neb.) 95 N. W. 506. Petition held sufficient to show prior possession—Watkins v. Nugen (Ga.) 45 S. E. 260.

80, 81. Horton v. Murden (Ga.) 43 S. E. 786.

fendant may compel his adversary to produce another than a title radically null before ouster can be decreed, even under the rule *possideo qua possideo.*[82]

Recovery cannot be had on prior possession as against one who enters under a valid deed from one in possession, though such possessor had no title, unless it is shown that defendant had knowledge. The rule is otherwise where the deed is void.[83]

Rights arising from mortgages.—After condition broken, the mortgagee may bring ejectment,[84] and the trustee in a trust deed may proceed without a demand for possession.[85] While the mortgage debt is not paid, action will not lie against a mortgagee in possession though foreclosure is barred by limitation.[86] If necessary parties are not joined on foreclosure, the purchaser cannot bring ejectment.[87]

Seisin of plaintiff.—Plaintiff's title must be connected with the possession.[88] Seizure and possession within the limitation act is shown by legal title in the absence of evidence of an actual adverse possession.[89] An heir may recover on the prior possession of his ancestor.[90]

Ouster by defendant.—Ejectment will not lie against one not in possession,[91] or after an abandonment of possession, where there is no assertion of title,[92] but it may be maintained against a tax title claimant under a void tax deed, who has not had actual possession.[93] Persons having an easement of way are not in such possession of the strip so used as to warrant ejectment being brought against them,[94] unless they take exclusive possession and exclude the owner of the fee.[95]

Public or quasi public use.—Where land has been occupied by a tram road without power of eminent domain, it may be recovered in ejectment,[96] but if a city takes possession of property appropriated for a local improvement without paying the compensation, the owner is not entitled to the remedy.[97] Grantors who have conveyed to a city an easement for levee purposes in certain lots may, on an unwarranted lease of the lots by the city, maintain an action against the lessee for possession.[98]

Taxation of land as estoppel of state.—A state or municipality is not estopped from maintaining ejectment by the fact that it has levied taxes on the land.[99]

§ 2. *Defenses.*—An equitable defense cannot be asserted in ejectment,[1] so an equitable estoppel cannot be urged.[2] Where resulting trusts are abolished by

82. Granger v. Sallier (La.) 34 So. 431.

83. As based on an immoral consideration—Watkins v. Nugen (Ga.) 45 S. E. 260.

84. Bradfield v. Hale, 67 Ohio St. 316.

85. Brown v. Schintz, 203 Ill. 136.

86. Action by heirs at law of a deceased mortgagor—Kelso v. Norton, 65 Kan. 778, 70 Pac. 896.

87. One who has conveyed with covenants of freedom from encumbrances cannot on purchase at foreclosure, in which his vendee is not joined, bring ejectment against the vendee in possession, since he takes before an assignment of the mortgage—Titcomb v. Fonda, J. & G. R. Co., 38 Misc. (N. Y.) 630.

88. Plaintiff must show a regular chain of title back to some grantor in possession or to the government—Jackson Lumber Co. v. McCreary (Ala.) 34 So. 850.

89. Code Civ. Proc. Alaska, c. 2, § 4, provides that plaintiff or one of his predecessors in title must be seized or possessed of the premises within ten years before commencement of an action to recover real property or the possession thereof—Tyee Consolidated Min. Co. v. Langstedt (C. C. A.) 121 Fed. 709.

90. It must be shown that the ancestor was in possession at the date of his death under a bona fide claim of right—Watkins v. Nugen (Ga.) 45 S. E. 260.

91. Doggett v. Hardin, 132 N. C. 690.

92. A defendant who on vacating a house had locked all the doors but one on the inside, leaving the keys inside, and closed the remaining door by a spring lock, keeping no key, is not in possession authorizing ejectment—Connor v. Connor (Mich.) 96 N. W. 441.

93. Dunbar v. Lindsay (Wis.) 96 N. W. 557.

94. Davis v. Morris, 132 N. C. 435.

95. Lott v. Payne (Miss.) 33 So. 948.

96. Hughey v. Walker (Ark.) 73 S. W. 1093.

97. Appropriation authorized in Rev. St. § 2232—Webber v. Toledo, 23 Ohio Circ. R. 237.

98. Sanborn v. Van Duyne (Minn.) 96 N. W. 41.

99. Levy of taxes on wharves in a river—Turner v. Mobile, 135 Ala. 73.

1. Action by a purchaser at a tax sale cannot be defended against on the ground of his incapacity to purchase—Graham v. Warren (Miss.) 33 So. 71.

2. Grubbs v. Boon, 201 Ill. 98; Haney v. Breeden (Va.) 42 S. E. 916. Action based on

statute, except in favor of creditors, a defendant in ejectment cannot show that plaintiff holds as a resulting trustee for a third person, unless defendant is a creditor of such person.[3] In case plaintiff fails to prove a valid title, defendants need not establish their title.[4]

Rightful possession under a lease with option to purchase will defeat ejectment.[5]

Removal into equity. Injunction.—Equity will not take jurisdiction to prevent a multiplicity of suits where a plaintiff basing his right on the same title, brings separate actions against numerous defendants who hold distinct portions of the land under different titles, and who are without privity with each other.[6] An ejectment suit cannot be enjoined for reasons which may be set up as a defense in the action,[7] and a city cannot have an action of ejectment against it to recover shore lands on a river, removed into equity, where it contends that it has a right to control certain wharves and lots by immemorial usage and custom, since such contention, if established, furnishes a complete and adequate defense to the action of ejectment.[8]

Limitations and laches.—Title by adverse possession affords a good defense to ejectment.[9] The action is not barred in a time shorter than the period prescribed by statute.[10]

§ 3. *Parties.*—The person in possession is a necessary party where ejectment is used to try a question of title asserted by one not in possession.[11] In ejectment by a claimant under a single title, all those in possession of the land should be joined though they claim distinct tracts under separate titles.[12] One alleged to be in possession jointly with claimants under an agreement with them is properly made a co-defendant.[13] A railroad which allows another railroad to operate over a right of way originally obtained by it is not a necessary defendant.[14] An administrator who is not in possession of land and has not been directed by the court to take possession cannot defend an action of ejectment and is not a proper party.[15] One who has sold the land in controversy cannot intervene in ejectment to which the purchaser is not a party and in which the vendor's title is not attacked.[16] Where on the declaration, made by the party against whom a petitory

breach of condition in a deed against the erection of a particular kind of building cannot be defended on the ground that the grantor with knowledge and without protest permitted the erection of such a building—Wakefield v. Van Tassell, 202 Ill. 41.

3. One holding as purchaser at a judicial sale cannot show that the plaintiff held title for the judgment debtor—Pfeffer v. Kling, 58 App. Div. (N. Y.) 179.

4. Sinclair v. Huntley, 131 N. C. 243.

5. Tyson v. Neill (Idaho) 70 Pac. 790.

6. Turner v. Mobile, 135 Ala. 73.

7. Bill to enjoin ejectment and set aside a deed to plaintiff on the ground that the grantor was insane, cannot be maintained—Larson v. Larson (Miss.) 33 So. 717.

8. Turner v. Mobile, 135 Ala. 73.

9. Baty v. Elrod (Neb.) 97 N. W. 343. Prescription under color of title—Ballard v. James (Ga.) 45 S. E. 68.

10. Prior to such time the action cannot be held to be on a stale claim—Craig v. Conover, 24 Ky. L. R. 1682, 72 S. W. 2.

11. Comp. Laws, § 10950, permits an action of ejectment for such purpose—Farrand v. Kavanaugh (Mich.) 93 N. W. 1083.

12. Lewis v. Hinson, 64 S. C. 571.

13. Complaint by the Cherokee Nation alleging that a third person pursuant to an agreement with the claimants to citizenship in the Nation holds the land jointly with the claimants is sufficient to authorize making such third person a defendant under Mansfield's Dig. § 4940; Ind. Ter. Ann. St. 1899, § 3149, allowing joinder of persons claiming adverse interests or who are necessary parties to a complete determination—Hargrove v. Cherokee Nation (Ind. T.) 69 S. W. 823.

14. Construing Ejectment Act, §§ 17, 18; 2 Starr & C. Ann. St. (2d Ed.) pp. 1610, 1614, providing for the making of the landlord defendant in an action against the tenant—Chicago & E. I. R. Co. v. Clapp, 201 Ill. 418.

15. Rev. St. Fla. § 1917—Finlayson v. Love (Fla.) 33 So. 306.

16. On ejectment for the possession of a portion of lands originally belonging to the Cherokee Nation, the Nation cannot be permitted to come in under Mans. Dig. § 4946 (providing for intervention by "any person having an interest in the property") and seek judgment for possession, improvements and back rents, on the grounds that the improvements were made on the land by defendant's grantor under claim of citizenship, that such claim was adjudged void and the improvements sold by the Nation to plaintiff's grantor, which sale carried with it the

action is brought, that he is a mere lessee, the lessor is brought into the action, the latter is the real defendant, he is a warrantor only in a qualified sense.[17]

§ 4. *Pleading. Complaint or petition.*—In an action of ejectment in the common-law form, an abstract of the title relied on need not be attached to the declaration.[18] Evidence of the truth of plaintiff's allegation of ownership need not be set out in the petition.[19] Where the action may be brought on an equitable title, the nature of the equity need not be stated in the complaint if from the record evidence introduced an ex parte correction of defects therein would be made by the court.[20] In jurisdictions allowing equitable defenses, on an action by the holder of the legal title for lands as an entirety, it is not necessary that he state equities in defendant.[21]

An allegation that plaintiffs were placed in possession by a former owner is sufficient.[22] In South Carolina, it is not necessary that the complaint allege a right to immediate possession in addition to an allegation of ownership and unlawful possession of defendants and a refusal on their part to surrender.[23]

Allegations that plaintiff has a lawful title and that defendants are unlawfully withholding possession are not demurrable as conclusions of law,[24] but if from the facts pleaded it is shown that an allegation of ownership is an unwarranted conclusion of law, the complaint is demurrable.[25]

A complaint specifying the nature of defendant's title to be under a pretended deed executed by plaintiff, which plaintiff avers that he never executed or delivered, but that he is and has been at all times the owner in fee simple of the premises, is not demurrable as stating an equitable cause of action.[26]

The fact that the prayer is only for damages is not ground for demurrer, if the complaint shows a cause of action for recovery of possession.[27]

The petition may be amended so as to conform to the evidence and properly describe the land sought to be recovered, even after trial and verdict.[28] The complaint cannot be amended so as to seek to enforce an equitable lien.[29]

Plea or answer.—An answer is sufficient which denies that plaintiff at the date laid in the declaration or at any other time was possessed or entitled to the possession.[30] A denial of plaintiff's title is sufficient as against a demurrer.[31]

Title by adverse possession to be a defense must be pleaded.[32] A plea that prior to the date laid in the complaint, defendant had acquired title by adverse

right of possession; that installments of the purchase money were due and unpaid and the Nation had an interest in the improvements to the extent of the deferred payments—Donohoo v. Howard (Ind. T.) 69 S. W. 927.

17. Jewell v. DeBlanc (La.) 34 So. 787.

18. Civ. Code, § 5002, concerning the action for recovery of lands and mesne profits is not applicable—Georgia Iron & Coal Co. v. Allison, 116 Ga. 444.

19. The petition which alleges that plaintiffs are the owners and entitled to possession of an undivided 1-36 interest of the land particularly described therein, and that the defendant was wrongfully withholding possession from them is sufficient—Anderson v. Proctor Coal Co., 25 Ky. L. R. 130, 74 S. W. 717.

20. Westfelt v. Adams, 131 N. C. 379.

21. Under Code, 1899, c. 90, § 9, in ejectment against a co-tenant having an equitable interest in the land in controversy, plaintiff having legal title need not mention such equity in her declaration—Parr v. Currence (W. Va.) 44 S. E. 184.

22. Whether plaintiffs had prior possession, were tenants at will, or were in under a mortgage, whether title had been acquired under the mortgage or not—Horton v. Murden (Ga.) 43 S. E. 786.

23. Senterfeit v. Shealy, 66 S. C. 384.

24. Livingston v. Ruff, 65 S. C. 284.

25. Ely v. Azoy, 39 Misc. (N. Y.) 669.

26. Evidence that the deed was never executed or delivered is admissible in ejectment—Wisconsin Lakes Ice & Cartage Co. v. Pike & North Lakes Ice Co., 115 Wis. 377.

27. Livingston v. Ruff, 65 S. C. 284.

28. Cushing v. Conness (Neb.) 95 N. W. 855.

29. Complaint by a creditor against one devisee cannot be amended to seek an equitable lien on the entire land of the estate to recover against all heirs and devisees—Finch v. Strickland, 132 N. C. 103.

30. Weeks v. Link, 137 Cal. 502, 70 Pac. 548.

31. Jones v. Griffin, 25 Ky. L. R. 117, 74 S. W. 713.

32. Code Civ. Proc. § 437, requires the statement of any new matter constituting a defense—Allen v. McKay (Cal.) 70 Pac. 8.

possession, together with a denial of plaintiff's title or right of possession as executor and denials of his executorship, and of the death of his testator, does not deny the title of the testator.[33]

Under a general denial, a partition decree between the parties cannot be attacked on the ground that it was rendered in the absence of defendant and not in accord with views previously expressed by the court.[34]

Where defendants set up a tax title they may be allowed to amend by specifically setting forth in their answer, the proceedings in the tax sale and the manner in which title became vested in the commonwealth.[35]

Effect of pleading.—A plea of the general issue is a waiver of a disclaimer.[36] Failure to serve a notice to quit is waived by an answer to the merits.[37]

Variance[38] with regard to immaterial allegations is not fatal.[39] An admission of legal title in plaintiffs and a common source contained in defendant's answer is not affected by an immaterial allegation in the reply that plaintiffs claimed through a person named as devisee of the common source, and hence failure of the evidence to show that plaintiff's title was derived through such devisee cannot be taken advantage of by the defendants.[40] Where possession as alleged is admitted, it cannot be shown that the premises are unoccupied.[41]

§ 5. *Evidence. Burden of proof.*—The burden is on plaintiff to establish his title as against the title asserted by defendant.[42] If he deraigns title through purchase from heirs, he must establish the fact of heirship.[43] Where a boundary is in dispute, he has the burden of establishing encroachment by defendant,[44] and if defendant has occupied for more than the time requisite to acquire title by adverse possession, plaintiff must show that the occupancy was not adverse.[45] If the parties claim under conflicting patents, plaintiff claiming under the junior patent must establish that the land for which he sues is within lands excepted by the senior patent.[46] Since one taking a deed from a widow is not estopped to deny a husband's title, where she is not one of the heirs or devisees of the husband, and her right of dower has not been assigned, the burden is on plaintiff to show that the deed covers the widow's dower interest.[47]

Presumption of a sale of an unlocated head right certificate may arise from continued possession under a claim of right together with acts of ownership.[48]

Common source of title.—Where the parties claim through a common source, examination of the title back of such source is unnecessary,[49] so where plaintiff brings ejectment as trustee against the mortgagor and his tenants, the trust deed stating that the grantor conveys and warrants renders unnecessary proof of title from the government there being an affidavit of common source.[50] A claim under a

33. Knight v. Denman (Neb.) 94 N. W. 622.

34. Bartley v. Bartley, 172 Mo. 208.

35. Jones v. Griffin, 25 Ky. L. R. 117, 74 S. W. 713.

36. Danner v. Crew (Ala.) 34 So. 822.

37. Action by the Cherokee nation against non-citizens—Hargrove v. Cherokee Nation (Ind. T.) 69 S. W. 823.

38. Defendant's allegation that she holds by mesne assignments of a mortgage does not render admissible parol evidence that she has executed an assignment of the mortgage as collateral after the date named and had received a re-assignment on repayment of the debt secured—Barson v. Mulligan, 77 App. Div. (N. Y.) 192.

39. Proof that legal title is in plaintiff and declaration that plaintiff was an administratrix—Richardson v. Biglane (Miss.) 33 So. 650.

40. Snyder v. Elliott, 171 Mo. 362.

41. Dunbar v. Lindsay (Wis.) 96 N. W. 557.

42. Instruction to such effect held proper—Finch v. Finch, 131 N. C. 271.

43. Lochridge v. Corbett (Tex. Civ. App.) 73 S. W. 96.

44. Harper v. Anderson, 132 N. C. 89.

45. Burden of showing that occupancy of land by a widow was as a homestead and not adverse to the heirs—Reno v. Blackburn, 24 Ky. L. R. 1976, 72 S. W. 775.

46. Virginia Coal & Iron Co. v. Keystone Coal & Iron Co. (Va.) 45 S. E. 291.

47. Caudle v. Long, 132 N. C. 675.

48. Lochridge v. Corbett (Tex. Civ. App.) 73 S. W. 96.

49. Horswill v. Farnham (S. D.) 92 N. W. 1082.

50. Brown v. Schintz, 203 Ill. 136.

decedent and a claim under the widow will be presumed to be through a common source, where by statute it is provided that in the absence of heirs at law the widow inherits her husband's realty in fee.[51]

The effect of filing an affidavit in denial of an affidavit of common source filed by plaintiff is to cast on plaintiff the burden of proving both his own and defendant's chain of title to the common source.[52] If all the titles held by one defendant are identical in origin with all held by the other defendant, they claim through a common source, and plaintiff is not required to elect under statutes requiring that when defendants hold under different sources, plaintiff shall elect against which he shall proceed.[53]

Admissibility of evidence.[54]—Evidence offered by a plaintiff having the burden of proving defendant's title to a common source is not inadmissible for the reason that it shows defendant's title to be defective.[55] The lesser seal of the commonwealth need not be shown by a land-office copy of a patent to be attached to the original to render it admissible in ejectment.[56] Where an instrument of conveyance has been lost, possession, acts of ownership, and other circumstantial proof may be offered.[57] In determining the question of whether plaintiffs have had sufficient possession of land to warrant the maintenance of ejectment, the manner in which owners of land of like character in the same neighborhood commonly occupy and use such lands may be considered.[58]

Deeds from persons not asserted by the pleadings to have had title are not admissible by plaintiff,[59] nor is a deed admissible where the alleged grantor denies its execution and there is no evidence of delivery.[60] Evidence in support of title outside of that shown by an abstract tendered, if admitted without objection, may be submitted to the jury though there is a statutory provision limiting a party in ejectment to the title shown by the abstract tendered by him.[61]

To render a sheriff's deed on execution sale admissible, the essentials to its validity must first be shown.[62] A sheriff's deed to defendant after an execution

51. Shannon's Code, § 4165—Carver v. Maxwell (Tenn.) 71 S. W. 752.

52. Bradley v. Lightcap, 201 Ill. 511.

53. Evidence held to show common source—Townsend v. Kreigh (Mich.) 97 N. W. 46.

54. In ejectment by the husband and wife where it is claimed that she furnished a portion of the purchase money, evidence as to statements made by the wife at the time she furnished a particular sum, and the purpose for which it was furnished is admissible—Ray v. Long, 132 N. C. 891. Where plaintiff is claiming title through a headright certificate a petition and judgment in favor of one asserting an ownership under the same right as plaintiff is admissible as establishing notoriety of an adverse claim and if plaintiff claims through purchase from the heirs of the owner of the certificate, the inventory and appraisement of such owner's estate showing the certificate, an order of court authorizing and approving its sale, and an administrator's deed reciting a purchase by the decedent from the original owner are admissible as muniments of title and declarations of ownership—Lochridge v. Corbett (Tex. Civ. App.) 73 S. W. 96. In ejectment based on breach of condition of a trust deed, the record of a judgment in a chancery action between the same parties finding a sum due on the note secured by the trust deed, is admissible though a writ of error had been prosecuted from the decree and a supersedeas granted. The original notes are also admissible in evidence though they have been merged in a decree or in judgment—Brown v. Schintz, 203 Ill. 136. Where plaintiff claims under a deed, a mortgage executed by the heirs of the grantor on the premises is admissible as bearing on the question of the nature of the grantor's subsequent possession, it being contended that the property had reverted to the grantor by failure of plaintiff to comply with the conditions of the deed—First Presbyterian Church v. Elliott, 65 S. C. 251. Where ejectment is based on breach of a condition against the erection of a building for a particular purpose, evidence as to the business and property interests of the grantors, is inadmissible—Wakefield v. Van Tassell, 202 Ill. 41.

55. Bradley v. Lightcap, 201 Ill. 511.

56. Virginia Coal & Iron Co. v. Keystone Coal & Iron Co. (Va.) 45 S. E. 291.

57. The acts of the husband and of the wife in relation to land are admissible to show in which one of them was the possession—Cahill v. Cahill, 75 Conn. 522.

58. Hanson v. Stinehoff, 139 Cal. 169, 72 Pac. 913.

59. Hilliard v. Connelly, 21 Pa. Super. Ct. 271.

60. Bynum v. Hewlett (Ala.) 34 So. 391.

61. Code 1896, § 1531—Louisville & N. R. Co. v. Massey, 136 Ala. 156.

62. Valid judgment and execution, the

sale on a judgment against plaintiff's husband is inadmissible where it is not contended that the husband had ever had title.[63]

Sufficiency of evidence.[64]—Where plaintiff was entitled to possession and defendants were unlawfully withholding at the time action was brought, plaintiff may recover on proof of his title without regard to the date of the ouster or the possession at any time prior or subsequent.[65] The evidence must identify and locate the lands which are the subject of controversy;[66] documentary evidence of title to a particular strip of land not shown to be the land described by metes and bounds in the complaint is not sufficient.[67] A decree divesting the title of parties to land in controversy and vesting it in one through whom plaintiff claimed is not a sufficient proof of title in the absence of evidence in the decree or otherwise as to who were the parties in the suit.[68] To establish title under an oral gift from a parent, the evidence must leave no room for reasonable doubt.[69] Mere description of themselves by the grantors in a quitclaim deed as heirs of a person named is not sufficient to establish title through intestate succession from such person.[70] Evidence of a possession under a recorded deed prior to defendant's entry authorizes the direction of a verdict in the absence of evidence by defendant.[71] Evidence of a deed to plaintiff's father is not sufficient in the absence of possession for a sufficient length of time to ripen a title.[72]

§ 6. *Trial and judgment. Instructions.*—Instructions should be applicable to the issues,[73] Where several distinct issues are submitted to the jury, an instruction requested by plaintiff on the effect of certain facts as barring his right of action should be limited to the issue of limitations.[74] An instruction on the effect of a deed as color of title in defendant is not harmful when, if the existence of the deed is found, defendant is entitled to a verdict.[75] Where only an undivided interest is sued for and verdict rendered therefor, a general charge for

jurisdiction of the court and whether defendant in ejectment was the party against whom the judgment was rendered—Clem v. Meserole (Fla.) 32 So. 815. Must be shown who the judgment or the order or execution was against, or whose title the sheriff's deed purported to convey in the absence of evidence sufficient to show a claim of adverse possession—Bynum v. Hewlett (Ala.) 34 So. 391.

63. Finch v. Finch, 131 N. C. 271.

64. To establish ownership—Baxter v. Newell, 88 Minn. 110. To authorize a verdict finding part for plaintiff and part for defendant—Perry v. Saylor (Ga.) 44 S. E. 993. To allow submission of the question of forgery of a deed—Larson v. Pederson, 115 Wis. 191. To sustain a defense based on occupancy of land under a parol contract with the grand-parent as against the plaintiff claiming under a deed—Shroyer v. Smith, 204 Pa. 310. To establish title under a gift—Ramey v. Crum, 24 Ky. L. R. 741, 69 S. W. 950. To show entry under a parol gift by a parent and erection of improvements in reliance thereon—Goodin v. Goodin, 172 Mo. 40. To show title by inheritance or through a decree in chancery vesting title in a partnership under which plaintiff claimed—Stockley v. Cissna (C. C. A.) 119 Fed. 812. To show that one through whom plaintiff claimed died at such date as to preclude his having taken as an heir—Peniston .. Schlude, 171 Mo. 132. To show possession of a river bed vacated by diversion of the water into a new channel at the time defendants entered—Hanson v. Stinehoff, 139 Cal. 169, 72 Pac. 913. To sustain a finding that defendant had offered to pay a balance remaining due on the purchase price of the premises—Belger v. Sanchez, 137 Cal. 614, 70 Pac. 738.

65. Walton v. Wild Goose Min. & Trading Co. (C. C. A.) 123 Fed. 209.

66. A map attempting to plat land located under a lake is not sufficient proof of location in the absence of any showing of a survey—Webster v. Harris (Tenn.) 69 S. W. 782, 59 L. R. A. 324.

67. Stoffelo v. Molina (Ariz.) 71 Pac. 912.

68. Stockley v. Cissna (C. C. A.) 119 Fed. 812.

69. Claim by a son against other heirs—Goodin v. Goodin, 172 Mo. 40.

70. Stockley v. Cissna (C. C. A.) 119 Fed 812.

71. Wilcox v. Moore (Ga.) 45 S. E. 400.

72. Possession for seven years—Caudle v. Long, 132 N. C. 675.

73. An instruction on adverse possession by defendants ignoring an issue of co-tenancy and failing to show knowledge of the adverse holding on the part of plaintiff is erroneous—Parr v. Currence (W. Va.) 44 S. E. 184.

74. Defendant claimed title by deed and also by adverse possession—Pittman v. Weeks, 132 N. C. 81.

75. Though the defense asserted is the 20-year limitation and not the 7-year limitation based on color of title—Pittman v. Weeks, 132 N. C. 81.

the recovery of the entire land is harmless.[76] If there is evidence of breach of condition of a deed, an instruction as to the effect thereof may be given.[77]

Directing verdict.—Under a declaration charging a joint holding, a verdict cannot be directed on evidence that defendant's holding was not joint.[78] A verdict may be directed against defendant who has asserted an entire ownership though a deed in evidence not relied on by him in his pleadings shows that he is the owner of a tenth interest.[79]

Conformity of pleadings, evidence, and findings with judgment.—The judgment must conform to the pleadings and evidence.[80] If defendants set up complete performance of a contract of purchase and pray judgment for a deed from plaintiff or repayment of the purchase price and improvements, a judgment that plaintiff take nothing, that defendants go without day and recover the costs, is erroneous.[81] Under statutes allowing recovery on a showing of a possession in defendant and a right to possession in plaintiff, findings that defendants are withholding possession and that plaintiffs have the right to possession will support a judgment for plaintiff without a specific finding of an ouster.[82] Judgment awarding plaintiff possession cannot be rendered on findings of fact not showing title in plaintiff.[83] Where the judgment conforms to a particular description in the petition which describes a piece of land which is no part of that sought to be recovered, it cannot be sustained, though there is a general description of the land in the petition which is correct.[84] If the only question submitted to the jury is one of damages, the judgment cannot be amended to conform to the verdict by striking out an award of possession.[85]

A written disclaimer is necessary before a judgment can be rendered in favor of defendant if his defense is that he is not in possession or claiming title.[86]

Relief granted.—Where a deed is not void on its face, defendant may be required to deliver it up for cancellation.[87] In ejectment by a grantor in which he tenders a deed to defendant, the court may render a decree as in an action for specific performance allowing the defendant to take the deed on performance of the conditions.[88]

Effect of judgment.—One not a party to ejectment who does not appear and who is not vouched in is not bound by the judgment.[89]

76. Danner v. Crew (Ala.) 34 So. 822.

77. First Presbyterian Church v. Elliott, 65 S. C. 251.

78. Townsend v. Kreigh (Mich.) 94 N. W. 732.

79. McCandless v. Inland Acid Co., 115 Ga. 968.

80. Value of use of a party wall cannot be included in the judgment in the absence of a claim therefor or evidence of use by defendant—Alexander v. Parks, 24 Ky. L. R. 2113, 72 S. W. 1105.

81. Since defendant was either entitled to a decree as prayed in the answer or not to recover at all and if it was found that a balance remained due on the purchase price, a conditional decree should have been rendered vesting title in him on payment of the balance, interest and costs—Chouteau Land & Lumber Co. v. Chrisman (Mo.) 72 S. W. 1062.

82. Rev. St. 1887, par. 3139—Curtis v. Boquillas Land & Cattle Co. (Ariz.) 71 Pac. 924.

83. Findings that defendant delivered plaintiff's grantor a deed of the lands and that a sheriff delivered a deed based on a sale of the land on execution are not sufficient—Wickersham Banking Co. v. Rice, 137 Cal. 506, 70 Pac. 546.

84. Cushing v. Conness (Neb.) 95 N. W. 855.

85. It being apparent that the court found for plaintiffs on all issues not submitted to the jury—Barson v. Mulligan, 77 App. Div. (N. Y.) 638.

86. Judgment should not be rendered on a verdict before such disclaimer is filed if the verdict is in favor of defendant on the evidence of witnesses that defendant was not in possession or claiming title—Lehigh Valley Coal Co. v. Beaver Lumber Co., 203 Pa. 544.

87. Watkins v. Nugen (Ga.) 45 S. E. 260.

88. Decree held to be based on such theory which allowed a railroad company to withdraw a deed from the record, which deed conveyed to the company on condition of the erection of a station—Smith v. Frankfort & C. R. Co., 24 Ky. L. R. 2040, 72 S. W. 1088.

89. Ballard v. James (Ga.) 45 S. E. 68.

Writ of possession, supersedeas, restitution.—Payment of sums had by plaintiff under the contract by which he is entitled to possession may be exacted before the award of a writ of possession.[90] Where a supersedeas writ is illegally issued restraining a writ of possession, the obligors on the bond are nevertheless liable as on a common law obligation.[91] On reversal of a judgment for plaintiff in ejectment, restitution cannot be awarded to defendant, where a receiver appointed pending the litigation has sold the land as trustee of a paramount mortgage.[92]

§ 7. *Receivership in ejectment.*—Pending action of ejectment, a court of equity may appoint a receiver of the rents and profits where it appears that defendants are appropriating the rents and profits, that from the state of the law docket there can be no speedy trial of the action, and the defendants are insolvent.[93] A receiver in ejectment is not authorized by a showing that there was a deed of trust on the land superior to the title of either of the parties or of those under whom they claim title, that the interest was unpaid, the taxes were delinquent, and foreclosure was threatened.[94] In ejectment by a foreclosure purchaser, collection of rents by an insolvent in possession may be enjoined and a receiver appointed.[95]

Right of defendant to rents.—If on an intervention in ejectment, a receiver of rents and profits is appointed, defendant may be allowed the money derived from the receivership if plaintiff is without title and an intervenor failed to allege sufficient interest to permit an intervention.[96] Where land incumbered by a mortgage paramount to the rights of either of the parties is sought to be recovered in ejectment and a receiver is appointed, the defendant on reversal of a judgment against him is entitled to recover rents and profits and the proceeds of a sale of the equity of redemption, which the receiver has paid over to plaintiff. Defendant is not liable for rents and profits after the appointment of a receiver, and on reversal of the judgment may have restitution in a summary manner in the ejectment suit without being relegated to a separate action.[97]

§ 8. *New trial.*[98]—The assertion of an equitable counterclaim for specific performance of an oral contract for sale of land will not prevent a new trial as of right though by statute it does not exist in equitable actions, notwithstanding they determine not only the possession but the title, where also by statute defendant is allowed to set up equitable defenses in his answer in ejectment.[99] A second new trial in ejectment can be granted only as a matter of favor, and when the court is satisfied that justice will be promoted.[1]

Amendments setting up the statute of limitations may be refused in the discretion of the court on a second trial.[2]

Conditions. Bond.—A bond filed is sufficient though conditioned for payment of costs "if" the new trial is granted.[3] Where payment of all costs recov-

90. Plaintiffs were in possession under a deed from an ancestor, having agreed to make certain payments to their brothers and sisters—Howard v. Murray, 203 Pa. 464.

91. Leech v. Karthaus, 135 Ala. 396.

92. Colbern v. Yantis (Mo.) 75 S. W. 653.

93. Whyte v. Spransy, 19 App. D. C. 450.

94. Colbern v. Yantis (Mo.) 75 S. W. 653.

95. Whyte v. Spransy, 19 App. D. C. 450; Vizard v. Moody, 117 Ga. 67.

96. Donohoo v. Howard (Ind. T.) 69 S. W. 927.

97. Colbern v. Yantis (Mo.) 75 S. W. 653.

98. New trial for error and not of right, see generally New Trial.

99. Rev. St. 1898, §§ 3073, 3078, 3092—Newland v. Morris, 115 Wis. 207.

1. New trial should be granted where its defeat may have turned on a question of pleading and of the order of proof, which on another trial might be obviated by an amendment of the answer and strict compliance with rules governing the introduction of evidence—Barson v. Mulligan, 40 Misc. (N. Y.) 407.

2. Kennan v. Smith, 115 Wis. 463.

3, 4. Rev. St. 1898, § 3092—Newland v. Morris, 115 Wis. 207.

ered by the judgment is made a condition to the granting of a new trial, interest on the costs to the time of payment is not required.[4] On a second new trial in ejectment, defendant, though held to the payment of costs and damages awarded the plaintiff is not required to pay damages awarded for the rents and profits or the value of the use and occupation.[5]

§ 9. *Mesne profits and damages.*[6]—A statutory provision for the recovery of mesne profits is applicable to an action by an Indian nation under an act of congress to recover land from a trespasser.[7]

Necessity of prayer.—If the prayer is simply for possession of the premises, damages for mesne profits cannot be awarded,[8] and where special damages are not claimed, the rental value cannot be awarded as damages nor can the complaint be amended to cover such rentals.[9]

Persons liable.—In order that one may be protected by good faith in possession as against a claim for waste, the possession need not be continuous or of the entire property.[10] One taking possession in error as to the law may be regarded as holding in bad faith and chargeable with rents and profits,[11] and one in under an erroneous judgment must respond to the owner for resulting damages.[12]

Time for which recovery may be had.—If the statute provides that rents and profits or the value of the use and occupation for a term not exceeding 6 years may be recovered, the 6 years are to be regarded as dating back from the beginning of the action.[13] Where defendants in ejectment are without notice of plaintiff's title until action is begun, they can be chargeable only from the date of filing the suit to the date of judgment.[14] Judgment should not be rendered against defendants for detention of the premises prior to the time at which plaintiffs acquired title.[15]

Set-off.—A claim for rents and profits may be off-set by the cost of clearing the land in a case where the court is in doubt as to the actual value of the occupancy.[16] If the premises detained are a homestead, defendant, as against a claim for the use thereof, cannot set off judgments held by him against plaintiff.[17]

Measure of damages.—The measure of damages for an unlawful withholding of possession is the value of the use for any legitimate and proper purpose while the owner is deprived thereof.[18] An increased rental value resulting from improvements made by one holding under color of title and in good faith should not be taken into consideration against him.[19] Disconnected benefits, not arising in the usual course of defendant's occupancy, should not be considered,[20] nor uses

5. Damages mentioned in Code, § 1525, will be regarded as those recovered for waste and other material injuries and not the penalty for the detention of the premises—Barson v. Mulligan, 40 Misc. (N. Y.) 407.

6. See generally Waste, Damages.

7. Mansfield's Digest, § 2637; Ind. Ter. Ann. St. 1899, § 1921, is applicable to an action under Act of Congress, June 28, 1898, §§ 3, 4 & 6 (Ind. Ter. Ann Sts. 1899, §§ 57s, 57t, 57v)—Brought v. Cherokee Nation (Ind. T.) 69 S. W. 937.

8. Gen. St. p. 1289, § 45; Sup. Ct. Rule 85—Kline v. Williams (N. J. Law) 54 Atl. 556.

9. Pfeffer v. Kling, 171 N. Y. 668.

10. Claim for value of timber cut down and disposed of—Leathem & Smith Lumber Co. v. Nalty, 109 La. 325.

11. McDade v. Bossier Levee Board, 109 La. 625.

12. On detention of a farm, water mill and power, the reasonable rental value together with the expenses in moving to and from the premises may be recovered less the taxes and the value of the permanent reasonable and necessary repairs—Lewis v. Scott, 24 Ky. L. R. 2367, 73 S. W. 1131.

13. Code Civ. Proc. § 1531—Willis v. McKinnon, 79 App. Div. (N. Y.) 249.

14. Cowan v. Mueller (Mo.) 75 S. W. 606.

15. Where title is acquired by descent, judgment should not be rendered for detention prior to the death of the ancestor—Fitzpatrick v. Graham (C. C. A.) 122 Fed. 401.

16. McDade v. Bossier Levee Board, 109 La. 625.

17. Lewis v. Scott, 24 Ky. L. R. 2367, 73 S. W. 1131.

18. Curry v. Sandusky Fish Co., 88 Minn. 485.

19. McCarver v. Herzberg, 135 Ala. 542.

20. Such as a particularly profitable catch of sturgeon in defendant's fishing business—Curry v. Sandusky Fish Co., 88 Minn. 485.

peculiar to defendant's business.[21] A city on recovery of land dedicated as a street cannot recover its rental value where it is shown that it was useful only for agricultural purposes and the city has sustained no damage.[22] In assessing damages for waste in the cutting of timber, the diminished value of the land and not the manufactured value of the timber is to be regarded as the measure, but the value of timber in its manufactured state may be shown in connection with the reasonable cost of manufacturing and marketing.[23]

§ 10. *Allowance for improvements and expenditures.*—In a real action to recover possession of property, defendant cannot be allowed for taxes paid, if rents and profits are not demanded.[24]

Defendant cannot be allowed for improvements which he makes with knowledge of the owner's rights,[25] or which he makes while occupying under a void decree.[26] Where by statute, defendants in possession under color of title and in good faith are allowed for their improvements, a claimant under a void tax deed will be allowed for his improvements though he knew that some interest was claimed by plaintiff if his occupancy was in good faith under belief of valid title.[27] He should be allowed compensation so far as such improvements increase the vendible value of the land, where they are necessary to a proper use of the land and made with knowledge of and without objection from plaintiffs.[28] Where an executor who is also a devisee joins in a sale of realty, the devisee on suing as such to recover his portion of the property on refusal of defendants to make payments, the executor being unable to confer title, may recover such share only on repayment of the proportionate part of defendant's expenditures and improvements less a like share of the rental value.[29]

If the deed under which defendant claims shows that the grantor does not claim to be an absolute owner, but only holds by a general license, he cannot claim compensation for improvements.[30] One making improvements on land which he has purchased at a sale by his assignee in bankruptcy to defeat a fraudulent conveyance to his wife and children is not entitled to compensation for improvements.[31]

In a statutory action to recover for improvements made on lands recovered in ejectment, the defendant cannot recover for improvements not made on the land in controversy.[32]

If a counterclaim for improvements in ejectment is based solely on statute, the defendant is not entitled to relief arising from the equitable powers of the court.[33]

21. Where defendant had occupied land in the business of catching and curing fish, evidence of the fishermen as to the value of the use based on the nature of defendant's business, is inadmissible—Curry v. Sandusky Fish Co., 88 Minn. 485.

22. City of Uniontown v. Berry, 24 Ky. L. R. 1692, 72 S. W. 295, 24 Ky. L. R. 2248, 73 S. W. 774.

23. Nelson v. Churchill (Wis.) 93 N. W. 799.

24. Milliken v. Houghton, 97 Me. 447.

25. Willis v. McKinnon, 79 App. Div. (N. Y.) 249.

26. Code, § 473, allows the value of improvements to an unsuccessful defendant in ejectment—Finch v. Strickland, 132 N. C. 103.

27. Comp. Laws 1897, § 10,995—Thomas v. Wagner (Mich.) 92 N. W. 106.

28. Jones v. Griffin, 25 Ky. L. R. 117, 74 S. W. 713.

29. Crouch v. Nast, 79 App. Div. (N. Y.) 492.

30. Under Comp. Laws Dak. 1887, §§ 5455, 5456—Skelly v. Warren (S. D.) 94 N. W. 408.

31. Not a bona fide holder of the premises under color of title believed by him to be good—Hallyburton v. Slagle, 132 N. C. 957.

32. Recovery cannot be had for improvements on neighboring islands, where certain islands have been recovered in ejectment—Kobush v. Schmidt (Mo. App.) 72 S. W. 1087.

33. Skelly v. Warren (S. D.) 94 N. W. 408.

CURRENT LAW.

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ELECTIONS.[1]

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§ 1. *Statutory authorization, time, place and notice.*[2]—A subsequent act of the legislature cannot validate an election already unlawfully held.[3]

Time.—Elections must be held at the time fixed by the law or by some person authorized by law to fix it: the authority to hold an election at one time will not warrant an election at another.[4] Where a time is fixed by the constitution, the election may be held at the required time without further legislation therefor.[5] An election for congressman only is not one for "state" officers at which a vacancy may be filled.[6] An election to fill a vacancy may be directed to be held before the expiration of the term by which the vacancy will result.[7] One departure for a special cause from a customary date of holding an election does not establish a new date.[8]

Place.—When electors are given power to designate the place of holding future elections but do not do so, ensuing elections are properly held at the same place.[9]

1. See Judges, for election of special judges. See Railroads for voting of municipal aid bonds.

Intoxicating Liquors, for local option elections. See articles dealing with various political divisions such as States, Municipal Corporations, Counties, Towns for powers of legislatures, boards of aldermen, councils, etc., to judge of qualifications of their members.

2. Bill for revision of a city charter held broad enough in its title to cover changes in the time of holding the charter elections. Laws 1896, p. 641, c. 520—People v. Kent, 83 App. Div. (N. Y.) 554. Section 42 of an act to regulate elections. Pub. Laws 1898, p. 258, is repealed by the 4th section of the supplement to said act approved April 14th, 1903, Pub. Laws 1903, p. 606—Hopper v. Stack (N. J. Sup.) 56 Atl. 1. Act Oct. 16, 1900, does not repeal all of Ky. St. 1471 except such portion as is reenacted in § 4—Herndon v. Farmer, 24 Ky. L. R. 1045, 70 S. W. 632.

3. Election held under repealed law not validated by act declaring that the repealing act was intended not to apply to place in question—Rodwell v. Harrison, 132 N. C. 45.

4. People v. Knopf, 198 Ill. 340. An incorrect statement of a clerk who is given no power to determine the year in which the election of particular officers shall take place, and who has no such power in the absence of statute, but whose duty is confined to stating in his notice the officers to be elected at any election as provided by law, will have no effect in rendering an election valid which the law does not authorize—People v. Kent, 83 App. Div. (N. Y.) 554. A private law fixing the time of the election of town officers is repealed by a general statute expressly so providing, so that an election held at a day fixed in the private statute is invalid—Rodwell v. Harrison, 132 N. C. 45.

5. State v. Moores (Neb.) 96 N. W. 1011.

6. Ferguson v. Hackett, 25 Ky. L. R. 170, 74 S. W. 708; Smith v. Doyle, 25 Ky. L. R. 278, 74 S. W. 1084.

7. People v. Wright, 30 Colo. 439, 71 Pac. 365.

8. It will be presumed that a customary long used date had been fixed by law or by a vote of the electors—Hoxsie v. Edwards, 24 R. I. 338.

9. Gen. Laws, c. 9, §§ 4, 9 as amended by

A mistake in the location of a polling place outside the limits of the election district will not invalidate the votes of the district, though it is provided by statute that the voter must vote in the district where he actually resides.[10]

Precincts.[11]—Irregular establishment of precincts does not render the election illegal and void where there is no showing of fraud, prejudice to any candidate, or deprivation of voting privileges.[12]

Notices.—Exact compliance with statutes in regard to notice of election is not requisite where such statutes are merely directory,[13] and the results of a full and fair election are not vitiated by failure in this regard.[14]

Mandamus.—Where a duty respecting the holding of an election is clearly obligatory and has been disregarded, the court will by mandamus compel action.[15]

Restraint.—An injunction does not lie to restrain the holding of a public election authorized by law,[16] and unless for irregularity such as to render the election absolutely illegal or void, the supreme court of a state will not, at the suit of a private person, restrain election inspectors from acting.[17]

§ 2. *Eligibility and registration of electors.*[18]—The constitutional right to vote for all elective officers cannot be curtailed by permitting a vote for only part of candidates for a board to the end that it shall be bi-partisan.[19] A requirement that electors shall vote in the wards in which they reside is an "additional qualification" for municipal elections within a constitutional grant of power.[20]

Residence.[21]—A constitutional period of residence "before election" cannot be extended by requiring it as a condition to registration.[22] The intention to remain is consistent with the purpose to remove at some future indefinite time,[23] but there must be a fixed intention to remain.[24] He must abandon his former residence.[25]

Removal with intention to reside permanently in another state forfeits a voting residence though the intention is altered and a return made to the state.[26] An intent to return may prevent loss of residence by removal.[27]

Pub. Laws, c. 808, § 8—Hoxsie v. Edwards, 24 R. I. 338.

10. Pub. Laws 1898, p. 237—Lane v. Otis, 68 N. J. Law, 656.

11. In Idaho, an election precinct cannot include more than one justice's precinct (Rev. St. 1887, § 759, subd. 3—State v. Vineyard (Idaho) 72 Pac. 824.

12. Election inspectors will not be restrained from acting in absence of such a showing—State v. Wilcox, 11 N. D. 329.

13. Posting of only one notice instead of two held not fatal—Hoxsie v. Edwards, 24 R. I. 338.

14. Omission to mention one of the offices among those to be filled—Winters v. Warmolts (N. J. Law) 56 Atl. 245. The mere fact that an election notice may be construed to authorize the closing of the registration books sooner than provided by law, will not invalidate an election, unless it is apparent that the books were so closed—Epping v. Columbus, 117 Ga. 263.

15. Giving notice—People v. Knopf, 198 Ill. 340. Inserting names of offices to be filled—People v. Knopf, Id.

16. Morgan v. Wetzel County Ct. (W. Va.) 44 S. E. 182.

17. In establishing precincts—State v. Wilcox, 11 N. D. 329.

18. Special advisory election courts see post, § 7.

19. Act April 8, 1884, as amended by act June 1, 1886, 2 Gen. St. p. 806, providing that boards of excise commissioners shall consist of five members not more than three of whom shall belong to the same political party and that no voter shall vote for more than three candidates—State v. Bedell, 68 N. J. Law, 451; Smith v. City of Perth Amboy (N. J. Sup.) 56 Atl. 145.

20. Code 1892, § 3028 is not in conflict with Const. §§ 241, 242, 245—State v. Kelly (Miss.) 32 So. 909.

21. Residence in a precinct from September 12th to November 5th, does not fulfil the 60 day requirement—Edwards v. Logan, 24 Ky. L. R. 1009, 70 S. W. 852; Id., 75 S. W. 257. A person becomes a resident on the day he rents a house and moves his clothing and furniture therein, he being married on that day and going into occupancy with his wife on the day following.—Conner v. Commonwealth, 24 Ky. L. R. 709, 69 S. W. 963.

22. Code 1892, § 3028 making residence of one year "prior to registration" essential, is invalid—State v. Kelly (Miss.) 32 So. 909.

23. Railroad laborers who have been working within the state for four years—Black v. Pate, 136 Ala. 601.

24. Students not qualified (Const. art. 7, § 4)—Parsons v. People, 80 Colo. 388, 70 Pac. 689.

25. A student desiring to compel his registration in the district of his residence at a seminary of learning must show his former residence and facts showing an abandonment thereof, and acts done by him besides that of taking up his abode at the seminary

Registration.—Conditions for registration must not impair the constitutional right to vote.[28] A provision that two members of a town council shall be registrars, and in case that they disagree as to voting qualifications a citizen of the town may be called upon as umpire, is reasonable.[29]

A board of registration is not liable in damages for refusal to register a voter.[30] A county board of registrars cannot in equity be compelled to place a negro's name upon the voting list, if the refusal to register him is alleged to be part of a general scheme to disfranchise negroes, since if such a scheme exists, a mere order of the plaintiff's name to be inscribed will not furnish adequate relief, and in addition, if the lists are fraudulent, the court cannot become a party to the unlawful scheme by adding another voter thereto.[31] Mandamus to compel registration will not lie, where the ground alleged denies the legal existence of the registration board.[32]

§ 3. *Nominations by convention or petition. Regularity of conventions.*—A convention if regular for one purpose is regular for all purposes within the scope of its action.[33]

A person who accepts a nomination from a convention of a party becomes bound by the rulings of the party organization as to the regularity of his nomination.[34] In a controversy as to which are the regular nominees of a party, the court's inquiry is limited to determine which was the regular party convention;[35] as to this question, the determination of the party central organization is conclusive.[36]

The majority of those voting will control action of a political convention,[37] and if it has been regularly organized those remaining cannot be deprived of their power to act by the voluntary withdrawal of a majority of delegates entitled to participate;[38] nor can such majority unite with rejected delegates to form a legal party convention.[39]

Nomination by petition.—Immaterial variations from the statute will not affect a petition of nomination.[40] The petitioners for a party nomination need not, under Kentucky laws, state that they are members of the party;[41] and though the petition

for the purpose of gaining a new residence—In re McCormack, 86 App. Div. 362.

26. Edwards v. Logan, 24 Ky. L. R. 1009, 70 S. W. 852; Id., 75 S. W. 257.

27. An unmarried man does not lose his residence by going to another state to secure labor (Ky. St. 1478)—Edwards v. Logan, 24 Ky. L. R. 1009, 70 S. W. 852; Id., 75 S. W. 257. A temporary removal from the ward for sanitary reasons does not forfeit residence—Finn v. Board of Canvassers, 24 R. I. 482.

28. Code 892, § 3028 requiring full period of residence prior to registration is invalid—State v. Kelly (Miss.) 32 So. 909.

29. Ordinance held authorized by a town charter as a "needful regulation" for registration—Epping v. Columbus, 117 Ga. 263.

30. Complaint held demurrable—Giles v. Teasley, 136 Ala. 164.

31. Giles v. Harris, 189 U. S. 475.

32. Demurrer sustained to mandamus to compel registration alleging that Const. 1901, art. 8, §§ 180, 181, 183-188 are unconstitutional, such sections prescribing qualifications of voters and the mode of registration—Giles v. Teasley, 136 Ala. 164.

33. County convention—State v. Liudahl, 11 N. D. 320.

34. State v. Liudahl, 11 N. D. 320.

35. State v. Porter, 11 N. D. 309.

36. The determination of the central organization of a party as to which of two caucuses is regular is conclusive as to which is a regular nomination—Rose v. Bennett (R. I.) 56 Atl. 185. The decision of a credential committee of a state convention as to the qualification of delegates from a county convention made on contest and with full notice, which is adopted by the state convention, is not reviewable by the courts—State v. Liudahl, 11 N. D. 320; State v. Porter, 11 N. D. 309. It is immaterial that delegates voted on the decision in the convention, if their votes were not controlling—State v. Weston, 27 Mont. 185, 70 Pac. 519, 1134. The decision of the state convention of a party as to which faction of a county central committee was entitled to select delegates to a state convention is conclusive as to the right of candidates for county offices subsequently nominated by the successful faction to appear on the official ballot under the party name—Id.

37. The fact that delegates are present and do not vote does not affect the acts of the majority voting—State v. Porter, 11 N. D. 309.

38, 39. State v. Porter, 11 N. D. 309.

40. Republican candidate instead of candidate of the Republican party—Wilkins v. Duffy, 24 Ky. L. R. 913, 968, 70 S. W. 668.

41. The statute requires that they shall state that they are qualified and desire to vote for the candidate—Wilkins v Duffy, 24 Ky. L. R. 913, 968, 70 S. W. 668.

does not state that there is no other nomination for the office, the nominee should be placed on the ballot by the clerk, if he has knowledge that there is no other nominee of the party and that no one claims the nomination.[42]

If petitioners be found not entitled to have the candidate placed on the ballot under the party name which they request, the name may be placed on the ballot without any party designation.[43]

Certificates and declinations and vacancies.—The nomination certificate must be filed with the officer designated by statute,[44] and his action thereupon may be subject to judicial review[45] or control.[46] If the nomination certificate is not filed in time, the defect may be remedied by filing as for a vacancy.[47]

Declinations of nomination must strictly follow the statutes as to time.[48] A convention may delegate the nominating power to a committee unless restrained by its party rules or by statute, and hence a committee to fill vacancies may nominate whomsoever the convention might have.[49]

§ 4. *Official ballot.*—One's eligibility to office is not curtailed by a law denying the right to print his name on the ballot if spaces to write it in are provided.[50] In California a nominee is held to have a constitutional right, if nominated by two parties for the same office, to have his name printed twice on the ballot under both party designations.[51]

An election is not vitiated by the fact that the clerk places the name of a candidate under an erroneous party device, where his action might be regarded as in good faith under a plausible interpretation of an opinion of the attorney general.[52] The surname of a candidate is a sufficient designation if there is only one candidate of such name for the office.[53]

The officer required to prepare the official ballot has purely ministerial duties.[54] A writ of prohibition will not issue to restrain the placing on a ballot of the name of a candidate whose nomination has been duly certified.[55]

42. Though a party nomination by petition may be made only in case of failure to nominate by convention or primary—Wilkins v. Duffy, 24 Ky. L. R. 913, 968, 70 S. W. 668.

43. Davidson v. Hanson, 87 Minn. 211.

44. A judge of a district having but one county should be regarded as a county officer in Montana, and certificates of nomination should be filed with the county clerk (Pol. Code, § 1312; Const. Sched. § 1)—State v. Hays, 27 Mont. 174, 70 Pac. 321. The officer's file mark is not necessary, presentation being sufficient under Code, § 1104—Reese v. Hogan, 117 Iowa, 603. Laws 1896, c. 909, § 56—Gillespie v. McDonough, 39 Misc. 147.

45. In New York the act of a secretary of state in filing nomination certificates may be reviewed in the judicial district of the supreme court in which the citizen resides.

46. The proper officer may be compelled by mandamus to receive a certificate of nomination, his duties being ministerial and not judicial, notwithstanding it is provided that the certificates must come from a party casting two per cent of the total vote of the preceding election—(Rose v. Bennett [R. I.] 56 Atl. 185); mandamus lies only where an election is duly to be held, hence will not issue where, pursuant to competent advice that the terms were not to expire, no proclamation for the election of judges in November 1902 was made and no party nominated candidates—State v. Chatterton (Wyo.) 70 Pac. 466.

47. Code, §§ 1104, 1102—Reese v. Hogan, 117 Iowa, 603.

48. Under act Feb. 2, 1899, § 24, the nominee must file his declaration at least thirty days before election day—Napton v. Meek (Idaho) 70 Pac. 945.

49. Gillespie v. McDonough, 39 Misc. 147 construing Laws 1896, c. 66, forbidding committees to nominate candidates of opposing parties, under certain circumstances.

50. State v. Moore, 87 Minn. 308, 59 L. R. A. 447 sustaining Primary Election Law.

51. Pol. Code, § 1197, to the contrary providing that his name shall appear once, and in the other party column the words "no nomination" held unconstitutional—Murphy v. Curry, 137 Cal. 479, 70 Pac. 461, 59 L. R. A. 97.

52. Placing Republican candidate under the title of the Independent Republican party. Laws Extra Sess. 1900, c. 5, § 12, provide that an election shall be void only where there is fraud, intimidation, bribery or violence—Wilkins v. Duffy, 24 Ky. L. R. 913, 968, 70 S. W. 668.

53. State v. Eagan, 115 Wis. 417.

54. Not authorized to select party names for candidates or determine which of two party names should be used for the party candidates—Lind v. Scott, 87 Minn. 226. Where names of candidates for state and judicial district offices are certified to the county auditor by the secretary of state, his duties as to preparing the official ballots become ministerial—Miller v. Davenport (Idaho) 70 Pac. 610.

Where a rate per thousand is established as compensation for printing ballots, the printer cannot charge the county the full price for a thousand ballots for a fraction furnished townships, but there can be but one fractional charge.[56]

Use of party name.—A substantial number of persons having an organization, a committee, distinct views and teachings, is a political party.[57] Party names must be distinct.[58] A factional dispute may give each of two candidates the right to the use of the party name.[59] Under the primary election law of Minnesota, a party which has made no nomination at the primary election cannot have a candidate placed with other candidates so nominated on the ticket under a party name;[60] but it does not lose the exclusive right to its party name on the state ticket by the failure to poll enough votes to go on the official ballot by nominations in convention; it may nominate by petition.[61]

§ 5. *Primary elections.*—Primary elections are subject to regulation under the police power of the state.[62] They must be held in accordance with the statute applicable thereto,[63] and in Minnesota are not prescribed for nominations of state officers,[64] but in Kentucky they are.[65]

Control by party committees.—Primary election laws usually intrust the calling of elections to the party governing committees[66] subject to statutory limitations on their mode of action.[67] A power to the state committee to count the votes cast at

55. Against the county auditor to restrain insertion of the name of a candidate for district judge on an official ballot, the nomination being duly certified to the secretary of state and by him to the auditor—Miller v. Davenport (Idaho) 70 Pac. 610.

56. Gen. St. 1901, § 2708—Honey v. Board of Commissioners, 65 Kan. 428, 70 Pac. 333.

57. The Socialist labor party is a political party within such definition in Minnesota though compelled to make its nominations by petition having failed to cast a statutory percent of the total vote at a preceding general election—Davidson v. Hanson, 87 Minn. 211.

58. "Social Democratic Party," held to conflict with "Democratic party" (Gen. Laws 1901, c. 312)—Lind v. Scott, 87 Minn. 226.

59. Nomination for registrar of voters was made by a special convention of the city committee and holders of certain designated offices in a town, and later by the voters at a primary election, held under a statute then first going into effect, and it was held that though the chairman of the town committee refused to recognize the latter nominee, such nominee was entitled to have ballots issued by him containing his name as a candidate for the office under the title of the party name counted—Flanagan v. Hynes, 75 Conn. 584.

60. Laws 1899, c. 349, § 25, as amended by laws 1901, c. 216, § 9—State v. Scott, 87 Minn. 313.

61. Gen. Laws 1901, c. 312—Davidson v. Hanson, 87 Minn. 211.

62. Hopper v. Stack (N. J. Sup.) 56 Atl. 1.

Validity of Statutes. Such laws are not rendered special by the fact that they apply only to fall elections (Hopper v. Stack [N. J. Sup.] 56 Atl. 1); or by the fact that they provide that candidates to be voted for by a single ward or township shall be nominated directly without intervention of delegates, while those to be elected by more than one ward or township shall be nominated by delegates in party conventions (Act April 14th, 1903, Pub. Laws, 1903, p. 603)—Id.

Laws 1899, c. 27 not being an amendment but only indirectly affecting general election law does not violate provisions regarding amendments—De France v. Harmer (Neb.) 92 N. W. 159. Act held not obnoxious to provision against adoption of other acts without setting them out—Hopper v. Stack (N. J. Sup.) 56 Atl. 1.

The voter may be required, if challenged, to make affidavit that at the last general election at which he voted, he voted for a majority of the candidates of the party with which he is proposing to act, without infringing his constitutional rights—Id.

63. Ky. St. art. 12—Young v. Beckham, 24 Ky. L. R. 2135, 72 S. W. 1092.

64. Such nominations are by convention—Davidson v. Hanson, 87 Minn. 211, construing statutes.

65. Ky. St. art. 12, §§ 1550, 1565—Young v. Beckham, 24 Ky. L. R. 2135, 72 S. W. 1092.

66. When called under such statutory provisions they cannot be enjoined (Ky. St. art. 12, c. 41)—Meacham v. Young, 24 Ky. L. R. 2141, 72 S. W. 1094. State committee denied power to prevent primary called regularly by local committee or to remove local committeemen and appoint new committee for that end—Neal v. Young, 25 Ky. L. R. 183, 75 S. W. 1082. Interference by state committee enjoined—Id. Governing committee cannot question the eligibility of a candidate before the primary and refuse to place his name on the ballot—Young v. Beckham, 24 Ky. L. R. 2135, 72 S. W. 1092.

67. A statute providing that rules shall not be amended except on reasonable notice, does not apply to rules adopted by the first meeting of a county general committee changing the rules of the preceding year. (Primary Election Law, Laws 1898, p. 336, c. 179 as amended by Laws 1899, p. 968, c. 473, subd. 2)—People v. Democratic General Committee, 82 App. Div. (N. Y.) 173. And a rule

a primary election for state officers will be read into a statute which authorizes the committee to call the convention and authorizes local committee to count the vote and certify the nominations for local officers.[68] Redress must be first sought from the committee before mandamus or certiorari will lie to review its action.[69]

Ballots for primaries.—"Primaries" are not "elections" which require a ballot with blank spaces for writing in names.[70]

Review and contest of primary.—A statutory power to review the action or neglect of public officers with regard to rights or duties prescribed by a primary law is confined to the subject-matter of the act.[71] Where the board of canvassers is given authority to hear and determine all questions concerning the counting of ballots cast in a party caucus for nomination, they are entitled to throw out the entire vote and refuse to certify any nomination, where the ballots evidence fraud.[72]

A notice of intention to contest is not sufficient to require a recount.[73] A petition for an injunction to compel a party committee to recount the ballots of a primary election must allege wrong doing or mistake on the part of the committee or election officers.[74]

§ 6. *Officers of election.*—An officer appointed by a committee under statute to police an election draws his authority from the statute and not from the committee and may use force in arresting a violator of the election law.[75] Compensation provided the officers for local elections is not necessarily affected by consolidation of the local elections with general elections.[76]

§ 7. *Polling the vote.*—An election actually held may be valid despite an officer's refusal to open the polls.[77]

Election courts.—A mere desire of election officers to have a means of advice as to legal rights or duties will not require a judge to be deputed under the Pennsylvania law to hold a special election court.[78]

§ 8. *Irregularity and ambiguity in ballot.*—The right of the elector to have his vote cast and counted should be protected from fraud or mistake of the election officers by every possible safe-guard,[79] but omission of mandatory requirements is

there adopted controls acts performed at that time, though it later may become ineffective on account of failure to file a certificate thereof as required by statute—Id.

68. Ky. St. art. 12, §§ 1563, 1565—Young v. Beckham, 24 Ky. L. R. 2135, 72 S. W. 1092.

69. Mandamus will not issue to compel the recognition of an unnamed person as member of the general committee of a party, if such person has never applied for, or been refused recognition, though by the statute summary jurisdiction is given to review the actions or neglect of the officers or members of a political convention committee—People v. Democratic General Committee, 82 App. Div. (N. Y.) 173.

70. Minnesota Const. art. 7—State v. Johnson, 87 Minn. 221.

71. Under Laws 1899, p. 995, c. 473, § 11, a justice of the supreme court cannot review the neglect of the mayor of a city in appointing election officers under a power conferred by laws 1896, p. 900, c. 909, § 12, as amended by laws 1901, p. 232, c. 95—McShane v. Murphy, 86 App. Div. (N. Y.) 566.

72. Cannon v. Board of Canvassers, 24 R. I. 473.

73, 74. Henry v. Secrest, 24 Ky. L. R. 1505, 71 S. W. 892.

75. Primary election sheriff—Ryan v. Quinn, 24 Ky. L. R. 1513, 71 S. W. 872.

76. Pub. Laws 1901, p. 41, does not affect compensation allowed by act March 22, 1901 for duties connected with charter elections in certain cities—Bennett v. City of Orange (N. J. Law) 54 Atl. 249.

77. His act did not disfranchise the electors since they had the right to elect a moderator in his place and proceed with the annual town election—Hoxsie v. Edwards, 24 R. I. 338.

78. In re Election Court, 204 Pa. 92.

79. State v. Falk (Minn.) 94 N. W. 879. **Defects held not material:** Failure to initial ballots (Construing Beaumont City Charter) —King v. State (Tex. Civ. App.) 70 S. W. 1019. A. Schr. placed on a ballot as the initials of a judge Anthony Schriver—Coulehan v. White, 95 Md. 703. Failure of clerk to sign ballots and use of the words "Hotel Lancaster" in place of his name "George D. Lancaster"—Bates v. Crumbaugh, 24 Ky. L. R. 1205, 71 S. W. 75. The fact that the judge's initials are placed on a portion of the ballot which is torn off before it is deposited. It will be presumed that all the ballots deposited were official, where one judge put on the initials and another judge accepted the ballots and placed them in the box. Construing Gen. Pub. Laws, art. 23, § 61, as amended by acts 1901, c. 2—Coulehan v. White, 95 Md. 703.

fatal whether from fraud, mistake, or irregularity.[80] Such statutes are regarded as constitutional and valid, though by their application the rejection of a few honestly voted ballots is necessitated.[81]

The marks must at least substantially conform to the statutes, applications whereof are noted below.[82] The voter's choice must be indicated.[83]

After marking in the circle indicating a desire to vote a straight ticket, the voter does not entirely invalidate his ballot by digressing into other columns.[84] Unofficial ballots authorized in case of failure to provide official ones may be counted though not regularly marked.[85]

The writing in of names is also controlled by statute, the intent of the voter being given great weight.[86] The rule as to the effect of writing in a name already printed on the ballot varies.[87] Where the voter is required to return a spoiled ballot and receive another, a ballot bearing attempted *erasures* may be rejected.[88]

80. Code 1899, c. 3, §§ 36, 66, require the rejection of any ballots not signed by clerk—Kirkpatrick v. Board of Canvassers (W. Va.) 44 S. E. 465. Ballots on which the names of both poll clerks are written by one of them or by some other person are void—Id. In an election for city officers in Missouri in a city which comes under the registration act, a ballot on which the registration number of the person casting the ballot is not indorsed cannot be counted (Rev. St. 1899, § 6995, is not repealed by the act of 1891, § 11)—Donnell v. Lee (Mo. App.) 73 S. W. 997.

81. Kirkpatrick v. Board of Canvassers (W. Va.) 44 S. E. 465.

82. May be marked in blue pencil—Coulehan v. White, 95 Md. 703. By express consent of an opponent, a ballot bearing a candidate's name in blue pencil may be counted, though the statute provides that all marks must be in black (Rev. St. §§ 2966, 35)—State v. Conser, 24 Ohio Circ. R. 270. Need not be in the shape of a cross (Coulehan v. White, 95 Md. 703); but the action of the court below in rejecting ballots marked with a straight line instead of a cross has been sustained—People v. Campbell, 138 Cal. 11, 70 Pac. 918.

83. Where mark is opposite a blank space following the name of a candidate, it cannot be counted for such candidate. Rev. St. c. 11, § 238, provides that the ballot shall not be counted if the voter's choice cannot be determined—Flanders v. Roberts, 182 Mass. 524. Erasure of a cross mark invalidates the ballot—Coulehan v. White, 95 Md. 703.

84. A ballot marked in the circle at the head of the ticket and with crosses after the names of candidates on other tickets, will be counted for all candidates under the marked circle, except for those offices as to which marks have been placed after the names of candidates on other tickets. Ballot marked in two circles and with a cross in the square opposite the name of one candidate under one of such circles, will be counted for the candidate after whose name he has placed the cross only—Edwards v. Logan, 24 Ky. L. R. 1099, 70 S. W. 852; Id., 75 S. W. 257.

A cross in the circle under the device of a regular party and also under the device of an independent candidate, will not cause the ballot to be rejected, but where there are three sets of candidates, if a cross is placed in two of the circles, it is fatal—Bates v. Crumbaugh, 24 Ky. L. R. 1205, 71 S. W. 75. If the ballot is marked in the circle under a party device and also under the device of an individual, independent candidate, it should be counted for the independent candidate and not for the candidate for the corresponding office on the party ticket, the independent candidate being the only one under the individual device—Little v. Hall, 24 Ky. L. R. 1060, 70 S. W. 642. If after marking the circle at the head of the ticket the voter makes a cross in the square opposite the single candidate on the other ticket, the vote should be counted for such candidate for that office, and as to the other offices for the party candidates under the circle which is crossed—Bates v. Crumbaugh, 24 Ky. L. R. 1205, 71 S. W. 75. Where the ballots are unmistakably marked for one party, the fact that there is an apparently fraudulent mark in the circle at the top of another ticket will not prevent the ballot being counted for the first party—Id.

85. No crosses—In re Hammond (R. I.) 52 Atl. 1079 (This was a town election).

86. The voter must not make a cross after the name which he so writes (Pol. Code, § 1205)—People v. Campbell, 138 Cal. 11, 70 Pac. 918. The writing of the name of a candidate in a blank under a printed designation of an office is under the Ohio law effective as a vote for such person for such office—State v. Conser, 24 Ohio Circ. R. 270. Name may be written beneath the line—People v. Campbell, 138 Cal. 11, 70 Pac. 918.

In Wisconsin, if a name is written on a ballot on which there is a printed name for such office, it will be counted for the written name; though Rev. St. 1898, § 799 provides that no ballot shall contain a greater number of names for any office than there are persons to be chosen—State v. Eagan, 115 Wis. 417.

87. A ballot with a cross placed under the party emblem or name from which the name of a candidate is erased, and the name of the candidate appearing on the opposite ticket written in should not be counted in favor of the opposite candidate (Pub. Acts 1901, p. 26, No. 214)—People v. Byers (Mich.) 97 N. W. 51. Where the name of an opposing candidate is written partly over the name of the candidate and a pencil line drawn through the name of the latter, it must be counted in favor of the name written, if the statute provides that ballots shall not be rejected for technical errors not making it impossible to determine the voter's choice;

§ 9. *Distinguishing marks on ballot.*—The intent of the voter must be determined by an inspection of the ballot and the existence of marks by which it may be identified irrespective of any conjecture as to the purpose or circumstances under which the mark was made.[89]

§ 10. *Count, canvas, and return.*—In determining a plurality the voter's choice for precedence is not material.[90]

Return.—It is not necessary in New York to return the number of votes cast by each of several parties for a common candidate.[91] An officer's refusal to sign a return does not invalidate the election.[92] An election certificate carries a presumption that proper canvass of the vote was had before the certificate was issued, and that the canvassing officers determined that the persons returned were duly elected.[93]

Recount.—A power to canvass returns does not confer authority to canvass ballots.[94] A recanvass should be restricted to ballots objected to.[95] A candidate does not waive the right to object to the legality of a recount by his presence thereat.[96]

Performance of purely ministerial duties concerning elections may be compelled by mandamus.[97]

and though no cross mark was under the written name Rev. St. §§ 2966, 2935—State v. Conser, 24 Ohio Circ. R. 270. Pol. Code. § 1205—People v. Campbell, 138 Cal. 11, 70 Pac. 918. The voters must not write a name in the blank left for candidates for certain offices, where such name is printed as a candidate for such office.

88. Pol. Code, § 1207—People v. Campbell, 138 Cal. 11, 70 Pac. 918.

89. People v. Campbell, 138 Cal. 11, 70 Pac. 918. **Marks regarded as distinguishing:** Double cross; cross after words "no nomination;" blot on margin; hole caused by erasure of stamp mark; cross inside a column; cross after words "for electors;" cross against the printed names for presidential electors, and nine names written for electors in the blank column; "William McKinley" or "McKinley" written in the blank column; letter A. No. 14; three lines forming a star—Coulehan v. White, 95 Md. 703.

Not distinguishing: An S. shaped mark resulting from an offset on folding of the ballot after it was placed in the hands of the board; "Wm. McKinley" written in blank column and no crosses against names of presidential electors (People v. Campbell, 138 Cal. 11, 70 Pac. 918); extending the cross slightly beyond the square; deficiency in the leg of a cross; ending arms of cross in curls; repetition of pencil strokes making cross (Coulehan v. White, 95 Md. 703); blurred figures or irregular black marks in the circle (Bates v. Crumbaugh, 24 Ky. L. R. 1205, 71 S. W. 75; ink blots on the back (Bates v. Crumbaugh, 24 Ky. L. R. 1205, 71 S. W. 75; Coulehan v. White, 95 Md. 703).

In the absence of statute the voter may make a cross in two of the circles at the head of the ticket, if by so doing he does not vote for two candidates, and such will not be regarded as a distinguishing mark if made in good faith. Ky. St. § 1471, provides that ballots shall not be rejected for technical errors, unless it is impossible to determine the voter's choice—Herndon v. Farmer, 24 Ky. L. R. 1045, 70 S. W. 632.

90. Statute read, that of the persons elected selectmen, the person first named on the plurality of the ballots cast for them or any of them shall be the first selectman. Contestant lacked a plurality without resort to votes on which he was not named first—Buck v. Barnes, 75 Conn. 460.

91. Construing election law, Laws 1896, c. 909, §§ 84, 110, 111, 131—People v. Board of County Canvassers, 79 App. Div. (N. Y.) 514.

92. Signature by the clerk after the judge's refusal on account of the reception of two votes after closing of the polls is sufficient—Collins v. Masden, 25 Ky. L. R. 81, 74 S. W. 720. Not invalidated by failure to sign at the proper time, where the ballots do not appear to have been tampered with, and correspond to the count returned—Bates v. Crumbaugh, 24 Ky. L. R. 1205, 71 S. W. 75.

93. State v. Kersten (Wis.) 95 N. W. 120.

94. Rev. St. c. 24, § 57, conferring authority on the board of trustees of villages to canvass returns of village elections—Holt v. People, 102 Ill. App. 276. In Nevada the board of county commissioners may recount the votes though it has canvassed and declared the election returns and given a certificate of election to a legislator (Comp Laws 1900, § 2116)—Wright v. Board of Com'rs (Nev.) 71 Pac. 145.

95. Election law, § 114; Laws 1896, c. 109, authorizes a judicial investigation of ballots objected to as illegal (In this case there was no claim that the number of votes shown by the tally sheet did not correspond to the number shown by the poll books)—In re Brush, 171 N. Y. 694.

96. Fritz v. Crean, 182 Mass. 433.

97. Mayor of a city may be compelled to certify the returns of the commissioners of election, where it is provided that such commissioners shall be appointed, and that after the close of the polls they shall ascertain the result of the election in the presence of the mayor who shall certify with the election officers to the returns—Bourgeois v. Fairchild (Miss.) 33 So. 495. Duty of registrars of voters making recount under Rev. Laws, c. 11, § 267, to reject certain defective ballots and make a statement of the result of a re-count then made held ministerial—Flanders v. Roberts, 182 Mass. 524.

A letter of a board of canvassers stating its decision not to certify the result of a re-

§ 11. *Review by court.*[98] *Right and remedies.*—The right to contest an election for fraud or mistake is not to be repealed or curtailed by inference from subsequent statutes,[99] and a remedy by legislative contest of election of a member is not a bar to other remedies for securing a review of the election.[1] Mandamus and certiorari cannot both be maintained.[2]

Failure of a candidate to object to the rejection of certain ballots in his presence at the first count does not estop him from contesting the election.[3] Error in receiving a ballot may be offset by receiving similar ballots for the opposing candidate.[4]

Jurisdiction and judicial inquiry under statutes creating special remedies or conferring special jurisdiction are limited by terms of the statutes.[5]

Pleadings and issues.—General statements or averments of illegality or irregularities are insufficient.[6] An amendment setting up new grounds of contest after the expiration of the period for contest will not render the entire petition liable to be stricken out.[7] Time for filing responsive pleadings as fixed in the statute is man-

count because it was convinced of intrinsic fraud is a judicial determination that all ballots should be rejected, and not a refusal to perform a ministerial duty of certifying the result of a re-count. And a declaration by the chairman of the board that one had received a plurality of the votes, being not an official finding does not render the issuance of a certificate merely ministerial—Cannon v. Board of Canvassers, 24 R. I. 473.

It will not lie to control purely political and governmental functions, unless there is a refusal to act in any manner—Orman v. People (Colo. App.) 71 Pac. 430. It lies to compel officers to declare the result of an election and to notify the parties shown to be elected—Holt v. People, 102 Ill. App. 276.

Nor will it lie to compel a board to perform acts not within its power. Under Gen. St. 1901, §§ 2587, 2590, requiring the board to open the returns, determine their regularity and genuineness, make the footing and declare the result, it cannot be required to re-canvass returns and exclude certain votes as cast and return under a law which is claimed to be unconstitutional—Sharpless v. Buckles, 65 Kan. 838, 70 Pac. 886.

98. See States, Municipal Corporations, Officers and kindred titles for review of qualification of members of representative bodies such as State Legislatures, city and town councils, etc., by the bodies to which they are elected.

99. State v. Conser, 24 Ohio Circ. R. 270.

1. Does not prevent a recount before the county commissioner under Comp. Laws 1900, § 2116—Wright v. Board of Com'rs (Nev.) 71 Pac. 145.

2. Review of re-count authorized by Rev. St. c. 11, § 267—Flanders v. Roberts, 182 Mass. 524.

3. State v. Conser, 24 Ohio Circ. R. 270.

4. People v. Campbell, 138 Cal. 11, 70 Pac. 918.

5. The action of the judge of a township election in rejecting and destroying ballots may be reviewed on a contest of the election (Rev. St. §§ 2966, 13)—State v. Conser, 24 Ohio Circ. R. 270. Summary process provided for the contesting of the election of selectmen may be invoked for the determination of the question of which selectman is to be first selectman—Buck v. Barnes, 75 Conn. 460. By statute in certain states the circuit court is entitled to declare that there is no election where there has been such fraud, intimidation, bribery or violence, that neither contestant nor contestee may be adjudged fairly elected (Laws, Extra Sess. 1900, c. 5, § 12)—Stewart v. Rose, 24 Ky. L. R. 1759, 72 S. W. 271. A county court in Illinois has no authority to entertain a contest of an election for the office of president of an incorporated town existing under a special charter. He is not by the fact that he is ex-officio of the board of county supervisors rendered a county officer within the meaning of Rev. St. 1874, p. 464, giving the county court jurisdiction of contests as regards county officers; jurisdiction rests in the circuit court under the mandatory act of 1895, § 97—King v. Jordan, 198 Ill. 457. In Massachusetts, the supreme judicial court may correct errors of law in the count by the registers, if such errors appear on the face of the papers. Rev. Laws, c. 11, § 267 does not remove such power—Flanders v. Roberts, 182 Mass. 524.

Where there is a tie vote a justice of the supreme court on a re-count in certiorari cannot make an order revoking the certificate of the canvassing board, since no person has received a majority on which alone the power rests to revoke the certificate (Pub. Laws 1898, p. 311, § 160)—Kehoe v. Stagmeier (N. J. Law) 56 Atl. 252.

6. Paulk v. Lee, 117 Ga. 6. Petition asserting that the county canvassing board made grave errors and that owing to one etc., it was easy to make mistakes to the injury of plaintiff, too general (Election law of October 24, 1900)—Edwards v. Logan, 24 Ky. L. R. 678, 69 S. W. 800. Specifications alleging that certain legal ballots were cast for contestant which were not counted, and that there were certain ballots counted for contestee that were so marked, mutilated or defective as to render them void, are not sufficient without a charge that the illegal ballots counted for contestee, or the legal ballots not counted for contestant were protested, and it is also not charged that any of such ballots were preserved and returned to the clerk of the circuit court—Hall v. Campbell (Ind.) 68 N. E. 892.

7. Motion to strike should be limited to the new ground of contest—Southerland v. Sandlin (Fla.) 32 So. 786.

datory, unless good cause is shown.[8] Rules as to pleadings in general are not controlling.[9] An answer which sets up counter grounds of a contest need not be styled a counterclaim.[10] It may be set up in an amended answer that ballots had been altered and that there had been an opportunity for such alteration, such matter not being regarded as ground of a counter contest.[11] Judgment cannot be rendered for the contestee on the striking of the contestant's reply to counter grounds, where though the answer is taken as true, the contestant might recover on proof of his petition.[12] The fact that an assignment of grounds of contest of an election is dismissed on motion for insufficiency of statement of facts is harmless, though the proper way of contesting the sufficiency of such specifications is by demurrer.[13] Only the issues made up within the time limited by the statute may be passed on together with proof filed within such time.[14]

Dismissal.—An election contest may be dismissed by the contestant at any time before issue is joined, and until such dismissal is set aside, another party cannot intervene and be substituted as a contestant; nor can the dismissal be set aside without notice to contestant.[15]

Preservation and production of ballots.—The United States district court may require the ballots cast for a congressman to be preserved, where they would be destroyed under a state law before they could be used as evidence on an election contest, and a showing that they are desired as evidence is sufficient to support an order, though the issues as to the contest are not made up so as to authorize the taking of testimony.[16]

Secrecy of the ballot may forbid its production in court to be made a matter of record.[17]

Evidence.—The rules of evidence applicable to contests involving property rights are applicable to election contests.[18] Where ballots have been in the custody of one of the parties in ballot boxes which were susceptible of entry, they are not admissible until it is shown that they have not been tampered with and are the ones cast.[19] Decisions as to sufficiency are noticed in the foot notes.[20]

8. Other matters demanding counsel's special attention are not a sufficient excuse—Preston v. Price, 24 Ky. L. R. 1090, 70 S. W. 623. The day on which summons is served is included in the twenty days allowed for answer by the contestee under Election Law, Extra Session, 1900, § 12—Combs v. Eversole, 24 Ky. L. R. 1063, 70 S. W. 638.

9. Notice of filing answer is needless—Preston v. Price, 24 Ky. L. R. 1090, 70 S. W. 623.

10. Preston v. Price, 24 Ky. L. R. 1090, 70 S. W. 623.

11. Edwards v. Logan, 24 Ky. L. R. 1099, 70 S. W. 852; Id., 75 S. W. 257.

12. Contestant alleged an irregularity affecting 200 votes for the contestee. The contestee set up counter grounds as to 40 or 50 of the contestant's votes—Preston v. Price, 24 Ky. L. R. 1090, 70 S. W. 623.

13. Hall v. Campbell (Ind.) 68 N. E. 892.

14. Edwards v. Logan, 24 Ky. L. R. 678, 69 S. W. 800.

15. The court moots the question of whether such a dismissal can be set aside—Moore v. Waddington (Neb.) 96 N. W. 279.

16. Rev. St. §§ 109, 123—In re Howell, 119 Fed. 465.

17. Order to custodian to produce ballots held void—Donnell v. Lee (Mo. App.) 73 S. W. 997.

18. Bates v. Crumbaugh, 24 Ky. L. R. 1205, 71 S. W. 75. Idiot may testify how he voted—Edwards v. Logan, 24 Ky. L. R. 1099, 70 S. W. 852; Id., 75 S. W. 257. Ballots need not be produced and proved within the time provided by statute for the taking of proof in the case—Id. School census not admissible to show minority of voters—Id.

19. Edwards v. Logan, 24 Ky. L. R. 1099, 70 S. W. 852; Id., 75 S. W. 257.

On a recount, it will be presumed that a torn ballot was damaged after consideration by the officer, it having been counted. Ballot marked under the Republican device which is torn on the side should be counted for the Republican candidates—Bates v. Crumbaugh, 24 Ky. L. R. 1205, 71 S. W. 75.

20. To warrant declaring an election void on the ground that neither party could be adjudged fairly elected—Stewart v. Rose, 24 Ky. L. R. 1759, 72 S. W. 271. Evidence of previous party affiliation is not sufficient to show the way in which an insane person voted so as to authorize the deduction of his vote from the candidate of that party, and if there is evidence that he has made conflicting statements as to the way in which he voted, his ballots should not be deducted—Edwards v. Logan, 24 Ky. L. R. 1099, 70 S. W. 852; Id., 75 S. W. 257. Facts held to justify the throwing out of the vote of a precinct on the ground of the misconduct of the officers in the manner in which the

Recount of ballots.—Where the ballots have been tampered with, a recount will not be ordered.[21] If the election officers are required to furnish with disputed ballots a statement as to whether they have or have not been counted, and if counted, what part, and for whom, such statement is essential to the consideration of such ballots on a contest.[22] In Kentucky, commissioners for a recount of the ballots must allow the presence of the interested parties and their representatives.[23]

Decision and review thereof.[24]—The judgment concludes only the facts involved.[25] Where a justice of the supreme court has not exceeded his jurisdiction, his order made in a recount cannot be reviewed on certiorari.[26] Objections not raised below cannot be considered on appeal.[27]

The appellate court will adopt findings of fact when there is any substantial evidence in support.[28] Evidence to influence or control discretion or findings of the lower court must be on the record,[29] and where a finding of fact is silent as to the legality of ballots, the party having the burden will be deemed to have failed in respect to the facts.[30]

Security.—A bond conditioned for the payment of costs and damages may be made a condition precedent to the right of appeal, in which case a supersedeas bond in the court of appeals is not sufficient.[31]

§ 12. *Offenses against election laws.*[32]—The congress of the United States has no power to punish bribery or intimidation at elections other than those in which the nation is directly interested, or in which some mandate of the national constitution is disobeyed.[33] A statute against "repeating" by voters in certain cities is

voting was allowed to be carried on and in the count—Combs v. Eversole, 24 Ky. L. R. 1063, 70 S. W. 638.

21. Application to set aside the canvass by the town board of election on questions submitted under the liquor tax law in which it appeared that the town clerk's office had been entered and the ballot box opened before the application for a setting aside of the returns—In re Bertrend, 40 Misc. (N. Y.) 536.

22. Acts Gen. Assembly 1900, Extra Sess. p. 18, § 10. It is not sufficient to state on the back of each ballot "not counted, questioned, W. H. Hack"—Edwards v. Logan, 24 Ky. L. R. 1099, 70 S. W. 852; Id., 75 S. W. 257.

23. Edwards v. Logan, 24 Ky. L. R. 1099, 70 S. W. 852; Id., 75 S. W. 257.

24. See, also, Appeal and Review; Certiorari.

25. A judgment establishing the invalidity of an election attempted to be made at a general election does not conclude the same parties as to the power to make election at a subsequent general election, though there have been no changes in the law relating to such elections—State v. Moores (Neb.) 96 N. W. 1011.

26. Re-count under Election Law, Pub. L. 1898, p. 310, 311, §§ 159, 160—Kehoe v. Stagmeier (N. J. Law) 56 Atl. 252.

27. That a name was unauthorized because also printed on a ballot, that a cross was marked after the words "no nomination" —People v. Campbell, 138 Cal. 11, 70 Pac. 918.

28. Donnell v. Lee (Mo. App.) 73 S. W. 997. A jury finding that the ballots counted by the board of canvassers were the same as those voted will not be reviewed—Attorney-General v. Campbell (Mich.) 92 N. W. 787.

29. Refusal to set aside dismissal sustained on silent record—Moore v. Waddington (Neb.) 96 N. W. 279.

Attaching the original ballots to the findings and calling them exhibits is not a sufficient preservation of the evidence to allow the findings of the trial court as to the legality of the ballots to be reviewed—Bolton v. Clark (Ind.) 68 N. E. 283. The ballots are not a part of the record where it does not appear that they were ever filed, were in proof or received from the custody of the proper officer—Edwards v. Logan, 24 Ky. L. R. 678, 69 S. W. 800.

In some states they cannot become a part of the record—Donnell v. Lee (Mo. App.) 73 S. W. 997.

30. Bolton v. Clark (Ind.) 68 N. E. 283.

31. Acts Extra Session 1900, p. 40, § 12—Patterson v. Davis, 24 Ky. L. R. 842, 70 S. W. 47. The bond need not be signed by appellants. Acts Extra Session, 1900, p. 40, c. 5, § 12 provides that either party may appeal by giving bond to the clerk of the circuit court with good surety conditioned for the payment of all costs and damages—Keller v. Ferguson, 24 Ky. L. R. 2012, 73 S. W. 785.

32. In Massachusetts, since selling of a vote is not made a crime by statute, though punishments are provided for the giving of bribes, the common law making such selling of a vote a crime, will be regarded to be superseded, and a charge that plaintiff sold his vote is not slanderous—Doyle v. Kirby (Mass.) 68 N. E. 843.

33. Revised statutes of the United States, section 5507, punishing bribery, cannot be by the courts changed to fit particular transactions which congress might have legislated for—James v. Bowman, 190 U. S. 127. A statute of the United States punishing persons who by means of bribery or threats pre-

unconstitutional as punishing an offense punishable by a general law.[34] A statute punishing bribery and fraud at nominating elections applies only to bribery in nomination of candidates and not to the election of party officers.[35] A judge of election need not himself have made an alteration in the returns to render him liable for making a false return.[36] An offer of money to a member of an election board at a primary election to secure the casting and counting of the ward's vote for a certain person for county chairman is within a statute punishing any endeavor to influence a member of a county or executive committee of any party, a judge or clerk of any return board in the discharge, performance or nonperformance of any act, duty, or obligation pertaining to such office.[37] Going into a polling place to make inquiries or to remonstrate is not "remaining" within a prohibited distance of the polls.[38]

Special election courts.—Where the judge sits on election day for the purpose of hearing questions arising from breach of the peace and illegal acts of election officers, he sits as a committing magistrate, and not only courts of record but each judge has the power to issue warrants for election fraud, if the constitution provides that election officers shall be privileged from arrest, save on warrant of the court of record or judge thereof.[39]

The indictment need not negative the exceptions to the statute.[40] Different counts charging various acts all committed to secure the election of defendant to a particular office may be joined.[41] An indictment of an election judge under the Pennsylvania law for making false returns of a primary election need not aver that defendant was sworn as a judge.[42]

Questions for jury.—On a prosecution for false personation of an elector, the jury should not be left to determine whether the person personated was in law an elector.[43]

ELECTION OF REMEDIES AND RIGHTS.

§ 1. *Election of remedies.*—Any one of several proper remedies may be chosen which the circumstances will support.[44] The right of a seller of personalty to elect

vent the exercise of the right to suffrage guaranteed by the 15th amendment to the constitution, cannot be sustained on the ground that it is an exercise of the power granted to congress by the 15th amendment to prevent action by the state through some one or more of its official representatives, and an indictment which charges no discrimination on account of race, color or previous condition of servitude, is also destitute of support by the 15th amendment—Id.

34. Rev. St. 1899, § 7261 as to repeating in different "precincts" relates to the same offense as § 2114 against repeating in different "places"—State v. Anslinger, 171 Mo. 600.

35. Act June 8, 1881, Pub. Laws, 70, will not sustain an indictment alleging that defendant offered bribes to secure votes for himself for the office of county chairman at a primary election—Commonwealth v. Gouger, 21 Pa. Super. Ct. 217.

36. Votes at a primary election properly cast and counted but the returns altered after certification by the election officers—Commonwealth v. Hafer, 22 Pa. Super. Ct. 107.

37. Act June 8, 1881, § 6—Commonwealth v. Gouger, 21 Pa. Super. Ct. 217.

38. Ryan v. Quinn, 24 Ky. L. R. 1513, 71 S. W. 872.

39. Const. art. 8, § 14—In re Election Court, 204 Pa. 92.

40. Under Pen. Code, § 342, an indictment for carrying a pistol at an election precinct need not allege that defendant was not "a sheriff, deputy sheriff or other arresting officer acting in the discharge of his duty"—Kitchens v. State, 116 Ga. 847.

41. Commonwealth v. Gouger, 21 Pa. Super. Ct. 217.

42. Act June 29, 1881, P. L. 128—Commonwealth v. Hafer, 22 Pa. Super. Ct. 107.

43. A prima facie case is made out under such statute (Rev. Sts. 1899, § 7261) by the showing of an attempt to vote in the name of an adult foreign born citizen, the register of votes showing that such person had taken out naturalization papers—State v. Hardelein, 169 Mo. 579.

44. Conversion may be waived and suit brought on an implied promise to pay. Market value at time of conversion may be recovered—Hirsch v. Leatherbee Lumber Co. (N. J. Law) 55 Atl. 645. When a portion of the soil is removed from land the owner may recover its value as personalty instead of for the trespass on the realty—Hunt v. Boston (Mass.) 67 N. E. 244. In an action by a tenant for nuisance he may elect to have his damages measured by the depreciation in the rental value of the premises as a whole

between various remedies on insolvency of the buyer is not controlled by any consideration of the buyer's interests.[45] On breach of an entire contract of employment for a stated time, the employe may rescind and sue on a quantum meruit or bring an action for damages.[46] Action may be brought against an undisclosed principal on discovery, or against the agent.[47]

To require election remedies must be inconsistent,[48] and co-existent.[49]

Making election and effect thereof.—A participation in a proceeding shows an election against an inconsistent remedy.[50] Facts essential to an intelligent choice of procedure must be known.[51] Mistake as to remedy does not prevent a subsequent

or by the loss in the usable value of the premises—Hoffman v. Edison Elec. Illuminating Co., 87 App. Div. (N. Y.) 371.

On breach of agreement by landlord to repair action may be contract or tort—Thompson v. Clemens, 96 Md. 196, 60 L. R. A. 580.

Sale of realty. On failure of title a purchaser of realty may abandon and sue for the purchase money, recover damages or proceed in equity for a rescission of the contract—Newberry v. Ruffin (Va.) 45 S. E. 733. Where a plea of limitations is sustained to an action by the vendor for the purchase price he may elect to sue for the land—Sanders v. Rawlings (Tex. Civ. App.) 77 S. W. 41. On conveyance to a third party by a vendor the vendee may seek a performance from the third party or resort to the vendor for damages and a refusal by the vendee to carry out the contract with the third person amounts to an election to pursue the vendor —Meyers v. Markham (Minn.) 96 N. W. 787.

45. Pratt v. Freeman & Sons Mfg. Co., 115 Wis. 648.

46. Action to recover a month's salary under an employment at $1,000 per year amounts to an election preventing recovery for other damages—Ornstein v. Yahe & L. Drug Co. (Wis.) 96 N. W. 826. A contract for work and labor, the performance of which is prevented by the employer, may be abandoned by the employee and recovery had on a quantum meruit—Jenson v. Lee (Kan.) 73 Pac. 72. Where a promise and agreement to pay for plaintiff's services are alleged together with a promise to make compensation therefor by will or otherwise coupled with an allegation that defendant's decedent did make provision for payment by a deposit, such pleading does not show an election to proceed as if on a performance made by such act of deposit—Cooper v. Brooklyn Trust Co., 84 N. Y. Supp. 88.

47. Ware v. Long, 24 Ky. L. R. 696, 69 S. W. 797.

48. Held inconsistent. Attacking transfer and suing for consideration thereof and sharing therein as creditor of grantor. A creditor by election to sue for the consideration paid for a fraudulent transfer by a bankrupt and by acceptance of a dividend from the proceeds of the sale is estopped from seeking the land—McWilliams v. Thomas (Tex. Civ. App.) 74 S. W. 596. Action for possession or value and action for conversion (against executor)—Moran v. Morrill, 78 App. Div. (N. Y.) 440. Attachment for price and action for tort in fraudulent purchase—Ermeling v. Gibson Canning Co., 105 Ill. App. 196. Retaking of goods prevents action against purchaser for fraud—Bacon v. Moody, 117 Ga. 207. Defense of statute of frauds as against a contract which at the trial defendant admitted to be valid and sought to be relieved from certain stipulations therein contained—Graham v. Heinrich (Okl.) 74 Pac. 328. Action at law for breach carried to judgment prevents subsequent bill for specific performance—Slaughter v. La Compagnie Francaise Des Cables Telegraphiques (C. C. A.) 119 Fed. 588.

Election not required. Appeal from probate of a will and bill to charge trust on legatees and devisees—Spencer v. Spencer (R. I.) 55 Atl. 637. Action against a sheriff for false imprisonment and action for a penalty provided by statute on failure of the sheriff to keep an account of the labor done by a prisoner and pay to him any amount due on discharge (Pub. St. c. 282, § 20; Laws 1899, c. 31, §§ 1, 2)—Noyes v. Edgerly, 71 N. H. 500. Action at law on an insurance policy and suit for reformation of the policy—Lansing v. Commercial Union Assur. Co. (Neb.) 93 N. W. 756. Action by payee against executor of a co-payee to recover half the proceeds and action against one to whom the co-payee indorsed it without authority—Allen v. Corn Exch. Bank, 87 App. Div. (N. Y.) 335. Suit on a replevin bond given in sequestration and right to pursue the property or its value in the hands of a purchaser—Crawford v. Southern Rock Island Plow Co. (Tex. Civ. App.) 77 S. W. 280. Statutory provision (2 Ball. Ann. Codes & Sts. § 4487) for the cancellation of lis pendens is not exclusive of an action to cancel such lis pendens as a cloud on title as provided by 2 Ball. Ann. Codes & Sts. § 5521—King v. Branscheid (Wash.) 73 Pac. 668. Election is not required when suit is brought on a contract ordering goods and also on notes for the purchase price—Strickland v. Parlin (Ga.) 44 S. E. 997.

Action to set aside an assignment for creditors for fraud from which a creditor obtains no benefit is not a bar to a taking by the creditor under the assignment—In re Garver (N. Y.) 68 N. E. 667.

49. Action for money rent is not an election barring forcible entry and detainer, where at the time it was brought, the remedy of forcible detainer did not exist—Mark v. Schumann Piano Co., 105 Ill. App. 490.

50. The holder of an attachment lien who files a claim with a subsequently appointed receiver will be deemed to have elected to rely on the rights to be gained under the receivership—Mercantile Realty Co. v. Stetson (Iowa) 94 N. W. 859.

51. Pekin Plow Co. v. Wilson (Neb.) 92 N. W. 176; Noyes v. Edgerly, 71 N. H. 500.

Suit to set aside a conveyance in consideration of a sale induced by false statements of attaching creditors of the seller dismissed on discovery that creditors had no lien does

adoption of a proper remedy,[52] and the rule that having elected the party cannot pursue the other remedy does not cause a subsequent unsuccessful attempt to pursue such remedy to bar the right to pursue the remedy first elected.[53] Action dismissed without prejudice is not an election unless rights are affected.[54] Where two persons become severally liable, an action against one is not of necessity an election to pursue such person alone.[55]

The rules pertaining to election between counts are designed to secure singleness of issues and are relegated to appropriate titles.[56]

§ 2. *Election between rights and estates.*—The doctrine of election between rights is confined to narrow limits and cannot rest on a mere unfounded claim under a will.[57]

An acceptance of the will will not, in absence of statute, bar other rights not inconsistent.[58] There is no such inconsistency between the right of dower and the distributive share in personalty as to make the taking of one an exclusion of the other.[59] Heirs and devisees cannot assert a title hostile to their right of inheritance or to the will.[60] If the will directs payment of taxes and gives all the real estate to the wife, she cannot, if she claim under the will, assert a homestead exemption in the realty as against the husband's creditors, but the testator's children who take a remainder may claim a homestead therein during their unmarried minority.[61] Rights in hostility to a testamentary provision must be seasonably claimed,[62] and surviving spouses must renounce within such time as may be imposed by statute.[63]

not prevent a recovery of the goods sold against the attaching creditor—Garrett v. Farwell Co., 199 Ill. 436.

52. Hill v. Combs, 92 Mo. App. 242.

53. Acceptance of benefits from a railroad relief fund constitutes an election barring a right of action against the company for damages but a mistake in instituting such action does not affect the right to benefit from the relief fund which had become fixed—Chicago, etc., R. Co. v. Bigley (Neb.) 95 N. W. 344.

54. Another action not barred by an attachment dismissed without prejudice—First Nat. Bank v. Barse Live Stock Commission Co., 198 Ill. 232. See, also, Garrett v. Farwell Co., 199 Ill. 436.

55. Action against a grantee of mortgaged premises who assumed the mortgage to recover a personal judgment on the debt, not an election barring action against a prior grantee who also assumed the mortgage—Bossingham v. Syck, 118 Iowa, 192.

56. In civil cases, Pleading. In prosecutions for crime, Indictment, etc.

57. Does not apply to prevent a daughter from claiming under a conveyance from her mother though the daughter has claimed under her father's will where the mother discovering that she holds certain land by deed and not by the will conveys to the daughter —Parkey v. Ramsey (Tenn.) 76 S. W. 812.

58. Code 1873, § 2452—Kiefer v. Gillett (Iowa) 94 N. W. 270. A provision for joint occupancy of the realty by the wife and daughter, etc., held not inconsistent with dower—Id. In New York a widow cannot have dower in addition to a testamentary provision for payment to her of one-third of the income of the realty during the minority of the child, and on the termination of the trust for the child a conveyance of one-third of the realty itself—In re Gorden, 172 N. Y. 25, 11 Ann. Cas. 397. Where no provision is made for the widow by will except the creation of an annuity not stated to be in lieu of dower, the widow is not required to elect—Horstmann v. Flege, 172 N. Y. 381, 12 Ann. Cas. 163. Where there is nothing in the terms of the will to indicate an intention on the part of the testator to dispose of the widow's share of the community property, she is not put to an election—In re Wickersham's Estate, 138 Cal. 355, 70 Pac. 1076.

59. Though she take the value of dower in money (Rev. St. 1892, §§ 4176, 5964)—Hutchings v. Davis (Ohio) 67 N. E. 251. Rights under Civ. Code, §§ 228, 236, regarded as separate from rights under section 1852 —Dahlman v. Dahlman (Mont.) 72 Pac. 748.

60. Under statutes providing that a widow holding land through marriage shall not on re-marriage alienate such land so as to divert it from the children by the marriage through which the property came to her, the children by acceptance on their mother's death of the proceeds of property received by her in exchange for property which she conveyed to the second husband become barred from pursuing the property received through the first marriage—Pond v. Wood (Ind. App.) 69 N. E. 172. Election is not required in an action by a devisee to enforce specific performance of a contract to devise certain land as to whether complainant will take under the will or under the contract—Price v. Price (N. C.) 45 S. E. 855.

61. Kiesewetter v. Kress, 24 Ky. L. R. 1239, 70 S. W. 1065.

62. Election to take land in lieu of legacies must be made before the land is sold by the executor under a power—Hanbest v. Grayson (Pa.) 55 Atl. 786.

63. To be entitled to the year's support under Code 1883, § 2116, the widow must renounce the will and bring suit within six months from its probate—Perkins v. Brinkley (N. C.) 45 S. E. 465. On affirmance of a

Ignorance is not an excuse for delay.[64] A wife cannot be held to an election made at the time her husband executes his will,[65] though election may be by antenuptial agreement.[66]

The election must be unequivocal,[67] and understandingly,[68] and fairly and freely made.[69] A written declaration or admission of the mere capacity of heirship made by the descendants of a dead man does not of itself constitute an acceptance of his succession, nor does a written admission of the fact that the widow, in the absence of action by the creditors of the succession, is entitled to be recognized as usufructuary of that portion of the estate devolving on the legal heirs, and acceptance of the succession cannot be inferred against persons styling themselves heirs who have claimed nothing as such, taken no affirmative action in assertion of their rights, or contracted as such.[70] Silence and inaction by an heir after reaching majority may show an election to accept a family settlement made in his minority so as to prevent his heirs from claiming otherwise.[71] An election to take land in place of the proceeds of an equitable conversion must be by unequivocal acts joined in by all persons interested in the fund which would be derived from conversion.[72]

A court, in exercising an election for an incompetent, should take into account not only the value of the property but the circumstances surrounding the life and conditions of the parties, the contents of the will, and the probabilities as to what he would do if he were able to elect for himself.[73]

Where the widow elects to take a child's share rather than dower or under the will, she is bound to contribute ratably from her share to the payment of the debts

decree sustaining a will from which the widow has appealed, she must file her election within six months from the rendition of the original decree, unless she has obtained permission of the probate court to an extension of the time. Pub. St. c. 127, § 18—Bunker v. Murray, 182 Mass. 335.

64. Unless time was seasonably extended. Election must be within one year under Kentucky St. 1899, § 1404—Logsdon v. Haney, 25 Ky. L. R. 245, 74 S. W. 1073.

65. An acceptance by the wife of the provisions of her husband's will at the time of its execution in lieu of dower and other interest in his estate does not prevent her, after the husband's death electing to take contrary to the will under Rev. St. 1899, §§ 2948, 2949—Spratt v. Lawson (Mo.) 75 S. W. 642.

66. Antenuptial relinquishment of all interest in the husband's property (Code 1883, § 2116)—Perkins v. Brinkley (N. C.) 45 S. E. 465. Acceptance of a bequest of all the husband's personal property in addition to the property given by an antenuptial agreement is an election preventing the widow from claiming her award under Starr & C. Ann. St. p. 313, c. 3, par. 76, the antenuptial agreement providing for a cash payment in lieu of dower, widow's award and homestead right—Friederich v. Wombacher (Ill.) 68 N. E. 459.

67. Retention of property by the wife which had been temporarily assigned to the husband for occupancy as a homestead during legal proceeding does amount to an acceptance of it as a homestead barring her right to dower—Hogg v. Potter (Ky.) 76 S. W. 35. Election not shown by the fact of the widow's retention of the residence given her in lieu of dower by antenuptial contract during assignment of dower—Moran v. Stewart, 173 Mo. 207. Dower is not extinguished by merger on an acceptance from the heirs of a quitclaim deed of the premises in which dower is claimed, where a different intention may be reasonably deduced from the circumstances—Wettlaufer v. Ames (Mich.) 94 N. W. 950. The fact that the widow qualifies as executrix of her husband's will and unites with a co-executor in foreclosing mortgages belonging to the estate and buying in the property for the use of the estate, does not estop her from afterward dissenting from the will and electing to take a child's part in lieu of the provisions of the will and of dower (Rev. St. 1892, §§ 1830, 1831, 1833)—Benedict v. Wilmarth (Fla.) 35 So. 84.

68. A writing which could be construed to be an agreement to take less than the widow's distributive share will not be regarded as an election for such purpose, where it is not executed understandingly and a waiver of the widow's right to administer which contains a statement that the widow wishes to receive a child's part in the division of the estate, does not amount to a waiver of her distributive share—Evans' Adm'r v. Evans, 24 Ky. L. R. 2421, 74 S. W. 224.

69. In re Wickersham's Estate, 138 Cal. 355, 70 Pac. 1076.

70. Griffin v. Burris, 109 La. 216.

71. An heir having a right to claim property under her mother or her grandfather will be deemed to have elected to abide by a distribution of her grandfather's estate setting off certain property to her subject to a life estate to her father, by living on such property with her father, acquiescing in his management and seeking no account of the rents and profits—Appeal of Ward, 75 Conn. 598.

72. In re Rauch's Estate, 21 Pa. Super. Ct. 60.

73. In re Robinson's Estate, 88 Minn. 404.

and costs of administering the estate up to and including the point of actual distribution, but her share is superior to legacies.[74]

ELECTRICITY.[75]

Electric[76] *franchises*[77] cannot be granted by minor divisions of the state unless so empowered.[78] The use of streets for transmission of electric power on a system of poles and wires has been held an added servitude;[79] the operation of electric railroads not.[80] Franchises are limited by their terms.[81] The franchise is a contract whose obligation may not be impaired,[82] and service rates are protected from unreasonable regulation.[83] Injunction is the proper remedy for infringement.[84]

Contracts have been construed in cases cited.[85]

A degree of care commensurate with the highly dangerous character of electricity is due from one who uses it to prevent injuries to others.[86] Necessary care must be taken at places where others have a right to go,[87] or are likely to go.[88] In-

74. Rev. St. 1892, §§ 1830, 1831, 1833—Benedict v. Wilmarth (Fla.) 35 So. 84.

75. The law pertaining specifically to telegraphs and telephones is treated in a separate title, Telegraphs and Telephones.

76. Gas and other illuminating light held not to include electricity—People's Elec. Light & Power Co. v. Capital Gas & Elec. Light Co. (Ky.) 75 S. W. 280. An electric railway company chartered as a carrier may not transfer rights to others to vend electricity—Carthage v. Carthage Light Co., 97 Mo. App. 20.

77. See article Franchises.

78. Power to grant gas franchise not enough—Carthage v. Carthage Light Co., 97 Mo. App. 20. Use of streets may be given where ordinary use will not be obstructed —McWethy v. Aurora Elec. Light & Power Co., 202 Ill. 218. Right not availed of for 12 years is lost—Id. A requirement that permission of certain officials be first obtained may be waived by the city—Id. A conveyance of a municipal gas plant with an exclusive franchise imposing no obligation on the grantee to furnish any other light than gas did not give the grantee an exclusive right to furnish electric lights—People's Elec. Light & Power Co. v. Capital Gas & Elec. Light Co. (Ky.) 75 S. W. 280.

79. Goddard v. Chicago, etc., R. Co., 104 Ill. App. 526; Union Elec. Tel. Co. v. Applequist, 104 Ill. App. 517; Goddard v. Chicago, etc., R. Co., 104 Ill. App. 533; Bronson v. Albion Tel. Co. (Neb.) 93 N. W. 201, 60 L. R. A. 426. See Eminent Domain, post, p. 1011.

80. Parrish v. Hamilton, etc., Traction Co., 23 Ohio Circ. R. 527; Lonaconing Midland & F. R. Co. v. Consolidation Coal Co., 95 Md. 630.

81. Electric "railway" does not include "lighting"—Carthage v. Carthage Light Co., 97 Mo. App. 20. A contract to furnish electric lights held not to give the grantee an exclusive right to furnish electric lights—People's Elec. Light & Power Co. v. Capital Gas & Elec. Light Co. (Ky.) 75 S. W. 280. May lease properties to like companies—Crowe v. Nanticoke Light Co. (Pa.) 55 Atl. 1038. But cannot transfer portion of indivisible franchise—Carthage v. Carthage Light Co., 97 Mo. App. 20.

82. Southwest Mo. Light Co. v. Joplin, 113 Fed. 817; Hot Springs Elec. Light Co. v. Hot Springs, 70 Ark. 300.

83. See Constitutional Law, ante, p. 593.

84. People's Elec. Light & Power Co. v. Capital Gas & Elec. Light Co. (Ky.) 75 S. W. 280.

85. To take certain amount of power construed—Laclede Power Co. v. Stillwell, 97 Mo. App. 258. To permit stringing of wires on structure construed—Wagner v. Brooklyn Heights R. Co., 174 N. Y. 520. The contract contemplates reasonable access to make repairs—Id. See, also, Contracts generally.

86. Economy Light & Power Co. v. Hiller, 203 Ill. 518; Wagner v. Brooklyn Heights R. Co., 174 N. Y. 520; Katafiasz v. Toledo Consol. Elec. Co., 24 Ohio Circ. R. 127. That wires are reasonably safe is not sufficient—Geismann v. Missouri Edison Elec. Co., 173 Mo. 654. Must know conditions of wires and to use utmost care to protect same by proper insulation—Lexington R. Co. v. Fain's Adm'r, 24 Ky. L. R. 1443, 71 S. W. 628; Geismann v. Missouri Edison Elec. Co., 173 Mo. 654; Wagner v. Brooklyn Heights R. Co., 174 N. Y. 520. Such care as a reasonably prudent man would exercise under the circumstances considering, etc.—Neal v. Wilmington, etc., Elec. R. Co., 3 Pen. (Del.) 467; Kennealy v. Westchester Elec. R. Co., 86 App. Div. (N. Y.) 293. Must use high degree of care to prevent injury to persons using a bridge, taking into consideration all the uses to which the bridge is put—Nelson v. Branford Lighting & Water Co., 75 Conn. 548. Only ordinary care in the maintenance of wires and fixtures and appliances—Quincy Gas & Elec. Co. v. Bauman, 104 Ill. App. 600.

87. Potts v. Shreveport Belt R. Co. (La.) 34 So. 103. Under contract to carry wires on a structure a lineman has a right to go thereon to make repairs—Wagner v. Brooklyn Heights R. Co., 69 App. Div. (N. Y.) 349. Acceptance of pass with assumption of risk held not to make defense—Id.

88. Wires over a public bridge; injured person was not rightfully on the bridge—Nelson v. Branford Lighting & Water Co., 75 Conn. 548. Must exercise all reasonable precaution against passing a dangerous current of electricity through a guy wire attached to a pole on a vacant lot in densely peopled part of the city—New Omaha Thomson-Houston Elec. Light Co. v. Johnson (Neb.) 93 N. W. 778. Wires strung across a viaduct without the railing but at a place where small boys were in the habit of climbing and coming

spections must be thorough.[89] External or atmospheric currents should be guarded against.[90] After discovery of the dangerous condition of the wire, it is the duty of the company to act promptly in making repairs.[91] A company operating an electric plant is required to use the appliances with the same degree of care as if they were actually owned by the company.[92]

The defendant's negligence must be the proximate cause of injuries resulting from electricity.[93] The injured person must be free from contributory negligence.[94]

Actions.—Where different companies contribute to the injury, the liability is joint.[95] The actual owners of the plant and not an assignor are liable for injuries though the franchise forbade its assignment.[96]

Pleading.—Holdings as to sufficiency of pleadings,[97] and variance between pleading and proof, will be found in the footnote.[98]

Evidence.—The doctrine of res ipsa loquitur is not of universal application to injuries from electricity.[99] The fact of insulation recognizes the inherent danger of a wire.[1] It is the fact of injury by electricity and not the manner that is important.[2] Proof need not be made by an eye witness.[3] The condition of appli-

close to wires—Consolidated Elec. Light & Power Co. v. Healy, 65 Kan. 798, 70 Pac. 884.

89. Potts v. Shreveport Belt R. Co. (La.) 34 So. 103; Wagner v. Brooklyn Heights R. Co., 174 N. Y. 520.

90. Telephone wires left standing after disconnecting instrument—Southern Bell Tel. Co. v. McTyer (Ala.) 34 So. 1020. Liability for injuries to a customer, not avoided by reason of the consent of the store-keeper that the wires might be left twisted together inside the building—Id.

91. Evidence of gross negligence in delaying to obviate danger after notice that appliances were out of order—Lutolf v. United Elec. Light Co. (Mass.) 67 N. E. 1025. Case is for the jury where the break in wire of police alarm system was known to the police within an hour after it occurred and it was also known that the wire was in close proximity to other wires carrying dangerous currents (It fell across trolley feed wire)—Herron v. Pittsburg, 204 Pa. 509. Telephone company whose wires were burned out in the night time by contact with light wires and dangled in a street not negligent in law in failing to discover conditions by 8:30 the next morning—Economy Light & Power Co. v. Hiller, 203 Ill. 518.

92. Smith v. Brooklyn Heights R. Co., 82 App. Div. (N. Y.) 531.

93. **Causes held proximate.** Bringing telephone wire in contact with electric wire.—death of lineman—Cumberland Tel. Co. v. Ware's Adm'x (Ky.) 74 S. W. 289. Allowing a pulley wire of arc lamp to remain without insulation and come in contact with feed wires.—injuries to a boy passing along the sidewalk and taking hold of the wire—Lexington R. Co. v. Fain's Adm'r, 24 Ky. L. R. 1443, 71 S. W. 628.

94. Katafiasz v. Toledo Consol. Elec. Co., 24 Ohio Circ. R. 127. That painter on the balcony of a house came in contact with live wire few inches from the corner of the balcony, is not conclusive evidence—Consolidated Gas Co. v. Brooks (N. J. Law) 53 Atl. 296. Purposely taking hold of wire and causing contact with charged wire, is negligence—Lexington R. Co. v. Fain's Adm'r, 24 Ky. L. R. 1443, 71 S. W. 628.

95. Electric wire allowed to sag and charge telephone wires—Economy Light & Power Co. v. Hiller, 203 Ill. 518. A city, its contractor and the telephone company are jointly liable where the contractor strung defectively insulated wires and telephone company placed wires in contact—Cumberland Tel. Co. v. Ware's Adm'x (Ky.) 74 S. W. 289.

96. Gordon v. Ashley, 77 App. Div. (N. Y.) 525.

97. **Pleading sufficient** to allege liability for death due to delay in restoring worn out insulation—Geismann v. Missouri Edison Elec. Co., 173 Mo. 654. To charge bad wiring in a jail whereby fire resulted and caused death of inmate—Miller v. Ouray Elec. Light & Power Co. (Colo. App.) 70 Pac. 447. Methods of inspection sufficiently challenged by allegation that defendant negligently and carelessly suffered and permitted its wires to be out of repair—Lutolf v. United Elec. Light Co. (Mass.) 67 N. E. 1025.

An admission that on the day named defendant was operating the street railroad propelled and worked by electric power, is an admission that defendant was using appliances and mechanical devices necessary for its operation—Smith v. Brooklyn Heights R. Co., 82 App. Div. (N. Y.) 531.

98. No variance between allegation that wire was charged and for that reason was dangerous, and evidence showing that it might be charged and was so charged and was dangerous at the time of the injury—Melican v. Missouri-Edison Elec. Co., 90 Mo. App. 595.

99. It applies to an injury from a live trolley wire fallen in the street (Smith v. Brooklyn Heights R. Co., 82 App. Div. [N. Y.] 531) though plaintiff introduced evidence showing that the fall was caused by the trolley slipping off and striking some of the supporting wires (Clancy v. New York, etc., R. Co., 82 App. Div. [N. Y.] 563); also in case of death from contact with electric wires at a place where deceased had a right to be and might be expected to be. Geismann v. Missouri-Edison Elec. Co., 173 Mo. 654. No presumption of negligence by the happening of the injury—Crowe v. Nanticoke Light Co. (Pa.) 55 Atl. 1038.

1. Wagner v. Brooklyn Heights R. Co., 174 N. Y. 520.

2. Smith v. Brooklyn Heights R. Co., 82

ances,[4] and the cost of making changes to render them more safe may be shown.[5] Ordinances and rules as to inspection are admissible,[6] likewise the clothing worn by plaintiff at the time of an injury caused by a burn from a live wire.[7] The condition of the wire causing the injury shortly after the accident may be shown.[8] Holdings as to sufficiency of evidence are grouped in the footnote.[9]

Questions for the jury and instructions.—Questions of negligence are for the jury.[10] See footnote as to pertinency and sufficiency of instructions.[11]

EMBEZZLEMENT.[12]

Elements.—To constitute embezzlement, the property embezzled must be that

App. Div. (N. Y.) 531. Liable whether injury was by physical contact with a trolley wire or by ground currents caused by the wires—Clancy v. New York, etc., R. Co., 82 App. Div. (N. Y.) 563. Plaintiff need not prove that at the exact point of contact the insulation was off the wire—Geismann v. Missouri-Edison Elec. Co., 173 Mo. 654.

3. Consolidated Gas Co. v. Brooks (N. J. Law) 53 Atl. 296.

4. In an action for death resulting from contact with wires hung on a highway bridge, evidence tending to show that the pulley on which the wires were hung, was put in the proper place in being bolted to the bridge rather than out in the stream is admissible—Nelson v. Branford Lighting & Water Co., 75 Conn. 548.

5. In an action for death caused by contact with a wire hung along the truss bridge, evidence as to what the cost of elevating the wire above truss of the bridge would have been, was properly admitted—Nelson v. Branford Lighting & Water Co., 75 Conn. 548.

6. Herron v. Pittsburg, 204 Pa. 509.

7. Quincy Gas & Elec. Co. v. Baumann, 203 Ill. 295.

8. Gloucester Elec. Co. v. Kankas (C. C. A.) 120 Fed. 490.

9. **Sufficient.** To show injury received by voluntary contact with a guy wire, after notice—New Omaha Thomson-Houston Elec. Light Co. v. Johnson (Neb.) 93 N. W. 778. Whether wire was insulated and whether contact therewith caused decedent's death—Economy Light & Power Co. v. Sheridan, 200 Ill. 439. To show defective insulation of wire at time it was strung—Kennealy v. Westchester Elec. R. Co., 86 App. Div. (N. Y.) 293. To show negligence respecting a wire strung across a highway bridge—Nelson v. Branford Lighting & Water Co., 75 Conn. 548. To show ordinary care by defendant—Wagner v. Brooklyn Heights R. Co., 174 N. Y. 520.

Insufficient. To show contributory negligence—Nelson v. Branford Lighting & Water Co., 75 Conn. 548; Lutolf v. United Elec. Light Co. (Mass.) 67 N. E. 1025.

Evidence held to authorize the giving of binding instruction for defendant—Crowe v. Nanticoke Light Co. (Pa.) 55 Atl. 1038.

10. Failure to inspect—Lutolf v. United Elec. Light Co. (Mass.) 67 N. E. 1025. Contributory negligence—Lexington R. Co. v. Fain's Adm'r, 24 Ky. L. R. 1443, 71 S. W. 628; Geismann v. Missouri-Edison Elec. Co., 173 Mo. 654; Fitzgerald v. Edison Elec. Illuminating Co. (Pa.) 56 Atl. 350.

11. An instruction that if electric wires had the appearance of being properly insulated it was inducement to risk contact with them though announcing an abstract proposition of law, and did not purport to cover the whole cause, was not prejudicial—Geismann v. Missouri-Edison Elec. Co., 173 Mo. 654. An instruction that it was incumbent on defendant to keep its wires reasonably safe, is properly given on a petition averring that death was caused by contact with one of defendant's electric wires, upon which the insulation had, through defendant's negligence, become worn off and the current exposed, and that the defect had existed a long time prior to the day of the accident, and which defendant knew or might have known—Id. An instruction that if decedent knew or should have known of the danger resulting from contact with an insulated wire, and the wire was seen or should have been seen by him, and he negligently came in contact therewith, the verdict should be for defendant, is properly modified by adding "and knew that defendant's wire was at some point not properly insulated"—Id. An instruction on the negligence of decedent in failing to wear a rubber coat, boots or gloves, was properly limited by qualification as to their practicability in decedent's situation as a sign hanger—Id. An instruction that question of negligence on the part of defendants and care on the part of plaintiff were for the jury is not objectionable where the instruction further explained that it was their duty and province to determine those questions of fact under the law and evidence in the case—Economy Light & Power Co. v. Hiller, 203 Ill. 518. An instruction in an action against a telephone and electric light company for injuries that if the injury was caused by the negligence of defendants or either of them then plaintiff could recover is not prejudicial though not limiting recovery to the defendant proved guilty; the court having instructed that the telephone company should not be found guilty unless its negligence caused the accident and also having given blank verdicts suitable to the different contingencies and there being no doubt as to the negligence of the electric light company—Id. An instruction that on all evidence of the case, deceased having been warned to keep away from a pole, but having persisted in examining it, his act amounted to contributory negligence whether he knew the precise nature of the danger or not, was properly refused where there was evidence that deceased passing along a sidewalk near the pole received the fatal shock without touching or attempting to touch the pole—Lutolf v. United Elec. Light Co. (Mass.) 67 N. E. 1025.

12. Though matters pertaining to the law

of another,[13] and must have been in defendant's possession by virtue of an office or employment,[14] and there must have been an actual appropriation thereof,[15] with felonious intent.[16] One who with felonious intent urged the employer to intrust the money to the servant is guilty as a principal.[17]

Indictment[18] in the language of the statute is sufficient.[19] The money need not be described,[20] and an indictment charging embezzlement of "about" a certain sum is

of embezzlement are here discussed even where the statute denominates the offense larceny, many matters of procedure of general application will be found in Larceny.

13. Proof of a qualified or special property in the alleged owner is sufficient—Meacham v. State (Fla.) 33 So. 983. Under the Alabama statute it is immaterial whether the property belonged to defendant's principal if it came into defendant's hands by virtue of his employment—Willis v. State, 134 Ala. 429. One entitled to a commission out of the funds is a joint owner and cannot be guilty of embezzlement until there has been an accounting—McElroy v. People, 202 Ill. 473. A claim of a lien not asserted in good faith is no defense—State v. Lewis, 31 Wash. 75, 71 Pac. 778.

14. One who is authorized to buy goods for another, and who thereupon sends back a memorandum "you have bought from me" such goods, is a seller and not an agent—State v. Brown, 171 Mo. 477. The secretary of a lodge cannot be convicted of embezzlement where it was not his duty but that of another secretary to receive the funds—Loving v. State (Tex. Cr. App.) 71 S. W. 277. One intrusted with property to trade for other property holds the same as agent—O'Morrow v. State (Tex. Cr. App.) 70 S. W. 209. One entrusted with funds to purchase a business in which he and the owner of the money are to be partners is not an agent—Manuel v. State (Tex. Cr. App.) 71 S. W. 973. An attorney entrusted with money to loan on security to be approved by him, is liable under the act relating to embezzlement by attorneys—Commonwealth v. Barton, 20 Pa. Super. Ct. 447.

Public Funds. Money collected by the state department from foreign governments to indemnify citizens for injuries is public money of the United States within Rev. St. § 5488, relating to embezzlement by disbursing officers—Kieckhoefer v. United States, 19 App. D. C. 405. Assessments collected by a city to meet the cost of contemplated repairs are public funds—State v. Carter, 67 Ohio St. 422. Act creating new county government held not to interfere with powers of township officers—Commonwealth v. Carson, 21 Pa. Super. Ct. 48. A warrant duly issued for an approved claim and placed in the custody of the auditor is a subject of embezzlement—State v. Raby, 31 Wash. 111, 71 Pac. 771. Funds collected by a city officer under an arrangement for immunity between the city and persons engaged in unlawful sale of liquor are subject of embezzlement—State v. Patterson (Kan.) 71 Pac. 860. One required by a rule of the treasury department to deposit money on a certain day is within Rev. St. § 5492, as to failure to deposit when required to do so by the "Secretary of the Treasury"—Dimmick v. United States (C. C. A.) 121 Fed. 638. A clerk in charge of a branch money order office is in charge of funds which he is entitled to draw upon—United States v. Royer, 122 Fed. 844.

15. One having the property of a relative in his custody and appropriating it is liable though he gave her a note therefor, she not understanding the transaction—Jackson v. State (Tex. Cr. App.) 70 S. W. 760. But one who openly appropriated money and acknowledged the debt, whereupon the employer suspended prosecution has been held free from criminal intent—McElroy v. People, 202 Ill. 473. A temporary conversion is sufficient—People v. Jackson, 138 Cal. 462, 71 Pac. 566.

16. State v. McDonald (N. C.) 45 S. E. 582; State v. Sienkiewiez (Del.) 55 Atl. 346. Advice of counsel after the conversion is no defense—State v. Patterson (Kan.) 71 Pac. 860; State v. Hunt (R. I.) 54 Atl. 937.

17. Thomas v. State (Tex. Cr. App.) 73 S. W. 1045.

18. Duplicity and joinder. Indictment of public officer held not to charge statutory offense of failure to pay over to successor in addition to embezzlement—Commonwealth v. Carson, 21 Pa. Super. Ct. 48. Indictment charging bailee with embezzling money and failing to account therefor not double—State v. Humphreys (Or.) 70 Pac. 824. Indictment alleging continuing embezzlements during a period of several months held not double—State v. Dix (Wash.) 74 Pac. 570. Joinder of counts for theft and for embezzlement held not prejudicial—Davis v. United States, 18 App. D. C. 468.

19. State v. Jones, 109 La. 125. Indictment charging in general terms of the statute failure to account, the property and employment being specifically alleged is sufficient—State v. Whitworth, 30 Wash. 47, 70 Pac. 254. Statute prohibits embezzlement of money which one has in his possession by virtue of his employment. Indictment in language of statute that money was in defendant's possession by virtue of his employment without other averment of ownership of money was held sufficient—Willis v. State, 134 Ala. 429. The requirement of an intent to defraud not being specified in the statute relating to public officers but being inferred from the words "embezzle or convert" an indictment using such words is sufficient without an averment of fraudulent intent—State v. Patterson (Kan.) 71 Pac. 860. An indictment in the language of the statute but failing to show the relation of defendant to the person defrauded is bad—Commonwealth v. Barney, 24 Ky. L. R. 2352, 74 S. W. 181. The indictment need not allege that the person defrauded was a "private person"—Spurlock v. State (Tex. Cr. App.) 77 S. W. 447.

20. Dimmick v. United States (C. C. A.) 121 Fed. 638; State v. Bartholomew (N. J. Sup.) 54 Atl. 231. An averment that the money was lawful money of the United States though unnecessary must be proved as laid—State v. Neilon (Or.) 73 Pac. 321.

sufficient,[21] and variance as to the amount is not fatal;[22] but one charging possession as agent of "a horse" and conversion of "said mule" is bad.[23] The name of the employer and nature of the relation must be alleged,[24] but not whether a bailee was paid for his services.[25]

Admissibility of evidence.—A statement from which defendant paid the shortage therein shown is admissible,[26] as are books kept by defendant,[27] and evidence of other offenses when part of a system.[28] Defendant's need of money is admissible to show motive.[29] Defendant's declarations are admissible against him.[30] Evidence that defendant drew the money from a bank is admissible as tending to show conversion.[31]

Sufficiency of evidence in particular cases is discussed in the footnote.[32]

Instructions[33] must cover every grade of the offense which the jury might find,[34] and must require fraudulent intent.[35]

EMBLEMENTS AND NATURAL PRODUCTS.[36]

Annual crops are sometimes regarded as chattels,[37] sometimes as part of the

21. Willis v. State, 134 Ala. 429.

22. State v. Lewis, 31 Wash. 75, 71 Pac. 778; State v. Hunt (R. I.) 54 Atl. 937. Conversion of any part of the property described is sufficient—State v. Sienkiewiez (Del.) 55 Atl. 346.

23. Duncan v. State (Tex. Cr. App.) 70 S. W. 543.

24. State v. Holton, 88 Minn. 171. Com. v. Barney, 24 Ky. L. R. 2352, 74 S. W. 181. The mere fact that the name of the owner indicated that it was a building and loan society is insufficient to show such fact. The prosecution was under Code, § 1918, relating to embezzlement by officers of such associations—State v. Ames (Iowa) 94 N. W. 231. While defendant's office or employment should be correctly stated, misdescription is not always fatal. Defendant was described as "treasurer" instead of "collector" and it appearing that the collector was ex officio treasurer it was held that the error was harmless, the statute forbidding reversal for errors not prejudicing defendant—State v. Bartholomew (N. J. Sup.) 54 Atl. 231.

25. State v. Humphreys (Or.) 70 Pac. 824.

26. Willis v. State, 134 Ala. 429. As are the reports of a sheriff of tax collections on prosecution for embezzling the same—State v. Nellon (Or.) 73 Pac. 321.

27. Books of public officer—State v. Patterson (Kan.) 71 Pac. 860. Falsification of a check book stub not traced to defendant cannot be shown—State v. Ames (Iowa) 94 N. W. 231. Manner in which an employe kept his books to conceal defalcation—State v. Pittam (Wash.) 72 Pac. 1042.

28. Willis v. State, 134 Ala. 429. Evidence as to the manner in which defendant obtained the money is not inadmissible because it shows fraud on his part—Jackson v. State (Tex. Cr. App.) 70 S. W. 760.

29. Govatos v. State, 116 Ga. 592.

30. Declarations that the affair was at most a breach of trust, etc., admissible to show receipt of money—Jackson v. State (Tex. Cr. App.) 70 S. W. 760.

31. State v. Woodward, 171 Mo. 593.

32. Evidence of embezzlement of watch held sufficient—State v. McGregor, 88 Minn. 77. Failure to account for shortage held sufficient to show criminal intent—Willis v. State, 134 Ala. 429. Evidence held to show that defendant was entitled to commission and insufficient to show guilty intent—McElroy v. People, 202 Ill. 473. Evidence of intent held for the jury—State v. Lewis, 31 Wash. 75, 71 Pac. 778. Evidence held to show that advice of counsel was sought after the conversion—State v. Hunt (R. I.) 54 Atl. 937. Evidence held insufficient to show that property had not been sold to defendant on credit—People v. Goodrich, 138 Cal. 472, 71 Pac. 509. Evidence of failure of clerk in the mint to deposit money when required by regulations to do so held sufficient—Dimmick v. United States (C. C. A.) 121 Fed. 638. Evidence held insufficient to show embezzlement by bailee of horse—State v. Vennum (Kan.) 74 Pac. 268. Evidence of conversion of funds obtained for investment held sufficient—People v. Hackett, 82 App. Div. (N. Y.) 86.

33. Inadvertent use of the word "attorney" referring to defendant held harmless—State v. Lewis, 31 Wash. 75, 71 Pac. 778. Held to sufficiently cover defendant's right of disposal under a power of attorney—Jackson v. State (Tex. Cr. App.) 70 S. W. 760.

34. Petty embezzlement should be submitted where the evidence of amount is not clear—Loving v. State (Tex. Cr. App.) 71 S. W. 277.

35. State v. Ames (Iowa) 94 N. W. 231; McElroy v. People, 202 Ill. 473; State v. Rigall, 169 Mo. 659. General charge held to cover requested instruction as to intent—Dimmick v. United States (C. C. A.) 121 Fed 638. Instruction that conversion must have been "intentional and wilful" properly refused as misleading—Willis v. State, 134 Ala. 429.

36. Mineral products being governed by a distinct body of law, are treated in Mines and Minerals. Matters of contract respecting crops, not in any manner controlled by the nature of the subject matter, will be found in Contracts, Sales and similar titles.

37. Swafford v. Spratt, 93 Mo. App. 631; Glass v. Blazer, 91 Mo. App. 564.

realty.[38] They pass without mention by a deed of the land;[39] but, at least in states where they are held to be personalty, they may be separately sold[40] or mortgaged.[41]

As between landlord and tenant, the right to the crops depends on the terms of the contract.[42] A mortgagor is entitled to growing crops pending foreclosure proceedings,[43] but a purchaser on foreclosure of a vendor's lien has been held to be entitled to the crops.[44]

38. Within the statute of frauds—Kileen v. Kennedy (Minn.) 97 N. W. 126; Kirkeby v. Erickson (Minn.) 96 N. W. 705. Within homestead exemption laws—Moore v. Graham (Tex. Civ. App.) 69 S. W. 200.

Note. Effect of statute of frauds. In Bernal v. Hovious, 17 Cal. 541, 79 Am. Dec. 147, the fifteenth section of the Statute of Frauds, which declares that "every sale made by a vendor of goods and chattels in his possession or under his control, and every assignment of goods and chattels, unless the same be followed by an actual or continued change of possession of the things sold or assigned, shall be conclusive evidence of fraud as against the creditors of the vendor or the creditors of the persons making such assignment, or subsequent purchasers in good faith," was held not to apply to a case of growing crops, they not being goods and chattels within its meaning. Bours v. Webster, 6 Cal. 661; and Visher v. Webster, 13 Cal. 58, to the same effect.

Although growing crops are chattels and will pass by a verbal sale, yet they are not susceptible of manual delivery until harvested and therefore are not until harvested "in the possession or under control of the vendor within the meaning of the statute." Davis v. McFarlane, 37 Cal. 634, 99 Am. Dec. 340; Bours v. Webster, 6 Cal. 661; Visher v. Webster, 13 Cal. 58, to the same effect; Pacheco v. Hunsacker, 14 Cal. 120; Bernal v. Hovious, 17 Cal. 541, 79 Am. Dec. 147; Robbins v. Oldham, 1 Duv. 28. Such construction of the statute would make it an absolute interdiction upon the sale of growing crops, unless the vendor were willing to abandon the possession to the vendee at the same time. Davis v. McFarlane, 37 Cal. 634, 99 Am. Dec. 340. There is nothing in the vegetable or fruit which is an interest in or concerning land when severed from the soil, whether trees, grass, or other spontaneous growth (prima vestura) or grain, vegetables, or any kind of crops (fructus industriales), the product of periodical planting and culture. They are alike, mere chattels, and the severance may be in fact as when they are cut and removed from the ground, or in law as when they are growing, and the owner in fee of the land by a valid conveyance sells them to another person or where he sells the land reserving them by expressed provisions. Purner v. Piercy, 40 Md. 212, 17 Am. Rep. 591. As a general rule if the products of the earth are sold specifically, and by the terms of the contract to be separately delivered as chattels, the sale is not affected by the fourth section of the Statute of Frauds, as amounting to a sale of an interest in land. Purner v. Piercy, 40 Md. 212, 17 Am. Rep. 591. If the contract when executed is to convey to the purchaser a mere chattel, though it may be in the interim a part of the realty, it is not affected by the statute. Purner v. Piercy, 40 Md. 212, 17 Am. Rep. 591. If, however, the contract is in the interim to confer upon the purchaser an exclusive right to the land for a time for the purpose of making a profit of the growing surface, it is affected by the statute and must be in writing, although the purchaser is at the last to take from the land only a chattel. Purner v. Piercy, 40 Md. 212, 17 Am. Rep. 591. A contract for the sale of growing crops raised by the industry of man and the cultivation of the earth is not within the statute. Bloom v. Welsh, 27 N. J. L. 177; Green v. Armstrong, 1 Denio, 550; Davis v. McFarlane, 37 Cal. 634, 99 Am. Dec. 340; Flynt v. Conrad, 61 N. C. 190, 93 Am. Dec. 588; Brittain v. McKay, 23 N. C. 265, 35 Am. Dec. 738; Walton v. Jordan, 65 N. C. 172; Bond v. Coke, 71 N. C. 100; Cook v. Steel, 42 Tex. 53. In McIlvaine v. Harris, 20 Mo. 457, 64 Am. Dec. 196, it was held that growing wheat was an interest in land and a contract concerning it within the statute of frauds, and must be in writing, and that parol evidence of the sale of the wheat was inadmissible.—From extensive note to Dickey v. Waldo, 23 L. R. A. 449.

39. Gam v. Cordrey (Del.) 53 Atl. 334; Marshall v. Homier (Okl.) 74 Pac. 368; Kammrath v. Kidd (Minn.) 95 N. W. 213.

Note. Emblements on highways. Where the fee of a highway remains in the abutter, he is entitled to all herbage growing thereon. Smith v. Langewald, 140 Mass. 205; Blaker v. Rich, 34 N. H. 282; Woodruff v. Neal, 28 Conn. 165.—From note to People v. Foss, 8 L. R. A. 473.

40. Glass v. Blazer, 91 Mo. App. 564. Either a future crop or the hope of a crop may be sold. Where a future crop is sold the consideration must be returned if the crop fails, but it is otherwise if the mere hope of a crop is sold—Losecco v. Gregory, 108 La. 648. A grant of all timber on certain lands needed in certain operations is too uncertain to pass any present interest in the timber and the grantor may remove it before it is needed—Kennedy Stave & Cooperage Co. v. Sloss-Sheffield Steel Co. (Ala.) 34 So. 372.

41. Chattel mortgage held to sufficiently describe future crops—Woods v. Rose, 135 Ala. 297. Mortgage on crops by one who has sublet a part of his farm on shares covers only crops raised by him—Norfleet v. Baker, 131 N. C. 99.

42. Where the landlord is to receive half the crop title thereto is in him—Northness v. Hillestad, 87 Minn. 304. But where he is to receive one-half the "income" the title to the crops is in the tenant—Rowlands v. Voechting, 115 Wis. 352. Outgoing tenant held entitled to crop—Whorley v. Karper, 20 Pa. Super. Ct. 347. Title held to be in landlord until division—Kelly v. Rummerfield (Wis.) 94 N. W. 649. Crops held to belong to tenant as against purchaser of premises—Simanek v. Nemetz (Wis.) 97 N. W. 508; Horman v. Cargill (Mo. App.) 73 S. W. 1101. Testimony of custom is admissible to aid in construction of cropper's contract—Gehl v. Milwaukee Produce Co. (Wis.) 93 N. W. 26. But not to vary its terms—Thompson v. Exum, 131 N. C. 111.

43. As against a receiver appointed on

Liens on crops depend for their validity and enforcement on the statutes under which they arise.[45]

In some states growing crops are exempt from taxation.[46]

The aid of a receiver is sometimes invoked against injury by one out of possession but entitled to remove crops.[47]

EMINENT DOMAIN.

§ 1. **Power of the State and Delegations of It.**—Who may Exercise Power.
§ 2. **Purposes and Uses of a Public Character.**
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The general principles applying to appropriation of private property are treated here while the appropriation for many particular public purposes will be more fully treated under special subjects.[1]

§ 1. *The power of the state and delegations of it.*—The power of eminent domain is an inalienable right of sovereignty.[2] The territory of Arizona may provide for its exercise.[3] Generally, constitutional provisions merely recognize the

appeal from confirmation of foreclosure sale—Cassell v. Ashley (Neb.) 92 N. W. 1035.

44. Sieffert v. Campbell, 24 Ky. L. R. 1050, 70 S. W. 630.

45. A minor who cultivates crops for his father's creditor with the father's team may, if entitled to his own services, have a lien therefor but not for the services of the team—Tuckey v. Lovell (Idaho) 71 Pac. 122. An affidavit for a lien by a farm laborer under the Texas statute need not state the particular crops raised—Allen v. Glover, 27 Tex. Civ. App. 483. The obligation assumed by a tenant selling his crop on the faith of the landlord's waiver of his lien to make good title to the buyer is a sufficient consideration for the waiver—Fishbaugh v. Spunaugle, 118 Iowa, 337. A debt for supplies needed to raise crops is privileged in Louisiana and purchasers are presumed to know of its existence—Weill v. Kent, 107 La. 322.

46. Alfalfa, being perennial though not indigenous, is not exempt as a "growing crop"—Miller v. Kern County, 137 Cal. 516, 70 Pac. 549.

47. Threatened injury by an outgoing tenant required to harvest crops to certain crops of the new tenant is not sufficient to authorize the appointment of a receiver to harvest the crops—Horn v. Bohn, 96 Md. 8. Threatened injury to oil lands by one claiming conflicting title not sufficient for appointment of receiver to operate the same—Freer v. Davis, 52 W. Va. 35.

1. The reason for separate treatment is the difference in statutory proceedings to appropriate for such particular purposes—See Bridges; Canals; Highways & Streets; Public Works & Improvements; Sewers & Drains; Waters & Water Supply.

2. Hollister v. State (Idaho) 71 Pac. 541.

3. Under the Organic act granting the legislative power of the territory, and the exercise of all subjects of legislation not inconsistent with the federal constitution and laws—Sandford v. Tucson (Ariz.) 71 Pac. 903.

power to exist,[4] leaving to the legislature the right to determine the circumstances necessary to, and the manner and extent of, its exercise,[5] or to delegate such power of determination to municipal bodies.[6] The extent of its exercise is limited by express words or clearly implied conditions of the statutes.[7] A law authorizing condemnation of land for "private" roads is not special legislation.[8] The delegation of the power may be revoked or modified by the legislature at any time.[9] The grant to a corporation of the right to exercise eminent domain makes it subject to government regulation in public use of property or products.[10] The question of the necessity, propriety, or expediency of exercising the power, is legislative, not judicial, in the absence of contrary statutory or constitutional provisions.[11]

The power to take property is not necessarily exhausted by its first exercise.[12]

Who may exercise the power.—Municipalities and public,[13] or semi-public,[14] or domestic private corporations,[15] or foreign private corporations,[16] may exercise

4. Samish River Boom Co. v. Union Boom Co. (Wash.) 73 Pac. 670.

5. Samish River Boom Co. v. Union Boom Co. (Wash.) 73 Pac. 670. Grant to foreign corporations—Southern Illinois & M. Bridge Co. v. Stone, 174 Mo. 1. A taking of adjacent property to change a village street grade may be declared to be for a public use to the extent of injury (Laws 1897, p. 420, c. 414, § 159)—Comesky v. Suffern, 81 N. Y. Supp. 1049.

6. Comp. Laws, cc. 4097, 6446, as to power of township board to authorize construction of a street railway construed—Freud v. Detroit & P. R. Co. (Mich.) 95 N. W. 559. Act April 4, 1868, § 12; Pub. Laws 62, requiring municipal consent to occupation of a street by a railway is not repealed by Const. 1874, art. 17, § 1—Pittsburg v. Pittsburg, etc., R. Co., 205 Pa. 13. Pub. Laws 1894, p. 374, requiring a street railroad to obtain consent of a governing body of a municipality and of a certain proportion of abutting owners to construction of a railway upon a street or highway, was superseded by Pub. Laws 1896, p. 329—Mercer County Traction Co. v. United New Jersey R. & C. Co., 64 N. J. Eq. 588.

7. Waterbury v. Platt, 75 Conn. 387, 60 L. R. A. 211; Goddard v. Chicago & N. W. R. Co., 202 Ill. 362. Condemnation of property already appropriated to public use—Indianapolis, etc., R. Co. v. Indianapolis & M. Rapid Transit Co. (Ind. App.) 67 N. E. 1013.

8. Pol. Code, § 2692—Madera County v. Raymond Granite Co., 139 Cal. 128, 72 Pac. 915.

9. The various statutes and ordinances of Boston allowing private corporations to build underground conduits in certain streets to carry wires, none of which purport to convey private rights of property, merely provide for regulations of different public rights in the streets, and the rights of such corporations may be controlled or terminated by the legislature at any time without regard to express provisions therefor in such statutes and ordinances—New England Tel. v. Boston Terminal Co., 182 Mass. 397.

10. Fallsburg Power & Mfg. Co. v. Alexander (Va.) 43 S. E. 194.

11. Zircle v. Southern R. Co. (Va.) 45 S. E. 802.

12. Land may be taken by a railroad for additional tracks and enlargement of terminal facilities—Gardner v. Georgia R. & B. Co., 117 Ga. 522.

13. Cities may exercise the power in laying out and opening streets. Under Rev. Code 1899, § 2454, subd. 7 of section 2148 together with Code Civ. Proc. c. 35—Lidgerwood v. Michalek (N. D.) 97 N. W. 541. The police jury of a parish may condemn a site for a court house or jail. Under Civ. Code, art. 2630, amended by Acts 1886, No. 117, and Acts 1896, No. 96—Fuselier v. Police Jury, 109 La. 551.

14. That representation of a city on the board of directors of a free library, is only one-half the members, will not prevent it from taking land, part of which is to be used for such library—Laird v. Pittsburg, 205 Pa. 1.

15. Sand. & H. Dig. §§ 2757, 2758, 2770-2781, giving telephone and telegraph companies power to take a right of way along highways, railroads and post roads under statutory regulation, is constitutional—St. Louis, etc., R. Co. v. Southwestern Telephone & Telegraph Co. (C. C. A.) 121 Fed. 276. Under a law incorporating telegraph companies and giving them right to acquire property necessary to their lines and buildings, which incorporates laws regarding assessment of damages within itself, such companies may condemn land on assessment and payment of damages under the act so included—Postal Tel. & Cable Co. v. Chicago, etc., R. Co., 30 Ind. App. 654. Construction of Acts 1886, No. 117 and Acts 1896, No. 96, which amended and re-enacted Rev. St. § 1479, giving railroad, plank or turnpike road corporations the right to exercise the power of eminent domain, construed together with Civ. Code, art. 2630, as amending and re-enacting it, though not referred to in the amending act—Fuselier v. Police Jury, 109 La. 551. The original charter of the Georgia Railroad and Banking Company in Georgia, to exercise the power of eminent domain, as subsequently amended by Act Dec. 26, 1836, p. 197, (Prince's Dig. p. 358) is not affected by Act Dec. 18, 1894, p. 95, (Civ. Code 1895, § 4657 et seq.) prescribing a uniform method for exercise of the power. The act amending the original charter authorized it to condemn private property and prescribed a method for such condemnation—Gardner v. Georgia R. & B. Co., 117 Ga. 522. Where the charter of a cor-

the power to enable them to serve public purposes. A corporation of Arkansas cannot exercise the power in Indian Territory under the laws of that state.[17] That a boom company is a trespasser on property it seeks to condemn[18] or that one railroad company has leased its property to another and owns no rolling stock, will not prevent its exercise of the power.[19] A telegraph company maintaining lines on a railroad right of way under a rental contract, with a covenant to remove at the end of the term, obtained no rights from its tenancy which could support subsequent condemnation of the premises.[20] A prior purchase of land, and re-entry for breach of condition subsequent, will not prevent condemnation by the purchaser, a railroad company.[21]

§ 2. *Purposes and uses of a public character.*—Private property cannot be taken for a private purpose,[22] except as so permitted by the constitution;[23] but

poration provided that corporations for certain purposes could construct railways and condemn rights of way on payment of compensation, and the charter was amended by Act 1896, § 18, giving the right to cross existing railroads or public roads, and limiting the power to condemn land to such purposes, the original power of condemnation was taken away—Boyd v. Winnsboro Granite Co. (S. C.) 45 S. E. 10. The right to take land for a dam is not conferred on a corporation organized to own and operate gas, electric and water works, to furnish light, power and water for hire under Rev. St. 1899, c. 131, § 8756, giving such right only to public mills as defined by the statute to be grist mills grinding without toll, or water grist mills built on water courses by authority of statute or order of court—Southwest Missouri Light Co. v. Scheurich, 174 Mo. 235. Gen. St. 1865, c. 69, § 17, as amended by Laws 1871-72, p. 15, giving bridge corporations power to exercise eminent domain amended by later laws allowing them to take land for approaches, road, foot or wagon ways over bridges is construed as to the word "road" in the amendment, to apply to structures designed for the passage of railroad trains as though the word was "railroad" and authorizes a railroad bridge company to condemn land for approaches and necessary tracks—Southern Illinois & M. Bridge Co. v. Stone, 174 Mo. 1. A passenger railway company incorporated under Act June 7, 1901, P. L. 523, giving the right of eminent domain for the construction of an elevated railway on a highway for one mile, having obtained the consent of the local authorities and filed a bond for security of a non-consenting land owner, may build such road though the land owner has secured the restraint of other street railway companies from building a surface street railway for such districts—Philadelphia & T. R. Co. v. Neshaminy El. R. Co. (Pa.) 55 Atl. 1034.

16. A railroad corporation organized in another state complying with Acts 1889, p. 43, c. 34, giving it the same rights as domestic corporations in building a line within the state, is a domestic corporation as to the right of exercising eminent domain—Russell v. St. Louis S. W. R. Co. (Ark.) 75 S. W. 725. Rev. St. 1899, §§ 1024, 1025, giving foreign corporations authority to transact business in the state on complying with certain formalities as other corporations, empowers a foreign corporation to exercise the same power of eminent domain as domestic corporations, where chartered to build a toll bridge across a boundary river between two states, without regard to whether it was empowered to exercise such right in the state of its residence, where authorized by federal law to build such bridge—Southern Illinois & M. Bridge Co. v. Stone, 174 Mo. 235. A corporation established under laws of another state to build telegraph and telephone lines within certain counties of that state cannot extend its lines beyond those counties under act No. 124, 1880, providing for the condemnation of property within the state since that applies only to foreign corporations authorized in the states where they are created to carry on their business elsewhere—Southwestern Tel. Co. v. Kansas City, S. & G. R. Co., 108 La. 691.

17. St. Louis, etc., R. Co. v. Southwestern Telephone & Telegraph Co. (C. C. A.) 121 Fed. 276.

18. Samish River Boom Co. v. Union Boom Co. (Wash.) 73 Pac. 670.

19. State v. Superior Ct., 31 Wash. 445, 72 Pac. 89.

20. Western Union Tel. Co. v. Pennsylvania R. Co., 120 Fed. 362.

21. Supplement of March 25, 1881 (on failure to agree as to repurchase)—State v. Baltimore & N. Y. R. Co. (N. J. Law) 53 Atl. 1040.

22. Gaylord v. Sanitary Dist. of Chicago (Ill.) 68 N. E. 522. Lands for railroad purposes cannot be condemned by one not in charge of a public use, or intending to perform a public service, or who merely wishes to transfer rights acquired to another—Beveridge v. Lewis, 137 Cal. 619, 67 Pac. 1040, 70 Pac. 1083. Pub. Acts 1887, p. 219, No. 202, § 9, subd. 6, (2 Comp. Laws 1897, § 6814) permitting land to be taken for construction of a navigable water way with appurtenant water power, which can be used for private purposes held unconstitutional—Berrien Springs Water Power Co. v. Berrien Circuit Judge (Mich.) 94 N. W. 379. Laws 1901, p. 502, c. 354, preventing the owner of one of two or more artesian wells in any vicinity, one or more of which are operated, from wasting water flowing from his well so as to diminish the flow of water in other wells in the vicinity and rendering him liable to damages for discharging more than is reasonably necessary for his use, so as to materially diminish the flow of other wells, declared unconstitutional as to owners whose wells take their supply from percolating

that a private purpose will be incidentally served will not prevent taking for a lawful purpose.[24] The use must be necessarily of a public nature,[25] and must be for the general public, not merely particular individuals thereof,[26] and statutes granting the power will be construed to require public benefit.[27] Power to take property for a temporary use is not necessarily implied from power to take it for a permanent public use,[28] nor does statutory authority to condemn for a particular purpose not raise a presumption that such purpose is public.[29] A purpose partially public is insufficient.[30] The petitioner must be bound to serve a public purpose,[31] and the public must be entitled to use without his favor or permission.[32] Mere convenience is insufficient to show public necessity.[33] The condition which makes a use public must exist at the time of taking.[34] Property obtained for a public use cannot be diverted to a private use.[35]

waters—Huber v. Merkel (Wis.) 94 N. W. 354.

23. Const. art. 1, § 17, construed with art. 9, §§ 1, 2, gives certain corporations the right to condemn for branch railroads, etc.—Boyd v. Winnsboro Granite Co. (S. C.) 45 S. E. 10.

24. Berrien Springs Water Power Co. v. Berrien Circuit Judge (Mich.) 94 N. W. 379. Buying of electric light plants is for a public purpose though it is proposed to furnish private service with the public service (Rev. St. 1899, § 6275, construed in connection with Const. art. 2, §§ 20, 21)—State v. Allen (Mo.) 77 S. W. 868.

25. Act May 14th, 1899, Pub. L. 216, § 14, as amended by Act May 21, 1895, Pub. L. 93, giving one street railway the right to use a certain portion of the tracks of another street railway on payment of damages, cannot be sustained since it merely aids the first company to obtain property of the other for its own benefit—Philadelphia, M. & S. St. R. Co.'s Petition, 203 Pa. 354. Though a company incorporated under a special charter (Acts 1899-1900, p. 418) may, in the exercise of some of its functions, be subject to laws regulating internal improvement companies and would be subject to public regulation, where it devoted its products to public use, and had power under its charter to devote a part or none of such products to public use, the public has no such definite right to such use as will render constitutional a provision giving it a right of eminent domain—Fallsburg P. & M. Co. v. Alexander (Va.) 43 S. E. 194. Necessity of condemnation of certain property is shown by evidence of a reasonable necessity under circumstances of the particular case, dependent on the practicability of another location, considered in connection with the real cost to one and the probable injury to the other—Samish River Boom Co. v. Union Boom Co. (Wash.) 73 Pac. 670. Code, § 2028, giving an owner or lessee of land without a private or public way thereto, the right to acquire a public way to a railroad station, the street or highway on, or immediately adjacent to a railroad line, and Code, § 2031, giving the owner, lessee or possessor of mineral lands, on payment of damages assessed, the right to build a railway, to reach and operate such mine and carry products to market, must be construed together so that a railway under the latter act can only be established on a public way established under the first act (Code, §§ 2028, 2031)—Morrison v. Thistle Coal Co. (Iowa) 94 N. W. 507.

26. Water rights—Hildreth v. Montecito Creek Water Co., 139 Cal. 22, 72 Pac. 395.

27. Gen. Laws 1901, c. 258, not expressly providing that a ditch shall not be authorized, unless found of public benefit, will be construed to be intended for such benefit—State v. Board of County Com'rs, 87 Minn. 325.

28. Waterbury v. Platt, 75 Conn. 387.

29. Under Const. art. 1, § 16—Healy Lumber Co. v. Morris (Wash.) 74 Pac. 681.

30. Gaylord v. Sanitary Dist. of Chicago (Ill.) 68 N. E. 522. The taking of property for purposes, some of which are private in nature, does not comply with the constitutional provision for public necessity—Berrien Springs Water Power Co. v. Berrien Circuit Judge (Mich.) 94 N. W. 379.

31. The intention to devote the property to a public purpose must be independent of the corporate will of petitioner—Berrien Springs Water Power Co. v. Berrien Circuit Judge (Mich.) 94 N. W. 379. Power to flow the lands of another by the erection of a dam to obtain water, where such flowing was found to be of public benefit, will not allow building of a dam to generate electricity for the operation of a railroad on the ground of public benefit, under V. S. c. 159, not requiring petitioner to serve the public generally—Avery v. Vermont Elec. Co. (Vt.) 54 Atl. 179.

32. A mere public benefit is not a public use—Gaylord v. Sanitary Dist. of Chicago (Ill.) 68 N. E. 522.

33. An unsustained claim that unless a railroad right of way was condemned a street railway company would be compelled to diverge from its right of way, as located, so as to render hazardous, dangerous and impracticable the operation of its road, does not show necessity for condemnation of the right of way (Act 1901, p. 461; Burns' Rev. St. 1901, § 5468a, subd. 5, does not expressly or impliedly confer authority to condemn)—Indianapolis & V. R. Co. v. Indianapolis & M. Rapid Transit Co. (Ind. App.) 67 N. E. 1013.

34. The power cannot be invoked on the theory that forfeiture will result if the purpose proves not to be public—Avery v. Vermont Elec. Co. (Vt.) 54 Atl. 179.

35. Where a city attempted to condemn property for certain public purposes but failed to complete the condemnation pro-

A railway to a mine,[36] private roads which are open to public use,[37] a levee along the bank of a river,[38] purchase or erection and maintenance by cities of public and private electric plants,[39] drainage of wet lands,[40] a system of free public fisheries in fresh water lakes of every county of a state,[41] additional railroad tracks and enlargement of terminal facilities,[42] a branch track to reach a private industrial enterprise to be used in furtherance of public business,[43] land for a railroad water station,[44] supplying an incorporated city or town and its inhabitants with natural gas for heating and illuminating;[45] all these are public purposes for which private property may be taken. Condemnation of land for park purposes by a city is valid though it intends to use part of the land for a free library and art building at the time situated on another part of the public park.[46] Land for a log road,[47] or for a tram-way, cannot be taken by a lumber company only to carry its own timber.[48] Public necessity cannot be said as a matter of law to require improvements in a stream.[49] Water companies cannot condemn water from springs on their lands which naturally flows over adjoining lands.[50] Municipalities cannot embark in business generally of a private nature except under stress of public necessity.[51]

§ 3. *Property liable to appropriation and estate therein which may be acquired.*—Statutes must be strictly construed respecting the property which they allow to be taken.[52] An easement,[53] a right of profit a prendre in lands,[54] the

ceedings and the parties treated the proceedings as void and contracted for a sale of the property by deed containing certain restrictions as to its use, a lease by the city under chapter 34, p. 255, Sp. L. 1891, giving it the right to lease land obtained by it for a private purpose, of the property to another person for a private enterprise is an unconstitutional diversion of the property to private use and gives the lessee no rights against the owner—Sanborn v. Van Duyne (Minn.) 96 N. W. 41.

36. This though the public can only travel by railway cars, since another mine owner can use it without paying additional damages to the original owner; there is no unconstitutional taking; though the spur track from the mine connected with the railroad more than a mile from a station it complied with the statute providing for such tracks since the mine owner had a public way over which his cars could be hauled to the station—Morrison v. Thistle Coal Co. (Iowa) 94 N. W. 507.

37. Pol. Code, § 2692—Madera County v. Raymond Granite Co., 139 Cal. 128, 72 Pac. 915.

38. Missouri, K. & T. R. Co. v. Cambern (Kan.) 71 Pac. 809.

39. Rev. St. 1899, § 6275, construed in connection with Const. art. 2, § 20—State v. Allen (Mo.) 77 S. W. 868.

40. Lile v. Gibson, 91 Mo. App. 480. Const. art. 2, § 20, against taking private property for private use except for private ways and drains, ditches, for agricultural or sanitary purposes, does not apply to Rev. St. 1899, § 8251, etc., providing for establishment of drainage districts, construction of ditches and assessment of benefits—Mound City L. & S. Co. v. Miller, 170 Mo. 240.

41. Under Act of March 22, 1901, providing for regulation of such fisheries and use by all citizens—Albright v. Sussex County Lake & Park Commission, 68 N. J. Law, 523.

42. Under railroad charter powers—Gardner v. Georgia R. & B. Co., 117 Ga. 522.

43. Zircle v. Southern R. Co. (Va.) 45 S. E. 802.

44. Under Gen. St. 1901, § 1359—Dillon v. Kansas City, Ft. S. & M. R. Co. (Kan.) 74 Pac. 251.

45. By corporation organized under general laws and occupying streets and alleys under municipal authority (Code 1899, § 42) —Charleston Natural Gas Co. v. Lowe, 52 W. Va. 662.

46. Laird v. Pittsburg, 205 Pa. 1.

47. Laws 1899, p. 255, c. 130, construed in connection with Const. art. 1, § 16—Healy Lumber Co. v. Morris (Wash.) 74 Pac. 681.

48. Under Pub. Laws 1895, c. 224, § 297, and Code 1883, § 2056, amended by Pub. Laws 1887, c. 46, § 1 (at most it may obtain an easement under compliance with the statute) —Leigh v. Garysburg Mfg. Co., 132 N. C. 167.

49. Even though construction of a dam will render the stream navigable—Berrien Springs Water Power Co. v. Berrien Circuit Judge (Mich.) 94 N. W. 379.

50. Shannon's Code, §§ 1844 et seq., and § 2502—Watauga Water Co. v. Scott (Tenn.) 76 S. W. 888.

51. Cities and towns cannot be authorized by the legislature to buy and sell fuel to citizens in competition with private dealers, but the government of such a municipality may make itself an agent on occasions of great scarcity of fuel for relief of persons unable to supply themselves through private enterprise, and money so spent will be expended for public use—In re Opinion of the Justices, 182 Mass. 605.

52. Act Cong. July 24, 1866; R. S. §§ 5263, 5264, authorizing any telegraph company to build lines over any part of the public domain including military or post roads, gives an interstate franchise, but does not empower companies to exercise the power of eminent domain to take private property—

right to fish in fresh water lakes of a state,[55] and private interests in tide lands held under a contract from the state,[56] may be taken. Consent by an abutting owner to construction of a street railway is not such a property right as can be appropriated.[57]

Lands once acquired and lost may be reacquired by condemnation.[58]

Property exempt by law because used for a certain purpose must be capable of such use,[59] and must be so used at time of condemnation.[60]

Property in actual and necessary use for a public purpose cannot be taken for another purpose no more necessary,[61] but it may be taken if the new use will not materially interfere with the old use.[62] Statutory authority is not necessary

Western Union Tel. Co. v. Pennsylvania R. Co., 120 Fed. 362. Sufficiency of compliance with statutory requirements that a spur railway line should be located on, or immediately adjacent to a division line, where such spur line was constructed from a mine to a railroad across the land of another—Morrison v. Thistle Coal Co. (Iowa) 94 N. W. 507. Where a water district is empowered by Private Laws 1899, c. 200, to take the entire property of a water company within certain territory, it must take all the property held by such company within such territory, if it takes anything, whether specifically named in the statute or not, including real estate or other property not connected with the water system, the plant or physical system and all franchises or privileges exercised or capable of being exercised. Under Private Laws 1899, c. 200—Kennebec Water Dist. v. Waterville, 97 Me. 185. A company operating a railway on leased lands built under provisions of the Traction act of 1893 (§§ 13, 14, Gen. St. p. 3239), procured appointment of commissioners to condemn land adjoining its line so that the two tracks would not exceed 60 feet in width, is within the Act—Middlesex & S. T. Co. v. Metlar (N. J. Law) 56 Atl. 142. Where a railroad company taking a right of way covenanted to make a suitable and convenient crossing where the owner should direct, and he selected a place where the railroad was nearly at a grade and the crossing was constructed and used for several years, and subsequently the railroad company raised the grade so as to destroy the crossing, at which time the owner notified the company of his rights and demanded that the crossing be left open, he could not be compelled to accept compensation in the place of the crossing, where the charter of the original railroad company, (Laws 1867, p. 306, c. 160, § 9) and general statutes (Gen. St. p. 2661, § 84) under which the present company was formed, preserved the old road to the owner and required suitable crossings for farm purposes, and gave no right to take rights expressly given or reserved to the owner—Speer v. Erie R. Co., 64 N. J. Eq. 601.

53. Deavitt v. Washington County (Vt.) 53 Atl. 563.

54. Under Const. p. 16, art. 1, authorizing the taking of any interest in private property less than the whole—Albright v. Sussex County Lake & Park Commission, 68 N. J. Law, 523.

55. Though private property and prima facie belonging to owners of soil covered by the water—Albright v. Sussex County Lake & Park Commission, 68 N. J. Law, 523.

56. By railroad company under Ball. Ann. Codes & St. §§ 4333, 4334, the land was held by individuals subject only to forfeiture for failure to pay balance of purchase price—State v. Superior Ct., 31 Wash. 445, 72 Pac. 89.

57. It is a personal right under Rev. St. §§ 3439, 3440—Hamilton, G. & C. Traction Co. v. Parrish, 67 Ohio St. 181.

58. Bouvier v. Baltimore, etc., R. Co. (N. J. Law) 53 Atl. 1040.

59. Where property dedicated as a street had never been improved and could not be used as such without being improved, it is not exempt from condemnation by a railroad company because of Laws 1879, p. 147, giving street railway companies the power of eminent domain exempting public roads and streets—State v. Superior Ct., 30 Wash. 219, 232, 70 Pac. 484.

60. Under Act 1854, 55, c. 225, giving a railroad company the right to condemn a right of way but exempting gardens from such use, property which is not used as a garden at the time of condemnation is not exempt because used as a garden when the company afterward takes actual possession —Dargan v. Carolina Cent. R. Co., 131 N. C. 623.

61. Land used for public park cannot be taken for a postoffice; under Mass. Laws, governing an eminent domain proceeding by the United States—In re Certain Land in Lawrence, 119 Fed. 453. A creek improved by a city for drainage cannot be taken by a drainage district—Bishop v. People, 200 Ill. 33. One street car company granted right to build tracks in street already occupied by another company under former grant, cannot interfere with vested rights or franchises of the latter company by straddling its tracks—Parrish v. Hamilton, G. & C. Traction Co., 23 Ohio Circ. R. 527. One railroad company cannot condemn for right of way purposes, an entire tract of land belonging to another, part of which is in actual and necessary use for railway purposes—Atchison, etc., R. Co. v. Kansas City, etc., R. Co. (Kan.) 73 Pac. 899. Acts 1901, p. 461; Burns' Rev. St. 1901, § 5468a, subd. 5, giving an interurban street railway authority to build its road on a railroad which the route of its road shall intersect, does not authorize its appropriation longitudinally of the railroad right of way in whole or in part—Indianapolis, etc., R. Co. v. Indianapolis & M. Rapid Transit Co. (Ind. App.) 67 N. E. 1013.

62. Const. art. 12, § 10, construed in connection with Ball. Ann. Codes & St. § 5638—Samish River Boom Co. v. Union Boom Co. (Wash.) 73 Pac. 670. Under Civ. Code, § 2626,

to taking land already in public use for a new use if public interests demand it,[63] but if the right is given by statute it must be strictly construed,[64] and if express powers given a petitioner suffice to accomplish the object sought no implied power to condemn property already appropriated can exist.[65] The future needs of the present purpose and the public duty of the present occupant must be considered in allowing property already in public use to be taken,[66] but a mere hypothetical convenience of the occupant will not prevent appropriation.[67] A proceeding to obtain the right to connect a flume with a city canal to discharge water into it is not a condemnation of city land so that the use by the power company must be shown to be a more necessary public use than the use of city since the city owns but an easement over the land.[68]

State lands given by statute to each township to be sold for school purposes may be taken.[69]

Statutory authority to petitioner to choose his own location must be exercised in good faith.[70] Railroad companies exercising the power of eminent domain may determine, within statutory limits, the location and amount of land to be taken,

one railroad may condemn a crossing over another where necessary to public needs of the business—Houston & S. R. Co. v. Kansas City, etc., R. Co., 109 La. 581. Real estate of one railroad company not in actual and necessary use for its road may be taken by another company—Atchison, etc., R. Co. v. Kansas City, etc., R. Co. (Kan.) 70 Pac. 939. Act May 14, 1889, Pub. Laws 211, § 14 amended by Act June 7, 1901, Pub. Laws 514, authorizing one street railroad to use the track of another for a certain prescribed distance is unconstitutional—Commonwealth v. Uwchlan St. R. Co., 203 Pa. 608. Under Rev. St. 1878, §§ 3964, 5263, a telegraph company may locate lines along a railroad right of way—Postal Tel. & Cable Co. v. Chicago, etc., R. Co., 30 Ind. App. 654. Under Rev. St. arts. 698, 699, a telegraph and telephone company may take a right of way over railroad property though it might obtain a right of way over other lands—Fort Worth, etc., R. Co. v. Southwestern Tel. Co. (Tex.) 71 S. W. 270. Telephone companies can only occupy railroad rights of way and cannot interfere with tracks; under act 1880, p. 168, No. 124—Southwestern Tel. Co. v. Kansas City, etc., R. Co., 109 La. 892. 23 St. at Large, p. 61, §§ 2, 3, allowing telephone lines to be built over railroad or other land, authorizes telephone companies to condemn a right of way for its purposes, where acquired by the railroad company by condemnation and in fee—South Carolina & G. R. Co. v. American Tel. Co., 65 S. C. 459. An amendment to the charter of a railroad company which gave it no power to condemn a right of way across the track of another company, adopting provisions of the general railroad law as far as applicable, included in Civ. Code, § 2167, giving it right to acquire such right of way by condemnation though under the original charter it could only be acquired by private contract—Atlantic & B. R. Co. v. Seaboard Air Line R., 116 Ga. 412. Act March 19, 1900 (Pub. Laws 1900, p. 74) [which amended the telegraph company act April 9, 1875, § 8; Gen. St. p. 3457] construed as not depriving such companies of the right to condemn a use in public roads for such purposes, where the owners refused to consent, such power being given by Act March 11, 1880 (Pub. Laws 1880, p. 201). The act first mentioned does not confer or withdraw power of eminent domain, but merely regulates its exercise as to telegraph rights of way—Coles v. Midland Tel. Co., 68 N. J. Law, 413.

63. Taking of land by one railroad to cross another—Houston & S. R. Co. v. Kansas City, etc., R. Co., 109 La. 581.

64. Act Cong. July 24, 1866, c. 230, 14 Sts. 221, authorizing construction of telegraph lines over post roads including public roads and highways, does not confer the right to use streets and alleys of a municipality except on conditions prescribed—Postal Tel. Cable Co. v. Newport, 25 Ky. L. R. 635, 76 S. W. 159. Act Pa. March 24, 1849, chartering a telegraph company and authorizing it to build lines between certain cities and intermediate places, and to erect structures necessary to cross public ways and waters of the state so as not to interfere with their use, is a grant of a right of way along and over roads of the state, but does not confer expressly or by implication, the right to take, in exercise of the power of eminent domain, a right of way along a railroad track—Western Union Tel. Co. v. Pennsylvania R. Co., 120 Fed. 362.

65. Condemnation of railroad right of way by telegraph company—Western Union Tel. Co. v. Pennsylvania R. Co., 120 Fed. 362.

66. Taking railroad right of way for telegraph purposes—Western Union Tel. Co. v. Pennsylvania R. Co., 120 Fed. 362.

67. Taking right of way for telephone lines—Southwestern Tel. Co. v. Kansas City, etc., R. Co., 109 La. 892.

68. Rev. St. §§ 3588, 3590, construed in connection with § 3591—Salt Lake City Water & Elec. Power Co. v. Salt Lake City, 25 Utah, 441, 71 Pac. 1067.

69. Act Cong. July 3, 1890, known as "Idaho Admission Act"—Hollister v. State (Idaho) 71 Pac. 541.

70. In appropriation of shore lines or waters by boom companies, a later extension of business beyond the first location does not show bad faith (Ball. Ann. Codes & St. § 4379)—Samish River Boom Co. v. Union Boom Co. (Wash.) 73 Pac. 670.

and their discretion will not be controlled by the courts, unless clearly abused,[71] but after choice is made and the road established, the right of location under that proceeding is exhausted.[72]

Use or estate which may be exercised.—A use or interest in land may be taken temporarily.[73] A police jury failing to agree with landowners as to making a public road in a county may establish it by imposing mere servitude of passage over the lands.[74]

§ 4. *What is a "taking" or "injuring" of property.*—The duration of injury is immaterial; if it actually occurs there is a taking.[75] To be injured, property need not abut on a public improvement; it need only be near enough to be proximately and substantially injured.[76] A mere regulation of an occupation,[77] right,[78] or of the use of property,[79] is not an appropriation requiring compensation; but oppressive taxation or wrongful diversion of public funds may be.[80] Circumstances showing a taking or injury,[81] and damages which do not fall within those terms,[82] are illustrated in the cases cited below and under succeeding para-

71. Zircle v. Southern R. Co. (Va.) 45 S. E. 802. A railroad company under its charter powers may determine the amount of land necessary to enlarge its terminal facilities or build additional tracks—Gardner v. Georgia R. & B. Co., 117 Ga. 522. Where a railroad charter gave authority to build a line between two places without exact description thereof, it may be located at the company's discretion—Tennessee Cent. R. Co. v. Campbell (Tenn.) 73 S. W. 112.

72. Where the map of a proposed railroad filed by the company, does not describe definitely its location, nor is it so described in an instrument by an abutting owner conveying the right of way, the railroad company cannot change the track as established when the grant is made without the owner's consent or condemnation proceedings by making additional tracks, switches, or sidings—Stephens v. New York, O. & W. R. Co., 175 N. Y. 72.

73. For use while constructing water works under Act April 1, 1895 (Pub. Laws 1895, p. 769)—Hepburn v. Jersey City, 67 N. J. Law, 686.

74. Under Rev. St. § 3369—Fuselier v. Police Jury of Parish of Iberia, 109 La. 551.

75. Injury to abutting property only during construction of a railroad in a street—Bailey v. Boston & P. R. Corp., 182 Mass 537.

76. Const. 1874, art. 6, § 8—Cooper v. Scranton City, 21 Pa. Super. Ct. 17.

77. An act requiring a license of transient merchants, and imposing a penalty for violation (Act March 11, 1901; Burns' Rev. St. 1901, §§ 7231a, 7231b construed in connection with Const. art. 1, § 21)—Levy v. State (Ind.) 68 N. E. 172.

78. Regulation of a city water supply though injury results to established business (St. 1895, c. 488)—Sawyer v. Commonwealth, 182 Mass. 245.

79. Ordinance against allowing growth of weeds on private premises—St. Louis v. Galt (Mo.) 77 S. W. 876. A requirement, that railroad companies should keep rights of way clear of dry vegetation and under growth to prevent fires, and providing for certain penalties on failure (Rev. St. 1898, § 2614)—McFarland v. Mississippi River & B. T. R. Co. (Mo.) 75 S. W. 152.

80. Assessment of property for public improvements beyond total value of the property after assessment—Louisville v. Bitzer, 24 Ky. L. R. 2263, 73 S. W. 1115. Law apportioning money from city licenses between state, county and city, held unconstitutional (St. 1903, p. 190, c. 102, § 20, subd. 9, construed in connection with Bill of Rights, § 8)—State v. Boyd (Nev.) 74 Pac. 654.

81. A general telegraph line on a railroad right of way erected under a transfer of telegraph lines of the railroad company and enlarged for commercial purposes. The conveyance was an attempt to confer the right to maintain a general commercial line—Hodges v. Western Union Tel. Co. (N. C.) 45 S. E. 572. Obstruction of surface water by construction of railroad, making a pond on abutting farm property—Arkansas Cent. R. Co. v. Smith (Ark.) 71 S. W. 947. Destruction of a private road and the owner's access—Culver v. Yonkers, 80 App. Div. (N. Y.) 309. Destruction of a rice plantation by federal improvement in navigation (5th Amend to Cons. U. S.)—United States v. Lynah, 188 U. S. 445; Same v. Williams, 188 U. S. 485. Pollution of a river by drainage of city sewage damaging riparian owners above tide waters (The city had condemned no such right)—Doremus v. Paterson (N. J. Err. & App.) 55 Atl. 304. Damage to land by drainage of sewage into a creek in natural course of flowage, even though the sewers were properly constructed (Const. 1876, art. 1, § 17)—New Odorless Sewerage Co. v. Wisdom (Tex. Civ. App.) 70 S. W. 354. Appropriation of, or damage to, water rights of lessees from a company holding water power for manufacturing purposes under statutory authority, (Pollution by city sewage of streams from which lessees were entitled to draw water)—Doremus v. Paterson (N. J. Err. & App.) 55 Atl. 304. Taking of public lands occupied by a claimant as "homestead" (He has legal vested rights under his claim)—Oklahoma City v. McMaster (Okl.) 73 Pac. 1012. Taking of a dam for water supply to the impairment of granted rights of an owner servient to the flowage by the dam (L. 1893, p. 317, c 189)—In re Brookfield (N. Y.) 68 N. E. 138.

82. Injuries to riparian lands by piers, abutments or bridges erected by municipal

graphs. The opening of a highway across a railroad is a taking requiring compensation for land actually taken in absence of a showing of benefits.[83]

Destruction of a calling, business, or profession, is a taking of property as much as a taking of real estate.[84] A right of way of necessity based on estoppel but not amounting to an easement is not an interest in land entitling one to compensation, where taken for a public street.[85] Vested rights of riparian owners cannot be abolished by legislative action as to irrigation except by condemnation.[86] That an interest in lands is less than the whole will not prevent the right to compensation for land taken or damaged in constructing a street if the right is substantial and is affected.[87] Condemnation of a turnpike is no injury to abutting property.[88]

Establishment or vacation of streets.—Injury to abutting lands by opening a street,[89] or extending a street under railroad tracks,[90] or closing a street,[91] or of an alley, destroying access to adjacent property,[92] or temporary closing of a street destroying access during the period,[93] generally gives a right to damages; but this will not apply to statutory vacation as affecting rights of corporations to carry wires in underground conduits.[94]

Establishment or change of street grade.—Generally, no recovery can be had for grading under a previously established plan which injures improvements erected on the abutting property after establishment of the grade,[95] unless improvement

authorities in the exercise of public rights, so that the bank is washed by the augmented current—Salliotte v. King Bridge Co. (C. C. A.) 122 Fed. 378. Loss of business resulting from taking adjoining property for railroad purposes; a statute is necessary to create liability for such injury—Bailey v. Boston & P. R. Corp., 182 Mass. 537. Establishment of a highway across railroad tracks (Notice of the proceedings is unnecessary to foreclose rights of grantee of the railroad property)—Baltimore & O. S. W. R. Co. v. State, 159 Ind. 510. Lowering of the grade of a highway belonging to a plank road company to accommodate a street railway, the township and the plank road company consenting—Austin v. Detroit, Y. & A. A. R. (Mich.) 96 N. W. 35. Elevation of tracks on a railroad right of way to the damage of adjacent property (Chicago v. Webb, 102 Ill. App. 232) or obstruction of light, air and view—Osburn v. Chicago, 105 Ill. App. 217. Inspection of mining claims in an action to determine adverse claims thereto (Code Civ. Proc. § 1314, construed in connection with Const. art. 3, § 14)—State v. District Ct. (Mont.) 73 Pac. 230.

83. Lake Erie & W. R. Co. v. Shelley (Ind. App.) 67 N. E. 564.

84. State v. Chapman (N. J. Law) 55 Atl. 94. Widow keeping house and boarding her children and occasional visiting relatives during their vacation for pay does not have an established boarding house business—Gavin v. Commonwealth, 182 Mass. 190.

85. In re City of New York, 83 App. Div. (N. Y.) 430.

86. Crawford Co. v Hathaway (Neb.) 93 N. W. 781.

87. Olson v. Seattle, 30 Wash. 687, 71 Pac. 201.

88. Under Act May 14, 1889, § 17, P. L. 217—Hinnershitz v. United Traction Co. (Pa.) 55 Atl. 841.

89. Grant v. Hyde Park, 67 Ohio St. 166.

90. Requiring construction of a bridge or viaduct to carry trains over the street—Cincinnati, H. & D. R. Co. v. Troy (Ohio) 67 N. E. 1051.

91. The closing rendered the street a cul de sac directly in front of property—Village of Winnetka v. Clifford, 201 Ill. 475. The property must be so situated that the owner is entitled to notice of vacation proceedings: if it did not extend to an open part of the street, that a continuation in front of his property has been dedicated but never opened will not avail him—Beutel v. West Bay City Sugar Co. (Mich.) 94 N. W. 202.

92. The owner suffers a burden different from that of the general public—Chicago v. Webb, 102 Ill. App. 232.

93. Loss of rents of tenements abutting on private way leading to closed street (Sts. 1891, p. 880, c. 323, construed in connection with Pub. St. 1882, c. 49, § 16)—Munn v. Boston (Mass.) 67 N. E. 312.

94. The right of the corporation is a part of the public easement destroyed by the vacation (Act 1896, c. 516, § 23)—New England Tel. Co. v. Boston Terminal Co., 182 Mass. 397.

95. Ross v. Cincinnati, 24 Ohio Circ. R. 43. The owner had notice of the grade when he built—In re City of New York, 78 App. Div. (N. Y.) 355. A railroad company which had acquired the right to maintain its road along a certain street through a sub-way as against abutting owners, before passage of a law compelling a change of grade and erection of a steel viaduct to give the public use of the street, was not liable to abutting owners for damages from interference with easements of light, air and access. The state had the power to change the grade and compel the viaduct to be built for public benefit without compensation to abutting owners—Muhlker v. New York & H. R. Co., 173 N. Y. 549.

If no legal grade has been established for

to conform to the established grade destroys the natural drainage and furnishes no means adequate for drainage,[96] or unless the map showing the plan of grade is so vague as to mislead the abutting owner.[97] Change of an established grade resulting in consequential injury requires compensation[98] though the whole street has not been worked up to the established sidewalk grade;[99] but one who removed his building after title to land was acquired by the city but before the street was opened cannot recover.[1]

Notice sufficient to prevent abutting landowners from recovering for injuries from change in the grade of a street must be clear and conclusive.[2]

The legislature may declare a change of a street grade by a village to be a taking of adjacent property for public use to the extent of its injury.[3] A constitutional amendment giving damages to abutting property from change of a street grade applies to improvements of abutting owners made before as well as after its passage.[4]

Railroads or other ways or structures on city streets.—Electric railways are not an additional servitude on city streets when they can be said to fall within the public use for which the street was taken,[5] unless the construction changes the established grade of the street,[6] or special injury be done to abutting property.[7] Provisions made by statute for reservation of space for the construction of railways to which they are confined, show such a contemplated use.[8] The same rules apply to wires and poles,[9] transmission of electric heat, light, and power on poles or wires in use for a different purpose,[10] are added burdens to the street. As to property not too remote, construction of a railroad in a street,[11] or of an elevated railway, though the fee of the street is in the city,[12] amounts to a taking or injuring of abutting property; but this will not apply to railroad structures in a street resulting in mere

a street a city in Iowa is liable for damages to abutting property from grading (Wilbur v. Ft. Dodge [Iowa] 95 N. W. 186) but in Ohio there can be no recovery when a grade is established unless it is unreasonable (Ross v. Cincinnati, 24 Ohio Circ. R. 43) and in Montana, damages are allowed for injuries resulting from the first established grade (Const. art. 3, § 14)—Less v. Butte (Mont.) 72 Pac. 140.

96. Wilbur v. Ft. Dodge (Iowa) 95 N. W. 186.

97. In re City of New York, 84 App. Div. (N. Y.) 312.

98. Const. art. 1, § 13, amended in 1896—Dickerman v. Duluth, 88 Minn. 288. Direct and physical injury to abutting property cannot be denominated damnum absque injuria because done under police power—Chicago v. McShane, 102 Ill. App. 239. Accumulation of surface water on abutting property as a direct and unavoidable result of the change—Cooper v. Scranton City, 21 Pa. Super. Ct. 17.

99. Laws 1897, p. 420, c. 414, § 159—In re Comesky, 83 App. Div. (N. Y.) 137.

1. In re City of New York, 80 App. Div. (N. Y.) 622.

2. In re City of New York, 84 App. Div. (N. Y.) 525.

3. Laws 1897, p. 420, c. 414, § 159—In re Comesky, 83 App. Div. (N. Y.) 137.

4. Const. art. 1, § 13, amended in 1896—Dickerman v. Duluth, 88 Minn. 288.

5. Baker v. Selma St. & S. R. Co., 135 Ala. 552. Though the owner's fee extends to the center of the street—Lange v. La Crosse & E. R. Co. (Wis.) 95 N. W. 952.

6. Obstruction of access to abutting property—Farrar v. Midland Elec. R. Co. (Mo. App.) 74 S. W. 500.

7. Such as injury to easement of light and air by building a trestle and bridge in front of property (State v. Superior Ct., 30 Wash. 219, 232, 70 Pac. 484) or interference with access—Parrish v. Hamilton, G. & C. Traction Co., 23 Ohio Circ. R. 527.

8. St. 1895, p. 109, c. 131 (location under direction of selectmen)—Eustis v. Milton St. R. Co. (Mass.) 67 N. E. 663.

9. Recovery may be had for unavoidable injury to trees on abutting property by erection of wires, or where the poles and wires permanently or exclusively occupy parts of a public street or highway (Bronson v. Albion Tel. Co. [Neb.] 93 N. W. 201, 60 L. R. A. 426) but construction of a telephone system in city streets which are subject to such a use gives no right to damages; except as to unnecessary damage to abutters, for there is no additional servitude—Kirby v. Citizens' Tel. Co. (S. D.) 97 N. W. 3.

10. Street railway—Goddard v. Chicago & N. W. R. Co., 202 Ill. 362.

11. Construction and operation within less than thirty feet of a factory impairing access, and diverting the street from its dedicated purpose, requires compensation (Const. art. 1, § 16)—Cleveland Burial Case Co. v. Erie R. Co., 24 Ohio Circ. R. 107. That a railroad was built on the opposite side of a street will not prevent recovery by an abutting owner, but the owner of a residence lot 300 feet from the street cannot claim damages (Comp. Laws, § 6254)—Marquette & S. E. R. Co. v. Longyear (Mich.) 94 N. W. 670.

12. The question of additional servitude

inconvenience of access,[13] or to temporary railroad tracks in a city street during elevation of tracks,[14] or to change of a grade crossing,[15] or additional tracks laid in a street under municipal authority,[16] or change of grade, width, or use of a street for railroad tracks.[17]

Use of rural highways for purposes other than general public travel.—Street railways on highways are regarded as an additional servitude in Pennsylvania,[18] but not in Michigan,[19] Maryland,[20] or Kentucky.[21] A telegraph,[22] or a telephone line,[23] or a natural gas conduit,[24] or the change of a horse railway to an electric one,[25] adds to the burden of a country highway, except where the fee is in the public.[26]

Erection of public viaducts or bridges under statutory authority in a street, the fee of which is in the city, is not a taking of abutting property,[27] unless access be destroyed.[28] A bridge abutment or approach on a rural highway is a "taking" if it impairs access to abutting lands.[29]

§ 5. *Right of appropriation as dependent on compensation, payment, deposit, or offer to purchase. Compensation is necessary.*—Private property cannot be taken for a public purpose without payment of just compensation,[30] though the taking be

then becomes immaterial (Const. 1870, art. 2, § 13)—Aldis v. Union El. R. Co., 203 Ill. 567.

13. Where a depot is built across a street so as to require persons going from a dwelling a point beyond it to go around by other streets, there is no taking or injury to the dwelling—Dennis v. Mobile & M. R. Co. (Ala.) 35 So. 30.

14. Elevated grade crossings required by statute; the temporary character of the tracks can only be considered in estimating the amount of damages—McKeon v. New York, N. H. & H. R. Co., 75 Conn. 343.

15. The tracks were used so as to damage abutting property—Knapp & C. Mfg. Co. v. New York, N. H. & H. R. Co. (Conn.) 56 Atl. 512. Mere inconvenience in access to a street because of construction of a railroad is insufficient to amount to special injury—Putnam v. Boston & P. R. Corp., 182 Mass. 351.

16. They constitute an additional servitude though the grantor of the abutting owner granted the right to lay the original track—Rock Island & P. R. Co. v. Johnson, 204 Ill. 488.

17. Under Const. § 242—Louisville & N. R. Co. v. Cumnock (Ky.) 77 S. W. 933. Causing total destruction to access. See, also, as to special injuries to adjacent property (Pub. St. c. 112, § 95)—Putnam v. Boston & P. R. Corp., 182 Mass. 351. Though under statutory authority and though no more injury results than would result from filling the street with building material which is allowable by statute—Knapp & C. Mfg. Co. v. New York, N. H. & H. R. Co. (Conn.) 56 Atl. 512. Station houses of a railroad occupying more of the street than the viaduct on which the railroad is located thereby cutting off easements of light and air. Viaduct erected under Laws 1892, p. 694, c. 337—Dolan v. New York & H. R. Co., 175 N. Y. 367.

18. In townships of the first class; they constitute an additional burden to the fee—Dempster v. United Traction Co., 205 Pa. 70.

19. Austin v. Detroit, Y. & A. A. R. (Mich.) 96 N. W. 35.

20. County highway—Lonaconing Midland & F. R. Co. v. Consolidation Coal Co., 95 Md. 630.

21. Georgetown & L. Traction Co. v. Mulholland, 25 Ky. L. R. 578, 76 S. W. 118. Removal of obstructing fences to build electric railway held not an injury where they were built under license until removal was required by public necessity—Id.

22. The landowner held the fee—Union Elec. Tel. Co. v. Applequist, 104 Ill. App. 517.

23. Gray v. New York State Tel. Co., 41 Misc. (N. Y.) 108.

24. Fee was in abutter—Ward v. Triple State Natural Gas & Oil Co., 25 Ky. L. R. 116, 74 S. W. 709.

25. Consent to the horse road will not bind an abutting owner as to the electric way—Humphreys v. Ft. Smith Traction, etc., Co. (Ark.) 71 S. W. 662.

26. Kennedy v. Mineola; H. & F. Traction Co., 77 App. Div. (N. Y.) 484, 12 Ann. Cas. 189.

27. The street easement is for public purposes—Sauer v. New York, 40 Misc. (N. Y.) 585.

28. Approach to viaduct—Chicago v. Le Moyne (C. C. A.) 119 Fed. 662.

29. Interference with access need not be total—Lafean v. York County, 20 Pa. Super. Ct. 573.

30. Taking lands by United States to improve navigation (5th Amendment)—United States v. Lynah, 188 U. S. 445; Same v. Williams, 188 U. S. 485. Land taken by county for road—Hitch v. Edgecombe County Com'rs, 132 N. C. 573 (Const. § 21, art. 1)—Hogsett v. Harlan County (Neb.) 97 N. W. 316. Taking of property of water works company by city (Laws 1875, p. 157, c. 181 amended by Laws 1881, p. 220, c. 175. Laws 1883, p. 286, c. 255; Laws 1885, p. 370, c. 211 construed in connection with Laws 1875, p. 162, c. 181)—In re Board of Water Com'rs (N. Y.) 68 N. E. 348. Acts 1901, p. 90, c. 63, violates Const. art. 1, § 21, in not providing for compensation for taking water supply—Watauga Water Co. v. Scott (Tenn.) 76 S. W. 888. Rev. St. 1874, p. 701, c. 92, authorizing taking property for public mills or machinery other than public grist mills, is unconstitutional—Gaylord v. Sanitary Dist. of Chicago (Ill.) 68 N. E. 522. Under Const. art. 3, § 14, compensation must be made for damages from street grading though under the first grade fixed—Less v. Butte (Mont.) 72 Pac. 140. The rule applies to private corpo-

under the police power of the state,[31] or by taxation,[32] or by assessment for public improvements,[33] or by one railroad company for crossing the road of another;[34] but public streets or highways may be extended across a railroad without compensation.[35] "Just compensation" in the constitutional sense means full compensation, so that the taking of property for public use for less than full compensation invades constitutional rights without regard to the extent.[36]

Necessity of payment of compensation or deposit in court before taking property.—Railroad companies are generally required to pay the compensation awarded to the landowner, or into court for him, before taking possession,[37] or divesting the owner of title.[38] The rule has also been applied to street railways working injury to abutting owners,[39] to taking of lands by a city for streets,[40] or by a county for roads,[41] but it is unnecessary in Kansas as to land taken for a schoolhouse site.[42]

Necessity of securing consent or offer to purchase.—A railroad company must acquire its right of way by purchase if practicable, and resort to condemnation only when it cannot purchase.[43] To take lands for agricultural, domestic, or sanitary drains, an offer to purchase is not necessary before beginning proceedings.[44] New York City may proceed to take all rights of joint owners of the structure, user, and wharfage of a pier, in which the city is also joint owner, without an attempt to purchase from such owners.[45] Consent of a mortgagee to use of land for telegraph purposes need not be sought before condemnation if the owner refuses consent.[46]

rations taking property, they being limited in the delegation of power as other persons (Const. art. 1, § 14, construed in connection with the 14th amendment)—Steinhart v. Superior Ct., 137 Cal. 575, 70 Pac. 629.

31. Injury to abutting property by temporary use of street by railroad during elevation of tracks—McKeon v. New York, etc., R. Co., 75 Conn. 343, 53 Atl. 656; Knapp & C. Mfg. Co. v. New York, etc., R. Co. (Conn.) 56 Atl. 512.

32. The eastern half of the Union Pacific railroad company's bridge over the Missouri river, used exclusively for railroad purposes cannot be taxed for municipal purposes by the city of Council Bluffs, though within corporate limits, the east end of the bridge being over a mile from municipal improvements of any sort, and not furnished fire or police protection, and the land between the bridge and the settled part of the city used for agriculture—Arnd v. Union Pac. R. Co. (C. C. A.) 120 Fed. 912.

33. If the total value of assessed property after improvement is less than the cost of improvement, the assessment lien cannot be enforced—Louisville v. Bitzer, 24 Ky. L. R. 2263, 73 S. W. 1115.

34. Civ. Code, § 2167—Atlantic & B. R. Co. v. Seaboard Air-Line R., 116 Ga. 412.

35. The company has acquired subject to the public necessity—Baltimore, etc., R. Co. v. State, 159 Ind. 510.

36. Spring Valley Water Works v. City & County of San Francisco, 124 Fed. 574.

37. Code Civ. Proc. 1254, authorizing an order allowing a railroad company to take possession of lands during condemnation proceedings for a right of way, violates Const. art. 1, § 14, that no right of way shall be appropriated for private corporation until full compensation is made and paid into court for the owner—Steinhart v. Superior Ct., 137 Cal. 575, 70 Pac. 629.

38. Under Code, § 1079, providing for payment to person entitled or into court whereon title absolutely vests in petitioner in fee—Southern R. Co. v. Gregg (Va.) 43 S. E. 570.

39. State v. Superior Ct., 30 Wash. 219, 232, 70 Pac. 484.

40. Where damages are awarded in a taking of property for streets by a city, and on appeal to the circuit court a larger award is obtained, the land cannot be appropriated by the city until the difference in the awards is paid or tendered to the property owner though the original award has been paid into court—Heinl v. Terre Haute (Ind.) 66 N. E. 450.

41. Opening section line road—Chicago, B. & Q. R. Co. v. Douglas County (Neb.) 95 N. W. 339.

42. Under Gen. St. 1901, § 6131, providing means for determining value of property taken for such public purpose, and Const. art. 12, § 4, giving right to full compensation and under Bill of Rights giving remedy by due course of law for all such injury to property—Buckwalter v. School Dist. No. 2, 65 Kan. 603, 70 Pac. 605.

Note. The better rule would seem to be that in case of a purely public appropriation it suffices to provide for compensation, but the states are in conflict. See 6 Am. & Eng. Enc. Law [1st Ed.] 586.

43. Bouvier v. Baltimore, etc., R. Co. (N. J. Law) 53 Atl. 1040. Under Comp. Laws, §§ 6242, 6243, 6251—Marquette, etc., R. Co. v. Longyear (Mich.) 94 N. W. 670.

44. Under Act March 19, 1895 (Laws 1895, p. 142, c. 79)—Lewis County v. Scobey, 31 Wash. 357, 71 Pac. 1029.

45. Greater N. Y. Charter, §§ 822, 824 (Laws 1901, p. 354, c. 466)—In re City of New York, 41 Misc. (N. Y.) 134.

46. Coles v. Midland Tel. Co., 68 N. J. Law, 413.

Release or waiver of damages.—A landowner may waive his right to compensation by dedication,[47] written consent,[48] or by acts adopting or acquiescing in the conditions producing injury to his property,[49] but not by mere failure to appear in the proceedings to take the property.[50] Dedication of land taken will not waive damages to land not taken.[51] A general dedication as to property will not bind a subsequent grantee of part thereof, or those claiming under him, where he bought previously, and was recognized as the owner in the proceedings,[52] nor will consent to building of an elevated railway bind a bona fide purchaser without actual or record notice where there was already one road in the street.[53] Consent of the lessor will not bind the lessee as to his interest.[54] Consent to construction of a horse railway in a highway will not permit an electric railway.[55] Consent by an abutting owner to an elevated railway over the driveway of a street cannot be extended to the sidewalk.[56] A grant by an abutting owner of the right to lay a railroad track in a street under municipal authority will not bind his successor in title as to additional tracks.[57] A waiver of damages on laying out a road is binding, though the road is not actually opened until after the territory is included in an incorporated town.[58] A city may agree with an owner as to waiver of damages for a way across his land and assumption of betterments by the city, though it may be required to go on the land and to obtain the right to go on the land of others to care for surface waters and other private owners may be benefited thereby.[59] A purchaser from an abutting owner after passage of an ordinance authorizing grading of a street may recover for injuries to his property.[60]

§ 6. *Measure and sufficiency of compensation.*[61]—The general rule as to the measure of damages is that the owner shall be awarded the fair cash market value of property taken, and, as to property injured but not taken, the difference between such value just before and just after the appropriation.[62] The uses to which the

47. Const. art. 6, § 13, art. 17, § 18, allowing the fee in streets to remain in the owner on his dedication, does not prevent such dedication operating as a release of damages for street uses, e. g. by a telephone company—Kirby v. Citizens' Tel. Co. (S. D.) 97 N. W. 3. Dedication of a street prevents recovery of damages to lateral support by a cut in grade—Ross v. Cincinnati, 24 Ohio Circ. R. 43. An owner who granted land in fee to a county for a highway, cannot complain of a grant by the county for construction of a natural gas conduit under the road —Ward v. Triple State N. G. & O. Co., 25 Ky. L. R. 116, 74 S. W. 709.

48. Of abutting owner to construction of an elevated railway—Shaw v. New York El. R. Co., 78 App. Div. (N. Y.) 290.

49. An abutting property owner agreeing with a contractor employed in grading a street for the city, for a raising of the grade of his lot and house to correspond with the street grade, thereby assented and contracted to the grading of the street and cannot recover damages from such grading occurring after the agreement—Carson v. St. Joseph, 91 Mo. App. 324.

50. He may object to confirmation of the report on opening and grading a street—In re Opening of Tiffany St., 84 App. Div. (N. Y.) 525.

51. New York Consolidation Act, § 978, and Greater New York Charter 980, provide a separate award for property taken and property injured but not taken—In re City of New York, 81 App. Div. (N. Y.) 215. However see Ross v. Cincinnati, 24 Ohio Circ. R. 43, for dedication of street as waiver of injury to lateral support by cut in grade.

52. Toledo v. Weber, 23 Ohio Circ. R. 564.

53. Shaw v. Manhattan R. Co., 79 N. Y. Supp. 915.

54. Consent by city to elevated railroad in front of property leased by it—Storms v. Manhattan R. Co., 77 App. Div. (N. Y.) 94.

55. Humphreys v. Ft. Smith T. L. & P. Co. (Ark.) 71 S. W. 662.

56. Where not acted on by the company it cannot be construed as extinguishing his easement where in effect it merely expresses a willingness to give a restricted consent—Shaw v. Manhattan R. Co., 79 N. Y. Supp. 915.

57. Rock Island & P. R. Co. v. Johnson (Ill.) 68 N. E. 549.

58. Lake Shore, etc., R. Co. v. Town of Whiting (Ind.) 67 N. E. 933.

59. Rev. Laws, c. 50, § 11—Bell v. Newton (Mass.) 67 N. E. 599.

60. Work was not actually begun before conveyance—Howley v. Pittsburg, 204 Pa. 428.

61. Evidence of damages, see post, § 14.

62. Ely v. Conan (Minn.) 97 N. W. 737; Chicago & M. Elec. R. Co. v. Mawman (Ill.) 69 N. E. 66; Dallas v. Taylor (Tex. Civ. App.) 69 S. W. 1005; Chicago v. McShane, 102 Ill. App. 239; Village of Barrington v. Meyer, 103 Ill. App. 124; Chicago v. Anglum, 104 Ill. App. 188; St. Louis S. W. R. Co. v. Hughes (Tex. Civ. App.) 73 S. W. 976. Grading street —Robinson v. St. Joseph, 97 Mo. App. 503. Opening a street—Meridian v. Higgins (Miss.) 33 So. 1. Public improvement—Wheeler v. Bloomington, 105 Ill. App. 97;

property is put by the owner, or to which it is adapted, are to be considered,[63] together with its location and possibility of development.[64] Damages cannot be restricted to value of lands taken if other lands are injured,[65] but they must lie in the same body or continuous tract with lands taken.[66] Where a public improvement is made, the whole improvement must be considered.[67] Nominal damages are sufficient where the interest of the owner is slight and intangible.[68] Remote, speculative, conjectural,[69] or sentimental[70] damages, cannot be allowed.

Rockford v. Doughty, 103 Ill. App. 48. Railroad in front of property—Boyer v. St. Louis, S. F. & T. R. Co. (Tex. Civ. App.) 72 S. W. 1038; Eastern Texas R. Co. v. Eddings, 30 Tex. Civ. App. 170. Injury from approach to bridge in highway—Lafean v. York County, 20 Pa. Super. Ct. 573. Street railway in front of premises and raising track above grade—Farrar v. Midland Elec. R. Co. (Mo. App.) 74 S. W. 500. Closing street and building subway under railroad track in another street—Village of Winnetka v. Clifford, 201 Ill. 475. Injury to property used for business purposes—Bailey v. Boston & P. R. Corp., 182 Mass. 537.

The value to the seller and not the buyer must determine—Kennebec Water Dist. v. Waterville, 97 Me. 185. Condemnation of turnpike; the actual value, not the cost of construction at time of taking, is the measure under Const. § 242, and Act March 17, 1896—Richmond & L. Turnpike Road Co. v. Madison County Fiscal Ct., 24 Ky. L. R. 1260, 70 S. W. 1044. What the owner will take for the property or what the jurors would take if they were owners, is immaterial—Seattle & M. R. Co. v. Roeder, 30 Wash. 244, 70 Pac. 498. A prudent and beneficial sale is the measure of value—Kennebec Water Dist. v. Waterville, 97 Me. 185. No reduction can be made because of general depreciation of property caused by the improvement—Shimer v. Easton R. Co., 205 Pa. 648. The value before appropriation must not be affected by notice or knowledge that the property was to be taken—Louisville & N. R. Co. v. Cumnock (Ky.) 77 S. W. 933; Kennebec Water Dist. v. Waterville, 97 Me. 185. The use to which the petitioner puts the property is to be considered in damages to land not taken—South Buffalo R. Co. v. Kirkover (N. Y.) 68 N. E. 366. If a railroad company builds two tracks in a street when authorized to build one, the measure is the difference in the value of injured property as affected by the authorized track and its value as affected by addition of the unauthorized track—Klosterman v. Chesapeake & O. R. Co., 24 Ky. L. R. 1233, 71 S. W. 6. In condemnation of land from a larger tract by a city for improvement of water works, the rule of damages is the market value of the property taken for all legitimate purposes and the market value as increased by a valuable spring may be considered, though the corporation itself was supplying water to citizens and without regard to the particular necessity of the city for this distinct tract of land—Ely v. Conan (Minn.) 97 N. W. 737.

63. Bailey v. Boston & P. R. Corp., 182 Mass. 537; Chicago & M. Elec. R. Co. v. Mawman (Ill.) 69 N. E. 66; South Buffalo R. Co. v. Kirkover (N. Y.) 68 N. E. 366; Boston Belting Co. v. Boston, 183 Mass. 254. Homestead use—Eastern Texas R. Co. v. Eddings, 30 Tex. Civ. App. 170. Land taken or injured by opening highway—Watkins v. Hopkins County (Tex. Civ. App.) 72 S. W. 872. Taking railroad right of way for telegraph line—Cleveland, C., C. & St. L. R. Co. v. Ohio Postal Tel. Cable Co., 68 Ohio St. 306. Though a peculiar and increased value to the owner cannot be considered—United States v. Honolulu Plantation Co. (C. C. A.) 122 Fed. 581.

64. Where extension of a car line would render suburban property valuable—St. Louis S. W. R. Co. v. Hughes (Tex. Civ. App.) 73 S. W. 976.

65. Grant v. Hyde Park, 67 Ohio St. 166; Seattle & M. R. Co. v. Roeder, 30 Wash. 244, 70 Pac. 498. Even though not mentioned in the petition (Const. art. 1, § 16)—Sultan Water & Power Co. v. Weyerhauser Timber Co., 31 Wash. 558, 72 Pac. 114.

66. Injury to one of three adjoining farms by military appropriation will not require damages for the others—[illegible]p v. United States, 24 Sup. Ct. 114.

67. Chicago v. Anglum, 104 Ill. App. 188.

68. Where riparian owners had granted a dam proprietor lower down, all lands that would be overflowed by raising water over twelve feet but only for the purpose of flowage, under stipulation that if land was not so used or should not be used the grantors might buy it back, and the pond was condemned by the city and the rights of all lower riparian owners were taken for a municipal water supply, the interest of the granting riparian owners was so intangible and valueless even though the fee in the land granted for flowage was in their successors of title that a nominal sum granted in the commissioner's report establishing damages was sufficient—In re Brookfield, 78 App. Div. (N. Y.) 520.

69. Land for railroad—East & W. I. R. Co. v. Miller, 201 Ill. 413. Taking part of stone quarry for a railroad—Seattle & M. R. Co. v. Roeder, 30 Wash. 244, 70 Pac. 498. Danger too remote an element of damage—Chicago & M. Elec. R. Co. v. Mawman (Ill.) 69 N. E. 66. Building of railroad embankment as affecting flow on riparian lands—St. Louis, I. M. & S. R. Co. v. Vaughan (Ark.) 72 S. W. 575. Injury to market value of land on opening a street, because of cost of further street improvements which may be made, cannot be considered as a substantive item of damages, though it may be considered the fact—De Benneville v. Philadelphia, 204 Pa. 51. Damages from interruption of negotiations for sale cannot be allowed where it did not appear that a bona fide transaction was defeated; lands released from conditions imposed to protect New York water supply (Laws 1896, c. 674)—In re Collis, 76 App. Div. (N. Y.) 368.

70. Homestead taken for depot purposes

Benefits to property not taken cannot be set off against the value of property taken,[71] nor benefits accruing to the owner in common with the general public, even as against damages to property not taken.[72] As to land not taken, benefits may be allowed,[73] and laws providing for a taking of property by municipalities in Wisconsin must provide for set-off of such benefits.[74] Laws regulating set-off of benefits must operate uniformly.[75] Greater safety from elevation of railroad tracks cannot be called speculative benefits.[76] If the improvement as an entirety has resulted in benefit rather than damage to property, though it is damaged by part of the improvement standing alone, no recovery can be had if no property is actually taken.[77] If it does not appear that special benefit from the improvement had not been considered in awarding damages in condemnation, such benefit, if existing, cannot be set off against the damages.[78] If a land owner has paid, or will be obliged to pay, an assessment for street improvements in front of lots, only benefits in excess of such assessment can be off-set against his damages.[79] Where a contract was made between a railroad company, which had commenced construction without acquiring the right and had been enjoined, and the owner, that the company might continue construction on promise to pay damages to be assessed, including value of bridge abutments on the land and of the land taken, and payment of a bonus not to be considered as part of the damages, the owner could recover the value of the land taken, regardless of special benefits to the remainder from construction of the road, no damages being sought for land not taken.[80]

Particular elements of damage.—Danger of fire from a railroad, as increasing insurance rates,[81] or noise incident to operation of an elevated railroad, such

—Cane Belt R. Co. v. Hughes (Tex. Civ. App.) 72 S. W. 1020.

71. Railroad appropriation—Guthrie & W. R. Co. v. Faulkner (Okl.) 73 Pac. 290; South Buffalo R. Co. v. Kirkover, 86 App. Div. (N. Y.) 55.

72. Guthrie & W. R. Co. v. Faulkner (Okl.) 73 Pac. 290. Code, c. 49, § 1946, amended by Laws 1891, p. 149, c. 160—Southport, W. & D. R. Co. v. Owners of Platt Land (N. C.) 45 S. E. 589. Benefits from building street railroad above grade of street—Farrar v. Midland Elec. R. Co. (Mo. App.) 74 S. W. 500. General rise in value of realty from railroad in street—Pochila v. Calvert, W. & B. V. R. Co. (Tex. Civ. App.) 72 S. W. 255. Railroad in front of land—Boyer v. St. Louis, S. F. & T. R. Co. (Tex. Civ. App.) 72 S. W. 1038. Opening of street—Meridian v. Higgins (Miss.) 33 So. 1. Construction of viaduct in street damaging abutting property—Chicago v. Le Moyne (C. C. A.) 119 Fed. 662. Erection of depot in vicinity—Pochila v. Calvert, W. & B. V. R. Co. (Tex. Civ. App.) 72 S. W. 255. General benefits from an improvement by any corporation other than municipal, cannot be set off against damages resulting therefrom (Const. art. 1, § 14, requires compensation in such cases to be made in money or paid into court regardless of benefits)—Beveridge v. Lewis, 137 Cal. 619, 67 Pac. 1040, 70 Pac. 1083, 59 L. R. A. 581. Pecuniary benefits resulting from construction of a subway in another street by a railroad company as consideration in an agreement with a city as to closing a street, differ only in degree and not in kind from that accruing to the general public—Village of Winnetka v. Clifford, 201 Ill. 475.

73. Benefits resulting from conduit walls on taking of property by city to improve waterway—Brown v. Waterbury, 75 Conn. 727. Benefits of the whole improvement to abutting property on change of grade of a street may be considered—Chicago v. McShane, 102 Ill. App. 239; Village of Barrington v. Meyer, 103 Ill. App. 124; Chicago v. Anglum, 104 Ill. App. 188.

74. Building and repair of city docks (Fed. Const. art. 14, § 1; Const. Wis. art. 1, § 13; Racine City Charter, Laws 1891, pp. 206, 207, 216, c. 40, §§ 65-67, 77)—Lathrop v. Racine (Wis.) 97 N. W. 192.

75. Code Civ. Proc. § 1248, authorizing setting off of benefits on taking property for public use, construed in connection with Const. art. 1, § 14, providing that no right of way shall be appropriated for use of any other than a municipal corporation until compensation is made, irrespective of benefits, must have an unequal operation since it cannot be enforced where a corporation not municipal is seeking to condemn a right of way, and violates the constitutional provision against discrimination not justified by intrinsic differences and requiring uniform operation of general laws—Beveridge v. Lewis, 137 Cal. 619, 67 Pac. 1040, 70 Pac. 1083, 59 L. R. A. 581.

76, 77. Chicago v. Webb, 102 Ill. App. 232.

78. In subsequent action for damages by owner—Lamb v. Elizabeth City, 131 N. C. 241.

79. Damages for change of grade—Carroll v. Marshall (Mo. App.) 73 S. W. 1102.

80. McElroy v. Kansas City & I. Air Line, 172 Mo. 546.

81. Building over 100 feet from road—North Arkansas & W. R. Co. v. Cole (Ark.) 70 S. W. 312.

as constitutes a private nuisance, if not taken alone as distinguished from other concurring causes of damage,[82] may be considered; but not mere danger from construction or operation of a railroad.[83] Good will cannot be considered where the business is practically without competition.[84] Damages to rental and market value of lands because of diversion of business cannot be allowed;[85] nor loss in profits in business then conducted on the land;[86] nor increased expense in operating business on lands not adjacent to those taken;[87] nor value of improvements by petitioner on land with consent of the owner,[88] nor of improvements by the owner with notice of the proposed improvement;[89] nor consequential injuries to land not taken in erection of an approach to a county bridge;[90] nor can damages to crops during occupancy of the land without condemnation be added to permanent damages.[91] In opening a street, the cost of improvements to be charged against the property later may be considered, though it cannot be allowed as a substantive item of damages;[92] and the question of probable grade may be determined in assessing damages to land not taken.[93] Where a stone quarry is condemned, the quality and value of the stone quarried and the royalty given by the lessee may be considered in determining the value of the land.[94] The value of land taken by crossing a railroad with a highway must be allowed if no benefits appear.[95] Damages from improper construction and operation of a structure or improvement cannot be allowed in the condemnation proceedings.[96] In taking a railroad right of way, that telegraph lines were built along such way under a contract between the railroad company and a telegraph company creating an additional servitude on the land will not entitle the owner to an accounting of rents and profits received therefor by the railroad company.[97] Damages to a riparian estate from interference with flowage must be limited to deprivation of use of the water.[98] Interest on damages assessed as of the date of the taking may be given though the owner is not required to remove from the property, and does not remove until later.[99]

82. Under St. 1894, pp. 764, 765, c. 548, §§ 8, 9—Baker v. Boston El. R. Co., 183 Mass. 178.

83. Chicago & M. Elec. R. Co. v. Mawman (Ill.) 69 N. E. 66.

84. Water plant of private company—Kennebec Water Dist. v. Waterville, 97 Me. 185.

85. Abutting business property affected by lowering a street under a subway on elevation of railroad tracks—Chicago v. McShane, 102 Ill. App. 239.

86. Interference with flow of brook through premises—Boston Belting Co. v. Boston, 183 Mass. 254.

87. Floating logs on other lands than those taken for a dam and flume—Sultan Water & Power Co. v. Weyerhauser Timber Co., 31 Wash. 558, 72 Pac. 114.

88. Railroad tracks—Omaha Bridge & T. R. Co. v. Whitney (Neb.) 94 N. W. 513. Remainder men cannot recover for improvements on land under contract with life tenant, even after death of the latter, since entry was lawful—Chicago, P. & St. L. R. Co. v. Vaughn (Ill.) 69 N. E. 113.

89. Improvements on land before establishment of street grade—Wilbur v. Ft. Dodge (Iowa) 95 N. W. 186.

90. York County Act of Feb. 17, 1860 (P. L. 61) relating to roads and bridges in that county—Lafean v. York County, 20 Pa. Super. Ct. 573.

91. Action to recover permanent damages for telegraph line on land—Hodges v. Western Union Tel. Co. (N. C.) 45 S. E. 572.

92. De Benneville v. Philadelphia, 204 Pa. 51.

93. Grant v. Village of Hyde Park, 67 Ohio St. 166.

94. Such method of assessment will not separate the value of the stone from that of the land—Seattle & M. R. Co. v. Roeder, 30 Wash. 244, 70 Pac. 498.

95. Lake Erie & W. R. Co. v. Shelley (Ind. App.) 67 N. E. 564.

96. Adjacent property injured from improper construction of a railroad (Code Civ. Proc. § 2221, subds. 1, 2)—Montana R. Co. v. Freeser (Mont.) 74 Pac. 407. Subsequent damages in taking land for approach to railroad bridge—Russell v. St. Louis S. W. R. Co. (Ark.) 75 S. W. 725.

97. Chicago, M. & St. P. R. Co. v. Snyder (Iowa) 95 N. W. 183.

98. Boston Belting Co. v. Boston, 183 Mass. 254. Not extended to value of the whole flow, taking for irrigation—Crawford Co. v. Hathaway (Neb.) 93 N. W. 781. Value of spring as affected—Leiby v. Clear Spring Water Co., 205 Pa. 634. Where land is taken for a municipal reservoir, the value of the submerged land as a foundation for such reservoir, based on the value of the water per million gallons, is not a proper basis of estimation, since the city had acquired rights of lower riparian owners to unobstructed flow, and the owners of such lands merely had a right of use in the flowing water—In re Brookfield, 78 App. Div. (N. Y.) 520.

99. Taking by Metropolitan park commis-

Accrual and period of damages.—Damages for railroad appropriation must be assessed as of the time of entry;[1] for a street,[2] or a highway, as of the time of opening;[3] for appropriation to lay gas pipe lines in Indiana, as of the time of filing the instrument of appropriation.[4] Compensation for property taken cannot be limited to a temporary use for a public purpose,[5] except as to temporary location of railroad tracks in streets during elevation of regular tracks.[6] Damages to land on both sides of a highway, the owner of which is entitled to certain crossings, from a street railroad therein, may be recovered as for the time between injury of the crossings and their restoration.[7]

Taking rights in public ways.—Damages resulting from taking rights in public ways must be special and not those suffered by the public generally,[8] except as to electric roads in rural highways, as to which general depreciation of property values may be recovered.[9] Where the easement only of a highway is in the public, a landowner may recover compensation for the estate taken for a gas conduit placed therein under a county grant, and damages to adjacent premises.[10] Where a highway is taken by a railroad company which constructed a new road parallel with the old, the county may recover the cost of putting the new road in as good condition as the old road at condemnation.[11] Deposit in a street, with due care, of material and machinery by a railroad company to facilitate the work of elevating its tracks is not an element of damages to abutting owners; but substantial damages must be allowed an abutting owner, injured in the rental value of his land and in the business conducted thereon, by temporary railroad tracks in a street.[12]

Estate or interest appropriated.—In a proceeding to assess damages for land held under a valid title by adverse possession taken for a highway, that the owner had no valid record title is immaterial.[13] That petitioner does not acquire the fee may be considered.[14] In taking a leasehold, the award to the tenant cannot be deducted from the award to owners of fee in remainder.[15] Riparian rights taken require compensation as injuries to property by railroad construction.[16] In taking an established business and plant under an existing franchise, many elements must be noticed.[17]

sioners under St. 1894, p. 283, c. 288; St. 1895, p. 504, c. 450—Hay v. Commonwealth, 183 Mass. 294.

1. Seattle & M. R. Co. v. Roeder, 30 Wash. 244, 70 Pac. 498. Entry prior to assessment of damages—Van Husan v. Omaha Bridge & T. R. Co., 118 Iowa, 366. Where construction begun under prior entry was restrained and the owner licensed the company to proceed under promise to pay compensation assessed —McElroy v. Kansas City & I. Air Line, 172 Mo. 546.

2. Damages to buildings along line of street—In re City of New York, 80 App. Div. (N. Y.) 622.

3. Hogsett v. Harlan County (Neb.) 97 N. W. 316.

4. Muncie Natural Gas Co. v. Allison (Ind. App.) 67 N. E. 111.

5. Property taken for sewer which will be discontinued after a certain number of years (Act April 14, 1881, p. 234, § 4)—Waterbury v. Platt, 75 Conn. 387.

6. It cannot render compensation unnecessary—McKeon v. New York, N. H. & H. R. Co., 75 Conn. 343.

7. Georgetown & L. Traction Co. v. Mulholland, 25 Ky. L. R. 578, 76 S. W. 148.

8. Injury from locating railroad in street —Bailey v. Boston & P. R. Corp., 182 Mass. 537; St. 1894, p. 764, c. 548, §§ 8, 9; Baker v. Boston El. R. Co., 183 Mass. 178.

9. Shimer v. Easton R. Co., 205 Pa. 648.

10. Ward v. Triple State Natural Gas & Oil Co., 25 Ky. L. R. 116, 74 S. W. 709.

11. St. Louis, S. F. & T. R. Co. v. Grayson County (Tex. Civ. App.) 73 S. W. 64.

12. The damages must be limited to the time of deprivation—McKeon v. New York, N. H. & H. R. Co., 75 Conn. 343.

13. Hohl v. Osborne (Iowa) 92 N. W. 697.

14. Sexton v. Union Stock Yard & Transit Co., 200 Ill. 244. The value of a spring on land through which a railroad is built cannot be allowed unless it is destroyed—Guthrie & W. R. Co. v. Faulkner (Okl.) 73 Pac. 290.

15. St. Louis v. Abeln, 170 Mo. 318. Under Acts 1897, c. 19—Board of Levee Com'rs v. Nelms (Miss.) 34 So. 149.

16. Enjoyment of flowage of natural stream (Comp. St. 1901, § 93a, art. 2, § 41, and Const. art. 1, § 21, construed)—Crawford Co. v. Hathaway (Neb.) 93 N. W. 781.

17. In taking the plant of a water company the value cannot be limited to the cost of construction at that time of a plant of equal value and modern design, since it is the plant of a company in business and to do so would be to substitute one element of

Sufficiency of damages.[18]—An agreement by a county to spend a certain sum in improvement of a road at request of a landowner, and for his benefit, in lieu of damages where duly carried out, is due compensation for land taken.[19] Deposit of damages before entry of judgment cannot prejudice the landowner.[20]

§ 7. *Who is liable for compensation.*—Damages to an abutting owner from original establishment of a street grade cannot be recovered from a municipal corporation,[21] unless by statute.[22] A city is liable for change of street grade caused by it.[23] Elevation of a railroad track on the right of way in a city will not render the city liable for damages to property owners.[24] That an order, under which a city built a viaduct in a street, was void, or that it was built in the exercise of police power, will not prevent liability of the city for damages to abutting property.[25] One county cannot be compelled to pay for any portion of a turn pike road lying within the limits of another county.[26] A borough is liable for damages from change of grade of a road on the line between the borough and a township where the borough authorities directed and paid for the change.[27] No personal liability is imposed upon a land owner, against whom an assessment is levied, to pay for lands appropriated by a city in the exercise of eminent domain under a law providing for the levy of such assessment.[28]

§ 8. *Condemnation proceedings in general.*[29]—There must be a legal proceed-

value for the measure of value itself; the appraisers must consider that the plant is an active concern; its present efficiency; the time necessary to build it anew, the time and cost of development to its present state of business and income; the added income and profits, if any, which would accrue to a purchaser during time required to build the plant anew and to develop the business and income; all franchise rights and privileges; the right to continue business thereunder subject to regulation; that the business is practically without competition; that further development may be necessary to develop its use and that only reasonable water rates can be charged; any increase of value due to natural causes; the value of the plant as property in itself. But they cannot consider the fact that the plant will be taken as reducing its value; nor past misbehavior of the company rendering the franchise liable to forfeiture; nor excess of water rates charged in the past; nor impairment of efficiency of administration by combination of many water systems under one management; nor damages to other property not in relation to the system except that of common ownership; nor bad faith of the company in the past—Kennebec Water Dist v. Waterville, 97 Me. 185.

18. Sufficiency of award (In re City of New York, 84 App. Div. [N. Y.] 455) for an additional strip of about three acres on each side of a railroad right of way (Chicago, M. & St. P. R. Co. v. Brink [S. D.] 94 N. W. 422) of damages to abutting property by operation of railroad tracks on new grade of street and construction of stone wall interfering with view, air and light—Louisville & N. R. Co. v. Cumnock (Ky.) 77 S. W. 933.

Destruction of a building erected on land with consent of the owner of a private easement in taking land for a street entitles the owner of the land to a substantial award for the building—In re Opening of Summit Ave., 82 N. Y. Supp. 1027.

19. Welch v. Tipperry (Neb.) 92 N. W. 582.

20. Madera County v. Raymond Granite Co., 139 Cal. 128, 72 Pac. 915.

21. O'Donnell v. White (R. I.) 53 Atl. 633.

22. The right does not exist at common law—Reilly v. Ft. Dodge, 118 Iowa, 633.

23. Where liability of railroad companies for damages in construction of a viaduct over tracks in a city is determined on appeal, and afterward the city, the parties and the companies stipulated for an entry of judgment requiring the viaduct to be constructed according to a revised plan, the additional cost of which is to be borne by the city, and the city raised the grade of the street in front of improved property to its damage, and the viaduct was built in conformity with such changed grade, the city having caused the work to be done is primarily liable for consequential damages regardless of the relations between it and those performing the construction—Dickerman v Duluth, 88 Minn. 288.

24. By ordinance—Chicago v. Webb, 102 Ill. App. 232.

25. The latter condition is decided under the provision of the Constitution against taking private property for public use without just compensation—Chicago v. Le Moyne (C. C. A.) 119 Fed. 662.

26. Under Act June 2, 1887 (Pub. Laws 306) authorizing condemnation of turn pike rights wholly or in part in any county and assessment of damages on the proper county —In re Factoryville & A. Turnpike & Plank Road, 19 Pa. Super. Ct. 613.

27. Haggart v. California Borough, 21 Pa. Super. Ct. 210.

28. Comp. St. 1901, § 158, c. 12a—Omaha v. State (Neb.) 94 N. W. 979.

29. Traction Act of 1893, § 14 (Pub. Laws 1893, p. 302; Gen. St. p. 3235) prescribing practice in condemnation, is superseded by Gen. Condemnation Act of 1900. (Pub. Laws

ing for condemnation,[30] unless as to persons whose interests do not require it.[31] Only one proceeding in one county is necessary to condemn a telegraph right of way in many counties.[32] One proceeding by a city is sufficient to take property to build a bridge, and may include building of the bridge and the widening of streets leading thereto.[33] An attempt by one railroad company to condemn, for right of way purposes, an entire tract of land belonging to another, part of which is in actual and necessary use for railway purposes and for which a single award is made, is entirely void.[34] Petitioner must be given a reasonable time for condemnation.[35] An application by a railroad company to take land of plaintiff in trespass pending against it for entry before award and appeal therefrom cannot be consolidated with the action nor are the two proceedings merged.[36] A rental contract with a railroad company providing for removal at expiration, will not give a telegraph company the right to a petition to condemn the right of way.[37] Proceedings must affirmatively appear to have substantially followed authorizing statutes.[38] If the statutes provide for a full hearing, special provision for determination of benefits is unnecessary.[39] A conveyance of land after filing of the application and notice to the owner will not affect the proceedings.[40]

Conditions precedent; discontinuance or abandonment.—Petitioner's charter need not describe the route of its line, nor need such line be surveyed if data of a definite location otherwise appear.[41] Proceedings by a railroad are not void because its line was not located by the company or directors but by certain officers.[42] The petitioner may discontinue the proceedings,[43] and a city may abandon proceedings in good faith.[44] An agreement by the parties for abandonment is binding.[45]

1900, p. 79)—Paterson & State Line Traction Co. v. De Gray (N. J. Law) 56 Atl. 250.

30. Rev. St. 1899, § 8251—Mound City Land & Stock Co. v. Miller, 170 Mo. 240.

31. A railroad company which had no notice of proceedings for establishment of a highway across its right of way and was awarded no damages, is not thereby deprived of its property without due process of law and compensation so as to affect the rights of another company which succeeded to its rights, property and franchises—Baltimore, etc., R. Co. v. State, 159 Ind. 510.

32. Fed. Const. Amend. 14, is not violated by 23 St. at Large, p. 61—South Carolina, etc., R. Co. v. American Tel. Co., 65 S. C. 459.

33. Under Laws 1895, c. 986, authorizing construction of a bridge over the Harlem River by the City of New York—In re City of New York, 174 N. Y. 26.

34. Atchison, etc., R. Co. v. Kansas City, etc., R. Co. (Kan.) 73 Pac. 899.

35. A railroad company which had constructed tracks over land claiming under a deed from the life tenant has a reasonable time after death of the tenant, and suit by the remaindermen for partition within which to condemn the property—Chicago, etc., R. Co. v. Vaughn (Ill.) 69 N. E. 113. A railroad company entering realty under a lease with a view to purchase when possessed and building part of its line thereon, may restrain the lessor for a reasonable time from dispossessing it of the land so that it may condemn the land by proper proceedings—Winslow v. Baltimore & O. R. Co., 188 U. S. 646.

36. The application is no bar to the action—Georgia R. & Banking Co. v. Gardner (Ga.) 45 S. E. 600.

37. Western Union Tel. Co. v. Pennsylvania R. Co., 120 Fed. 362.

38. Brown v. Macfarland, 19 App. D. C. 525; St. Louis v. Koch, 169 Mo. 587.

39. Drainage of wheat lands under Gen. Laws 1901, c. 258—State v. Board of Com'rs, 87 Minn. 325.

40. Traction railway (3 Gen. St. p. 3235, called the Traction Act)—Houston v. Paterson State Line Traction Co. (N. J. Law) 54 Atl. 403.

41. The articles of incorporation of a telephone company need only express the general purpose of the business (Sand. & H. Dig. § 2770)—St. Louis, etc., R. Co. v. Southwestern Tel. Co. (C. C. A.) 121 Fed. 276.

42. Tennessee Cent. R. Co. v. Campbell (Tenn.) 73 S. W. 112.

43. The landowner cannot then compel appointment of commissioners to assess damages to obtain expenses. Code, §§ 3371, 3373, 3379, 3380, providing for condemnation proceedings, and § 3374 regarding abandonment of proceedings by the petitioner within 30 days after entry of the final order by written notice and payment of fees and expenses—County of Onondaga v. White, 38 Misc. (N. Y.) 587.

44. While a city attempting to condemn private property for internal improvements may abandon proceedings under the Code, §§ 880, 884, 1999, 2008-2011, it must do so in good faith with intent to surrender completely the project as far as the land involved is concerned, otherwise the first award in such proceedings will bind the municipality—Robertson v. Hartenbower (Iowa) 94 N. W. 857.

45. Independent contract treating pro-

Parties; bond.—The state and a water company need not be made parties to a proceeding by a railroad company to take land held under contract from the state and over which a water company has a right of way.[46] Where land was conveyed to petitioner before proceedings commenced, former owners need not be joined, if the mortgagee is a party.[47] A telegraph company operating on a railroad right of way must be a party to condemnation of the right of way by a telephone company.[48] If dedication for a street is unaccepted, the owner is a necessary party to condemnation by a traction company.[49] A bond supporting a petition to open a private road for a definite sum, double the probable cost of the proceedings as given in the bond, is sufficient though no unconditional promise is made to pay all expenses.[50]

§ 9. *Jurisdiction.*[51]—The Superior Court of Washington may entertain proceedings by a street railway to take a right of way.[52] In California, the proceedings must be brought in the superior court of the county where the property is situated.[53] A proceeding before a justice, to drain agricultural lands, will lie without regard to the county in which the lands are found, since it affects only the land over which the ditch is to be constructed.[54]

§ 10. *Applications; petitions; pleadings.*[55]—A greater interest in land than the law allows cannot be requested.[56] If petitioner proceeds as an agent, the agency must be alleged.[57] The public use, and the necessity of taking, must be al-

ceedings as void—Sanborn v. Van Duyne (Minn.) 96 N. W. 41.

46. Ballinger's Ann. Codes & St. §§ 5637, 5658, 5640—State v. Superior Ct., 31 Wash. 445, 72 Pac. 89.

47. Marquette, etc., R. Co. v. Longyear (Mich.) 94 N. W. 670.

48. South Carolina, etc., R. Co. v. American Tel. Co., 65 S. C. 459.

49. P. L. 302 (Gen. St. p. 3235)—Pease v. Paterson & S. L. Traction Co. (N. J. Law) 54 Atl. 524.

50. Pol. Code, §§ 2692, 2683—Madera County v. Raymond Granite Co., 139 Cal. 128, 72 Pac. 915.

51. An act providing that civil actions or special proceedings before the clerk of the superior court in North Carolina shall be sent to the superior court before the judge giving him jurisdiction and requiring him to determine all matters of controversy, refers to proceedings in actions so sent before the judge in term and does not authorize an appeal from the clerk's rulings on exceptions to the report of the commissioners in condemnation to the judge at chambers (Code 1883, § 1946 construed in connection with Act 1887, p. 15, c. 276 and Code 1882, § 252)—Cape Fear & N. R. Co. v. Stewart, 132 N. C. 248.

52. State v. Superior Ct., 30 Wash. 219, 232, 70 Pac. 484.

53. Code Civ. Proc. §§ 392, 395 and amendment of 1901 to § 394, construed in connection with §§ 22, 23, and 1243—Santa Rosa v. Fountain Water Co. (Cal.) 71 Pac. 1123.

54. Lile v. Gibson, 91 Mo. App. 480.

55. (Includes maps, plans, etc.).

A petition by a railroad company reciting that the company was organized to construct a railroad from a certain point to another point on the shore of a lake, that it intended in good faith to construct such road from the point just named to a certain point, and thence to the shore of the lake, that it had caused surveys to be made, and had located its road, is sufficient (Under Comp. Laws, § 6243, as amended by Acts 1901, p. 115, Act No. 80)—Marquette, etc., R. Co. v. Longyear (Mich.) 94 N. W. 670.

Sufficiency of description in instrument of appropriation. Description of lands sought to be condemned for a private road—Madera County v. Raymond Granite Co., 139 Cal. 128, 72 Pac. 915. Description of a right of way for levee purposes in petition so as to confer jurisdiction on the county court, under Rev. St. § 1889, c. 7796, amended by Laws 1893, p. 222—Williams v. Kirby, 169 Mo. 622. A petition to take land for drains for agricultural, sanitary or domestic purposes, need not detail all the space to be taken by the commissioners, under Act March 19, 1895 (Laws 1895, p. 142, c. 79)—Lewis County v. Scobey (Wash.) 71 Pac. 1029. Where attempts to purchase have failed, a railroad company need not include, in one petition, all descriptions in the county necessary for its road—Marquette, etc., R. Co. v. Longyear (Mich.) 94 N. W. 670. A petition to take land for a turnpike sufficiently describes the road where it sets forth that it begins at one of the terminal points of the turnpike and continues therefrom to a line between a borough named in one county, and a borough named in another county, under Act June 1887 (P. L. 306)—In re Factoryville & A. Turnpike & Plank Road, 19 Pa. Super. Ct. 613. A petition to take part of a railroad right of way for a telephone line sufficiently shows the location and construction of the line by statements that posts will be sunk along the main line a certain distance from the center of the track for a certain number of miles—South Carolina, etc., R. Co. v. American Tel. Co., 65 S. C. 459.

56. Gas company cannot ask fee where only easement can be taken (Burns' Rev. St. 1901, § 5104)—Great Western Natural Gas & Oil Co. v. Hawkins, 30 Ind. App. 557.

57. Natural person seeking land as agent

leged;[58] but a petition by a city to take land for streets need not allege that the city has made provision to pay the award either by general taxation or special assessment.[59] After filing an application to take land for a street, the city council cannot change its terms to include more or less land by passage of an ordinance.[60] A petition by a telegraph company need not be authenticated by a corporate seal.[61]

A general and specific denial suffices to try the right of a foreign corporation to do business in the state.[62] Where a complaint to take land to widen a street avers that costs, damages, and expenses were to be paid by special assessment on property benefited and not by the state, a demurrer fails to raise the question whether such improvement violates a law limiting indebtedness of cities.[63] That the county fenced the part of land necessary to location of a road may be shown in proceedings to take the land for the road, to prevent the recovery of such expense by the landowner if pleaded.[64] Filing a proper profile is a condition precedent to an order of condemnation.[65]

§ 11. *Process; notice, citation, publication.*—Summons must be served on,[66] or notice given, all interested persons or occupants,[67] except as to proceedings to take land for a school house in Kansas,[68] or as to a grantee in a conveyance of lands after filing of application and notice of condemnation to the owner,[69] or as to former owners who conveyed to petitioner before proceedings commenced, the mortgagee being a party,[70] or as to a railroad company succeeding another company over whose road a highway was extended;[71] and must include all lands intended to be condemned.[72] Notice must be provided for in a statute regulating the procedure.[73] As to land of a nonresident, it may be served on his agent.[74] Occupants may object for failure to serve all owners.[75]

§ 12. *Hearing and determination of right to condemn.*[76]—Courts cannot

of servant for public use—Beveridge v. Lewis, 137 Cal. 619, 70 Pac. 1083.

58. Land for gas pipe line, under Burns' Rev. St. 1901, § 5103—Great Western Natural Gas & Oil Co. v. Hawkins, 30 Ind. App. 557. Complaint by city to establish streets may do so by setting out ordinance showing necessity (Rev. St. 1901, § 2451, par. 2454)—Sanford v. Tucson (Ariz.) 71 Pac. 903. A petition filed with grade crossing commissioners of a city asking that application be made for appointment of a commission to appraise damages from construction of a viaduct through a street, alleging that under an agreement between the commissioners in behalf of the city and a railroad company and under the act creating such commissioners and its mandatory and supplemental acts, a cut was made in a certain highway, is sufficient to show that the cut was the result of a determination by the commissioners that it was necessary to carry out a plan adopted by them (Laws 1890, c. 255, known as the Grade Crossing Act)—People v. Adam, 79 App. Div. (N. Y.) 306.

59. Rev. Code 1899, § 5962—Lidgerwood v. Michalek (N. D.) 97 N. W. 541.

60. Grant v. Hyde Park, 67 Ohio St. 166.

61. Under Act March 20, 1900 (Pub. Laws 1900, p. 79)—Coles v. Midland Tel. Co., 68 N. J. Law, 413.

62. Act No. 124, 1880, on failure of showing dismissal will follow—South Western Tel. Co. v. Kansas City, etc., R. Co., 108 La. 691.

63. Harrison Act limiting municipal indebtedness—Sanford v. Tucson (Ariz.) 71 Pac. 903.

64. Watkins v. Hopkins County (Tex. Civ. App.) 72 S. W. 872.

65. Kinston & C. R. Co. v. Stroud, 132 N. C. 413.

66. "Special proceeding" for condemnation (Code 1883, §§ 199, 278, 279, 1943)—Carolina, etc., R. Co. v. Pennearden Lumber & Mfg. Co., 132 N. C. 644.

67. Otherwise commissioners cannot be appointed (Railroad Law, § 6 [Laws 1890, c. 565] regulating condemnation of lands by steam railroads)—Greenwich & J. R. Co. v. Greenwich, etc., R., 75 App. Div. (N. Y.) 220.

68. Gen. St. 1901, § 6131—Buckwalter v. School Dist. No. 42, 65 Kan. 603, 70 Pac. 605.

69. 3 Gen. St. p. 3235, called the Traction Act—Houston v. Paterson State Line Traction Co. (N. J. Law) 54 Atl. 403.

70. Marquette & S. E. R. Co. v. Longyear (Mich.) 94 N. W. 670.

71. Const., Bill of Rights, § 21—Baltimore, etc., R. Co. v. State, 159 Ind. 510.

72. For levee purposes (Laws 1893, p. 208, § 24; Rev. St. 1889, § 7796, amended by Laws 1893, p. 222, and Rev. St. 1889, § 7797)—Williams v. Kirby, 169 Mo. 622.

73. Board of Education v. Aldredge (Okl.) 73 Pac. 1104.

74. Watkins v. Hopkins County (Tex. Civ. App.) 72 S. W. 872.

75. Greenwich & J. R. Co. v. Greenwich, etc., R., 75 App. Div. (N. Y.) 220.

76. Sufficiency of evidence in proceedings to condemn land for a street to overcome

revise a legislative grant on the ground of impropriety or inexpediency,[77] but the right to condemn may be determined, though questions of fact are involved.[78] A law requiring the mode of crossing at intersection of two railroads to be submitted to the circuit court does not apply to a crossing of a railroad by a street or interurban electric railway.[79] The necessity of taking property is a question for the court,[80] but the question, whether other property than that sought can be condemned, cannot be determined.[81] In condemnation of a private passway, the jury cannot determine whether the proposed route is the most practicable or feasible.[82] The necessity of a crossing of one railroad line by another at a certain place is properly determined by a jury of the vicinage whose finding will not be disturbed unless manifestly wrong.[83] A landowner is not entitled to have issues of fact in proceedings to condemn a right of way, which are raised by his answer, tried by a jury before assessment of damages by commissioners or jurors and before appeal taken.[84] The court must find that the new use will not interfere with a public use to which the property is already applied.[85] The right to condemn must appear on the face of the proceedings,[86] and the right to condemn because of failure to purchase must be shown by evidence of negotiations or reasonable effort to purchase.[87] The grade of a highway will be presumed to have been lowered by a street railroad company with consent of the township, if done without objection.[88] Defendant may object that plaintiff is a corporation, the majority of the stock of which is owned by aliens and hence is prohibited from owning land within the state.[89] Appearance and filing cross petition in condemnation, and

presumption that certain land within the municipality was part of its territory and under its jurisdiction—Miller v. Sterling, 198 Ill. 523. Sufficiency of report of commissioners as to manner of crossing of a railroad by an interurban electric railway as construed in connection with the street interurban railway Act of 1901, and Burns' Rev. St. 1901, § 5158b and following—Wabash R. Co. v. Ft. Wayne & S. W. Traction Co. (Ind.) 67 N. E. 674.

Where in proceedings for a right of way before the clerk before hearing and appointment of commissioners, no irreparable damage could result to land owners, a writ of prohibition will not lie to prevent clerk from hearing the condemnation and appointing commissioners under Code, §§ 1945, 1946—Holly Shelter R. Co. v. Newton (N. C.) 45 S. E. 549. A decree, in certiorari to determine validity of an ordinance giving a street railway company power to lay a road on a highway within a township, holding such ordinance valid, will not estop contestant in a later new proceeding to urge invalidity of the ordinance for reasons not advanced or considered in the first proceeding—Mercer County Traction Co. v. United New Jersey R. & Canal Co. (N. J. Eq.) 54 Atl. 819.

77. Grant to street railway to use streets or bridges within corporate limits cannot be revised at suit of abutting owner—Lange v. La Crosse & E. R. Co. (Wis.) 95 N. W. 952. The question whether petitioner's charter was a fraud and that it was intended to be operated merely as a lumber road and not for public use cannot be considered—Holly Shelter R. Co. v. Newton (N. C.) 45 S. E. 549.

78. Construction of railroad charter as to right to condemn is for the court—Tennessee Cent. R. Co. v. Campbell, 109 Tenn. 655.

79. Gen. Railroad Law (Burns' Rev. St. 5158a) construed in connection with Burns' Rev. St. 1901, § 5468e—Wabash R. Co. v. Ft. Wayne & S. W. Traction Co. (Ind.) 67 N. E. 674.

80. St. Louis, etc., R. Co. v. Southwestern Tel. Co. (C. C. A.) 121 Fed. 276.

81. Where right has been granted a telephone company to take an easement on railroad right of way for their line in a manner so as to not interfere with the ordinary use of the right of way, the question of the necessity of taking is first, whether there will be substantial obstruction of the use by the railroad company, and whether the right is necessary to the use of the telephone company—St. Louis, etc., R. Co. v. Southwestern Tel. Co. (C. C. A.) 121 Fed. 276.

82. Under St. c. 110, art. 2, §§ 4348-4356—Barrall v. Quick, 24 Ky. L. R. 2393, 74 S. W. 214.

83. Houston & S. R. Co. v. Kansas City, etc., R. Co., 109 La. 581.

84. Under Pub. Laws 1893, p. 111, c. 148, & Code, § 1945—Holly Shelter R. Co. v. Newton (N. C.) 45 S. E. 549.

85. Taking railroad right of way for telegraph line—Cleveland, etc., R. Co. v. Ohio Postal Tel. Cable Co., 68 Ohio St. 306.

86. Taking right of way for gas pipe line (Burns' Rev. St. 1901, § 5105)—Great Western Natural Gas & Oil Co. v. Hawkins, 30 Ind. App. 557.

87. By street railway (Laws 1890, p. 1108, c. 565, § 90 as amended by Laws 1895, p. 791, c. 933)—Schenectady R. Co. v. Lyon, 85 N. Y. Supp. 40.

88. Austin v. Detroit, Y. & A. A. R. (Mich.) 96 N. Y. 35.

89. Under Const. art. 2, § 33—State v. Superior Court (Wash.) 74 Pac. 686.

submission of the issue to the jury, waives defendant's right to question the power of the petitioner to condemn.[90] A property owner need not defend against an apparently separate proceeding which affects him only because of an ulterior purpose therein.[91] The questions of necessity for a water station and the quantity of land required are settled conclusively after condemnation proceedings are regularly had, and the owner has accepted the award.[92] The extension of the work of a boom company to a greater extent than at first established does not show bad faith in its selecting the place appropriated for its business.[93] A decision of the county court confirming the decision of the county commissioners that a proposed highway is a public necessity is final.[94]

§ 13. *Commissioners or other tribunal to assess damages; trial by jury.*[95]—In taking property for park purposes, an appraiser who had formerly assisted in appraising the value of premises as a member of the real estate board was disqualified.[96] Where an owner appeared before grade crossing commissioners and established a prima facie injury to her property by a change in the grade, the commissioners could not produce witnesses on their own motion controverting such evidence and determine that she is not entitled to relief, but must apply to the supreme court for the appointment of a commissioner to determine the issues of fact.[97] Notice must be given of a new appointment of viewers on a street vacation.[98]

A jury may be had to try damages,[99] but not damages to business under an act limiting the right to a jury to property,[1] nor under the federal constitution as to proceedings under power delegated by a state removed to the federal court,[2] nor, in some cases, where commissioners have already acted.[3] Where the law

90. Du Pont v. Sanitary Dist., 203 Ill. 170.

91. Where there was no apparent connection between two ordinances, one of which authorized condemnation of lands to widen a city street and another a railroad company already operating two tracks in the street to lay two more tracks on payment of costs of condemnation and improvements made necessary by the alteration and the additional tracks, the property owner could not be required to make a defense in the original condemnation by showing the connection between the two ordinances and the real purpose of the railroad in the city in the proceeding, and his failure to object at that time on the ground that such purpose was to procure a right of way for the railroad, will not prejudice him—Pennsylvania Co. v. Bond, 202 Ill. 95.

92. Dillon v. Kansas City, Ft. S. & M. R. Co. (Kan.) 74 Pac. 251.

93. Samish River Boom Co. v. Union Boom Co. (Wash.) 73 Pac. 670.

94. In re Mitchell, 85 App. Div. (N. Y.) 277.

95. Compensation of commissioners as costs, see post, § 17.

Laws 1890, p. 1082, c. 565 as amended by Laws 1892, p. 1382, c. 676, authorizing appointment of commissioners to determine compensation to be paid by one railroad for the right to intersect another, is not repealed by Laws 1897, p. 795, c. 754 as amended by Laws 1900, p. 1590, c. 739—Oneonta, etc., R. Co. v. Cooperstown, etc., R. Co., 85 App. Div. (N. Y.) 284.

96. State v. District Court, 87 Minn. 268.

97. Court Crossing Act, § 12 as amended by Laws 1898, p. 605, c. 345 as amended by Laws 1890, p. 473, c. 255—People v. Adam, 83 App. Div. (N. Y.) 620.

98. One filing a petition for appointment of viewers to award damages for vacation of a street and securing a continuance of the jury exclusively for two terms because of doubt as to whether damages may be recovered at law and who then, after six years delay, secures a new jury under the original petition, their award assessing benefits against another owner without notice of the appointment of such new jury, is erroneous —In re Upsal Street, 22 Pa. Super. Ct. 150.

99. Proceedings by United States to take land in Hawaii—United States v. Honolulu Plantation Co. (C. C. A.) 122 Fed. 581. Damages for crossing one railroad by another—Houston & S. R. Co. v. Kansas City, etc., R. Co., 109 La. 581.

1. Stat. Mass. 1895, c. 488, § 15—Sawyer v. Commonwealth, 182 Mass. 245, 59 L. R. A. 726.

2. The state procedure applies—Postal Tel. Cable Co. v. Southern R. Co., 122 Fed. 156.

3. One whose property is not taken or entered upon by the action of the water board in taking the water of a river, or whose property is not adjacent to the river or crossed by or adjacent to any railroad or public way, the location of which is changed by construction of the water works, has no right to a jury trial if dissatisfied with damages allowed by commissioners, under Metropolitan Water Supply Act (St. 1895, p. 573, c. 488) § 14, construed in connection with § 15 (St. 1895, p. 575, c. 488)—Fairbanks v. Commonwealth (Mass.) 67 N. E. 335.

allows a second jury of twelve on filing of exceptions to the verdict of the first jury of seven by the owners, the authorities and not the owners must demand the second jury.[4] A law providing in part that roads shall be laid out by a jury of free holders is valid.[5] A decision of the court that the jury should determine damages in a railroad condemnation authorizes impaneling a jury.[6]

§ 14. *The trial, or inquest, and hearing on the question of damages.*—Where part of a highway is discontinued by the railroad commissioners under statutory authority, a proceeding may be had to assess damages to abutting lands.[7] After complaint filed in the proper county in condemning a right of way for a ditch, plaintiff cannot change the place of trial at his own instance by recitals in the summons.[8] Where a railroad divides land, there is no presumption that the owner will not be given the privilege of crossing.[9] Where petitioner files a map of location and alleges inability to agree on a reasonable purchase price, he must prove such facts.[10] Refusal of a demand to take testimony in writing will not affect the award where not renewed or insisted upon.[11] Refusal of the jury to hear arguments of counsel after testimony and view, will not invalidate the award where it does not appear that the party objecting insisted on argument or that it would have been refused if he had insisted.[12] A jury appointed to determine compensation for taking property for public improvements cannot consider the question whether the city had acquired title by prescription.[13] Damages need be assessed separately, only in highway proceedings.[14] Whether a proceeding by a city to take land for a park is a continuation of a former proceeding, after reversal on appeal by part of defendants, or a new one based on a new ordinance, the first verdict cannot be made the basis for the second.[15] Deposit of damages before entry of judgment cannot prejudice the landowner.[16] A plea is necessary, in highway proceedings, to admit evidence, after contest filed, that the county fenced the part of the land necessary to be fenced for the highway.[17]

The jury may make their verdict from knowledge gained on a view as well as from opinions and conclusions as to the extent of damages given by witnesses,[18] and commissioners are not bound by the technical rules of evidence, or as to their source of information, but may be guided by their own judgment and experience rather than by the opinions of witnesses.[19] That witnesses were examined on the

4. Under Rev. St. D. C. c. 11, §§ 263-265—Brown v. Macfarland, 19 App. D. C. 525.

5. Rev. St. § 3369, construed in connection with Civ. Code, art. 2640, and those immediately preceding—Fuselier v. Police Jury, 109 La. 551.

6. Where in condemnation proceedings by a railroad company, the court settled the issue as to whether a bona fide offer to purchase was made by the company before beginning the proceedings as being on the evidence for determination by the jury giving the land owner an opportunity later to offer additional evidence, the refusal of another judge to hear such evidence will not oust jurisdiction to impanel the jury—Detroit & T. Shore Line R. Co. v. Hall (Mich.) 94 N. W. 1066.

7. Pub. St. 1891, c. 159, § 18—Leighton v. Concord & M. R. R. (N. H.) 55 Atl. 938.

8. Code Civ. Proc. § 2210—State v. District Court (Mont.) 74 Pac. 200.

9. A right of way divided a stone quarry and separated the water front from the upland—Seattle & M. R. Co. v. Roeder, 30 Wash. 244, 70 Pac. 498.

10. Code 1883, c. 49—Carolina, etc., R. Co. v. Pennecarden Lumber & Mfg. Co., 132 N. C. 644.

11. Law requiring testimony to be taken does not require a stenographer—Benton Harbor Terminal R. Co. v. King (Mich.) 91 N. W. 641.

12. Benton Harbor Terminal R. Co. v. King (Mich.) 91 N. W. 641.

13. 4 Starr & C. Ann. St. p. 166, c. 24, par. 59—Thomas v. Chicago (Ill.) 68 N. E. 653.

14. Hurd's Rev. St. 1899, c. 121, § 46—Hamilton v. Commissioners of Highways, 203 Ill. 269.

15. In re West Terrace Park (Mo.) 75 S. W. 973.

16. Madera County v. Raymond Granite Co., 139 Cal. 128, 72 Pac. 915.

17. Watkins v. Hopkins County (Tex. Civ. App.) 72 S. W. 872.

18. Seattle & M. R. Co. v. Roeder, 30 Wash. 244, 70 Pac. 498; Groves, etc., R. Co. v. Herman (Ill.) 69 N. E. 36; Petzel v. Chicago & N. W. R. Co., 103 Ill. App. 210. But they cannot disregard the evidence and determine their verdict from the view alone—Du Pont v. Sanitary Dist., 203 Ill. 170.

assumption that petitioner would build a dock to take the place of one condemned did not make a stipulation binding on it to build such new dock, where the stipulation was not recognized in the petition nor the judgment.[20]

Admissibility of evidence.[21]—The evidence must be confined to the market value of the property,[22] and cannot include mere offers for its purchase or lease,[23] or prices paid for it several years before,[24] or condition of the property long before appropriation,[25] or the value or extent of improvements upon land not taken or affected,[26] or the amount that the owner and other witnesses would take for property similarly situated,[27] or the effect of the improvement on property in general.[28] The general selling price should be fixed from a knowledge of the price

19. In re Town of Guilford, 85 App. Div. (N. Y.) 207.

20. Du Pont v. Sanitary Dist., 203 Ill. 170.

21. Where renditions made by plaintiff in a suit to recover damages to abutting property by a street railroad, of the property for taxes were admitted in evidence, plaintiff could show that the valuations were made by the assessor—Boyer v. St. Louis, S. F. & T. R. Co. (Tex.) 76 S. W. 441. Where it appeared in an action by a county for damages for appropriation of a highway by a railroad which had built a new road parallel to the old, that the railroad company had made excavations adjacent to the new road after construction, damages may be allowed for such injury even though the pleadings did not authorize a recovery on that ground, the jury being liable to consider such evidence without an instruction—St. Louis, S. F. & T. R. Co. v. Grayson County (Tex. Civ. App.) 73 S. W. 64. In recovery of damages for land taken for a town way, evidence as to condition of a side walk immediately in front of the premises before and after taking may be given, especially where limited to description of the premises and for that purpose (Pub. St. c. 49, §§ 79-105)—Carraher v. Inhabitants of Revere, 182 Mass. 427. Where a land owner claimed as a part of damages by condemnation by a city of a right of way through land to make a water way to carry waters of a brook that he had been deprived of the right to shift the bed of the brook so as to increase the cellar room of his building, evidence as to the extent of such damage did not prejudice the city, where the court had found that it was not proved with reasonable certainty and assessed only nominal damages; the land owner may show that for years the flow of a brook had increased to more than its former or natural flow because of erection of a number of mills on the water shed, where the court had found that the conduit through which the brook flowed was large enough to carry away all the water at all times—Brown v. Waterbury, 75 Conn. 727.

In taking the property and franchise of a water company, evidence may be heard: To show the actual construction of the plant with proper allowance for depreciation, though this is not conclusive; to show the quality of water furnished, the services given the public, the fitness of the plant, the source of water supply to meet reasonable needs, present and future; to show the actual rates charged in the past and actual earnings, the value of such evidence depending on the reasonableness of the rates; the amount for which the plant may be reproduced though this is not conclusive (however capitalization of the income even at reasonable rates will not suffice to show present value of the plant, though admissible)—Kennebec Water Dist. v. Waterville, 97 Me. 185.

22. Dallas v. Taylor (Tex. Civ. App.) 69 S. W. 1005; Kennebec Water Dist. v. Waterville, 97 Me. 185; Chicago, R. I. & T. R. Co. v. Douglass (Tex. Civ. App.) 76 S. W. 449. Fair market value before and after improvement—Village of Barrington v. Meyer, 103 Ill. App. 124. Specific damages to spring on land—Leiby v. Clear Spring Water Co., 205 Pa. 634; Seattle & M. R. Co. v. Roeder, 30 Wash. 244, 70 Pac. 498. Price for which lands are generally held for sale in the ordinary course of business in the neighborhood—Friday v. Pennsylvania R. Co., 204 Pa. 405.

23. Smith v. Pennsylvania R. Co., 205 Pa. 645. Offers five years before condemnation—Eastern Texas R. Co. v. Eddings, 30 Tex. Civ. App. 170. Testimony of owner as to offers to lease or purchase—Sharp v. United States, 24 Sup. Ct. 114.

24. Price paid by owner seven years before—Lanquist v. Chicago, 200 Ill. 69. Evidence of what the owner paid for two lots sought to be condemned cannot be received where the owner bought them and another lot for a lump sum so that the amount given for each lot could not be determined—Id.

25. In action by county for damages against a railroad company from excavations near a new road which the company had built parallel to the old road, because of its appropriation of the latter, testimony as to the condition of the old road long before appropriation or the new road long after completion is inadmissible—St. Louis, S. F. & T. R. Co. v. Grayson County (Tex. Civ. App.) 73 S. W. 64.

26. United States v. Honolulu Plantation Co. (C. C. A.) 122 Fed. 581.

27. Building railroad in street—Eastern Texas R. Co. v. Scurlock (Tex. Civ. App.) 75 S. W. 366.

28. Construction of railroad—Eastern Texas R. Co. v. Eddings, 30 Tex. Civ. App. 170. An opinion expressed by witnesses that any farm was depreciated in value by location of a pipe line across it, will not authorize testimony that prices of farms in general in the county had not been affected by the location of pipe lines across them—Trussell v. Western Pennsylvania Gas Co., 20 Pa. Super. Ct. 423. Where an abutting owner testified in a suit to recover damages from building of a street railroad in front of his property, that his business was interfered

of lands generally held for sale, and at which they are sold in the course of ordinary business in the neighborhood.[29] As to lands of different sorts, values may be placed on different parts so divided in the segregate,[30] and testimony may be heard concerning several tracts of land jointly, though owned in severalty by different owners.[31] It may be shown that a purchaser could not be found in the county.[32] Where the court had determined that the use of the lands sought was public, evidence to show an intention of a different use is inadmissible.[33] Evidence of general uses to which property may be put cannot be admitted to lessen damages to the use to which it is put,[34] nor evidence that an entire tract would sell more advantageously if cut up into smaller tracts.[35] Exposure of buildings to fire, as increasing insurance rates, may be shown,[36] and increased expense in operation because of proximity of the improvement,[37] and reasonable probability of increased value of the property in the future.[38] A map showing largely imaginary, though possible, developments of the land, cannot be admitted.[39] A lease given by operators of a stone quarry to owners, fixing a royalty, may be admitted to show value of the land and leasehold interest.[40]

Witnesses familiar with the land and improvements, and with actual sales of land in the vicinity, may testify as to damages.[41] Unqualified witnesses cannot testify as to probable efficiency of an improvement to serve the public.[42]

Sufficiency of evidence.[43]—On taking land for a right of way, an instrument

with by operation of the road, but on cross examination testified to an increase in his business, proof of general improvement in business in the city could not be given in rebuttal—Boyer v. St. Louis, S. F. & T. R. Co. (Tex.) 76 S. W. 441.

29. Friday v. Pennsylvania R. Co., 204 Pa. 405.

30. Land consisting of both tide and uplands—Seattle & M. R. Co. v. Roeder, 30 Wash. 244, 70 Pac. 498.

31. Under Comp. Laws, § 6363, concerning condemnation by Union Depot Companies—Benton Harbor Terminal R. Co. v. King (Mich.) 91 N. W. 641.

32. Taking part of stone quarry—Seattle & M. R. Co. v. Roeder, 30 Wash. 244, 70 Pac. 498.

33. Sultan W. & P. Co. v. Weyerhauser Timber Co., 31 Wash. 558, 72 Pac. 114.

34. Evidence by a railroad company constructing tracks in a street in front of certain property, that the property was increased in market value for general purposes, cannot be admitted to lessen the damages of the abutting owner whose evidence showed that the property was injured as a homestead for which purpose he occupied it, since the railroad company had no right to lessen its value for home purposes without compensation—Eastern Texas R. Co. v. Scurlock (Tex. Civ. App.) 75 S. W. 366.

35. The owner is entitled to the value of the land as taken, and to any loss resulting from the taking to the remainder of the tract for uses to which it was adapted or to which it had been applied—Watkins v. Hopkins County (Tex. Civ. App.) 72 S. W. 872.

36. Railroad over 100 feet from building—North Arkansas & W. R. Co. v. Cole (Ark.) 70 S. W. 312.

37. Blasting in quarry through which railroad is built—Seattle & M. R. Co. v. Roeder, 30 Wash. 244, 70 Pac. 498.

38. Suburban property as affected by future extension of street car line—St. Louis, S. W. R. Co. v. Hughes (Tex. Civ. App.) 73 S. W. 976.

39. Sexton v. Union Stock Yard & Transit Co., 200 Ill. 244.

40. Seattle & M. R. Co. v. Roeder, 30 Wash. 244, 70 Pac. 498.

41. Smith v. Pennsylvania R. Co., 205 Pa. 645; Leiby v. Clear Spring Water Co., 205 Pa. 634. They must be acquainted with the market value of the land—Chicago, R. I. & T. R. Co. v. Douglass (Tex. Civ. App.) 76 S. W. 449.

42. Witness without special knowledge who had not investigated a proposed sewer system—Chicago & M. Elec. R. Co. v. Mawman (Ill.) 69 N. E. 66. See, also, Evidence, § 9.

43. In re Town of Guilford, 85 App. Div. (N. Y.) 207. To show damage to lands not taken in condemnation for a street—Miller v. Sterling, 198 Ill. 523.

In action to determine conflicting claims to award for land taken for a street to show that part of the land had previously been dedicated as a street so that defendant had no right to compensation—Gardiner v. Baltimore, 96 Md. 361. To show that a building had been erected before establishment of grade of a street on which it abutted, so as to entitle the owner to damages by the grading of the street in accordance with established plan—In re City of New York, 78 App. Div. (N. Y.) 355. Evidence in proceedings to condemn a turnpike road in connection with the fact that a certain par value of its stock was selling at that price at time of condemnation, to show that such price was just compensation for the property (St. § 4748B)—Richmond & L. Turnpike Road Co. v. Madison County Fiscal Ct., 24 Ky. L. R. 1260, 70 S. W. 1044.

Proof to estop land owners from recovering for a change of grade producing injury to buildings fronting on a street, must be clear and conclusive as to existence of facts charging them with notice of the inten-

conveying a right of way to the company on certain compensation, as liquidated damages, obtained with a view to constructing the road without binding the company, and on which it entered and took the land, is conclusive as to the amount of damages.[44] Testimony of a witness as to value of property cannot be given great weight merely because he is willing to purchase it.[45]

Instructions.[46]—The jury may be instructed as to the interest acquired by the

tion to regulate and change such grade—In re City of New York, 84 App. Div. (N. Y.) 525.

Evidence in a proceeding to take land adjoining a river for railroad purposes that when the water rose high enough in the river to overflow an embankment which was intended to be erected by a railroad company, it would wash out defendant's lands not taken, is speculative and insufficient to support a verdict for damages to such land where evidence of experts was undisputed that the current of water would be checked in flowing over the embankment by back water on the lands not taken so that no washout would result—St. Louis, I. M. & S. R. Co. v. Vaughan (Ark.) 72 S. W. 575.

Where it appeared that commissioners had awarded a certain amount to a hospital as damages from lowering the grade of an adjoining street, that access to the hospital was obtained from another street already graded, and to a certain degree over land fronting on street to be graded, and the only evidence was the testimony of an expert that it would cost a certain amount to lower the building, it was apparent that the amount awarded was based on an erroneous principle or was without foundation though substantial damage was done to the buildings. The construction of New York Consolidation Act, § 978 (Laws 1882, c. 410) and Greater New York Charter, §§ 980, 988 (Laws 1901, c. 466)—In re City of New York, 81 App. Div. (N. Y.) 215.

44. Chicago, R. I. & T. R. Co. v. Douglass (Tex. Civ. App.) 76 S. W. 449.

45. Friday v. Pennsylvania R. Co., 204 Pa. 405.

46. An instruction in a proceeding to take part of a stone quarry, which was such that the jury could not assume that the amount of rental paid at the time of trial would be the fair rental value for the future, cannot be given—Seattle & M. R. Co. v. Roeder, 30 Wash. 244, 70 Pac. 498. An instruction that damages must be assessed relating to the time of the condemnation, amounts to an instruction that relation must be had to the time of the filing of the instrument of appropriation—Muncie Natural Gas Co. v. Allison (Ind. App.) 67 N. E. 111. Where the jury were permitted to view premises sought for a railroad right of way and were charged that the view was to allow them to obtain a more intelligent idea of the property and that they might consider their observation together with the testimony, rejecting what they believed from their view to be false, and in case the evidence was conflicting to resort to knowledge gained by the view as determining the verdict, and that the testimony of any witness if false might be disregarded entirely unless corroborated by credible evidence, the instruction amounted only to a charge that if there was a conflict in the testimony they might resort to the evidence of their own senses in order to settle the damages—Seattle & M. R. Co. v. Roeder, 30 Wash. 244, 70 Pac. 498.

Sufficiency of particular instructions. An instruction in proceedings to take land for a private pass way failing to state the quantity of land required, is not defective where the jury knew fully the amount of land necessary—Barrall v. Quick, 24 Ky. L. R. 2393, 74 S. W. 214. An instruction stating that the jury were not bound to believe witnesses unless worthy of credit but might disregard the testimony if they believed from their view and all the evidence that it was not true, was wrong—Du Pont v. Sanitary Dist., 203 Ill. 170. An instruction that railroads are public necessities and that such use of land is a public use, was proper, where other instructions gave the jury the question whether it was necessary to take the land for a public use—Detroit & T. Shore Line R. Co. v. Hall (Mich.) 94 N. W. 1066. The appropriating party in an action for damages by the unlawful grading of a street, is not prejudiced by the introduction in the case of an incorrect rule of damages, where the rule tended rather to diminish the recovery than increase it—Friedrich v. Milwaukee (Wis.) 95 N. W. 126. An instruction that the jury should give the value of all the land to the owner did not exclude damages for anything on or under the land or damages resulting to other land, where other instructions state that the value was its worth in consideration of any injury sustained to the land remaining—Detroit & T. Shore Line R. Co. v. Hall (Mich.) 94 N. W. 1066. Where part of a stone quarry in active operation and valuable only for that purpose, was taken for a railroad right of way the jury were properly instructed that it might consider the quality of stone it produced and its value, or the royalty given by the lessee, in determining the value of the land, since this did not separate the value of the stone from that of the land—Seattle & M. R. Co. v. Roeder, 30 Wash. 244, 70 Pac. 498. Where there is evidence in locating a highway that it would be of public utility, an instruction cannot be given that benefits to a land owner should be considered together with all the other evidence, since they should have been instructed to consider only that bearing properly on the issue of property and benefits—Angell v. Hornbeck (Ind. App.) 67 N. E. 237. An instruction in proceedings to take land for an approach to a bridge which will injure a levee of the owner, that damages which he may thereafter suffer cannot be considered if possible to be prevented by proper construction and maintenance of the work, is not cured by another instruction that the jury should consider the reasonable cost of a new levee, the market value of a steam-

taking,[47] and that they "can" consider the purpose for which the property is used.[48] An erroneous instruction on the measure of damages is not cured by another giving a correct measure.[49] If defendant fears the jury will give too great effect to certain testimony, he must guard against danger by requesting instructions.[50]

§ 15. *View of appropriated premises.*[51]—A view of the premises sought to be taken may be had,[52] but it is not absolutely required by the federal constitution.[53] In a proceeding to condemn land for a turnpike, a map of the entire road need not be attached to the report of the jury of view, though a map showing definitely the points between which the road is condemned is necessary.[54]

§ 16. *Verdict, report or award; judgment thereon, and lien and enforcement of judgments.*—A final order nunc pro tunc as of the date of entry of judgment takes effect from the actual date though it recites an earlier one.[55] Adjustment of damages from construction of a dam does not include damages to riparian owners from subsequent impeded navigation of the river;[56] and damages caused by seepage of water from a canal resulting from faulty construction are not included

boat landing at the place and the increased danger of overflow on the owner's plantation—Russell v. St. Louis S. W. R. Co. (Ark.) 75 S. W. 725. Where in condemnation proceedings to take lands for a dock line, a cross-petition was filed alleging that other lands not described would necessarily be taken and asking damages therefor, an instruction that the jury were not confined to the petition but could render a verdict for the value of all lands, which under the evidence, would be taken and requiring them to consider the values in evidence allowing the market value of the lands whether described in the petition or not, is erroneous—Du Pont v. Sanitary Dist., 203 Ill. 170. An instruction that the market value of property taken cannot be reduced by benefits from the construction or operation of drainage canals by petitioner, but such benefits, if any, must be confined to property not taken, and the rights in the property and uses of which defendant would be deprived, or the use, benefit and enjoyment of which would be interfered with physically, is misleading and inconsistent—Id. On assessment of damages to land by erection of a telephone line, an instruction is incorrect which charges the jury that they are not bound to take the opinions of any witness though they might adopt such opinions so far as reasonable but that they could consider their own experience as to the effect of such structure on market value of abutting property, and that if such property in their opinion was affected thereby the compensation should be made accordingly, or if otherwise, the award should be proportionately less—De Gray v. New York & N. J. Tel. Co., 68 N. J. Law, 454. Where a railroad company taking a right of way stipulated to build culverts to carry water across such right of way, but did not bind itself not to obstruct the flow of such water, or to carry it over at any particular place as should be convenient to defendants as the water should naturally flow, they could not object to a charge permitting the jury to consider any interference with the carrying of water over the right of way as an element of damages, on the ground that such element had been eliminated—Seattle & M. R. Co. v. Roeder, 30 Wash. 244, 70 Pac. 498. Where the jury were permitted to view premises sought to be taken for a railroad right of way and were charged that the view was to allow them to obtain a more intelligent idea of the property and that they might consider their observation together with the testimony, rejecting what they believed from their view to be false, and in case the evidence was conflicting to resort to knowledge gained by the view as determining the verdict, and that the testimoney of any witness if false, might be disregarded entirely unless corroborated by credible evidence, amounted only to a charge that if there was a conflict in the testimony they might resort to the evidence of their own senses in order to settle the damages—Id.

47. After proper instructions as to elements of damage—Sexton v. Union Stock Yard & Transit Co., 200 Ill. 244.

48. Street railroad—Boyer v. St. Louis, S. F. & T. R. Co. (Tex.) 76 S. W. 441.

49. Chicago & M. Elec. R. Co. v. Mawman (Ill.) 69 N. E. 66.

50. Carraher v. Inhabitants of Revere, 182 Mass. 427.

51. Weight to be given to knowledge obtained on view in making verdict, see ante, § 14.

52. Petzel v. Chicago & N. W. R. Co., 103 Ill. App. 210; Seattle & M. R. Co. v. Roeder, 30 Wash. 244, 70 Pac. 498; Sexton v. Union Stock Yard & Transit Co., 200 Ill. 244; Groves & S. R. R. Co. v. Herman (Ill.) 69 N. E. 36; Du Pont v. Sanitary Dist., 203 Ill. 170.

53. 23 St. at Large, p. 61, giving telegraph companies power to take railroad rights of way is not in violation of Fed. Const. Amend. 14, for failing to provide for a view—South Carolina & G. R. Co. v. American Tel. Co., 65 S. C. 459.

54. In re Factoryville & A. Turnpike & Plank Road, 19 Pa. Super. Ct. 613.

55. The right to make such an order is doubted—Madera County v. Raymond Granite Co., 139 Cal. 128, 72 Pac. 915.

56. Sultan Water & P. Co. v. Weyerhauser Timber Co., 31 Wash. 558, 72 Pac. 114.

in an award to the owner in condemnation of the land for the canal.[57] Where an award was not paid but petitioner entered and used the land for the purpose for which it was condemned, the owner had a lien on the land for the award enforceable in equity; and the waiver of the lien by permitting the line to be constructed before payment, if effective, was complete on construction without regard to lapse of time.[58]

Sufficiency.[59]—The award of the commissioners is sufficient unless palpable error in principles on which damages are assessed appears.[60] That a judgment was in personam and did not, in form, require payment of damages, but appropriation of the land, will not prejudice the owner where the damages were paid into court.[61] Where a judgment provides that unless the award is paid within a certain time the proceedings shall abate and the land cannot be occupied until payment is made, defendant cannot object that damages are assessed against the drainage district instead of the county though the district is not responsible.[62] An order in proceedings to alter a highway in a county under township organization may properly provide for assessed damages to be paid to owner before the judge, or to the township trustee if he refuses to accept.[63]

Validity.—The report of commissioners must conform to the statute.[64] A report of commissioners against the free judgment of their majority, but following erroneous advice of the corporation counsel under stress of a threat to have them removed with loss of fees, is void.[65] The award of commissioners is not erroneous because they heard incompetent evidence, where they viewed the property, and damages awarded are established by competent evidence.[66] A condemnation judgment is valid though payment is made before it is due.[67] A quotient ver-

57. Turpen v. Turlock Irr. Dist. (Cal.) 74 Pac. 295.

58. Where a judgment was rendered when the owner was in the employ of the railroad company and in easy circumstances, but the railroad company was financially embarrassed and payment was requested by the owner several times thereafter from the railroad company and its successor, that he permitted the first company to build the line without paying the award did not waive his equitable lien—Southern R. Co. v. Gregg (Va.) 43 S. E. 570.

59. An award, by a jury who viewed the land and were properly instructed as to elements of damage, which was in excess of the value fixed by plaintiff's witnesses but less than the value fixed by defendant's witnesses, was not necessarily inadequate—Sexton v. Union Stock Yard & Transit Co., 200 Ill. 244.

Where appraisers gave a certain sum for property taken for park purposes, in case "buildings and improvements" should not be removed, and another sum should they be removed, they did not fail to value the buildings alone so as to render the award invalid, since the word "improvements" had reference to the attachments and fixtures necessarily constituting a part of the building and was equivalent to the word "building" under city charter arranging for assessment of damages in condemnation of property for park purposes—State v. District Ct., 87 Minn. 268.

Where injury to two lots is alleged from a railroad tunnel, and it appears that one was injured but the other suffered only nominal damages, and damages were awarded in a lump sum, the entire judgment is erroneous if it does not show an assessment as to each lot—Peak v. Kings County Elec. R. Co., 81 N. Y. Supp. 926.

60. In re Brookfield, 78 App. Div. (N. Y.) 520.

61. Condemnation by municipal corporation—Madera County v. Raymond Granite Co., 139 Cal. 128, 72 Pac. 915.

62. Taking land for drainage purposes (Act March 19, 1895 [Laws 1895, p. 142, c. 79])—Lewis County v. Schobey, 31 Wash. 357, 71 Pac. 1029.

63. Shively v. Lankford, 174 Mo. 535.

64. Where a village board of water commissioners having authority to purchase or condemn water rights and property necessary for a water supply, bring condemnation to take property of a water works already supplying the village, and commissioners appointed to make an award refuse to follow the statute as to appraisal of such property including good-will and franchises of the company at full value, and determine such value as provided by a contract between the village and the water works company, void because ultra vires, a new appraisal will be ordered before new commissioners—In re Board of Water Com'rs (N. Y.) 68 N. E. 348.

65. Taking land for street—In re City of New York, 83 N. Y. Supp. 1081.

66. Change of street grade—In re Comesky, 83 App. Div. (N. Y.) 137.

67. Code Civ. Proc. § 1251—Madera County v. Raymond Granite Co., 139 Cal. 128, 72 Pac. 915.

dict as to damages is not void in the absence of a binding agreement by the jury to accept it.[68]

Effect or conclusiveness.[69]—The judgment is conclusive as to successors in property to petitioner,[70] but it is not a bar to a subsequent action for damages for faulty construction of the improvement.[71] The finding of commissioners as to value of land taken for railroad terminal purposes and benefits is conclusive.[72] Commissioners who dismissed a claim by a landowner for want of jurisdiction through mistake or inadvertence cannot reopen their decision.[73] Where there was a settlement by the parties, a decree entered by consent, giving an easement for the right of way as described, had the same effect as a deed of the right of way.[74] A stipulation signed by the attorney for petitioner, requiring the latter to build a new dock on real estate remaining after land is taken for dock purposes according to specifications, will not bind the petitioner, where the judgment did not mention the stipulation.[75]

68. The verdict is properly regarded as not arrived at by chance where six or eight jurors file affidavits that they had regarded the evidence and the instructions merely, and five affidavits stating that while a quotient estimate was made there was no agreement for its acceptance; an affidavit by a right of way agent of the railroad that the quotient verdict was adopted by previous agreement, will be presumed to be on information alone and incompetent, where it does not disclose whether on knowledge or information—Groves & S. R. R. Co. v. Herman (Ill.) 69 N. E. 36.

69. A finding that damages were assessed by taking into consideration the existence of the brook taken by a city for a waterway, and its walls, and the extent to which they affected the value of the land taken, did not support a claim that the land covered by the side walls of the old water way was regarded by the court as unincumbered—Brown v. Waterbury, 75 Conn. 727. Where in proceedings to open a street a city designates a person in possession of property as its owner and damages are awarded by the jury to him, and it appears in the proof that he purchased such property before the day of dedication of the street, the city after several years cannot deny title in him and claim that the grantor, by signing the dedication, bound him or persons claiming under him, especially where it appears that such signing was done generally and without naming a specific portion of the property—Toledo v. Weber, 23 Ohio Circ. R. 564. A judgment in condemnation under statutes allowing a municipality to obtain land as provided by general statutes, to convey it to the United States for naval purposes, which general statute relates to condemnation proceedings for such purpose, and the award of damages therefor, which were paid to and accepted by the owner without appearing or taking in appeal, is res judicata in an action against one holding the land for the U. S. for its recovery on account of the unconstitutionality of the statute authorizing the proceedings by one claiming title through such owner—Branch v. Lewerenz, 75 Conn. 319. Where the common council of the city brought proceedings to condemn property for street purposes under laws in force and the proceedings were pending on appeal when another law became effective as to the city transferring to the board of public works the authority to condemn property but providing that proceedings begun before its passage should be carried forward by the proper department, and placing on the city attorney the duty to apppear in all appeals concerning the city, it will be assumed that he was discharging his duty and acting with full authority in asking for a judgment on the verdict in the appeal over the objections of the property owner, and the judgment will bind the city—Heinl v. Terre Haute (Ind.) 66 N. E. 450.

70. Where one railroad company failed to present to the commissioners a claim for damages for establishing a highway across its right of way, another company succeeding to its rights. franchise and property after the final order establishing and opening the highway, cannot show on mandamus to compel it to build the highway crossing, that it will be compelled to expend considerable funds in building such crossing, since ample opportunity was given for the adjustment of claims in the proceedings for location of the highway—Baltimore & O. S. W. R. Co. v. State, 159 Ind. 510.

71. A judgment in proceedings by a sanitary district to take land for a channel to divert a river in which plaintiff joined with other joint owners of a tract cut by the channel and which included a portion afterward put in crops by him, in a cross petition alleging that the tract constituted an entire dairy farm and asking damages for injuries to it, and for loss of shipping facilities which did not appear to have been recovered, is not a bar to his recovery in an action against a district for damages from an overflow, because of negligent construction of the channel, where it did not appear that an overflow would have resulted had the channel been constructed according to specifications exhibited in the condemnation proceedings, nor whether it was built according to such plans—Sanitary Dist. v. Ray, 199 Ill. 63.

72. Under Code, c. 49, §§ 1945, 1946—Southport, W. & D. R. Co. v. Owners of Platt Land (N. C.) 45 S. E. 589.

73. Assessment of damages for change of grade—People v. Leonard, 87 App. Div. (N. Y.) 269.

74. Chicago, M. & St. P. R. Co. v. Snyder (Iowa) 95 N. W. 183.

75. Du Pont v. Sanitary Dist., 203 Ill. 170.

§ 17. *Costs and expenses.*[76]—Assessors cannot allow a prevailing party on hearing to tax as costs sums voluntarily paid by him as compensation for their services; nor the amount paid under an agreement between counsel for hiring a stenographer;[77] and commissioners cannot receive compensation for days when nothing was accomplished at their meetings though their failure resulted from acts of the corporation counsel.[78] A petitioner is liable for court costs and attorney's fees for defendant, on refusal to pay the award.[79] The general statute relating to costs where the recovery exceeds the amount offered before trial applies to condemnation proceedings.[80] Where it appears, in proceedings to locate a highway, that the county has fenced such land, in considering the costs, the expense of fencing should be added to the award, and if the sum is greater than the amount fixed by commissioners, the landowner may recover costs.[81] After dismissal of proceedings, a city is not liable for attorney's fees in defense unless it wrongfully and needlessly continued the proceedings while able to have them dismissed.[82] When plaintiff seeks to discontinue the proceedings before appointment of commissioners, the landowner cannot compel such appointment so as to obtain his expenses.[83] An allowance for costs previous to appointment of commissioners in charge of a street grade is discretionary and cannot be taxed by the clerk.[84] The costs in proceedings for construction of drains must be assessed

76. Construction of various statutes as to costs and expenses. Laws 1896, c. 393, providing that in condemnation by the city of New York, the corporation counsel shall furnish a clerk to the commissioners, is not impliedly repealed though omitted from New York Charter of 1897, and commissioners are not authorized to appoint a clerk where furnished one by the corporation counsel—In re Board of Public Improvement. 77 App. Div. (N. Y.) 351. Hurd's Rev. St. 1899, p. 839, c. 47, § 10, requiring the court to make an order on dismissal of condemnation proceedings by petition before entry of final order or failure to make payments within the time named, for payment of costs, expenses and attorney's fees by the petitioner as may seem just, does not apply to proceedings under Act July 1, 1897, as amended by Laws 1901, p. 117—Rieker v. Danville (Ill.) 68 N. E. 403. Code Civ. Proc. § 3372, providing that if compensation awarded by the commissioner exceeds the offer of petitioner for the property, the court in its final order shall direct defendant to recover costs, as allowed in the supreme court, including those for proceeding before and after notice of trial, refers to trial before appointment of commissioners and the land owner is not entitled to costs in proceedings before the commissioners as though a trial had been had—In re Brooklyn Union El. R. Co., 82 App. Div. (N. Y.) 567. A provision in a city charter that if the award of appraisers of land taken for park purposes should be set aside, the court may recommit the matter to the same appraisers or appoint new ones, allowing reasonable compensation for services and award of costs, including such compensation, is not unconstitutional as imposing undue hardship on a party appealing, but merely relates to costs and disbursements connected with the trial—State v. District Ct., 87 Minn. 268. The charter provision for costs in the Act of 1876, c. 198, giving petitioner the right to abandon condemnation proceedings after final order, not having been adopted in § 3374 of the Code passing in 1390, it cannot be held that costs and expenses of the owner may be included in the order of discontinuance but plaintiff is entitled to an order giving leave to discontinue on payment of taxable costs of parties appearing, and of motions, and compensation of a guardian ad litem of infant defendant, to be fixed under a rule of court relative to such compensation, opportunity being given plaintiff to file answering affidavits (Code, § 3374 and Laws 1876, c. 198, amending Laws 1850, c. 140, § 18)—Onondaga County v. White, 38 Misc. (N. Y.) 587.

77. Rev. Laws, c. 165, § 54—Boston Belting Co. v. Boston, 183 Mass. 254.

78. In re City of New York, 77 App. Div. (N. Y.) 433.

79. Local Imp. Act, § 94, as amended by Laws 1901, p. 117—Rieker v. Danville (Ill.) 68 N. E. 403.

80. A landowner may recover the same amount of costs that defendant may recover in proceedings before notice of trial, where compensation awarded by the commissioner exceeds the amount in the offer to purchase with interest from the time offer was made, where the land owner succeeded in the supreme court after trial (Code Civ. Proc. § 3251 construed in connection with § 3372)—In re Brooklyn Union El. R. Co. (N. Y.) 68 N. E. 249.

81. Watkins v. Hopkins County (Tex. Civ. App.) 72 S. W. 872.

82. St. Louis City Charter, art. 6, § 9, authorizing dismissal or withdrawal of proceedings by the city at any time before final judgment on payment of costs—Lester Real Estate Co. v. St. Louis, 170 Mo. 31.

83. Onondaga County v. White, 38 Misc. (N. Y.) 587.

84. Laws 1897, p. 420, c. 414 (Code Civ. Proc. § 3420)—Bley v. Hamburg, 84 App. Div. (N. Y.) 23.

against the drainage district instead of the county, though the latter is the nominal party.[85] An order reversing the proceedings on appeal with costs as in an action entitles appellant to tax costs including disbursements.[86] On appeal, attorney's fees cannot be taxed and apportioned as part of the costs between the parties, where the verdict was much smaller than the commissioner's award,[87] and costs in the circuit court must be taxed against appellant.[88] Where appeal is dismissed by stipulation on terms favorable to the landowner without mention of costs, they should be taxed against the company.[89] Affidavits by commissioners for allowance of fees and expenses must be specific and certain.[90]

§ 18. *Review of condemnation proceedings.*[91]—If on appeal by a mortgagee to the district court, the landowner is not brought in, the corporation petitioner may bring him in if necessary to protect his rights.[92] An award will not be set aside for instructions which do not prejudice the petitioner, where within the range of testimony.[93]

Right to appeal. Decisions reviewable.—Particular statutes allowing appeal must be strictly construed.[94] The judgment appealed from must be final.[95] A mortgagee who appeared may appeal from the award independently of the owner, and his right is not forfeited or suspended by filing a claim against the mortgagor's estate.[96] An appeal will lie from an order of the special term of the supreme court of New York setting aside an award of commissioners.[97] A taxpayer or citizen, showing no special injury different from that of the general pub-

85. Act March 19, 1895 (Laws 1895, p. 142, c. 79)—Lewis County v. Schobey, 31 Wash. 357, 71 Pac. 1029.

86. Taking land for an approach to a bridge (Code Civ. Proc. §§ 3240, 3256)—In re Dept. of Public Works, 78 App. Div. (N. Y.) 631.

87. Wormely v. Mason City & Ft. D. R. Co. (Iowa) 95 N. W. 203.

88. Appeal from county to circuit court on taking lands for private passway—Barrall v. Quick, 24 Ky. L. R. 2393, 74 S. W. 214.

89. Appeal by both parties from an award dismissed on stipulation that the land owner should receive the full award in settlement of his claim, and that the railroad company should build a private crossing at a place to be designated without any statement as to costs and attorney's fees (Code, § 2007)—Heath v. Mason City & Ft. D. R. Co. (Iowa) 94 N. W. 467.

90. Greater N. Y. Charter, §§ 998, 999, providing for the taxation of costs, fees and expenses of such commissioners—In re City of New York, 77 App. Div. (N. Y.) 433. Laws 1897, § 713, regulating compensation of commissioners of appraisal in proceedings to take real estate for the water supply of the city of New York—In re Collis, 80 App. Div. (N. Y.) 287.

91. General questions of appeal, see Appeal & Review, p. 85 et seq.

92. Omaha Bridge & Terminal R. Co. v. Reed, (Neb.) 96 N. W. 276.

93. Groves & S. R. R. Co. v. Herman (Ill.) 69 N. E. 36.

94. The Traction Act of 1893, gives no appeal in condemnation from the report of commissioners as appeal is meant in § 9 of the Condemnation Act, and companies organized under the former cannot appeal under the latter—Paterson & State Line Traction Co. v. De Gray (N. J. Law) 56 Atl. 250. Under Act May 16, 1891, P. L. 75, giving the right of appeal to abutting owners from an ordinance opening, altering or improving a street, an appeal will not lie from vacation—Daughters of American Revolution v. Schenley, 204 Pa. 572. Comp. Laws 1897, §§ 6248, 6240, giving an appeal from commissioners or jury in condemnation by a railroad company, do not authorize appeal from an allowance of attorney's fees to the owner—Detroit & L. Shore Line R. Co. v. Hall (Mich.) 94 N. W. 1066.

95. After entry of judgment for a right of way it is final and appeal will lie though damages are not settled—Tennessee Cent. R. Co. v. Campbell, 109 Tenn. 640. That a plea not barred is filed in proceedings for a right of way before the clerk, will not justify an appeal from an order of the Superior Court directing the clerk to hear the proceedings and appoint commissioners (Code, § 1946)—Holly Shelter R. Co. v. Newton (N. C.) 45 S. E. 549. In proceedings for a right of way a determination on preliminary trial that plaintiff has the right to condemn the land for such purposes, is not open to appeal until final judgment—Tennessee Cent. R. Co. v. Campbell, 109 Tenn. 640. Where defendant appeared before the clerk, and specially objected to service of summons on one defendant, and answered raising issues of fact asking that the case be transferred to the Superior Court at term, and on refusal appealed to the judge of such court, his order remanding the case to clerk with directions for hearing on ten days' notice was interlocutory and no appeal would lie to the Supreme Court—Holly Shelter R. Co. v. Newton (N. C.) 45 S. E. 549.

96. Omaha Bridge & Terminal Co. v. Reed (Neb.) 92 N. W. 1021.

97. Code Civ. Proc. § 3375—In re Town of Guilford, 85 App. Div. (N. Y.) 207.

lic in highway proceedings, cannot appeal to the supreme court.[98] Failure of an owner to appear before commissioners and show damages sustained by opening and grading of a street will not deprive him of damages, and if he has any not allowed, he may object to confirmation of the report.[99] In proceedings to assess damages on a street on pending appeal to the circuit court when a certain law became effective, the subsequent judgment of the court is final and there can be no further appeal.[1]

Remedy for review; certiorari.—Certiorari will not be allowed to an abutting owner whose land is injured by a change in location of a highway authorized by the board of railroad commissioners,[2] nor to an owner who acquiesced in the taking if there is a legal foundation therefor,[3] nor to review the award on taking land for a turnpike,[4] nor in proceedings to condemn rights of way for ditches.[5] The supreme court may issue a writ of certiorari to review condemnation proceedings when no other adequate remedy is available.[6] Where commissioners, to assess damages from a change of grade, erroneously dismissed a claim for want of jurisdiction, the claimant's remedy was not by application for a rehearing, but by certiorari for review, or motion to the court to reopen the matter and send it back to the commissioners.[7] The question of a third adequate remedy is immaterial where certiorari cannot be had in proceedings to condemn land for a ditch, the right of appeal being given.[8]

Saving questions for review.—An objection that jurors were not residents of the county in which the land was situated,[9] or that persons who obtained a conveyance of land for a right of way to a railroad company were not its agents,[10] cannot be raised on appeal where not raised in the court below. A motion for a new trial is unnecessary to review of improper exclusion of evidence as to damages to lands not named in the petition,[11] or to review rulings on evidence to which exceptions were reserved on trial.[12] An objection to a charge as to the measure of damages will not lie where no instruction curing the defect was offered by appellant and the instruction he did offer was similar to the one given.[13] It cannot be said on appeal that there is no evidence of public necessity,[14] and where the petition alleged that petitioner was unable to acquire purchase, it cannot be said that there was no evidence of such inability,[15] where all the evidence is not

98. Pub. St. c. 68, § 2—Bennett v. Town of Tuftonborough (N. H.) 54 Atl. 700.

99. In re City of New York, 84 App. Div. (N. Y.) 525.

1. Various statutes construed—Evansville & T. H. R. Co. v. Terre Haute (Ind.) 67 N. E. 686.

2. There is an ample remedy by appeal—Leighton v. Concord & M. R. R. (N. H.) 55 Atl. 938.

3. Acquiescence amounts to estoppel—Slocum v. Neptune Tp., 68 N. J. Law, 595.

4. The appellate court cannot examine the extent to which the jury should have considered the reduced value of part of the road lying in one county, by reason of the taking of part in another, since if the company is dissatisfied with its award it may appeal to the court of common pleas under Act June 2, 1887—In re Factoryville & A. Turnpike & Plank Road, 19 Pa. Super. Ct. 613.

5. The remedy is appeal to the Supreme Court (Code Civ. Proc. § 2214)—State v. District Ct. (Mont.) 74 Pac. 200.

6. For right of way (Shannon's Code, §§ 4834, 4853, 4854, 6329, 6336)—Tennessee Cent. R. Co. v. Campbell, 109 Tenn. 640. Right of appeal is not given (Const. art. 1, § 16, and art. 4, § 4)—State v. Superior Ct., 30 Wash. 219, 232, 70 Pac. 484.

7. People v. Leonard, 87 App. Div. (N. Y.) 269.

8. State v. District Ct. (Mont.) 74 Pac. 200.

9. Benton Harbor Terminal R. Co. v. King (Mich.) 91 N. W. 641.

10. Chicago, R. I. & T. R. Co. v. Douglass (Tex. Civ. App.) 76 S. W. 449.

11. 2 Bail. Ann. Codes & St. § 5056—Sultan Water & Power Co. v. Weyerhauser Timber Co., 31 Wash. 558, 72 Pac. 114.

12. Mills' Ann. St. § 1727, providing that a motion for a new trial is unnecessary to enable the supreme court to review proceedings of an inferior court, where errors have been once passed upon by such court against exceptions, applies to appeals in eminent domain under Mills' Ann. Code, § 393, allowing such appeals to be taken to the supreme court as other appeals from the district court—Loloff v. Sterling (Colo.) 71 Pac. 1113.

13. Board of Councilmen v. Howard, 25 Ky. L. R. 111, 74 S. W. 703.

14, 15. Benton Harbor Terminal R. Co. v. King (Mich.) 91 N. W. 641.

in the record. If the record shows neither testimony nor a substitute therefor, but only the award or verdict and exceptions, the order below will be affirmed.[16] Where the commissioner's report gave part of the damages assessed to a tenant for his leasehold interest, the circuit court properly overruled exceptions to the report where the exact extent of his interest was not shown.[17] On appeal by a city from an order refusing in part to confirm the report of commissioners as to certain lands and referring the report back to them with directions to award substantial damages to the owners thereof on a certain basis after regarding private but not public easements, the owners could not contend that such private easements had been abandoned or lost by adverse possession.[18]

Bringing up the cause; record.—A landowner is not affected by an appeal by his mortgagee, if no summons issued against him.[19] An objection to a requirement in the judgment that each party shall pay its own costs cannot be made on appeal on the judgment roll alone;[20] and a recital of payment of damages in the final order is conclusive.[21] A certificate signed by the trial judge bearing date after notice of appeal and stipulation of counsel as to printing the transcript is not a part of the judgment roll.[22]

Scope of review.[23]—The question of public necessity of a proposed railroad will not be reviewed on appeal from the award.[24] Whether certain persons not parties were entitled to damages will not be considered.[25] On appeal by the condemning party, distribution of the award will not be reviewed.[26] The question to be determined on appeal by a mortgage is the value of his lien.[27] Where the appeal was on the question of damages for additional land taken for a railroad, it will be presumed that no damages were awarded for the first construction.[28] An award by commissioners on both testimony and view will be affirmed unless palpably incorrect,[29] or unless the commissioners have proceeded on an erroneous basis, have overlooked material features, or have been influenced by passion or hearsay.[30] An award,[31] or report of commissioners,[32] or the finding of a chancellor,[33] or the ver-

16. Macfarland v. Byrnes, 19 App. D. C. 531.

17. St. Louis v. Abeln, 170 Mo. 318.

18. In re City of New York, 84 App. Div. (N. Y.) 455.

19. Omaha Bridge & Terminal R. Co. v. Reed (Neb.) 96 N. W. 276.

20, 21, 22. Madera County v. Raymond Granite Co., 139 Cal. 128, 72 Pac. 915.

23. Where in a proceeding to open a street, testimony was given to show different methods of grading as showing the grade which might ultimately be adopted, and the jury found substantial damages for the remainder of the owner's land in a general verdict, and a special verdict holding damages to be allowed only because of establishment of a future grade and that if the street should be improved on a grade which would not produce a cut of more than 5 ft. there would be no damages, on review the general verdict cannot be disregarded and a holding made that it is controlled by the special verdict so as to set aside amount of general verdict as to damages for land not taken—Grant v. Hyde Park, 67 Ohio St. 166. Where a city council brought proceedings to open a street under laws in force and an appeal was pending when another law became effective as to the city, transferring to the board of public works the authority to condemn property, but providing that proceedings begun before its passage should be carried forward by the proper department, and placing on the city attorney the duty to appear in all appeals concerning the city, it will be assumed that he was discharging his duty and acting with full authority in asking for judgment on the verdict in the appeal over objections of the property owner, and the judgment will bind the city—Heini v. Terre Haute (Ind.) 66 N. E. 450.

24. Detroit & L. Shore Line R. Co. v. Hall (Mich.) 94 N. W. 1066.

25. Marquette & S. E. R. Co. v. Longyear (Mich.) 94 N. W. 670.

26. The city is not interested in distribution of damages for street grading—In re City of New York, 81 App. Div. (N. Y.) 215.

27. Omaha Bridge & Terminal R. Co. v. Reed (Neb.) 96 N. W. 276.

28. The railroad company had already taken a right of way and were seeking to take land to widen it—Chicago, M. & St. P. R. Co. v. Brink (S. D.) 94 N. W. 422.

29. In re Collis, 76 App. Div. (N. Y.) 368.

30. In re Town of Guilford, 85 App. Div. (N. Y.) 207.

31. Marquette & S. E. R. Co. v. Longyear (Mich.) 94 N. W. 670.

32. Contradicted by testimony of one witness—St. Louis v. Abeln, 170 Mo. 318.

33. Unless an erroneous measure of damages was applied—Richmond & L. Turnpike Road Co. v. Madison County Fiscal Ct., 24 Ky. L. R. 1260, 70 S. W. 1044.

dict of a jury,[34] on conflicting evidence, will be affirmed; especially where the jury viewed the premises.[35] The lower court cannot confirm the verdict of the first jury of seven allowed under the statute, where the property owners have filed exceptions asking the verdict to be vacated.[36]

Trial or hearing.[37]—Where the action of the court below influenced certain landowners to forego their right to a second jury, that right was retained for them on appeal.[38] A motion to the court to set aside an award of commissioners is not a rehearing on the merits so that further affidavits as to the value of the property may be received.[39] Where a railroad company had filed exceptions to proceedings by street railway to acquire crossing over its road and has appealed, it cannot interfere with the street railway and prevent the crossing.[40] On appeal from an award for land taken for a depot, evidence cannot be given that the railroad owned land adjacent to the land sought equally suitable for such purpose.[41] On exceptions in the circuit court to the report of commissioners, they were properly allowed to testify.[42] On trial de novo on appeal from an award by commissioners, the jury must award damages on the evidence before them without regard to the former award.[43]

Decision and determination.—On appeal, the court cannot modify an excessive award but must set it aside.[44] Where landowners appealed from an award in their favor to the circuit court, the jury must of necessity find for them.[45] If property owners refuse a stipulation in an order to set aside an award, unless they consent to its reduction, it in legal effect sets aside the award.[46] The verdict and judgment are set aside by a reversal though only part of defendants appeal.[47] A verdict for landowners on appeal to the circuit court must be itemized, since the statute and not the jury fixes the costs.[48] On appeal from an order of the special term setting aside an award of commissioners, the appellate division must determine on the facts whether there should be a re-reference to the commissioners.[49] After an affirmance of judgment for petitioner, dismissal properly follows on plaintiff's motion where the appeal was on other grounds than insufficiency of the award, and before determination of the appeal plaintiff notified the other parties that he would not take the property and would move to dismiss.[50]

§ 19. *Remedy of owner by action or suit.*[51] *A. Actions for tort, dam-*

34. Seattle & M. R. Co. v. Roeder, 30 Wash. 244, 70 Pac. 498.

35. Lanquist v. Chicago, 200 Ill. 69; East & W. I. R. Co. v. Miller, 201 Ill. 413; Detroit & L. Shore Line R. Co. v. Hall (Mich.) 94 N. W. 1066; Natchitoches R. & Const. Co. v. Henry, 109 La. 669.

36. Taking land to widen a street; the statutory requirement for a second jury is absolute (Act Congress March 3, 1899, § 5, and Rev. St. D. C. c. 11, §§ 263-265)—Brown v. Macfarland, 19 App. D. C. 525.

37. Act May 21, 1895, governing actions to recover damages for appropriations by private corporations, giving the right to waive assessments of damages by viewers, and to demand a jury view of the premises, applies only to actions brought directly to recover damages without interposition of viewers, and not to cases arising by appeal from the award of viewers—Frazee v. Manufacturers' Light & Heat Co., 20 Pa. Super. Ct. 420.

38. Street extension—Under Rev. St. D. C. c. 11—Macfarland v. Byrnes, 19 App. D. C. 531.

39. In re Town of Guilford, 85 App. Div. (N. Y.) 207.

40. Under Burns' Rev. St. 1901, § 5468e, § 17—Wabash R. Co. v. Ft. Wayne & S. W Traction Co. (Ind.) 67 N. E. 674.

41. Cane Belt R. Co. v. Hughes (Tex. Civ App.) 72 S. W. 1020.

42. St. Louis v. Abeln, 170 Mo. 318.

43. Sharp v. United States, 24 Sup. Ct. 114.

44. Code Civ. Proc. § 3371—In re Town of Guilford, 85 App. Div. (N. Y.) 207.

45. Acts 1897, c. 19, p. 22 et seq.—Board of Levee Com'rs v. Nelms (Miss.) 34 So. 149.

46. In re Town of Guilford, 85 App. Div. (N. Y.) 207.

47. In re West Terrace Park (Mo.) 75 S. W. 973.

48. Acts 1897, c. 19, p. 22 et seq.—Board of Levee Com'rs v. Nelms (Miss.) 34 So. 149.

49. In re Town of Guilford, 85 App. Div. (N. Y.) 207.

50. Pool v. Butler (Cal.) 74 Pac. 444.

51. Measure of damages in action or suit to recover as well as condemnation proceedings, see ante, § 6.

ages, or trespass; recovery of property.[52]—An application by a railroad company to take land as property of plaintiff in trespass for entry of the land before award of the appraisers, and appeal therefrom, cannot be consolidated with the trespass, it being no bar to such action, nor are the two proceedings merged.[53] Written notice of injury is unnecessary before bringing action against a railroad company for damages from temporary use of a street.[54] Recovery for damages to abutting property from a railroad in a street from noise, smoke, and difficulty of access, will not bar a subsequent action for a change in grade by the company and construction of a stone wall.[55] Statutory bar of actions for damages depends upon the particular statute.[56]

Right of action.—Statutes prescribing remedies for recovery of damages must be strictly construed.[57] One who did not appeal from a judgment and award cannot sue for the value of his land.[58] A city entering a private road and erecting structures, partially destroying the owner's means of access to his property without authority or compensation, must pay damages or be compelled to restore the road to its original condition.[59] On wrongful appropriation of land by a city, the owner need not look to a fund provided by a certain statute in recovery of damages, if it does not contemplate creation of a fund for that purpose.[60] An expressed intention by a railroad company not to abandon a right of way is not conclusive evidence thereof, but may be considered in ejectment by the owner together with acts of the company.[61] A declaration to recover land, showing on its fact that the railroad company had been in actual occupation of the land before plaintiffs acquired title, is liable to demurrer.[62] Where the legal title to land owned by a husband stood in his wife's name, a contract by the husband with a city to waive damages for laying out of a way, and the

52. Rights acquired by defendant on recovery of damages as well as by condemnation, see post, § 21.

A judgment in proceedings by a sanitary district to take land for a channel to divert a river in which plaintiff joined with other joint owners of a tract cut by the channel and which included a portion afterward put in crops by him, on a cross petition alleging that the tract constituted an entire dairy farm and asking damages for injuries to it, and for loss of shipping facilities which did not appear to have been recovered, is not a bar to his recovery in an action against a district for damages from an overflow from negligent construction of the channel, where it did not appear that an overflow would have resulted otherwise, nor whether it was built according to plans exhibited on the condemnation—Sanitary Dist. of Chicago v. Ray, 199 Ill. 63.

53. Georgia R. & Banking Co. v. Gardner (Ga.) 45 S. E. 600.

54. By railroad (Gen. St. 1902, § 2020)—Knapp & C. Mfg. Co. v. New York, N. H. & H. R. Co. (Conn.) 56 Atl. 512.

55. Louisville & N. R. Co. v. Cumnock, 25 Ky. L. R. 1330, 77 S. W. 933.

56. That an owner secures modification of a proposed change of street grade so as to cause less injury, will not bar his right to damages from the actual change—Klaus v. Jersey City (N. J. Law) 54 Atl. 220. Where a land owner whose property is taken for a railroad right of way, conveys the land to his wife after he is barred by a two years' limitation, she has no right of recovery against the company (Acts 1872-73, c. 75, & Acts 1854-55, c. 225)—Dargan v. Carolina Cent. R. Co., 131 N. C. 623. Every day's temporary use of a highway by a railroad company while changing a grade crossing without compensation to abutting owners is a new trespass and no bar to recovery arises for damage suffered within three years (Gen. St. 1902, § 1115)—Knapp & C. Mfg. Co. v. New York, N. H. & H. R. Co. (Conn.) 56 Atl. 512. The right to sue a railroad company for damages from construction and operation of tracks in a street in front of property under legislative and municipal authority is barred after five years, but an action for damages for such construction and operation without such authority is barred only by the 15 years statute—Klosterman v. Chesapeake & O. R. Co., 24 Ky. L. R. 1233, 71 S. W. 6.

57. Gen. St. p. 2820, § 71, giving a right of action to an owner of a building abutting upon a street or highway, the grade of which is altered by a municipality, to recover damages will not authorize an action against a village, villages not being included in the act—Bellis v. Village of Flemington (N. J. Err. & App.) 55 Atl. 300.

58. Omaha Bridge & Terminal R. Co. v. Reed (Neb.) 96 N. W. 276. Private Laws 1899, c. 62, § 24, applying to condemnation of land in Elizabeth City—Lamb v. Elizabeth City, 132 N. C. 194.

59. Culver v. Yonkers, 80 App. Div. (N. Y.) 309.

60. Comp. St. 1901, § 158, c. 12a—Omaha v. State (Neb.) 94 N. W. 979.

61. Chicago & E. I. R. Co. v. Clapp, 201 Ill 418.

62. King v. Southern R. Co., 119 Fed. 1017.

assumption of betterments by the city, will entitle the wife to sue for damages sustained by the husband through breach of the contract.[63] If a city appropriates property under statutory authority without payment of compensation, the owner must seek compensation, and cannot bring ejectment;[64] nor can compensation be recovered in ejectment for land taken by a railroad company under a statute providing for assessment of compensation.[65] A grant by ordinance to a street railway company to use streets or bridges within corporate limits is legislative so that it cannot be revised by the court on the ground of inexpediency at suit of the abutting owner.[66] The county may sue for damages from appropriation of a highway by a railroad company.[67] Owners injured by alteration of a highway may sue in the superior court for damages without first applying for assessment of damages by county commissioners.[68] Filing a claim for damages in highway proceedings which was refused, and dismissal of appeal therefrom, will not prevent an action for damages.[69] One cannot sue for damages to access by street vacation, unless his property is situated so as to entitle him to notice of vacation proceedings.[70] An owner cannot recover for injuries to highway fences by construction of an electric road, where such fences were constructed under a license requiring removal on request, their presence was inconsistent with use of the highway, and the owner had been requested to remove them.[71] An owner may recover value of things removed in laying out a street because of failure to give notice of removal, only by statutory petition and not in tort.[72] Where land was conveyed to a city under a deed restricting its use to a certain public purpose, and proceedings by the city to condemn the land were never completed and were treated as void, the owners may assert their rights as against a lessee of the city who used the land for a private manufacturing enterprise.[73] An abutting owner may recover for damages by change of a street grade resulting in accumulation of water on his premises.[74] Where injury from change of a street grade is unavoidable, the owner's remedy is by statutory proceedings before viewers, and not by trespass.[75] No right of action exists for damages from raising a street to conform to an established grade, without authority of a resolution, though the grade had been established by ordinance.[76] Where a village did not acquire rights of property owners affected by change of a grade crossing, authorized in proceedings by trustees before railroad commissioners and to ascertain damages therefor, the owners have an action against the village for damages.[77] After establishment of a grade by ordinance, improvement, or user, an abutting owner

63. Bell v. Newton (Mass.) 67 N. E. 599.
64. Webber v. Toledo, 23 Ohio Circ. R. 237.
65. Acts 1872-73, c. 75, or Acts 1854-55, c. 225, providing for application for assessment to the clerk of the superior court—Dargan v. Carolina Cent. R. Co., 131 N. C. 623.
66. Lange v. La Crosse & E. R. Co. (Wis.) 95 N. W. 952.
67. Under Rev. St. 1895, art. 4426—St. Louis, S. F. & T. R. Co. v. Grayson County (Tex. Civ. App.) 73 S. W. 64.
68. Under St. 1900, c. 299—Ahearn v. Middlesex County, 182 Mass. 518.
69. Hogsett v. Harlan County (Neb.) 97 N. W. 316.
70. Where his land did not extend to the open part of a street though it reached part which had never been opened, the dedication of which had never been accepted, and he could not reach the street directly except by use of an old crossing belonging to a railroad company whose track crossed the street and which had been allowed to be used as a cross street since vacated, he is not so situated as to be entitled to recover—Beutel v. West Bay City Sugar Co. (Mich.) 94 N. W. 202.
71. Georgetown & L. Traction Co. v. Mulholland, 25 Ky. L. R. 578, 76 S. W. 148.
72. Stowell v. Ashley (Mass.) 68 N. E. 675.
73. Sanborn v. Van Duyne (Minn.) 96 N. W. 41.
74. Recovery from city—Cooper v. Scranton City, 21 Pa. Super. Ct. 17.
75. Borough improvement without negligence and following a borough plan of general improvement (Act May 23, 1889, or Act May 16, 1891)—Cooper v. Scranton City, 21 Pa. Super. Ct. 17.
76. Wilbur v. Ft. Dodge (Iowa) 95 N. W. 186.
77. Torge v. Village of Salamanca, 86 App. Div. (N. Y.) 211.

may improve his property in accord therewith; but before establishment he cannot recover for injury from a change after improvement of his property, unless the city has established an unreasonable grade.[78] A riparian owner whose property rights are injured or appropriated by irrigation works may recover compensation.[79] An action of tort will not lie to recover damages for water taken from a stream and building of a water plant.[80] After a railroad company has entered land and erected buildings with or without the owner's consent, a subsequent vendee can recover neither the land nor its value from company.[81] Though abutting owners on Park Ave., New York, cannot restrain operation of railroad on a viaduct erected under a statute, when suing for damages to fee and rental values of property, they may recover where station houses of the company extend beyond the street line of the viaduct depriving them of light and air.[82] After leasing premises, a city cannot deprive the lessee of damages to the leasehold from construction of an elevated railroad in front of the property by consenting to construction; the lessee may recover for a building constructed before construction of the road regardless of renewals of the lease since they relate back to renewal of the original term.[83]

Pleading, issues and proof.—A declaration to recover damages from lowering the grade of a street need not allege that the property has been benefited by the entire improvement in other respects so as to compensate the owner for such damages.[84] An abutting owner suing to recover damages for use of a street by a railroad company while changing a grade crossing need not show a benefit to defendant from such use but must show that he suffered loss.[85] That plaintiff's possession in an action for damages from construction of a railroad in a street, extended into the street, and that he had not acquired the right to such property, may be considered on the extent of injury.[86] Damages may be recovered for accumulation of water on land, in an action for damages on taking for a right of way, though improper construction of the road is not substantially pleaded.[87] Where it was not alleged in recovery for negligence of a city in removing buildings from condemned lands that there was any cost in raising the buildings after removal, the jury could not be charged to consider such cost as an element of damages.[88] In a suit to recover damages for wrongful taking of land by a city and careless removal of buildings where it appeared that the property had been legally condemned and damages assessed and tendered, evidence that special benefit to the property was greater than its value was irrelevant where plaintiff was allowed to amend by striking out averments as to wrongful taking.[89] In an action for damages from construction of a railroad in an adjacent street, defend-

78. Ross v. Cincinnati, 24 Ohio Circ. R. 43.

79. Irrigation Act of 1895—Crawford Co. v. Hathaway (Neb.) 93 N. W. 781.

80. St. 1886, pp. 278, 279, c. 311, §§ 1, 2, 4, creating the company and authorizing it to take water from a stream and construct dams and basins, and making it liable for damages to be recovered as in the case of land taken for a highway, provides the remedy for damages to a meadow by reason of the dam and raising of water in the pond—Benson v. Great Barrington Fire Dist. (Mass.) 67 N. E. 876.

81. King v. Southern R. Co., 119 Fed. 1017.

82. Viaduct erected under Laws 1892, p. 694, c. 337—Dolan v. New York & H. R. Co., 175 N. Y. 367.

83. The rent for renewal cannot be considered to have been paid with reference to the presence of the road when the building was erected previously; assignment of the lease in violation of covenant where the lessors collected rents and executed a renewal of the lease without regard to the breach—Storms v. Manhattan R. Co., 77 App. Div. (N. Y.) 94.

84. It is a matter of defense—Chicago v. McShane, 102 Ill. App. 239.

85. Knapp & C. Mfg. Co. v. New York, N. H. & H. R. Co. (Conn.) 56 Atl. 512.

86. Pochila v. Calvert, W. & B. V. R. Co. (Tex. Civ. App.) 72 S. W. 255.

87. Arkansas Cent. R. Co. v. Smith (Ark.) 71 S. W. 947.

88, 89. Lamb v. Elizabeth City, 131 N. C. 241.

ant cannot show its offer to cut down the street grade made after beginning the action.[90] Evidence that plaintiff was compensated, in proceedings to condemn land for a canal, for injuries from seepage of water, is not admissible where the condemnation proceedings are not pleaded.[91] On an issue as to abandonment of a railroad right of way, it may be shown that the road was built to haul supplies and products for a mine now exhausted.[92]

Burden of proof; questions of fact; witnesses.[93]—Defendants, in action for damages by construction of a railroad, must show the extent of special benefits.[94] Though a petition to recover for land taken alleges damages to land not taken, plaintiff waives such damages if he introduces no proof thereof.[95] The question of damages to property from street improvements is for the jury in an action against the city.[96] Whether there was an intention to abandon a railroad right of way is a question for the jury on evidence that it had ceased to operate the road, had removed the tracks almost entirely, had failed to keep up the fences, and allowed the right of way to grow up with weeds.[97] A witness unacquainted with property before construction of a trolley line on a highway through the property cannot testify as to the damages.[98]

View of premises; instructions.[99]—The jury may view the locus in an action against a county to recover damages from construction of a bridge.[1] An instruction that abandonment of right of way will give the owner of the fee right to possession is not misleading as omitting the element of intention in abandonment where other instructions clearly charged as to such intention.[2]

Verdict, judgment, and allowance of damages.—In a suit to recover permanent damages for erection of a telegraph line upon land without acquisition of the right, damages to crops within the three years during which the line was building cannot be added to permanent damage.[3] Where it did not appear, in an action to recover for negligence in removing buildings from land appropriated by the city, that special benefit had not been considered in the condemnation proceedings, it could not be set off against the damages.[4] Where, in an action for injuries from seepage of water from a canal, a stipulation was made that a judgment for plaintiff should be joint against the contractor and the canal corporation, and that the latter would not set up a defense against plaintiff that the contractor was an independent contractor, a finding for plaintiff after verdict that the canal corporation was liable and the contractor not liable was harmless though unnecessary.[5] A writ of ouster in ejectment will not be restrained as to service, where it appears from the face of the petition that the defendants in the ejectment claimed under condemnation proceedings after the final ejectment judg-

90. Pochila v. Calvert, W. & B. V. R. Co. (Tex. Civ. App.) 72 S. W. 255.

91. Turpen v. Turlock Irr. Dist. (Cal.) 74 Pac. 295.

92. Chicago & E. I. R. Co. v. Clapp, 201 Ill. 418.

93. Sufficiency of objection in ejectment against a railroad company that employe of the company was not permitted to state the intention of the company as to abandonment of the road—Chicago & E. I. R. Co. v. Clapp, 201 Ill. 418.

94. Pochila v. Calvert, W. & B. V. R. Co. (Tex. Civ. App.) 72 S. W. 255.

95. McElroy v. Kansas City & I. Air Line, 172 Mo. 546.

96. Board of Councilmen v. Howard, 25 Ky. L. R. 111, 74 S. W. 703.

97. Chicago & E. I. R. Co. v. Clapp, 201 Ill. 418.

98. Shimer v. Easton R. Co., 205 Pa. 648.

99. Sufficiency of instructions as to measure of damages in an action to recover for construction of viaduct on a street in front of property (Chicago v. Le Moyne [C. C. A.] 119 Fed. 662) as to set-off in action to recover for closing a street under agreement between a city and a railroad company occupying another street—Village of Winnetka v. Clifford, 201 Ill. 475.

1. Lafean v. York County, 20 Pa. Super. Ct. 573.

2. Chicago & E. I. R. Co. v. Clapp, 201 Ill. 418.

3. Hodges v. Western Union Tel. Co. (N. C.) 45 S. E. 572.

4. Lamb v. Elizabeth City, 131 N. C. 241

5. Turpen v. Turlock Irr. Dist. (Cal.) 74 Pac. 295.

ment and which were void because the law under which they were brought failed to provide for notice to the landowner.[6] Where, in statutory proceedings for assessments of damages from construction of approach to a county bridge, an objection was made successfully on the ground that the act does not apply, the county commissioners cannot object to a judgment in trespass by the owner after trial on the merits, on the ground that his proper remedy was under such act.[7] In a suit against a city to prevent continuing trespass and recover damages from lowering the water level under land by establishment of a pumping station nearby, an award of fee damage is not incorrect because the city had given plaintiff no notice of intention to acquire the land.[8] An award of fee damage against a city for continuing trespass and damage from lowering the water level under land by establishment of a pumping station cannot be attacked on the ground that it was an award of depreciation in value of the rest of the property after the water was taken, without allowing for the water, plaintiff having only a right of use in the water which was included in the fee damages.[9]

Appeal.—While a deed by plaintiff's curator to land for a railroad track and appurtenances might be investigated in an action against the railroad company for obstruction of use of a roadway reserved in the deed, to determine whether such reservation was made, the title to the land could not be affected by the judgment so as to give the supreme court jurisdiction of an appeal direct from the circuit court.[10]

(§ 19) *B. Suits in equity; injunction.*[11]—An attempt to take property without exercise of eminent domain, or payment of compensation, will be restrained,[12]

6. Board of Education v. Aldredge (Okl.) 73 Pac. 1104.

7. Act May 16, 1891, P. L. 75—Lafean v. York County, 20 Pa. Super. Ct. 573.

8. Plaintiff was not entitled to notice of intention to commit a trespass—Westphal v. New York, 75 App. Div. (N. Y.) 252.

9. Westphal v. New York, 75 App. Div. (N. Y.) 252.

10. In re McGee St. (Mo.) 74 S. W. 993.

11. Where there was no apparent connection between two ordinances, one of which authorized condemnation of lands to widen a street and another authorized a railroad company already operating two tracks in the street to lay two more tracks on payment of costs of condemnation and improvements made necessary by the alteration and the additional tracks, the property owner could not be required to make a defense in the original condemnation by showing the connection between the two ordinances and the real purpose of the railroad in the proceeding, and his failure to object at that time on the ground that such purpose was to procure a right of way for the railroad, will not prejudice him in a suit to restrain the construction—Pennsylvania Co. v. Bond, 202 Ill. 95.

12. St. Louis & S. F. R. Co. v. Southwestern Tel. Co. (C. C. A.) 121 Fed. 276. Taking of property for public street—Baya v. Town of Lake City (Fla.) 33 So. 400. Entry of abutting lands by electric railway company—Freud v. Detroit & P. R. Co. (Mich.) 95 N. W. 559. Though there is a controversy as to title or boundaries—Foley v. Doddridge County Ct. (W. Va.) 46 S. E. 246. Railroad sidings and switches in highway under power to maintain only a single track—Stephens v. New York, O. & W. R. Co., 175 N. Y. 72. Construction of railroad in street in which abutting owner has easement—Cleveland Burial Case Co. v. Erie R. Co., 24 Ohio Circ. R. 107. An abutting owner may restrain building of telephone line on rural highway—Gray v. New York State Tel. Co., 41 Misc. (N. Y.) 108. Riparian owners may restrain pollution of a river by city sewage above tide waters—Doremus v. Paterson (N. J. Err & App.) 55 Atl. 304. The court failed to provide for payment of damages assessed on opening a highway (Rev. St. art. 4694)—McCown v. Hill (Tex. Civ. App.) 73 S. W. 850. One railroad company will be prevented from crossing track of another (Civ. Code, § 2167)—Atlantic & B. R. Co. v. Seaboard Air-Line R., 116 Ga. 412. Crossing irrigation canal with lateral to carry water to land—Castle Rock Irr. Canal & Water Power Co. v. Jurisch (Neb.) 93 N. W. 690. Taking for a street; exclusive possession under a contract of purchase and part payment of purchase price gives the right to bring injunction—Olson v. Seattle, 30 Wash. 687, 71 Pac. 201. Railroad siding in street on other than established grade built without authority of city and damaging access and drainage rights—Zook v. Pennsylvania R. Co. (Pa.) 56 Atl. 82. Railroad track in street the title to which was in the abutting owner; that construction has been begun and the company has incurred great expense will not prevent restraint—Paige v. Schenectady R. Co., 77 App. Div. (N. Y.) 571. Abutting owner may restrain laying of additional railroad tracks in a street without grant or condemnation or payment of compensation—Rock Island & P. R. Co. v. Johnson (Ill.) 68 N. E. 549. An owner may restrain street railroad tracks built without his consent though owners on the opposite side of the street have consent-

but construction of an improvement causing damages will not be prevented there being a remedy at law for damages,[13] unless it is shown to be a nuisance by which complainants suffer special injury;[14] nor an improvement causing no injury to complainant;[15] nor where property is not taken directly for public purpose, but suffers injury as to rights incidental to its peculiar station or position, so that condemnation proceedings and payment of damages in advance are not practicable.[16] A railroad company may be restrained from destroying a telegraph line built by a telegraph company under statutory authority along the railroad and pending proceedings to condemn a right of way along such road, where irreparable damage would result to the telegraph company.[17] In Maryland, construction and operation of an electric railway on a county highway will not be restrained.[18] Where two years before making of a contract for lease of a quarry the owner conveyed a railroad right of way, the lessee's rights were subject to the deed, so that he could not restrain the building of the railroad by a grantee from the railroad company because of failure of such grantee to condemn and pay damages for his interest.[19] Condemnation will not be restrained because of lack of failure to agree on compensation,[20] nor because an illegal and unconstitutional method of assessing damages was prescribed.[21] An action by an owner to dispossess a railroad company of his land will be restrained on offer of compensation by the company.[22] Condemnation proceedings to take a right of way will not be restrained.[23] A railroad company entering realty under a lease, with a view to purchase when possible and building part of its line, may restrain the lessor for a reasonable time from dispossessing it so that it may condemn the land.[24] One who failed to appeal cannot sue in equity to set aside the condemnation.[25]

In suing to determine rights in a stream, plaintiff may offer to do equity by compensating riparian owners whose rights are affected by construction of

ed—North Pennsylvania R. Co. v. Inland Traction Co., 205 Pa. 579. Wrongful entry of a private road and damage to access and property by a city may be prevented. Where part of the cost was assessed against the owner he may have the assessment set aside and compel restoration and payment of damages—Culver v. Yonkers, 80 App. Div. (N. Y.) 309. It must appear that there was appropriation actual or intended without compensation where directors of a water company evinced an intention to comply with the law in taking waters in which riparian owners had rights—Hey v. Springfield Water Co. (Pa.) 56 Atl. 265. Construction of elevated railroad in street already containing one railroad will be restrained at suit of a subsequent purchaser of abutting property without actual or constructive notice of consent by his grantor to such construction—Shaw v. New York El. R. Co., 78 App. Div. (N. Y.) 290.

13. Abutting owners cannot restrain electric railway in street because of threatened damage to access or from noise, dust and vibration—Baker v. Selma St. & S. R. Co., 135 Ala. 552. Operation of railroad track in highway under special ordinance causing injury to abutting owners—Budd v. Camden Horse R. Co., 63 N. J. Eq. 804.

14. Electric railway in street—Baker v. Selma St. & S. R. Co., 135 Ala. 552.

15. A railway company cannot restrain construction of street railway on public road crossing its tracks and on which its lands abut, if none of its rights or franchises are injured (Act June 19, 1871; P. L. 1360)—North Pennsylvania R. Co. v. Inland Traction Co., 205 Pa. 579.

16. The owner will be left to his remedy at law unless insolvency or other special reason appears—Bronson v. Albion Tel. Co. (Neb.) 93 N. W. 201.

17. Act July 24, 1866, construed in connection with Rev. St. § 3964—Western Union Tel. Co. v. Pennsylvania R. Co., 120 Fed 981.

18. The easement taken for the highway is held to have included such use—Lonaconing Midland & F. R. Co. v. Consolidation Coal Co., 95 Md. 630.

19. Coyne v. Warrior Southern R. Co (Ala.) 34 So. 1004.

20. There is an adequate remedy by defense in the condemnation proceedings—St. Louis & S. F. R. Co. v. Southwestern Tel. Co. (C. C. A.) 121 Fed. 276.

21. Taking land for sewerage plant by city; power to take the land was not in issue—Vickers v. Durham, 132 N. C. 880.

22. Action by lessee giving company right to enter—Winslow v. Baltimore & O. R. Co., 188 U. S. 646, 47 Law. Ed. 635.

23. Holly Shelter R. Co. v. Newton (N. C.) 45 S. E. 549.

24. Winslow v. Baltimore & O. R. Co., 188 U. S. 646.

25. Opening highway (Rev. St. 1899, § 9419)—Searcy v. Clay County (Mo.) 75 S. W. 657.

an irrigation canal without leaving them to their actions at law.[26] By suing in equity instead of at law for trespasses by injuries to property, plaintiff waives his statutory right to condemnation proceedings and a jury trial.[27] Where a devisee seeks to restrain operation of a street railway in front of premises and to recover damages accruing after the death of his testator and before such death under an assignment from the testator, defendant waives his right to have such damages ascertained at law by making no objection to their recovery and allowing proof.[28]

Limitation and laches.—Recovery for permanent damages by erection of a telegraph line across land, within three years, is not barred by the three years' statute.[29] Proceedings for damages instituted nearly three years after reference of assessment of damages by the board of strect commissioners to commissioners of assessments are not barred by laches.[30] One whose property is taken by a city without payment or taking possession within six months may elect, after the taking, his manner of suit therefor, and such right will not be barred in less than twenty-one years.[31] Where a street railway company built a single track on a turnpike so as to show intent to build a double track and operated it for two years before laying of the second track, abutting owners are estopped by laches from restraining further construction after the track is one-third completed.[32] An abutting owner owning the fee in a street on which a railroad company, granted municipal authority to construct a track, has laid a second track, is not guilty of laches in seeking to restrain use of such track because the right of construction was not obtained by grant or condemnation, where he proceeded as soon as he learned that the company intended to use such track as a permanent second track supposing previously that it was only a temporary track.[33]

Parties.—Nonriparian lessees and grantees of the privilege to take and use water from a canal, into which water flowed from a river above the flow of the tide and which was returned to the river below such flow, cannot be joined as complainants with riparian owners in a suit against the city to restrain the pollution of the river without condemnation and compensation.[34] Where it appears after suit for injunction and damages for operation of a railway in front of premises that the original plaintiff has parted with the fee without reserving any rights so that the only question in issue is that of past damages, the court cannot, in the exercise of its discretion, make the grantee a party plaintiff.[35]

Pleading and issues.—A petition to restrain opening of a highway alleging that damages assessed to plaintiff had not been paid is sufficient, where no special exception is made to admitting evidence on the issue.[36] In a suit to prevent erection of a telephone pole on property because of irreparable damage, allegations that defendant was without authority to erect the pole, or that its erection would be unlawful, or that there was no adequate remedy at law, are necessary.[37] A

26. Crawford Co. v. Hathaway (Neb.) 93 N. W. 781.

27. Injury from city pumping stations—Westphal v. New York, 75 App. Div. (N. Y.) 252.

28. Hirsh v. Manhattan R. Co., 84 App. Div. (N. Y.) 374.

29. Hodges v. Western Union Tel. Co. (N. C.) 45 S. E. 572.

30. Klaus v. Jersey City (N. J. Law) 54 Atl. 220.

31. Rev. St. §§ 2260, 4977—Webber v. Toledo, 23 Ohio Circ. R. 237.

32. Hinnershitz v. United Traction Co. (Pa.) 55 Atl. 841.

33. Rock Island & P. R. Co. v. Johnson (Ill.) 68 N. E. 549.

34. Their rights are subordinate to those of the city—Doremus v. Paterson (N. J. Err. & App.) 55 Atl. 304.

35. The causes of action are totally distinct—Pope v. Manhattan R. Co., 79 App. Div. (N. Y.) 583.

36. McCown v. Hill (Tex. Civ. App.) 73 S. W. 850.

37. Cooke v. Central Dist. & Print. Tel. Co., 21 Pa. Super. Ct. 43.

complaint for injunction to restrain interference with a taking of property need not set out the instrument of appropriation or aver that it stated jurisdictional facts.[38] On a bill to prevent a railroad company from laying a siding in a street, in a manner other than the established grade, the power of the city to give consent cannot be considered.[39] A devisee who acquired, by assignment, claims of his testator's estate to damages for operation of an elevated railroad in a street, may include them in recovery in a suit to restrain operation.[40]

Decree, judgment, or order.[41]—On a prima facie showing to restrain condemnation of land for a station, the proceedings should be restrained until the statutory right to condemn is judicially determined.[42] In a suit to restrain the crossing of one railroad track by another, the court cannot provide that plaintiff's track may be crossed on condition that defendant put in a certain described system of switches.[43] In a suit to restrain proceedings by one railroad company to take an entire tract of land belonging to another, and including property already in actual and necessary use for railroad purposes, the court cannot divide a single award so as to allow it to stand in part and to be set aside in part.[44]

§ 20. *Payment and distribution of sum awarded.*[45] *Title or interest requiring compensation.*[46]—A city to which land has been dedicated for a public park

38. It is sufficient if it alleges authority to cross a railroad track and inability to agree on compensation, the filing of an instrument of appropriation, the fixing of the amount by commissioners, and that the railroad company interfered with its right to cross, asking an injunction (Burns' Rev. St. 1901, § 5468a, cl. 5, & § 5468e)—Wabash R. Co. v. Ft. Wayne & S. W. Traction Co. (Ind.) 67 N. E. 674.

39. Zook v. Pennsylvania R. Co. (Pa.) 56 Atl. 82.

40. Hirsh v. Manhattan R. Co., 84 App. Div. (N. Y.) 374.

41. A judgment against the city to prevent a continuing trespass and for damages to land caused by a pumping station, rendered lessees for raising crops, requiring them on in behalf of plaintiffs some of whom are only tender of the amount designated to convey to defendant the right to maintain and operate the pumping station as constructed, merely intends conveyance of such rights as a particular plaintiff may have and was not incorrect as requiring him to act beyond his power—Westphal v. New York, 75 App. Div. (N. Y.) 252.

42. Riley v. Charleston Union Station Co. (S. C.) 45 S. E. 149.

43. Under Civ. Code, § 2167—Atlantic & B. R. Co. v. Seaboard Air-Line R., 116 Ga. 412.

44. Atchison, etc., R. Co. v. Kansas City, etc., R. Co. (Kan.) 73 Pac. 899.

45. The special fund referred to in Comp. St. 1901, c. 12a, § 7 providing the moneys to re-imburse a city for payment of damages to abutting property on the taking of lands, does not refer to an assessment levied in pursuance of that law, but to a levy made for the payment of a specific judgment under § 158, Comp. St. 1901, § 2, art. 6, § 77—Omaha v. State (Neb.) 94 N. W. 979.

46. Where property is under lease for a certain term with covenant of renewal on terms to be settled by the parties and lessee builds on the premises, that the rent for renewal was paid with reference to presence of an elevated railroad in front of premises erected during original term will not prevent lessee from recovering damages to his lease hold—Storms v. Manhattan R. Co., 77 App. Div. (N. Y.) 94. Where land was appropriated by a city to widen and extend a street and compensation assessed but possession was not taken by the city nor the award paid until years after the appropriation and after the property had changed hands, a widow receiving part of the property as devisee under will of a testator who owned it at time of condemnation and to whom part was conveyed by warranty deed after condemnation, and before construction of the street, may sue for the compensation assessed—Webber v. Toledo, 23 Ohio Circ. R. 237. Where before actual grading of a street was begun under a contract, land on which it was laid out was conveyed and viewers appointed to estimate the damages, from whose estimate a new owner appealed and on the issues a verdict was properly rendered for him; the viewers were appointed after the grading and he was entitled to recover regardless of a law requiring the viewers to report in a single sum as to both benefits and damages, or another law requiring that an award of damages shall include all damages, since such laws apply only to viewers appointed before the court (Act May 16, 1891 [Pub. Laws 75] & Act May 26, 1891 [P. L. 117])—Howley v. Pittsburg, 204 Pa. 428. Where a city acquired land three years after proceedings were begun to lay out a street designated on a map previously filed with the registrar, and before condemnation, the land was subdivided into lots and a map made on which the proposed street appeared as laid out, the lots were sold and deeds delivered the day after acquisition by the city, boundaries of lots including all land within the proposed street and the deeds containing a clause making the sale subject to proceedings pending for the opening of streets, the grantee had an absolute title to the land without regard to easements, and must receive compensation for full fee value —In re City of New York, 80 App. Div. (N. Y.) 618.

cannot have compensation on its condemnation for a post office.[47] Property owners whose title depends on a conveyance from the heirs of a former owner cannot contest the title of other heirs in condemnation without acquiring the interest of the latter.[48] An award to a tenant for interruption to his business by condemnation of property cannot be deducted from damages sustained by the property.[49] That a devisee may restrain operation of an elevated railroad in front of premises will not entitle him to recover damages accruing during life of the testator.[50] Where a city builds a viaduct over railroad tracks causing a change of street grade, damaging municipal property, no damages can be awarded to the city in order to compel partial contribution by the railroad company.[51]

Sufficiency of payment.[52]—Compensation for property taken must be by actual payment or its equivalent of damages assessed.[53] Where an unconditional award is made an owner for land condemned by a city, a personal debt of the owner for taxes may be deducted by the city.[54] In a county under township organization, damages for land taken for a highway may be paid to a township trustee after the owner refuses to receive them.[55]

Distribution.[56]—Equity will determine which of several claimants is entitled to the award for land condemned by a city for a street.[57] The award of freeholders, or of the district court on appeal, stands for the land and belongs to lienholders to the extent of their liens.[58] Where plaintiff has recovered judgment and paid into court the damages, payment to defendants cannot be ordered pending appeal by them on other grounds than insufficiency of the award.[59]

Lien and enforcement.[60]—Where an award was not paid but petitioner entered and used the land, the owner had a lien on the land enforceable in equity.[61] An attorney's lien against an award may be enforced in equity where distribution is disputed.[62]

47. It has no legal estate; laws and decisions of Mass. governing condemnation proceedings for that purpose by the United States—In re Certain Land in Lawrence, 119 Fed. 453.

48. United New Jersey R. & Canal Co. v. Consolidated Fruit Jar Co. (N. J. Eq.) 55 Atl. 46.

49. St. Louis v. Abeln, 170 Mo. 318. The award to the tenant cannot be deducted from the award to owners of fee in remainder (Acts 1897, c. 19)—Board of Levee Com'rs v. Nelms (Miss.) 34 So. 149.

50. Hirsh v. Manhattan R. Co., 84 App. Div. (N. Y.) 374.

51. Viaduct built under a contract with the city—In re Grade Crossing Com'rs, 171 N. Y. 685.

52. Comp. St. 1901, § 158, c. 12a, regarding the assessment of damages against abutting and adjacent lands for lands taken by a city provides means for re-imbursement of the city for such payment, but does not contemplate the creation of a fund to pay such owners—Omaha v. State (Neb.) 94 N. W. 979.

53. Brown v. Chicago, R. I. & P. R Co. (Neb.) 92 N. W. 128.

54. Buckhout v. New York, 82 App. Div (N. Y.) 218.

55. Const. art. 2—Shively v. Lankford (Mo.) 74 S. W. 835.

56. Sufficiency of evidence in action to determine conflicting claims to award for land taken for a street to show that part of the land had previously been dedicated as a street so that defendant had no right to compensation—Gardiner v. Baltimore, 96 Md. 361. On conflicting claims to an award equity may entertain a bill by a defendant in the proceedings, claiming that a tract owned by him and condemned was claimed by the city as included in the street and refusing to receive the award for property which was not claimed as within the street, under Acts 1892, c. 165; New Charter of Baltimore, § 827, providing for determination of conflicting claims regarding awards for condemnation of property by the city by a suit in equity—Id.

57. The title passes to the city and the suit is not to determine title—Gardiner v. Baltimore, 96 Md. 361.

58. Omaha Bridge & Terminal R. Co. v. Reed (Neb.) 96 N. W. 276.

59. Pool v. Butler (Cal.) 74 Pac. 444.

60. Sufficiency of evidence in a suit to enforce an equitable lien on land taken for payment of the award to overthrow a presumption of payment from lapse of time—Southern R. Co. v. Gregg (Va.) 43 S. E. 570.

Where the question of payment was not in issue in a suit to enforce an award for land taken, and plaintiff's evidence that there had been no payment was not denied and he had continuously asserted such claim, which had been acknowledged by the defendant railroad company and its predecessors who condemned the property, there was no laches—Southern R. Co. v. Gregg (Va.) 43 S. E. 570.

61. Southern R. Co. v. Gregg (Va.) 43 S. E. 570.

62. Award to a city and other claimants

§ 21. *Ownership or interest acquired.*—An easement running with the land is acquired by condemnation thereof.[63] A stock yard and transit company does not acquire the fee in taking land.[64] A petitioner taking a right of way for a ditch, having a prior right to construct it, is vested with the exclusive right, title, and possession of the land.[65] A provision that proceedings under statutes for condemnation of property and giving "ownership" to plaintiff applies to all cases where the intent is to vest in plaintiff more than the right of occupation or use of the land.[66] Proceedings by a school district to take a school house site divests the owner of title though he had at the time only an equitable title and afterward received the legal title.[67] A railroad built on public tide lands of the state will not pass by purchase of the land.[68] By condemnation of a right of way, the interest obtained is the ownership of the land,[69] so that the company may convey, to a connecting company, land acquired for a right of way.[70] Possession of a landowner who holds part of the land taken for a railroad right of way is subservient to rights of the company, unless it is shown that it is adverse thereto with knowledge of the company.[71] A railroad company, by taking land as purchaser from one holding under adverse possession, received a good title when the combined adverse possession of it and its grantor reached the statutory period.[72] A wagon road laid out by owner entirely on his own land belongs to him as any other land, so that railroad company taking a right of way across such road acquires title to it as to the remainder.[73] Where lands are condemned for a railroad water station, the owner in fee has no concurrent right of possession with the company of the part of the lands not actually used by the company or of any part necessary for its use.[74] Where a railroad company is required to maintain waterways for owners whose lands it intersects, an owner has a right of crossing appurtenant to each of his divided tracts which is not transmitted to grantee of part of lands lying on one side of the track.[75] A settlement in proceedings to take a right of way by stipulation, giving a right of way with no reservation as to any land contained therein, merges all prior agreements in such stipulation, and an oral agreement that the owner's use of his way as it then existed would not be disturbed is unenforceable.[76] A railroad company which had located a branch line on land to which it held title partly by condemnation, and partly by deed, and of which it was in actual or constructive possession for railroad purposes, may restrain another company from ousting it by force under a title from the same person from which the first company claimed.[77] On recovery by a lessee of damages for construction of an elevated railroad in front of the leasehold, the company is entitled to a release from him including not only the easement during the existing term but for

for land taken in extension of a street—Deering v. Schreyer, 171 N. Y. 451.

63. Deavitt v. Washington County (Vt.) 53 Atl. 563.

64. Sexton v. Union Stock Yard & Transit Co., 200 Ill. 244.

65. Rev. St. § 3084—Whalon v. North Platte Canal & Colonization Co. (Wyo.) 71 Pac. 995.

66. Civ. Code, art. 2640—Fuselier v. Police Jury, 109 La. 551.

67. Gen. St. 1901, § 6131—Buckwalter v. School Dist. No. 42, 65 Kan. 603, 70 Pac. 605.

68. The railroad company may condemn a right of way after the purchase—Lake Whatcom Logging Co. v. Callvert (Wash.) 73 Pac. 1128.

69. Since aliens cannot hold such title they cannot condemn (Const. art. 2, § 33)—State v. Superior Ct. (Wash.) 74 Pac. 686.

70. Code 1896, § 1170—Coyne v. Warrior Southern R. Co. (Ala.) 34 So. 1004.

71. Chicago, M. & St. P. R. Co. v. Snyder (Iowa) 95 N. W. 183.

72. Covert v. Pittsburg & W. R. Co., 204 Pa. 341.

73. Charleston & W. C. R. Co. v. Fleming (Ga.) 45 S. E. 664.

74. Dillon v. Kansas City, Ft. S. & M. R. Co. (Kan.) 74 Pac. 251.

75. Marino v. Central R. Co. (N. J. Err. & App.) 56 Atl. 306.

76. Chicago, M. & St. P. R. Co. v. Snyder (Iowa) 95 N. W. 183.

77. Pennsylvania Co. v. Ohio River Junction R. Co., 204 Pa. 356.

future renewals provided for.[78] A prohibition against authorizing a street railway company to acquire realty within a city by condemnation does not restrict the power of eminent domain given by other sections of the law to corporations subject to it; and relates only to private property and not to an abutting owner's rights in the street.[79] The constitutional provision that the fee of land taken for highways shall remain in the owner does not apply to streets of a city for the purpose to which they have been dedicated.[80] The city of New York by condemning land for a bridge over the Harlem river acquired title to all lands taken necessary for such construction and the approaches in fee simple absolute, but only a title in trust as to lands taken for altering streets.[81] In extending a street across a railroad track, the city acquires only a joint right with the company to use, allowing the company its right to lay additional tracks as increase of business may require, provided it keeps the tracks occupied by the street free and open to public use.[82] An application to take lands for a street and to assess compensation, where the proceedings are not amended, will give the city the right after judgment to use the land for all street purposes including establishment of a reasonable grade.[83]

§ 22. *Transfer of possession and passing of title.*—Where the report of commissioners made an award for land and improvements taken for a street, and a resolution of the board of street opening and improvement under statutory authority vested title in the city six months before, listing and valuation of the property for taxes, confirmed after title passed, did not make the tax a lien on the land making the owner liable.[84]

§ 23. *Relinquishment or abandonment of rights acquired.*[85]—A lease by a railroad company of land condemned for a water station to a fishing and boating club with reservation of actual possession for all purposes for which the land was taken, and the right to cancel the lease on notice, is not an abandonment of the land.[86] On abandonment of a railroad, the property reverts to the former owner; the abandonment must include an intention to abandon as well as an actual relinquishment.[87] On alteration in location of an existing highway, a town board cannot order the bed of the old highway to revert to a particular person, where it is not shown that he or his grantors have owned such land.[88] An intention expressed by a railroad company not to abandon a right of way is not conclusive evidence of such intention, but may be considered in ejectment in connection with acts of the company; on the question of abandonment it may be shown that the road was built to haul goods and products to and from a mine now exhausted. Whether there was an intention to abandon the right of way is for the jury. An instruction that the abandonment will give the owner of the fee right to possession is not misleading as omitting to mention the element of intention in abandonment where other instructions clearly charged as to such intention.[89]

78. Storms v. Manhattan R. Co., 77 App. Div. (N. Y.) 94.

79. Laws 1890, p. 1108, c. 565, § 90, as amended by Laws 1895, p. 791, c. 933—Schenectady R. Co. v. Lyon, 85 N. Y. Supp. 40.

80. Const. art. 6, § 13, art. 17. § 18—Kirby v. Citizens' Tel. Co. (S. D.) 97 N. W. 3.

81. Laws 1895, c. 986—In re City of New York, 174 N. Y. 26.

82. Chicago & A. R. Co. v. Hogan, 105 Ill. App. 136.

83. Grant v. Hyde Park, 67 Ohio St. 166.

84. Buckhout v. New York (N. Y.) 68 N. E. 659.

85. Abandonment of condemnation proceedings as to procedure, see ante, § 8. Sufficiency of objection in ejectment against a railroad company that employe of the company was not permitted to state the intention of the company as to abandonment of the road—Chicago & E. I. R. Co. v. Clapp, 201 Ill. 418.

86. Dillon v Kansas City, Ft. S. & M. R. Co. (Kan.) 74 Pac. 251.

87. Const. 1870, art. 2, § 13; Starr & C.'s Ann. St. p. 113, 2d Ed.—Chicago & E. I. R. Co. v. Clapp, 201 Ill. 418.

88. People v. Vandewater, 83 App. Div. (N. Y.) 60.

89. On evidence that it had ceased to operate the road, had almost entirely removed the tracks, had failed to keep up the fences,

EQUITY.*

§ 1. **General Principles Controlling Equity.**
§ 2. **Equity Jurisdiction and Occasion for Relief.**
A. In General; Relief at Law or In Equity; Effect of Codes and Statutes.
B. Principles and Maxims Controlling Application of Equitable Relief; General Maxims; Adequate Remedy at Law; Doing Complete Justice; Multiplicity of Suits.
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§ 3. **Laches and Acquiescence.**—Excusable Delay; Adoption of Statutes of Limitation.
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§ 5. **Parties.**—Bringing in New Parties; Intervention.
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§ 7. **Taking Bill as Confessed, or Default.**
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§ 9. **Hearing or Trial; Rehearing.**
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C. Evidence and Its Introduction; Verdicts and Findings.
§ 10. **Decree, Judgment or Order.**
A. In General; Requisites and Sufficiency.
B. Effect and Construction.
C. Measure of Relief.
D. Modification and Amendment; Vacation and Setting Aside; Collateral Attack; Satisfaction; Lien and Enforcement.
§ 11. **Bill of Review.**—Time for Bill and Laches; Grounds; Application and Proceedings.

This topic will treat of the general rules of equity and of procedure in equity in those states where the adoption of a code has not changed equitable forms and procedure, and also such matters of procedure as remain under the codes.

and had allowed the right of way to grow up with weeds—Chicago & E. I. R. Co. v. Clapp, 201 Ill. 418.

***Notes from "L. R. A." and "Am. St. Rep.," classified according to above analysis.**

§ 1. General protection of rights. 37 L. R. A. 783, 38 L. R. A. 240.

§ 2A. Adoption by federal courts of remedies created by state statutes; limiting or enlarging equity powers and jurisdiction. 18 L. R. A. 266; 24 L. R. A. 417; 30 L. R. A. 336. Federal equity jurisdiction. 2 L. R. A. 225. Protection of civil rights. 10 L. R. A. 616. Jurisdiction to order foreclosure sale of realty in different states. 32 L. R. A. 208. Concurrent jurisdiction. 2 L. R. A. 175.

§ 2B. Adequate remedy at law. 6 L. R. A. 855; 11 L. R. A. 65. Coming into equity with clean hands. 2 L. R. A. 368; 11 L. R. A. 458. Doing equity. 1 L. R. A. 863. Following the law. 4 L. R. A. 858; 7 L. R. A. 85. Multiplicity of suits. 1 L. R. A. 801; 11 L. R. A. 207.

§ 2C. Foreign corporations. 85 Am. St. Rep. 924. Enforcement of stockholders' liability. 37 Am. St. Rep. 172. Corporations generally. 9 L. R. A. 650. Discovery by stockholder. 3 Am. St. Rep. 86. Forfeiture of corporate franchise. 9 L. R. A. 273; 8 Am. St. Rep. 200. Enforcement of stockholders' liability. 3 Am. St. Rep. 808. Foreclosure of liens on corporate stock. 42 L. R. A. 532. Assignments of expectancies. 56 Am. St. Rep. 339. Equitable assignments. 4 L. R. A. 247. Trusts; enforcement of constructive trust. 38 L. R. A. 497. Of voluntary imperfect trusts. 34 Am. St. Rep. 196. Unexecuted voluntary trust. 51 Am. St. Rep. 391. Protection of trusts. 35 L. R. A. 175. Accounts. 4 L. R. A. 504. Reformation of instruments; wills. 50 Am. St. Rep. 283. Instruments in general. 3 L. R. A. 189; 5 L. R. A. 156. Contracts. 65 Am. St. Rep. 481. Deeds. 65 Am. St. Rep. 506. Cancellation of instruments. 9 Am. St. Rep. 777; 9 L. R. A. 200; 36 L. R. A. 367; 43 L. R. A. 566. Administration of estates; setting aside letters. 81 Am. St. Rep. 560. Care of infants. 7 L. R. A. 534; 54 Am. St. Rep. 253. Relief against mistake. 4 L. R. A. 483; 12 L. R. A. 273; 32 Am. St. Rep. 385; 24 Am. St. Rep. 388; 9 Am. St. Rep. 712; 55 Am. St. Rep. 494; 65 Am. St. Rep. 487. Relief from duress. 43 Am. St. Rep. 889; 6 L. R. A. 493. Contest for office. 5 L. R. A. 403; 42 Am. St. Rep. 236. Dissolution of partnerships. 69 Am. St. Rep. 410. Foreclosure of liens. 42 L. R. A. 532; 74 Am. St. Rep. 387. Crimes and criminal prosecutions. 35 Am. St. Rep. 670. Interference with discretionary power. 8 L. R. A. 175. Interference in elections. 42 Am. St. Rep. 235. To prevent waste. 11 L. R. A. 207. Relief against judgment. 23 Am. St. Rep. 117; 25 Am. St. Rep. 165; 53 Am. St. Rep. 444; 54 Am. St. Rep. 218; 30 L. R. A. 498. Enforcement of judgment. 16 L. R. A. 115; 45 L. R. A. 285. Partition. 8 L. R. A. 289; 88 Am. St. Rep. 726. Matters of boundaries. 18 L. R. A. 361; 26 L. R. A. 749; 24 Am. St. Rep. 388. Prevention of public nuisance. 57 Am. St. Rep. 694; 36 L. R. A. 593; 12 L. R. A. 753; 9 L. R. A. 711. Relief from fraud. 5 L. R. A. 189; 11 L. R. A. 65; 2 Am. St. Rep. 801. Protection of insane persons. 54 Am. St. Rep. 253; 1 L. R. A. 610.

§ 3. Laches. 10 L. R. A. 125; 57 L. R. A. 253; 1 L. R. A. 191; 8 L. R. A. 248; 6 L. R. A. 799; 2 Am. St. Rep. 802; 9 Am. St. Rep. 530; 23 Am. St. Rep. 149; 54 Am. St. Rep. 259; 26 Am. St. Rep. 22; 60 Am. St. Rep. 660; 65 Am. St. Rep. 504; 63 Am. St. Rep. 475; 2 Am. St. Rep. 799.

§ 4. 33 L. R. A. 87. Federal courts. 11 L. R. A. 275. Adoption by federal courts of remedies created by state statutes. 18 L. R. A. 266; 30 L. R. A. 336.

§ 5. 3 Am. St. Rep. 815; 54 Am. St. Rep. 255; 44 Am. St. Rep. 738; 10 Am. St. Rep. 646.

§ 1. *General principles controlling equity.*—Courts of equity will be liberal rather than strict in adapting their practice and applying their jurisdiction to existing conditions.[1]

§ 2. *Equity jurisdiction and occasion for relief. A. In general.*—Conditions existing when a bill is filed and not those which come into existence later must determine equitable jurisdiction.[2] Parties cannot by silence or consent confer it.[3] If before trial the parties agree to dispense with the necessity for granting relief sought, the court will refuse to act.[4] If equity is without jurisdiction on an original bill, it cannot take jurisdiction on a cross bill in the same suit.[5]

Where parties are within the jurisdiction of the court, any suit may be maintained and remedy granted directly operating on the person of defendant and not upon the subject-matter, which may be situated in another state or country, and such decree may be enforced against the person of defendant thus indirectly affecting his property beyond the jurisdiction.[6]

Courts of equity and of law have concurrent jurisdiction over certain matters.[7]

The Federal equity jurisdiction to give relief is that which equity had when the Judiciary Act was adopted.[8] Federal equity jurisdiction cannot be altered by state laws but substantial rights may be created which the proper federal court will enforce by the proper remedy, either in equity, in admiralty, or at law,[9] and congress may also create new rights of action likewise enforceable.[10]

§ 6. Complaint in suit for relief from judgment. 28 Am. St. Rep. 111. Amendments to pleadings. 51 Am. St. Rep. 423. Supplemental bill. 10 L. R. A. 298. Amendments in general. 51 Am. St. Rep. 423. Auxiliary bills. 3 L. R. A. 189. Cross bills. 56 Am. St. Rep. 868; 50 Am. St. Rep. 738; 29 L. R. A. 263. Demurrer. 23 Am. St. Rep. 150; 2 Am. St. Rep. 807. Multifariousness. 1 L. R. A. 125. Pleading laches. 2 Am. St. Rep. 807; 23 Am. St. Rep. 150.

§ 8. Trial by jury. 5 L. R. A. 226; 18 L. R. A. 646; 15 L. R. A. 287; 23 L. R. A. 367. Right to jury in actions against receivers. 74 Am. St. Rep. 290.

§ 11. Necessity of leave of court. 28 L. R. A. 157. Right to file in general. 36 L. R. A. 385. Computing time for. 49 L. R. A. 226.

1. Gibbs v. Morgan (Idaho) 72 Pac. 733.

2. Busch v. Jones, 184 U. S. 598, 46 Law. Ed. 707.

3. Damages for trespass—McMillan v. Wiley (Fla.) 33 So. 993.

Jurisdiction in equity cannot be conferred by estoppel, based on an order requiring election between bill and garnishment proceedings—Henderson v. Hall, 134 Ala. 455.

4. Daugherty v. Curtis (Iowa) 97 N. W. 67.

5. Metz v. McAvoy Brew. Co., 98 Ill. App. 584. But the cross bill may state a case on which the bill could not have been sustained—Sanders v. Riverside (C. C. A.) 118 Fed. 720.

6. Specific performance respecting land in another state—Barringer v. Ryder (Iowa) 93 N. W. 56. Where a citizen of one state furnished to a manufacturer in another state a certain machine, title to remain in the seller until the price was paid, but the agreement as to title was not recorded in the state where the machinery was located as required by its laws, and the whole plant was afterwards attached under a mortgage, the court in the state of the seller's domicile had jurisdiction at the suit of the assignee of the mortgage to restrain the seller from removing the machinery from the plant; this case reviews many cases as to territorial jurisdiction of courts of equity—Schmaltz v. York Mfg. Co., 204 Pa. 1. In a suit to subject lands within the state to a claim for breach of a contract to convey land without the state, on service by publication, the bill cannot be changed into one for specific performance, since the court would have no jurisdiction of the subject matter—McGaw v. Gortner, 96 Md. 489.

The county court of one county cannot entertain a suit to enjoin judgment rendered by the county court of another county (Batt's Civ. St. § 2996)—Aultman v. Higbee (Tex. Civ. App.) 74 S. W. 955.

7. **Nuisance**—Miller v. Edison Elec. Illuminating Co., 78 App. Div. (N. Y.) 390. **Frauds**—Bank of Montreal v. Waite, 105 Ill. App. 373; Alton Grain Co. v. Norton, Id., 385. Remedy by cancellation not affected by statutory remedy—Roberts v. Central Lead Co., 95 Mo. App. 581. Money received by a bank from one afterward adjudged a bankrupt may be recovered by his trustee in equity under the federal bankruptcy act though he might have recovered it at law—Gnichtel v. First Nat. Bank (N. J. Ch.) 53 Atl. 1041.

8. National Surety Co. v. State Bank (C. C. A.) 120 Fed. 593.

9. National Surety Co. v. State Bank, 120 Fed. (C. C. A.) 593; Jones v. Mutual Fidelity Co., 123 Fed. 506. Creditors' suit entertained while probate proceedings on debtors' estate were pending—Hale v. Tyler, 115 Fed. 833. Such statutes or decisions of state courts can never confer authority on a federal court within the state to exercise equitable jurisdiction in actions at law—Goodyear Shoe Mach. Co. v. Dancel (C. C. A.) 119 Fed. 692; Peck v. Ayers & L. Tie Co. (C. C. A.) 116 Fed. 273; United States Min. Co. v. Lawson, 115 Fed. 1005.

In so doing the legislature must preserve

The Federal district court sitting in bankruptcy exercises a special and not a general chancery jurisdiction.[11] The equity jurisdiction of probate courts is usually a limited statutory one.[12]

The right to proceed at law or in equity may be waived.[13] Where it has been decided on appeal that an action is in equity the court cannot, in a second trial, treat the action as at law and render a judgment accordingly, but must dismiss the action.[14]

Effect of code or statutory provisions.—The codes recognize the distinction between legal and equitable character as distinguished from the form of actions.[15] Creation by statute of a new equitable right or a new application of an equitable remedy does not enlarge the constitutional jurisdiction of chancery.[16] Where the code is silent as to remedies furnished by the old common law or equity practice, they may be employed in the bringing of a cross suit if not inconsistent with the code; and it seems that though a cross petition is more than merely defensive and asks affirmative relief, such relief need not be equitable when based on equitable grounds, but the matters set up in the cross petition must be germane to the original suit.[17] Equitable defenses may be made in legal actions,[18] but apart from statute, affirmative equitable relief cannot be administered.[19]

(2) *B. Principles and maxims controlling application of equitable relief. General maxims.*—No wrong will be suffered to exist without a remedy in equity, where the injury is sufficient to impress the conscience of the chancellor and complainant asks relief seasonably.[20]

right of jury trial—Hudson v. Wood, 119 Fed. 764. See, also, forthcoming article Jurisdiction and article Courts, ante.

10. U. S. Rev. St. 1979—Giles v. Harris, 189 U. S. 475.

11. Construction of Bankrupt Act of July 1, 1898, c. 541, § 23; 30 Stat. 552, 553 (controversy between trustee and claimant of property)—In re Rochford (C. C. A.) 124 Fed. 182.

12. Construction of various statutes as to the equity jurisdiction of probate courts in Massachusetts—Abbott v. Gaskins, 181 Mass. 501. The probate court of Illinois has no general chancery jurisdiction, and such chancery jurisdiction as it has will not divest other courts of general chancery jurisdiction of the power to act in the same matters—Northern Trust Co. v. Marsh, 98 Ill. App. 596.

13. Answering to cross bill filed in action at law—Wollenberg v. Rose, 41 Or. 314, 68 Pac. 804. Stipulation that the issues arising on petition at law might be tried on equity side with those on the cross-bill—Shehan v. Stuart, 117 Iowa, 207. Suing in equity instead of at law for trespasses plaintiff waives his statutory right to put defendant to condemnation proceedings and a jury trial—Westphal v. New York, 75 App. Div. (N. Y.) 252.

14. Porter v. International Bridge Co., 79 App. Div. (N. Y.) 358.

15. Character of action under code as determining right to jury trial—New Harmony Lodge v. Kansas City, etc., R. Co. (Mo. App.) 74 S. W. 5. Effect of amended petition in injunction to restrain trespass as changing suit to action of trespass to try title maintainable only in county where land is situate—Fant v. Kenedy Pasture Co. (Tex. Civ. App.) 69 S. W. 420. In California, a proceeding to revoke probate of a will cannot be changed into a proceeding in equity to declare a trust—In re Davis' Estate, 136 Cal. 590, 69 Pac. 412. An action to foreclose a lien on property pledged as security for money loaned is inconsistent and cannot be joined with another to recover on a claim assigned to plaintiff for services rendered by a third person (Code Civ. Proc. § 484)—Conde v. Rogers, 74 App. Div. (N. Y.) 147. Ejectment, and count asking the court to ascertain and declare the title, may be joined (Rev. St. 1899, § 593)—Lane v. Dowd, 172 Mo. 167.

Where a cross bill in an action to recover rent of premises asks a cancellation of the lease, it is a suit in equity wherein equitable principles will control relief—Lincoln Trust Co. v. Nathan (Mo.) 74 S. W. 1007.

16. A statute authorizing the state board of health to restrain continuance of the discharge of sewage or other pollution into a stream. The reason for the act is that the legal remedy has been found inadequate (Act 1899. Pub. Laws, p. 73)—State v. Diamond Mills Paper Co. (N. J. Ch.) 51 Atl. 1019.

17. Armstrong v. Mayer (Neb.) 95 N. W. 51.

18. Defense of mistake (Code Civ. Proc. § 507)—Madison v. Benedict, 73 App. Div. (N. Y.) 112.

19. Damages from tort cannot be set off in an action on contract, because of insolvency or non-residence of plaintiff, where the jurisdiction of the court to hear equitable defenses does not include the recognition of such right and the award of affirmative relief—Hecht v. Smook & A. Furniture Co., 114 Ga. 921.

20. Balch v. Beach (Wis.) 95 N. W. 132.

He who comes into equity must come with clean hands,[21] but the rule applies only to a complainant whose misconduct is the basis for his request for relief in the particular transaction.[22]

He who seeks equity must do equity.[23] Compensation for a taking of prop-

21. Balch v. Beach (Wis.) 95 N. W. 132; Trice v. Comstock (C. C. A.) 121 Fed. 620.

Relief denied. To assist business in violation of Const. art. 1, § 9, against pool selling or gambling—Maxim v. Sheehan, 37 Misc. (N. Y.) 368. Complainant guilty of the same misconduct with which he charges respondent—Edward Thompson Co. v. American Law Book Co. (C. C. A.) 122 Fed. 922. One who seeks to avail himself of a crime whether he or another committed the crime—Bank of Montreal v. Waite, 105 Ill. App. 373; Alton Grain Co. v. Norton, Id., 385. Contracting to make defendant a free holder so as to enable him to sign appearance bonds for pay to be divided between them—Bacon v. Early, 116 Iowa, 532. Procuring attachment by a creditor to prevent attachment by other creditors—Moore v. Hemp's Ex'rs, 24 Ky. L. R. 121, 68 S. W. 1. Bucket shop trades in futures obnoxious to law—Board of Trade v. O'Dell Commission Co., 115 Fed. 574.

Lessee claiming under lease against public policy as forfeiting franchise of railroad—Brooklyn, etc., R. Co. v. Long Island R. Co., 72 App. Div. (N. Y.) 496. Where abatement of stock pens is sought as a nuisance, it cannot be enjoined by defendants thereto, though plaintiffs in the abatement have no authority to have them abated—Pittsburgh, etc., R. Co. v. Crothersville, 159 Ind. 330. Where an attorney obtained leave to sell the land of a decedent to pay debts, which had formerly been mortgaged by the administrator for the same purpose under representations that a larger amount of debts was owing than actually existed, and misstating the interests of the mortgagee in the property, and secured a license to sell without statutory notice, purchasing the property himself for an amount agreed upon with the administrator, he cannot secure cancellation of a mortgage given by the executor as a cloud on title—Snow v. Blount, 182 Mass. 489. Usurious payments on mortgage sought to be foreclosed—Interstate Sav. & Loan Ass'n v. Badgley, 115 Fed. 390. Excessive claim in suit to enforce lien—Camden Iron Works v. Camden, 64 N. J. Eq. 723.

Both parties equally guilty (fraud on creditors)—Edgell v. Smith, 50 W. Va. 349; Bagwell v. Johnson, 116 Ga. 464. Contract concerning the sales of lands, whereby they were to sell the land secretly so as to defraud the owner—Trice v. Comstock, 115 Fed. 765.

Query. Whether the holder of a contract purporting to be for the purchase and sale of a diamond issued by what is commonly called a tontine company can come into equity with clean hands—Mann v. German-American Inv. Co. (Neb.) 97 N. W. 600.

22. Trice v. Comstock (C. C. A.) 121 Fed. 620. In a suit to restrain the erection of windows over a sidewalk, complainants are not barred by relief because they themselves have erected obstructions over the sidewalk—Anisfield v. Grossman, 98 Ill. App. 180. A debtor may apply to a court of equity for relief against usury when he has paid fully his lawful indebtedness—Bell v. Mulholland, 90 Mo. App. 612. Where a combination of railroad companies forming a passenger association violates the federal anti-trust law it is not so directly connected with the contract of a ticket buyer that a railroad company in the association will be refused equitable relief in restraint of third persons from dealing in tickets in violation of the contract—Kinner v. Lake Shore, etc., R. Co., 23 Ohio Circ. R. 294.

23. Complainant must acknowledge all equitable rights justly belonging to the adverse party necessarily involved in the subject matter of the suit—Wenham v. Mallin, 103 Ill. App. 609. Stockholder suing on refusal of directors must show that the result of the action will not be inequitable—Siegman v. Maloney, 63 N. J. Eq. 422. Payment of debts to trustee of homestead when asking enforcement of reconveyance—Walsh v. Walsh (Neb.) 95 N. W. 1024. Offer to allow redemption not required from execution creditor suing to quiet title under sheriff's deed—Worthington v. Miller, 134 Ala. 420. An attorney who obtained leave to sell the land of a decedent to pay debts, and by agreement bought it was required to do equity to a mortgagee claiming under a mortgage by the representative for an excessive amount—Snow v. Blount, 182 Mass. 489. An agreement between the parties to a suit in equity that on certain consideration defendant would pay two notes, held not fair and equal when it did not provide for the surrender of outstanding notes and bond—Cook v. Casler, 83 N. Y. Supp. 1045.

Surrender of losses paid to tenant for burned fixtures held not necessary on rescission of lease when that question is not reached by issues made—Lincoln Trust Co. v. Nathan (Mo.) 74 S. W. 1007.

Where the distinction between legal and equitable rights is strictly preserved, estoppel in pais is not available at law (Grubbs v. Boon, 201 Ill. 98; Haney v. Breeden [Va.] 42 S. E. 916; Wakefield v. Van Tassell, 202 Ill. 41), but the general rule is otherwise.

Returning consideration or benefits. A rescinding vendee need not return the property in the condition in which it was received—Bell v. Felt, 102 Ill. App. 218. Returning moneys to which party not entitled—Lincoln Trust Co. v. Nathan (Mo.) 74 S. W. 1007. Benefits received by heir under agreement with administrator—Holmes v. Columbia Nat. Bank (Neb.) 97 N. W. 26. Difference between real value of services rendered under employment by corporation from which the stock was purchased, and the amount plaintiff received therefor, (suit to rescind sale of stock)—Deppen v. German-American Title Co., 24 Ky. L. R. 1110, 70 S W. 868.

Duty to conflicting claimants, lienors, etc. Interest must be paid on moneys of other parties retained by suitor—Weber v. Zacharias, 105 Ill. App. 640.

Discharge of debt secured by mortgage on fraudulently conveyed property sought to be

erty may be offered as equity in a suit respecting a stream and persons injured need not be remitted to the legal remedy.[24]

Equity follows the law.[25]

Equity will not attempt to give relief where it would be futile.[26] The right sought to be enforced must be valuable.[27]

Existence of an adequate remedy at law will render equitable interference unnecessary and improper,[28] unless the legal and equitable remedies are concurrent;[29] even then equity will refuse to act if the law court has already taken jurisdiction.[30] The application of the rule depends upon the particular circumstances of each case,[31] and rests in the sound discretion of the court where circum-

subjected to complainant's judgment—Taylor v. Dwyer, 131 Ala. 91. Offer to pay taxes and penalties with interest on redeeming from tax sale—South Chicago Brew. Co. v. Taylor (Ill.) 68 N. E. 732.

24. Rights of riparian owners damaged by making irrigation ditch—Crawford Co. v. Hathaway (Neb.) 93 N. W. 781.

25. As to the statute of limitations—Parmelee v. Price, 105 Ill. App. 271; Hale v. Coffin (C. C. A.) 120 Fed. 470; Crawford v. Watkins (Ga.) 45 S. E. 482; Mantle v. Speculator Min. Co., 27 Mont. 473, 71 Pac. 665. As to a legal demand sued on in equity—Sibley v. Stacey (W. Va.) 44 S. E. 420; Boynton v. Haggart (C. C. A.) 120 Fed. 819; Sioux City & St. P. R. Co. v. O'Brien County, 118 Iowa, 582; Newberger v. Wells, 51 W. Va. 624. However see Ide v. Trorlicht, etc., Carpet Co. (C. C. A.) 115 Fed. 137; Wall v. Meilke (Minn.) 94 N. W. 688; State v. Dashiele (Tex. Civ. App.) 74 S. W. 779.

26. The inadequacy of its relief by decree will prevent a court of equity from compelling a county board of registrars to enroll negro on the voting lists where the refusal to register is alleged to be part of a general scheme by the whites of the state and the state to disfranchise the negroes—Giles v. Harris, 189 U. S. 475.

27. The amount of $3.55 which will be considerably reduced by later circumstances, is too small to justify the interference of a court of equity—Tanner v. Nelson, 25 Utah, 226, 70 Pac. 984.

28. Sharpe v. Hodges, 116 Ga. 795; Shenehon v. Illinois Life Ins. Co., 100 Ill. App. 281. Protection of irrigation rights—Crawford Co. v. Hathaway (Neb.) 93 N. W. 781. Definition of adequate remedy at law—Carter v. Warner (Neb.) 89 N. W. 747; Keplinger v. Woolsey (Neb.) 93 N. W. 1008.

29. To cancel an instrument—Roberts v. Central Lead Co., 95 Mo. App. 581. Probate courts—Northern Trust Co. v. Marsh, 98 Ill. App. 596. Nuisances—Miller v. Edison Elec. Illuminating Co., 78 App. Div. (N. Y.) 390. Questions of fraud—Bank of Montreal v. Waite, 105 Ill. App. 373; Alton Grain Co. v. Norton, Id., 385. On equity jurisdiction of Massachusetts probate courts—Abbott v. Gaskins, 181 Mass. 501. That the statutes of a state give complainant a legal remedy in its courts which did not exist at common law will not prevent a federal court of equity from taking jurisdiction—Peck v. Ayers & L. Tie Co. (C. C. A.) 116 Fed. 273. Cancellation of a release of damages for personal injuries, obtained by fraud in equity, will not be prevented by an enactment of a statute giving a remedy at law—Roberts v. Central Lead Co., 95 Mo. App. 581.

Whether the procedure shall be in one court or another depends absolutely on the object of the suit and the nature of the relief sought, so that if the procedure and the relief are essentially equitable, it does not matter that they bear relation to a legal demand—Jones v. Mutual Fidelity Co., 123 Fed. 506.

Code remedies may embrace both equitable and legal relief and be in addition to legal remedies strictly speaking, e. g.: remedy to "ascertain" and "quiet" title to land (Code Civ. Proc. § 1310)—Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co., 27 Mont. 288, 70 Pac. 1114. In Missouri under the statute, a suit in equity to remove a cloud on title may be maintained by one not in possession—Field v. Barber Asphalt Co., 117 Fed. 925.

30. Matters of complex or mutual accounts and claims arising out of fiduciary relations which are already in litigation at law—Nash v. McCathern, 183 Mass. 345.

31. EQUITABLE RELIEF DENIED.

Cases in which the legal remedy is held to be adequate. Where an action at law is brought against attorneys to recover money retained by them as fees from the proceeds of prior litigation, they have an adequate remedy at law to determine their fees, in the action against them—German v. Browne (Ala.) 34 So. 985. Where damages will fully compensate complainant and no multiplicity of suits is threatened jurisdiction will be refused—Wabash R. Co. v. Engleman (Ind.) 66 N. E. 892. Injunction against an action by a guardian (adequate remedy by appeal from the order of appointment by the probate court)—White v. Strong, 75 Conn. 308. In an action to enforce a lien against a town collector and his sureties one of whom is dead, the administrator may defend upon the ground that there is an adequate remedy at law, where the complaint alleges that they claimed an interest in the premises which accrued subsequently to the lien of the tax collector's bond—Chatfield v. Rodger, 75 App. Div. (N. Y.) 631. A bill to prevent diversion of water from a canal will be dismissed to leave plaintiff to his remedy at law, where it appears that, at the time of filing, his business had been destroyed by certain combinations, that he had long delayed in asserting his right, that the damage was trifling, if any, and that defendant had made improvements greatly increasing the capacity of the canal—Stewart Wire Co. v. Lehigh Coal & Nav. Co., 203 Pa. 474. Equity will not interfere with eminent domain proceedings by a city to acquire an easement along a creek where, under the city charter and the Code of the state, plaintiff has an ample remedy by interposing in

stances appear showing that the legal remedy may not be complete.[32] The rule is

the proceedings—Hooker v. Rochester, 172 N. Y. 665. The federal court will not entertain a suit seeking discovery and relief where the only ground for equity is discovery of evidence to be used in enforcing a legal demand—Safford v. Ensign Mfg. Co. (C. C. A.) 120 Fed. 480.

A suit may be brought to determine which of several claimants is entitled to the award for land condemned by a city for a street, since the title to the property passes to the city and the action is not to determine title to land—Gardner v. Baltimore (Md.) 54 Atl. 85.

Contracts. Absence of fraud or mistake—Bank v. Belington Coal Co., 51 W. Va. 60. Discharge of servant from employment—Boyer v. Western Union Tel. Co., 124 Fed. 246. Breach of a contract to sell a certain commodity—Mundy v. Brooks, 204 Pa. 232. Breach of sale of standing timber by denial of license to enter (Under Code 1896, § 809) —Inglis v. Freeman (Ala.) 34 So. 394. Failure to deliver goods sold (injunction asked against sale to others)—New Hartford Canning Co. v. Bulifant, 78 App. Div. (N. Y.) 6. A written contract will not be construed in equity, nor damages granted for its breach, where a reformation is not asked and neither fraud nor mistake is alleged—Clarke v. Shirk (C. C. A.) 121 Fed. 340. Where the right to a lien was lost through bad faith, a suit for breach of contract and foreclosure of the lien will be dismissed, leaving plaintiffs to their remedy at law—Robinson v. Brooks, 31 Wash. 60, 71 Pac. 721. Specific performance of a verbal contract leasing an office for a term of years will not be decreed after part performance where the lessee asking relief did nothing which may not readily be compensated for by an action for damages—Henley v. Cottrell Real Estate, etc., Co. (Va.) 43 S. E. 191. After one partner sells his interest to the other, under the latter's agreement to pay the debts he is not entitled to maintain a suit in equity for enforcement of the contract and an accounting, unless he shows fraud, there being an adequate remedy at law—Pace v. Smith (Ala.) 34 So. 1006. Defense cognizable at law in action on insurance policy will prevent a suit in equity for its cancellation—Mutual Life Ins. Co. v. Pearson, 114 Fed. 395; Shenehon v. Illinois Life Ins. Co., 100 Ill. App. 281.

Accounting. No showing of mutual, intricate or complicated account or other ground invoking equity (American Spirits Mfg. Co. v. Easton, 120 Fed. 440), or that the contract provided for such accounting—Lee v. Washburn, 80 App. Div. (N. Y.) 410. A complaint alleging that plaintiff was employed as promoter, held insufficient—Everett v. De Fontaine, 78 App. Div. (N. Y.) 219.

Right of property or possession. Defendant in replevin when prevented pending action from exercising dominion may try his right before a jury—Jones v. MacKenzie (C. C. A.) 122 Fed. 390. In a suit to recover possession of a deed returned to the grantor to be corrected after delivery to the grantee, on his refusal to return will not lie, unless there is no adequate remedy at law, and claim and delivery or an action to determine adverse claims may be maintained by the grantee—Barkey v. Johnson (Minn.) 95 N. W. 583.

Remedy by ejectment—Lasswell v. Kitt (N. M.) 70 Pac. 561. If there is no equity in the cause of one seeking an injunction against erection of a building on land the presence of defects in the title on which the other party relies has no significance—Dobleman v. Gately, 64 N. J. Eq. 223. A bill to cancel or remove a cloud on title cannot be maintained by one not in possession—Neff v. Ryman (Va.) 42 S. E. 314; Treadwell v. Torbert, 133 Ala. 504. Incompetency of suitor makes no difference—Wilkinson v. Wilkinson, 129 Ala. 279; Galloway v. Hendon, 131 Ala. 280. Nor can he regain possession so as to sue in equity by leasing to tenants of the grantee—Treadwell v. Torbert, 133 Ala. 504.

Forcible dispossession of one in possession under a deed purporting to convey the legal title—David v. Levy, 119 Fed. 799.

Deed absolutely void for insanity of the grantor—Boddie v. Bush, 136 Ala. 560. Enforcement of condition precedent in a deed —Davison v. Davison, 71 N. H. 180. Invalidity of deed to homestead by insane husband and not joined in by wife—Larson v. Larson (Miss.) 33 So. 717; Letohatchie Baptist Church v. Bullock, 133 Ala. 549. Title and boundary of land as between adverse claimants—Freer v. Davis (W. Va.) 43 S. E. 164. Protection of wharfage rights along the line of their abutting property, which was recognized by custom and the statute and organic law of the state—Turner v. Mobile, 135 Ala. 73. Violation of the terms of a deed granting an easement for right of way to a railroad company by the erection of a trestle above the grade as required by the state railroad commissioner, will not entitle the grantor of the easement to a decree compelling the removal of the track and abandonment of the road, but only to pecuniary damages—Lane v. Michigan Traction Co. (Mich.) 97 N. W. 354. The prosecution of several actions for injuries to land on the ground that defendant will require discovery as to title and interest of each complainant will not be restrained in equity (Shannon's Code, § 5684 authorizes discovery in suits at law)—Ducktown Sulphur, Copper & Iron Co. v. Fain, 109 Tenn. 56.

Torts or criminal acts. Equity will not interfere where a tort only has been committed—Sheriff v. Turner, 119 Fed. 782. Violation of penal laws will not be prevented at suit of one seeking merely to restrain a rival in business (York v. Yzaguairre [Tex. Civ. App.] 71 S. W. 563); nor to prevent criminal acts merely because the proper officers have neglected or refused to perform their duty in enforcing the law; or a public nuisance on the ground that the criminal laws as administered do not meet the requirements unless it clearly appears that injury will result to public civil rights or property—People v. Condon, 102 Ill. App. 449.

Where property is not taken directly for public purpose, but suffers injury as to rights incidental to its peculiar situation or posi-

not to be carried out so strictly as to deny any party reasonable means for enforcing legal or equitable rights.[33] To remit complainant to law his damages

tion, so that condemnation proceedings and payment of damages in advance are not practicable, the owner will be left to his remedy at law and will not be granted an injunction unless for insolvency or other special circumstances—Bronson v. Albion Tel. Co. (Neb.) 93 N. W. 201.

Trespass. One out of possession—Gildersleeve v. Overstolz, 97 Mo. App. 303. Repeated trespass, where plaintiff holds the legal title—Thomas v. Robinson (Iowa) 92 N. W. 70. Unnecessary encroachment on a toll road by an electric railroad—Detroit & B. Plankroad Co. v. Oakland R. Co. (Mich.) 92 N. W. 346. Acts of trespass confined to the driving of a few stakes by surveyor—Wabash R. Co. v. Engleman (Ind.) 66 N. E. 892. Entry by solvent person and the sinking of shafts and carrying away of samples of ore, the substance of the estate being not materially injured—Harley v. Montana Ore Purchasing Co., 27 Mont. 388, 71 Pac. 407.

Penalties. An equitable action to cancel a chattel mortgage which has been paid cannot be based upon a claim for the statutory penalty for failure to release other chattel mortgages unpaid and not reduced to judgment. The penalty should be recovered at law before being made the foundation of an equitable proceeding for cancellation of the lien—Meredith v. Lyon (Neb.) 92 N. W. 122.

Suits pertaining to public office. Removal from, or right to office—Marshall v. Board of Managers, 201 Ill. 9. Appointment of public officers or their title to office—Landes v. Walls (Ind.) 66 N. E. 679. Quo warranto and not a suit in equity is the proper remedy for preventing a de facto officer from performing the duties of the office—Deemar v. Boyne, 103 Ill. App. 464. Equity will not interfere by injunction to test the validity of the action of the mayor and council of the city in removing a city attorney for misconduct or in recognizing his successor—Howe v. Dunlap (Okl.) 72 Pac. 365. The mayor of a city cannot restrain impeachment proceedings and his removal from office as against the aldermen and city council, since he has an adequate remedy at law to protect his title to office—Riggins v. Thompson (Tex. Civ. App.) 70 S. W. 578.

Existence and powers of municipal corporations. Relief from ultra vires dealings of municipal corporations—Balch v. Beach (Wis.) 95 N. W. 132. Legality of organization of a school district cannot be attacked in equity, the proper remedy being quo warranto—School Dist. No. 4 v. Smith, 90 Mo. App. 215. A federal court of equity cannot entertain a suit by holders of warrants issued by the board of Metropolitan police of New Orleans, to enforce payment by the city from a fund required to be raised by taxation under the apportionment to the city by the board of its share of expense in policing the district except as ancillary to a judgment at law against the city, and even then it will only apply to taxes collected. The creditors have an action at law against the city notwithstanding the act of 1877 (see New Orleans v. Benjamin, 153 U. S. 411.) —Emsheimer v. New Orleans, 116 Fed. 893.

Remedies against corporations or stockholders. Dispute as to corporate office—Standard Gold Min. Co. v. Byers, 31 Wash. 100, 71 Pac. 766. Management of a corporation will not be interfered with in absence of fraud or collusion or ultra vires acts on the part of the managing officers—Coss v. Herring, 24 Ohio Circ. R. 36. Where stock subscribers sold their stock to a nonresident with intent to defraud the corporation and its creditors and without reason to believe that the purchaser would be able to pay the subscription notes, a judgment creditor of the corporation could not sue in equity to compel them to pay their subscription notes because there was an adequate remedy at law by garnishment—Henderson v. Hall, 134 Ala. 455. The remedy at law is sufficient to prevent jurisdiction of a bill asking for a temporary injunction on behalf of a non-assenting holder of preferred stock to prevent a corporation from carrying out an agreement with another corporation for the substitution of non-accumulative for accumulative dividend-paying preferred stock and a refund of all dividends in arrears—Willcox v. Trenton Potteries Co., 64 N. J. Eq. 173. A bill against a re-organized railroad company which had bought and gone into possession of the property of the first company through a foreclosure sale and a trust company to get possession of bonds deposited by complainant with the latter company which were guaranteed by the first railroad company and to compel their payment on the ground that the foreclosure was void, does not show that there is no adequate remedy at law, so as to justify interference of equity, even if it is not open to the objection of multifariousness—Sawyer v. Atchison, etc., R. Co., 119 Fed. 252.

Enforcement of, or relief against judgments at law. Balch v. Beach (Wis.) 95 N. W. 132. Vacation of judgment in equity after the term will not be allowed in absence of substantial injury; construing Code Civ. Proc. subd. 4, § 602—Van Every v. Sanders (Neb.) 95 N. W. 870. Equity cannot subject choses in action belonging to a judgment debtor to the satisfaction of an execution returned "no property found" without an allegation of fraud, mistake, the presence of a trust or other fact recognized as ground for interference of equity—Henderson v. Hall, 134 Ala. 455. Equity will decline to interfere to grant new trials at law when relief may be obtained by application to the law court—Hayes v. United States Phonograph Co. (N. J. Eq.) 55 Atl. 84.

EQUITABLE RELIEF GRANTED.

Cases in which the legal remedy is held to be inadequate. Where the law, because of its universality and the peculiar circumstances of the case, cannot restore to a person a right wrongfully taken by another, equity will afford a remedy—Rhoten v. Baker, 104 Ill. App. 653. The interference of equity is justified where irreparable injury is imminent to preserve matters in statu quo until the court ascertain the truth—Leigh v. National Hollow Brake Beam Co., 104 Ill. App. 438. That violence committed

must be susceptible of proof.[34] To warrant the interference of equity to prevent a nuisance, it must appear that the danger of injury is imminent and impending

by strikers may be punished criminally will not prevent restraint in equity to protect property or business—Union Pac. R. Co. v. Ruef, 120 Fed. 102.

Prevention of collisions at crossing of railroads—Jersey City etc. R. Co. v. New York R. Co. (N. J. Eq.) 53 Atl. 709. Restraining exercise of eminent domain—St. Louis, etc. R. Co. v. Southwestern Tel. & T. Co. (C. C. A.) 121 Fed. 276. Action on negotiable paper where the indorsee has only an equitable title—Moore v. Durnam, 63 N. J. Eq. 96; Action asking judgment that a chattel mortgage executed to plaintiffs be declared a lien on the property prior to certain other mortgages of earlier date assigned to defendant—Salmon v. Norris, 82 App. Div. (N. Y.) 362. Suit to adjust rights and distribute moneys arising on condemnation—Deering v. Schreyer, 171 N. Y. 451.

Multiplicity of suits—Longshore v. Longshore, 200 Ill. 470. If an interpleader will not clearly lie, equity may take jurisdiction to prevent a multiplicity of suits and a waste of property, especially where the remedy at law is not as complete as may be afforded in equity—Fleming v. Blosser Printing Co. (Ga.) 44 S. E. 805. Where a judgment creditor is prosecuting a multiplicity of proceedings in garnishment to subject wages of laborers, mechanics and clerks absolutely exempt by law from attachment, execution and garnishment process as far as his judgment is concerned, he may be restrained in equity—Siever v. Union Pac. R. Co. (Neb.) 93 N. W. 943.

Relief against fraud and mistake. Fraud —Bank of Montreal v. Waite, 105 Ill. App. 373; Alton Grain Co. v. Norton, Id. 385. Constructive fraud in execution of an instrument—Gorman v. McCabe (R. I.) 52 Atl. 989. Insertion of clause in note by fraud—Gregory v. Howell, 118 Iowa, 26.

Mistake which is not the result of complainant's own violation of a legal duty—Barker v. Fitzgerald, 105 Ill. App. 536. Mistake of law resulting in loss of property rights—Bottorff v. Lewis (Iowa) 95 N. W. 262.

Enforcement of contracts. Contract not mutual but accepted and performed by one party—Corbet v. Oil City Fuel Supply Co., 21 Pa. Super. Ct. 80. Where part of the price has been paid for land sold, the vendor may have specific performance—Maryland Clay Co. v. Simpers, 96 Md. 1. By-law of a mutual benefit society so amended as not to be a breach of the contract with member as to entitle him to sue for damages—Langan v. Supreme Council American Legion of Honor, 174 N. Y. 266. Cross-bill in equity filed in an action at law setting up part payment on a parol contract for the sale of land and asking relief thereon—Wollenberg v. Rose, 41 Or. 314, 68 Pac. 804. Where one who desired to develop the water power of a river, secured options on adjoining lands necessary to his object, and on learning that other landowners were securing lands for the same purpose, transferred his options to them under an agreement that a corporation should be organized in which he was to have a certain interest, he was entitled to sue in equity for the appointment of a receiver to complete the purchase and to protect his rights, where they refused to complete the contract and ignored his demand for a return of the options conveyed—Barrett v. Twin City Power Co., 118 Fed. 861.

Preventing interference with contractual rights. The unlawful interference with performance of contracts by coal companies will be prevented where it appears that the plaintiff is without adequate remedy at law—Chesapeake & O. Coal Agency Co. v. Fire Creek Coal & Coke Co., 119 Fed. 942. The assaulting or intimidating of workmen by strikers or threatening them or their families so as to prevent them from working for the employer will be restrained in equity where there is no adequate remedy at law—Union Pac. R. Co. v. Ruef, 120 Fed. 102.

Cancellation or reformation of contracts. —Null v. Elliott, 52 W. Va. 229; Nutter v. Brown, 52 W. Va. 598; Youngstown Electric Light Co. v. Butler County Poor Dist., 21 Pa. Super. Ct. 95; Enos v. Stewart, 138 Cal. 112, 70 Pac. 1005. Suit to cancel a contract for fraud—Andrews v. Frierson (Ala.) 33 So. 6. Deed including, by mistake of scrivener, more land than intended—Barry v. Rownd (Iowa) 93 N. W. 67. Setting aside fraudulent conveyance for undue influence—Keys v. McDermott (Wis.) 93 N. W. 553. Fraud in conveyance of lands—Allen v. Henn, 197 Ill. 486. A suit to cancel a deed on consideration that the grantee should remain with, and care for, the grantor during life on the ground of breach of contract is properly brought in equity—Lowman v. Crawford, 99 Va. 688. Instrument made on misrepresentation and fraud as to the consideration by one in a fiduciary relation—Robinson v. Sharp, 201 Ill. 86. To compel surrender of judgment note to which there is a defense as against any person—Vannatta v. Lindley, 198 Ill. 40 (Hurd's Rev. St. 1899, c. 98, § 10) —Vannatta v. Lindley, 198 Ill. 40. Cancellation of promissory note for total failure of consideration (Womelsdorf v. O'Connor [W. Va.] 44 S. E. 191); especially where the holder has taken possession of property covered by a mortgage given as security for the note—Hodge v. McMahon (Ala.) 34 So. 185.

Remedies against unconscionable contracts and forfeitures.—Roux v. Rothschild, 37 Misc. (N. Y.) 435; Coveney v. Pattullo (Mich.) 89 N. W. 968. Usurious contracts—Bill v. Mulholland, 90 Mo. App. 612. Forfeitures—Houston v. Curran, 101 Ill. App. 203.

Recovery of personal property. Where it appears in an action to enforce a constructive trust in property claimed to have been sold under false representations of the buyer and mingled with other property so as to be difficult of investigation, the remedy at law by an action of replevin was not adequate and equity would assume jurisdiction—Missouri Broom Mfg. Co. v. Guymon (C. C. A.) 115 Fed. 112.

Recovery of lands based on necessity of first cancelling a deed—Kilgore v. Norman, 119 Fed. 1006.

Trespass, waste and other injuries to real property or possession thereof. Trespass may be prevented where irreparable injury

and its effect certain.[35] That the same judge presides over both courts will not change the rule.[36] A federal court can never assume equitable jurisdiction in an

will result, until the question of title can be determined at law—Freer v. Davis, 52 W. Va. 1.

Where trespass has already been done, and it appears to the court that defendant intends to commit other deliberate trespasses which cannot be adequately compensated for at law, equity will interfere, especially where defendant is insolvent—Adden Coal Co. v. Challis, 103 Ill. App. 52; (cutting of trees)—Palmer v. Crisle, 92 Mo. App. 510.

But insolvency is not indispensable to make a case—Lynch v. Egan (Neb.) 93 N. W. 775. Riparian owner filling low places and constructing a levee so as to overflow lands on the opposite side may be restrained though not insolvent—Under Rev. St. 1895, art. 2, c. 89—Sullivan v. Dooley (Tex. Civ. App.) 73 S. W. 82.

Equitable waste by removing timber pending action on a title bond the vendees being insolvent—Terry v. Robbins, 122 Fed. 725.

Interference by lessor with construction of a switch track to a mine by a lessee—Ingle v. Bottoms (Ind.) 66 N. E. 160. Remedy of lessee of oil lands against one who has attempted to bore for oil under contract with owner—Chappell v. Jasper County Oil & Gas Co. (Ind. App.) 66 N. E. 515. One who is a licensee for removal of ore from land and whose license may be revoked only for breach of rules and regulations has no remedy at law against a trespasser—Lytle v. James. 98 Mo. App. 337.

Where the construction of a track by a railroad company in a street will destroy an easement owned by an abutting owner, he may ask interference in equity to prevent the laying of the track until his rights have been properly appropriated or purchased through proceedings by the railroad company—Cleveland Burial Case Co. v. Erie R. Co., 24 Ohio Circ. R. 107. Though construction has been begun and great expense incurred—Paige v. Schenectady Ry. Co., 77 App. Div. (N. Y.) 571. An action at law to dispossess a railroad company which entered and built its track under an unenforceable contract, will be restrained if the company offers to compensate for use and occupation which compensation may be fixed by condemnation proceedings—Winslow v. Baltimore & O. R. Co., 188 U. S. 646, 47 Law. Ed. 635. Opening and using land as a street without the owner's consent, condemnation, dedication, or user—Baya v. Town of Lake City (Fla.) 33 So. 400.

A cross-bill in a suit to quiet title, averring that defendant has possession and asking establishment of its title, will give a court of equity jurisdiction to settle the question as to title as between the parties, though the failure of plaintiff to be in possession would have defeated jurisdiction on the original bill—Sanders v. Village of Riverside (C. C. A.) 118 Fed. 720; Village of Riverside v. Sanders, Id.

Where improvements are made on land of another in good faith and under belief of title and the builder on discovery of the mistake, removes them, and the owner sues for the value of the improvements, the defendant may obtain relief in equity, when he cannot under his title recover under the occupying claimants' act—Darnall v. Jones' Ex'rs, 24 Ky. L. R. 2090, 72 S. W. 1108.

Equity will grant relief on a bill to restrain obstruction of an easement, though there has been no decision as to title at law, where the evidence as to plaintiff's title is such that a verdict would be directed for him at law—Richmond v. Bennett, 205 Pa. 470.

Removal of boundary fences and encroachments by new fences (F. H. Wolf Brick Co. v. Lonyo [Mich.] 93 N. W. 251) no question of title being involved—Currier v. Jones (Iowa) 96 N. W. 766.

Matters relating to corporations. Suit to restrain a resident creditor from suing a corporation for which the receiver was appointed in another state—Davis v. Butters Lumber Co., 132 N. C. 233.

Statute providing for production of documents in possession of an "adverse party" gives no adequate remedy for discovery of names of defendant corporation's stockholders before suing (Gen. Laws, c. 244, § 47)—Clark v. Rhode Island Locomotive Works (R. I.) 53 Atl. 47.

Though the title to office in private corporations must be tried at law by quo warranto, if other elements exist in a case which make equitable intervention proper, a court of equity may determine the title to office—Boggiano v. Chicago Macaroni Mfg. Co., 99 Ill. App. 509.

Illegal acts by municipalities. Unlawful revocation by a city council of a permit to remove a building within the fire limits—Lerch v. City of Duluth, 88 Minn. 295. Where municipal authorities are taking unauthorized action under color of office, which injures the rights of a taxpayer so that he has no direct remedy at law, he may appeal to equity—Poppleton v. Moores (Neb.) 93 N. W. 747. A taxpayer after payment of his taxes has no remedy at law against an illegal award of a sum of money and may restrain payment—Kircher v. Pederson (Wis.) 93 N. W. 813.

Public Improvements and Contracts. Where work has been begun under a contract which was awarded to a bidder other than the lowest bidder, the only remedy is in equity—City of Akron v. France, 24 Ohio Circ. R. 63. Suit for damages on contractor's bond is adequate to remedy threatened use of worthless material in a public work—Miller v. Bowers, 30 Ind. App. 116. Improper departures already made from paving contract by which the city is defrauded—Central Bitulithic Pav. Co. v. Manistee Circuit Judge (Mich.) 92 N. W. 839; Common Council of City of Manistee v. Same, Id. Where a city wrongfully erected structures on a private road to enable its use by the public so as to injure the owner's access to adjoining property and assessed part of the costs on his property, he may bring a suit in equity to set aside the assessment, secure the restoration of the road to its former condition and for damages—Culver v. City of Yonkers, 80 App. Div. (N. Y.) 309.

Enforcement of debts against insolvents or bankrupts. A set off may be enforced

action at law because it is conferred by state statutes or decisions of state courts.[37] A remedy must exist which is adequate and applicable in the same jurisdiction.[38]

The legal remedies must have been diligently pursued and exhausted,[39] unless complainant would have defeated himself by so doing.[40]

The adequacy of the legal remedy must be raised by defendant,[41] before defense on the merits.[42]

Doing complete justice.—Where equity has obtained jurisdiction, on equitable

against one who is insolvent—Hahn v. Gates, 102 Ill. App. 385. Bankrupt's trustee may sue to recover the money paid in contemplation of insolvency though he might have recovered it at law—Gnichtel v. First Nat. Bank (N. J. Eq.) 53 Atl. 1041.

Relief against judgment—Brooks v. Twitchell, 182 Mass. 443. Collusive judgment against municipality may be restrained by a taxpayer—Balch v. Beach (Wis.) 95 N. W. 132. Administrator relieved as against a judgment against the estate—Polarek v. Gordon, 102 Ill. App. 356. Written agreement outside the record not to levy execution against property of certain parties now complaining in consideration of their making no active defense to the action—Crook v. Lipscomb (Tex. Civ. App.) 70 S. W. 993.

Enforcement of judgment and aid of execution. A right to reach choses in action of a judgment debtor given by statutes to a judgment creditor by garnishment proceedings may be enforced in equity where because of impediment it cannot be enforced at law—Henderson v. Hall, 134 Ala. 455; Hall v. Henderson, Id. Existence of money demand not triable in creditors' suit—Hudson v. Wood, 119 Fed. 764.

32. Mutual Life Ins. Co. v. Pearson, 114 Fed. 395.

33. Fryberger v. Berven, 88 Minn. 311.

34. Restrictive contract—American Fisheries Co. v. Lennen, 118 Fed. 869.

35. Drilling of oil well—Pope v. Bridgewater Gas Co., 52 W. Va. 252.

36. Union Light & Power Co. v. Lichty (Or.) 71 Pac. 1044.

37. Goodyear Shoe Mach. Co. v. Dancel (C. C. A.) 119 Fed. 692.

38. Federal courts—National Surety Co. v. State Bank (C. C. A.) 120 Fed. 593.

39. Metz v. McAvoy Brew. Co., 98 Ill. App. 584. The holder of a contract for sale of a diamond on tontine plan not reduced to judgment or who has no lien on property of the company, cannot come into equity—Mann v. German-American Inv. Co. (Neb.) 97 N. W. 600. Failure to appeal or bring certiorari—Kyle v. Richardson (Tex. Civ. App.) 71 S. W. 399. An adjoining land owner who has failed to appeal cannot sue in equity to vacate proceedings for opening of a highway. Under Rev. St. 1899, § 9419 giving an appeal from the judgment in such proceedings in the county court—Searcy v. Clay County (Mo.) 75 S. W. 657. Where it appears that defendants could have obtained any relief they were entitled to against a default judgment on motion, they cannot sue in equity to set aside the proceedings—Baer v. Higson (Utah) 72 Pac. 180. A new trial will not be granted in the district court by petition in equity on the ground that a hearing in the supreme court has been denied the applicant without his fault, unless it appears that he has used the utmost diligence to have the case reviewed in the supreme court and the review has been denied him—Langan v. Parkhurst (Neb.) 96 N. W. 63. Where the jurisdiction of chancery to reach equitable or legal assets of a defendant, whether a corporation or a natural person, is in aid of a legal remedy for a money demand, it is not by way of substitution for, but only in aid of, the legal remedy and cannot be resorted to until plaintiff has exhausted the latter remedy by obtaining judgment for the demand and general issue of execution returned unsatisfied—Jones v. Mutual Fidelity Co., 123 Fed. 506. General corporate creditors cannot proceed in the federal court of equity, against the stockholders, until they have exhausted their remedy against the corporation by reducing their claims to judgment—New Hampshire Sav. Bank v. Richey (C. C. A.) 121 Fed. 956. A return of "no property found" on execution, prima facie shows that legal remedies have been exhausted so that equity may take jurisdiction—Oppenheimer v. Collins, 115 Wis. 283. Where it appears that an administrator fraudulently filed a petition representing that decedent left no lineal descendants and obtained an order distributing his estate and discharging himself, and after the death of the widow of decedent was appointed her administrator, and fraudulently represented the amount of her property and failed to charge himself with amounts of money which came into his possession as administrator of the two estates, the children of a brother of the decedent, suing to recover one-half of his estate were not required, first before bringing their bill, to proceed against the widow's estate in the probate court—Maney v. Casserly (Mich.) 96 N. W. 478.

Mistake, accident or omission in pursuing legal remedy. Mistakes of law—Dobson v. Central R. Co., 38 Misc. (N. Y.) 582.

One having a complete and adequate remedy at law will not be heard in equity, unless prevented by accident or circumstances beyond his control from asserting it at law and when he is free from laches—Klinesmith v. Van Bramer, 104 Ill. App. 384. One may have relief in equity from a fraudulently procured judicial accounting where he learned the facts too late for appeal—Aldrich v. Barton, 138 Cal. 220, 71 Pac. 169.

40. Jones v. Mutual Fidelity Co., 123 Fed. 506.

41. Le Vie v. Fenlon, 39 Misc. (N. Y.) 265.

42. United States v. Southern Pac. R. Co., 117 Fed. 544. The right to object may be waived by stipulating for a hearing before the master—Sanders v. Riverside (C. C. A.) 118 Fed. 720.

grounds, of the parties and the subject-matter for one purpose it will retain the case to grant complete relief,[43] though plaintiff did not pray all relief given,[44]

43. Richardson v. Ranson, 99 Ill. 258; Bonney v. Sellers, 99 Ill. App. 444; Leigh v. National Hollow Brake Beam Co., 104 Ill. App. 438. Though some matters may concern purely legal remedies—Bourke v. Hefter, 104 Ill. App. 126; Whalen v. Billings, 104 Ill. App. 281.

Applications of rule. Jurisdiction taken to appoint a receiver (Barrett v. Twin City Power Co., 118 Fed. 861); or to test validity of assignment of mortgage by decedent on behalf of heirs (Snyder v. Snyder [Mich.] 92 N. W. 353); or to construe a will (Lyons v. Steinhardt, 37 Misc. [N. Y.] 628); or to prevent multiplicity of suits (Richardson v. Ranson, 99 Ill. App. 258; Bonney v. Sellers, 99 Ill. App. 444); or to determine whether conveyance is a mortgage (Lane v. Beitz, 99 Ill. App. 342); or to restrain trial of a claim case between the same parties and relating to the same land—Goodwynne v. Bellerby, 116 Ga. 901. Equity, having once obtained jurisdiction respecting land, will entertain a cross-bill asserting other rights than those set forth by the bill (Longshore v. Longshore, 200 Ill. 470); or praying a reconveyance and accounting of rents—Allen v. Leflore County (Miss.) 31 So. 815. Original suit concerning water rights, and retention of case until all matters involved between the parties are finally adjusted—La Junta & L. Canal Co. v. Hess (Colo.) 71 Pac. 415.

On jurisdiction to determine a disputed boundary line, the ownership of land lying between the boundary lines claimed by each of the parties may be settled—Killgore v. Carmichael, 42 Or. 618, 72 Pac. 637. Where jurisdiction is acquired to discharge a mortgage, the whole controversy will be settled and complainant will be awarded a surplus due her as heir of the mortgagor, consisting of rents from the estate of the mortgagee—Whetstone v. McQueen (Ala.) 34 So. 229. After a contract for collection of payments on insurance policies has been cancelled for fraud, the bill may be retained to enjoin further litigation on the contract—Barrington v. Ryan, 88 Mo. App. 85. After taking jurisdiction to establish title to land because of the destruction of records in the Chicago fire, the court may remove a cloud on title in the same suit—South Chicago Brew. Co. v. Taylor (Ill.) 68 N. E. 732. If equity has taken jurisdiction of the parties and the subject, and on trial has granted interpleader to determine ownership of certain property as between two defendants, it will keep jurisdiction to determine that controversy—American Press Ass'n v. Brantingham, 37 Misc. (N. Y.) 426. After jurisdiction is rightfully taken of a controversy and all parties are before the court, equity may retain jurisdiction to grant full relief, and in doing so may restrain an action at law by one party in another court involving the same matters in controversy—Berliner Gramophone Co. v. Seaman (C. C. A.) 113 Fed. 750; Id., 115 Fed. 806. In a litigation to preserve and protect property of a corporation pending litigation for benefit of creditors, bondholders and stockholders, all questions relating to ownership and claims against the property may be settled in the one cause—Richardson v. Ranson, 99 Ill. App. 258; Bonney v. Sellers, 99 Ill. App. 444. Where an incompetent person conveyed land and gave money to another through undue influence, a court of equity, after cancelling the deed at the suit of the grantor's heirs, may retain the bill to recover the money—Eagan v. Conway, 115 Ga. 130. Commission of waste by cutting timber which constitutes the chief value of land may be restrained in equity and also an accounting may be had for waste already committed and equity may also determine the title to land, though plaintiff is out of possession—Douglas Co. v. Tennessee Lumber Mfg. Co. (C. C. A.) 118 Fed. 438. In a suit to determine rights in a stream, plaintiff may offer to compensate riparian owners whose land is affected by construction of an irrigation canal, so that the rights of all the parties as to damages may be settled without leaving such owners to actions at law—Crawford Co. v. Hathaway (Neb.) 93 N. W. 781. If equity has taken jurisdiction of a trust estate for a party in interest entitled to complain of the investment of the fund in land in the name of the trustee, it will retain the case for complete justice and compel restoration of the capital by all who have aided in its impairment—Newton v. Rebenack, 90 Mo. App. 650. In a suit to foreclose a mortgage placed on water works previous to purchase by a city, equity will determine all matters in controversy and enforce complainant's rights under a contract made before execution of the mortgage, requiring the city to pay rentals to the trustee for the benefit of the bondholders—Centerville v. Fidelity Trust & Guaranty Co. (C. C. A.) 118 Fed. 332; Fidelity Trust & Guaranty Co. v. Fowler Water Co., 113 Fed. 560. Where a corporation organized by the owners of water rights was before the court in a suit to require transfer of deeds of water rights, it was held unnecessary to bring a new action against such corporation for the appointment of a receiver—La Junta & L. Canal Co. v. Hess (Colo.) 71 Pac. 415. Where cross suits have been brought for reformation of an insurance policy, to enforce payment of loss and for cancellation, and to restrain prosecution of an action at law, equity may retain jurisdiction to determine all the issues on the consolidation and trial of the suits together, including all questions at issue between the parties, and may render judgment for the loss on the policy—German Ins. Co. v. Downman (C. C. A.) 115 Fed. 481. Where it appears that the sole executor of an estate, who was also the co-executor of another estate of which his wife was executrix and residuary legatee, had joined with her in asserting claims against the estate of which he was sole executor, a court of equity is justified in taking jurisdiction to determine whether there was a conspiracy between them to defraud parties in interest, and having so acquired jurisdiction it will retain it to afford relief demanded by the facts—Steinway v. Von Bernuth, 82 App. Div. (N. Y.) 596. Joinder by statute of all matters of action necessary

provided the relief is consistent with the cause of action in the original suit.[45] If the relief sought by the bill is denied, it will not be retained to give purely legal relief incidental in its nature,[46] but only that within the scope of the controversy.[47] When nonresidents are in court by publication only, jurisdiction cannot be retained for relief which requires jurisdiction of the person.[48]

Jurisdiction may be taken to give complete relief where equitable rights appear in an action at law.[49] A bill may be retained on the docket to allow trial of title at law.[50]

Multiplicity of suits.—Where there is danger of a multiplicity of suits at law, equity will take jurisdiction,[51] unless the several suits depend on the same statement of facts and subject-matter,[52] or plaintiff has no valid cause of action legal or equitable,[53] or the persons directly interested are not parties, are not

to a complete remedy (Burns' Rev. St. 1901, § 281)—Palmer Steel & Iron Co. v. Heat, etc., Co. (Ind.) 66 N. E. 690.

44. Cancellation of contract decreed—Jordan v. Coulter, 30 Wash. 116, 70 Pac. 257.

45. A suit for cancellation of an instrument cannot be retained after a finding that the instrument is valid to construe the instrument and to restrain defendant from representing that it operated as a license—Kerr v. Southwick (C. C. A.) 120 Fed. 772.

46. After sustaining demurrer to the bill—Kessler v. Ensley Co., 123 Fed. 546. Damages will be assessed only where incidental to other relief in disposal of the whole controversy, and not if equitable grounds for relief have vanished—National Tube Co. v. Eastern Tube Co., 23 Ohio Circ. R. 468. A claim against a city to recover water rentals due under a contract, being a strictly legal question, cannot be enforced in a federal court of equity, though the court has acquired jurisdiction concerning other matters in controversy between the parties. Under the constitutional guaranty of right to trial by jury—American Waterworks Co. v. Home Water Co., 115 Fed. 171.

47. Where equity has obtained jurisdiction for purposes of an injunction, and such relief is denied, it may retain the case to give pecuniary damages, rather than remit complainant to his remedy at law—Lane v. Michigan Traction Co. (Mich.) 97 N. W. 354. Where one sues in equity in good faith but fails to show a right to equitable relief, the court may refuse to dismiss the suit and leave him to an action at law to secure a legal right within the scope of the controversy to which he shows himself clearly entitled, regardless of the form of the action—Gates v. Paul (Wis.) 94 N. W. 55.

48. Specific performance denied—McGaw v. Gortner, 96 Md. 489.

49. Where an action has been begun at law on an insurance policy, it appears after answer that a mutual mistake in the instrument will prevent recovery, equity will stay the prosecution at law, receive a bill for reformation of the policy, join the two actions and render judgment on the policy as reformed—Lansing v. Commercial Union Assur. Co. (Neb.) 93 N. W. 756.

50. Partition suit—Eagle v. Franklin (Ark.) 75 S. W. 1093.

51. Crawford Co. v. Hathaway (Neb.) 93 N. W. 781; Fleming v. Blosser Printing Co. (Ga.) 44 S. E. 805; Perry v. Elliott (Va.) 44 S. E. 919. After jurisdiction has been obtained to restrain waste and for an account for waste already taken, a multiplicity of suits may be prevented by settling the question of title—Peck v. Ayers & Lord Tie Co. (C. C. A.) 116 Fed. 273. Where many complainants have identical claims of right in the same subject matter against many defendants which are corporations alleged to be in a combination to inflict wrongs on each complainant, equity will taken jurisdiction to avoid a multiplicity of suits—Tift v. Southern R. Co., 123 Fed. 789. A creditor's bill cannot be dismissed on a finding that certain defendants were indebted to the debtor for rent because plaintiff has an adequate remedy in garnishment proceedings, since one of the objects of the bill is to prevent a multiplicity of suits—Benedict v. T. L. V. Land & Cattle Co. (Neb.) 92 N. W. 210. Where it appears by a petition that defendant was acting in a manner to cast a cloud on the title of leases belonging to plaintiff causing plaintiff a multiplicity of suits to protect his rights, equity will interfere by injunction—Allen v. New Domain Oil & Gas Co., 24 Ky. L. R. 2169, 73 S. W. 747.

Illustrations. To prevent continued trespasses—Palmer v. Crisle, 92 Mo. App. 510; Lynch v. Egan (Neb.) 93 N. W. 775. Multiplicity of garnishment proceedings to subject wages of employes to attachment which are exempt by law—Siever v. Union Pac. R. Co. (Neb.) 93 N. W. 943. Three persons interested in an award for damages on extension of a street—Deering v. Schreyer, 171 N. Y. 451. Injunction against enforcement of an illegal city ordinance imposing a license tax where complainant will be called upon to defend many criminal prosecutions and to suffer irreparable injury—City of Hutchinson v. Beckham (C. C. A.) 118 Fed. 399. Rights to waters of a stream claimed by many persons because of riparian rights, appropriations and prescription or otherwise—Crawford Co. v. Hathaway (Neb.) 93 N. W. 781. Constantly recurring injury resulting from a trespass by a railroad company for which suit had already been instituted and plaintiffs intended to sue again—Illinois Cent. R. Co. v. Garrison (Miss.) 32 So. 996.

52, 53. Where several persons holding tracts of land under different titles without privity between them are sued each in ejectment by another equity will not intervene to prevent a multiplicity of suits—Turner v. City of Mobile, 135 Ala. 73.

numerous, and have separate and independent claims.[54] There must be a community of interest in the subject-matter or a common right or title.[55] It is not necessary that the many threatened suits shall have been begun.[56] A statutory remedy of one action at law will prevent equitable interference.[57] A reduction of the controversies to one issue will oust equitable jurisdiction.[58]

(§ 2) *C. Occasions for, and subjects of, equitable relief.*—The subjects of equity jurisdiction have been classified by numerous writers.[59] Justice Story assigns the following groups,[60]—trusts and equitable estates generally,[61] mistake, accident, and fraud,[62] penalties and forfeitures, imposition, unconscionable bargains, and

54. Threatened survey of state lands by land department of state—Kirwan v. Murphy, 189 U. S. 35, 47 Law. Ed. 698.

55. Tift v. Southern R. Co., 123 Fed. 789. A bill to prevent suits by 21 owners of land adjoining plaintiff's sulphur works will not be entertained—Ducktown Sulphur, Copper & Iron Co. v. Fain, 109 Tenn. 56. A suit to enforce the statutory liability of stockholders of a foreign corporation cannot be brought in equity to prevent a multiplicity of suits, where the amount demanded is the full amount of the par value of the stock held by each, the interest of each stockholder being separate and distinct—Hale v. Allinson, 188 U. S. 56, 47 Law. Ed. 380.

56. Prevention of enforcement of a city ordinance because void as against plaintiff and because many threatened prosecutions may result—Joseph Schlitz Brewing Co. v. City of Superior (Wis.) 93 N. W. 1120.

57. Where a statute for highway assessments provides for one assessment to be paid up at once or on default to be paid in ten parts annually giving the right to the parties assessed to elect and have the question of validity of assessment determined in one action, a suit to declare an assessment void will not be entertained—Greenhood v. MacDonald, 183 Mass. 342.

58. All but one disclaimed—Nash v. McCathern, 183 Mass. 345.

59. Approved classifications may be found in Bispham's Equity, chapter on "Outline of Jurisdiction," and in Cyc. Law Dict. title "Equity."

60. 1 Story, Eq. Jur. § 29, cited Fletcher Eq. Pl. & Pr. § 3.

61. In a suit for relief respecting a trust arising under a will, the court will not refuse to exercise its power because some of the beneficiaries are infants or because objections are made on behalf of one of such beneficiaries if convinced that a change in the scheme of the trust is necessary to carry out the testator's intention and will result in benefit to the infants and protection of their interests—Pennington v. Metropolitan Museum of Art (N. J. Eq.) 55 Atl. 468. A bill to recover profits, alleged to have been made by a director of a corporation employed on a salary to purchase goods for the corporation, on the ground that he had sold such goods to the corporation at a profit, cannot be sustained as a bill to enforce a trust—American Spirits Mfg. Co. v. Easton, 120 Fed. 440.

Equitable assignment wrought by attorney's contract—Deering v. Schreyer, 171 N. Y. 451.

A lien will be kept alive or extinguished in equity as will best accomplish justice and the actual intention of the parties—Kohlsaat v. Illinois Trust & Sav. Bank, 102 Ill. App. 110. But an equitable action will not lie to enforce an attorney's statutory lien. Lien given by Code Civ. Proc. § 66—Fromme v. Union Soc. & Guaranty Co., 39 Misc. (N. Y.) 105.

62. **Mistake** in matters of law may even be made the ground for relief and where one parts with a private right of property on grounds on which he would not have acted had he not misapprehended the law, he may be granted relief—Bottorff v. Lewis (Iowa) 95 N. W. 262. An award in arbitration will not be reviewed for alleged mistakes of law, where the arbitrator honestly decided the case consistent with what he believed to be the law—Dobson v. Central R. Co., 38 Misc. (N. Y.) 582.

An erroneously instituted proceeding was remanded to a court of equity whence it had come on appeal with directions to proceed in equity regularly—Smith v. Gudger (N. C.) 45 S. E. 955.

A void process cannot be amended in equity so as to vitalize a suit brought on the law side of the court, since it is equivalent to no process at all—Neal-Millard Co. v. Owens (Ga.) 45 S. E. 508.

Fraud in execution of a will—Delabarre v. McAlpin, 71 App. Div. (N. Y.) 591. One dealing with a municipal corporation in regard to matters beyond defendant's corporate powers, can have no relief in equity to save himself from loss; but if public officers collusively neglect to defeat the bringing of invalid claims against the municipality into judgment, a taxpayer may intervene in a seasonable time in the name of one or more taxpayers acting for all, to restrain its collection—Balch v. Beach (Wis.) 95 N. W. 132.

Cancellation of contracts obtained by fraud—Andrews v. Frierson (Ala.) 33 So. 6. An allegation in a bill to restrain an action on a note, that the clause in the note as to place of payment was inserted by fraud, will justify the intervention of equity—Gregory v. Howell, 118 Iowa, 26. The most extensive remedy will be given to a defrauded person, and all actually concerned in the fraud or who directly or knowingly participate in its fruits will be reached where the fraud relates to the contract—Bank of Montreal v. Waite, 105 Ill. App. 373; Alton Grain Co. v. Norton, Id. 385. Relief will be granted the purchaser of lands because of false representations as to their value by the vendor upon which the purchaser relied—Allen v. Henn, 197 Ill. 486. A bill alleging that defendant was long the confidential agent of a deceased person, and that while the latter was mentally incompetent defendant induced the purchase of lands at exorbi-

betrayals of confidence,[63] impending irreparable injuries or meditated mischiefs,[64] and many cases of oppressive proceedings and undue advantages.[65] The admin-

tant prices to his own benefit, and that he had neglected to account for moneys received by him, the amounts of which were wholly within his own knowledge, and asking that the conveyances be declared fraudulent and defendant required to account, shows a case for equity—Keys v. McDermott (Wis.) 93 N. W. 553.

63. Wherever there exists a relation of trust and confidence between parties giving one an advantage over the other, equity will investigate transactions between them, and will not be confined to merely formal fiduciary relations—Cannon v. Gilmer, 135 Ala. 302. Contract by attorney for fees in defense of one charged with robbery—Coveney v. Pattullo (Mich.) 89 N. W. 968. Total failure of consideration—Womelsdorf v. O'Connor (W. Va.) 44 S. E. 191. Sale of annuity worth $20,400 for $2,700—Roux v. Rothschild. 37 Misc. (N. Y.) 435. Usurious agreements—Bill v. Mulholland, 90 Mo. App. 612.

The rule against declaring forfeitures is not offended by enforcing rights under an accomplished and completed forfeiture; application to restrain a trespass by a tenant after exercise of option to forfeit lease—Metropolitan Land Co. v. Manning (Mo. App.) 71 S. W. 696.

64. Trespass—Freer v. Davis, 52 W. Va. 1; Palmer v. Crisle, 92 Mo. App. 510; Lynch v. Egan (Neb.) 93 N. W. 775. See also forthcoming article Injunction. A party will not be aided in maintaining a public nuisance nor in violating the penal laws of the state—Nebraska Tel. Co. v. Western Independent Long Distance Tel. Co. (Neb.) 95 N. W. 18. See also the doctrine of "clean hands," ante

Equity may determine the proper provisions for protection against collision, where two railroads cross each other at grade and cannot themselves agree upon such provisions—Jersey City, etc. St. R. Co. v. New York etc. R. Co. (N. J. Eq.) 53 Atl. 709. The statutory authority given the court of equity in New Jersey to entertain a petition to compel a railroad company to erect gates at a crossing is consistent with its general jurisdiction and modes of procedure. Act March 16, 1898 (Pub. L. 1898, p. 110)—Palmyra Tp. v. Pennsylvania R. Co. (N. J. Law) 52 Atl. 1132.

65. Extortionate charges and unjust discriminations by common carriers will be restrained—Tift v. Southern R. Co., 123 Fed. 789. Where a contract is not mutual in the sense of equality of benefit, but has been accepted and performed by one of the parties, performance by the other may be compelled—Corbet v. Oil City Fuel Supply Co., 21 Pa. Super. Ct. 80.

Taking property without purchase or the owner's consent, condemnation proceedings, dedication or prescription, may be enjoined—St. Louis etc. R. Co. v. Southwestern Tel. & T. Co. (C. C. A.) 121 Fed. 276. Laying out street—Baya v. Town of Lake City (Fla.) 33 So. 400. One holding title to the center of a street may restrain building or operation of a railroad line thereon the right not having been acquired by condemnation—Paige v. Schenectady R. Co., 77 App. Div. (N. Y.) 571. One railroad company will be restrained from crossing the track of another without acquiring the right by condemnation. Under Civ. Code, § 2167—Atlantic, etc., R. Co. v. Seaboard Air Line R., 116 Ga. 412. One without authority may be restrained from crossing the canal of an irrigation company with a lateral to carry water to his land from another canal—Castle Rock Irr. Canal & Water Power Co. v. Jurisch (Neb.) 93 N. W. 690.

Relief may be granted against forfeitures caused by fraud, accident or mistake, but if the forfeiture amounts to a mere pecuniary obligation, no relief will be given where it was caused by gross or willful negligence—Houston v. Curran, 101 Ill. App. 203. Forfeiture of a mining lease will be enforced where it will work equity and protect the landowner against negligence and laches of the lessee and great loss—Negaunee Iron Co. v. Iron Cliffs Co. (Mich.) 96 N. W. 468. While equity will not enforce forfeitures, the rule will not be applied to relieve a party against express terms of his own contract—Robinson v. Board of Education of City of Chicago, 98 Ill. App. 100, and where a contract provides for a forfeiture in unmistakable terms and is otherwise legal, equity will not relieve as against the forfeiture—Equitable Loan & Security Co. v. Waring (Ga.) 44 S. E. 320.

Enforcement of a judgment may be restrained where substantial injury will result from its enforcement—Henderson v. Hall, 134 Ala. 455; Hall v. Henderson, Id.; Jones v. Mutual Fidelity Co., 123 Fed. 506; Hayes v. United States Phonograph Co. (N. J. Eq.) 55 Atl. 84; Brooks v. Twitchell, 182 Mass. 443. Unless there is some substantial injury authorizing the vacation of a judgment in equity after the term, it will not be authorized by subd. 4, § 602, Code Civ. Proc., which is merely declaratory of equity jurisdiction under the old practice—Van Every v. Sanders (Neb.) 95 N. W. 870. Relief cannot be granted from a judgment obtained by fraud perpetrated by the judgment creditor, where the debtor is not guilty of any inexcusable ignorance or negligence, by granting a new trial or disturbing judgment, but the judgment creditor may be prevented from enforcing the judgment—Balch v. Beach (Wis.) 95 N. W. 132. Strictness regarding the restraint of enforcement of a judgment will be relaxed where it is asked by an administrator with no personal knowledge of the subject-matter or where the injured party could not obtain relief at all or was prevented without fault or negligence from obtaining such relief by fraud or accident—Polarek v. Gordon, 102 Ill. App. 356. Where a defense to an action comes to the knowledge of a party for the first time after trial in a court of law and the enforcement of the judgment would amount to a fraud on the part of the other party, such enforcement will be restrained—Polarek v. Gordon, 102 Ill. App. 356. Where the attorney of plaintiff in an action at law assured defendant that he might appear at any time and that no advantage would be taken of the delay but a default and judgment was entered under a general order without knowl-

istration and distribution of property of bankrupts may be had in equity and becomes a branch of equity jurisdiction when authorized by act of congress.[66] The management of a corporation or society will not be interfered with unless the officers or stockholders are exceeding their corporate power or there is fraud or collusion as to the managing officers or the stockholders.[67] A suit in equity cannot be maintained merely to settle the title to a corporate office.[68]

Chancery is concerned only with questions of property and the maintenance of civil rights, and has no jurisdiction in criminal or merely immoral matters not affecting rights to property.[69] Violation of penal or criminal laws will not be prevented in equity,[70] nor matters of a political character considered.[71]

Peculiar remedies of equity have been enumerated[72] as follows,—specific performance, injunctions,[73] re-execution, reformation, and cancellation;[74] account,[75] dower, and partition suits, confusion of boundaries, and rents, partnership bills, creditors' bills, and administration suits, relief and care of infants, idiots, and lunatics, discovery, commissions to take testimony, or bills to perpetuate evidence, or to take testimony de bene esse, bills quia timet, receivership, ne exeat, and supplicavit.

edge of the parties until two years afterwards when the judgment could not be vacated on motion or proceeding for review, a bill showing such facts is not liable to demurrer for want of equity to set aside the judgment—Brooks v. Twitchell, 182 Mass. 443. Where execution of an ejectment judgment against a railroad company will seriously affect public interests, it may be suspended by a court of equity in its discretion during a period sufficient to enable the company to prosecute condemnation proceedings in order to secure the land—Griswold v. Minneapolis, etc. R. Co. (N. D.) 97 N. W. 538.

Complainant must be free from neglect to assert his rights at law—Langan v. Parkhurst (Neb.) 96 N. W. 63; Kyle v. Richardson (Tex. Civ. App.) 71 S. W. 399; Klinesmith v. Van Bramer, 104 Ill. App. 384. Relief against default—Baer v. Higson (Utah) 72 Pac. 180.

66. In re Rochford (C. C. A.) 124 Fed. 182.

67. Coss v. Herring, 24 Ohio Circ. R. 36.

68. Standard Gold Min. Co. v. Byers, 31 Wash. 100, 71 Pac. 766.

69. Marshall v. Board of Managers of Illinois State Reformatory, 201 Ill. 9. Statutory penalties cannot be recovered. For failure to release chattel mortgages—Meredith v. Lyon (Neb.) 92 N. W. 122.

70. Injunction to prevent keeping open barber shop on Sunday—York v. Yzagnairre (Tex. Civ. App.) 71 S. W. 563. Merely criminal acts will not be prevented merely because public officers have neglected to perform their duties—People v. Condon, 102 Ill. App. 449.

71. Questions concerning an appointment of public officers or their title to office will not be determined—Howe v. Dunlap (Okl.) 72 Pac. 365; Riggins v. Thompson (Tex. Civ. App.) 70 S. W. 578; Deemar v. Boyne, 103 Ill. App. 464; Landes v. Walls (Ind.) 66 N. E. 679. Question of removal or title to office—Marshall v. Board of Managers of Illinois State Reformatory, 201 Ill. 9.

72. See Bispham's Equity.

73. A justice of the peace will not be prevented from acting in regard to a matter of which he has jurisdiction—Klinesmith v. Van Bramer, 104 Ill. App. 384. Where irreparable injury is being done or threatened to land, going to destroy the substance of the estate when the title is in dispute, equity will interfere to prevent trespass and to preserve the property until the question of title is determined at law, though no action for that purpose has been begun, if plaintiff intends immediately to begin such an action—Freer v. Davis, 52 W. Va. 1.

The proper remedy to restrain unauthorized exercise of the power of eminent domain in Arkansas is a suit in equity for injunction—St. Louis & S. F. R. Co. v. Southwestern Tel. & T. Co. (C. C. A.) 121 Fed. 276.

74. A written instrument will be cancelled or reformed for mutual mistake, accident, undue advantage or other equitable ground—Null v. Elliott, 52 W. Va. 229; Youngstown Electric Light Co. v. Butler County Poor Dist., 21 Pa. Super. Ct. 95; Nutter v. Brown (W. Va.) 42 S. E. 661; Enos v. Stewart, 138 Cal. 112, 70 Pac. 1005. Where the agent of a grantee drew the deed including by mistake more land than was intended, and land for which no consideration was paid, the grantee will not be allowed to profit by the mistake in order to defeat a suit for reformation—Barry v. Rownd (Iowa) 93 N. W. 67.

A suit may be maintained by the United States to set aside patents erroneously issued under a grant to a railroad company and to test the good faith of bona fide purchasers thereof and establish their rights in such lands and in the same suit an accounting may be required from the railroad company regarding the lands sold by it and the amount received therefor recovered by decree. Under Acts March 3, 1887, Feb. 12, 1896 and March 2, 1896—United States v. Southern Pac. R. Co., 117 Fed. 544.

75. The former treasurer of a corporation, and also a bank in which its funds were deposited with knowledge of their ownership and fraudulent withdrawal by the treasurer to be converted to his own use, may be re-

Separate articles pertaining to each of the several subjects of equitable jurisdiction and to each equitable remedy should be consulted.[76]

§ 3. *Laches and acquiescence.*—Laches will prevent interference of equity,[77] when to grant complainant relief would presumptively be inequitable and unjust because of the delay;[78] change of condition during negligent delay being essential.[79] Laches is not imputed to the public exercising governmental functions.[80] It may occur in failure to assert a legal remedy or defense.[81] What conduct amounts to laches depends upon the peculiar circumstances of each case where no analogous statute of limitations exists at law.[82]

quired to account—Hunter v. Robbins, 117 Fed. 920.

76. See titles like Cancellation of Instruments; Contribution; Discovery and Inspection; Injunctions; Trusts.

77. Phillips v. Piney Coal Co. (W. Va.) 44 S. E. 774; Crawford Co. v. Hathaway (Neb.) 93 N. W. 781. By reason of the maxim,—"Equity aids the vigilant and not the slothful."

78. Hahn v. Gates, 102 Ill. App. 385. Delay will not prevent relief where it does not appear that defendant has suffered any disadvantage from complainant's mere delay —Williams v. Starkweather, 24 R. I. 512. Laches in a suit to enforce an award for land taken for a railroad right of way, is not shown where the denial of payment is not controverted and the claim has been continuously asserted and acknowledged by the other party and his predecessors—Southern R. Co. v. Gregg (Va.) 43 S. E. 570.

79. O'Brien v. Wheelock, 184 U. S. 450, 46 Law Ed. 636.

Delay such that memories of those having knowledge of the material facts have weakened, amounts to laches—Lutjen v. Lutjen, 64 N. J. Eq. 773. Delay in bringing suit to charge landowners with liability for levee assessments during which time the owners of the property were constantly changing and the property had become liable to large assessments under a new statute and under expenditures for repair of the levee—O'Brien v. Wheelock, 184 U. S. 450, 46 Law. Ed. 636. A bill to restrain completion of a contract between the officers of a city and a railroad company for elevation of tracks and the building of a retaining wall, brought by abutting owners three months after the execution of the contract, will be dismissed for laches, where it appears that the railroad company had incurred great expense in constructing the improvements and had purchased land on the faith of the contract before the bill was filed—Keeling v. Pittsburg, etc., R. Co., 205 Pa. 31.

80. A suit against a railway corporation to recover surplus profits directed by law to be paid the state, cannot be barred by laches of state officers, the relation between the state and the corporation raised by the incorporation of the company, being an exercise of state sovereignty and not a business contract. Right to surplus profits given by local laws 1847, p. 77—Terre Haute & I. R. Co. v. State, 159 Ind. 438.

81. Klinesmith v. Van Bramer, 104 Ill. App. 384. Where it appears that the parties are guilty of neglect in not presenting a defense against a former suit at the proper time they will not be granted relief against a judgment—Allen v. Foster (Tex. Civ. App.) 74 S. W. 800. Where it appears that five out of nineteen complainants object to proceedings to make a street improvement, on the ground that the several assessments were not equal according to benefits, but the appeal was not sustained and no other steps were taken, they were prevented by laches from obtaining relief by a suit to restrain collection of the assessments because of irregularities—Gates v. Grand Rapids (Mich.) 95 N. W. 998. See ante, § 1 (exhaustion of legal remedy).

82. Laches sufficient to defeat a re-hearing and after interlocutory decree, finding infringement of a patent, is a matter depending on the facts of each case and the effect of the grant or refusal on the rights of the respective parties—Pittsburgh Reduction Co. v. Cowles Elec. Smelting Co., 121 Fed. 556.

Conduct amounting to laches. 12 years' delay—Wilcoxon v. Wilcoxon, 199 Ill. 244. Three months where great expense was incurred—Keeling v. Pittsburg, etc., R. Co., 205 Pa. 31. Four years' unexplained delay in suing to cancel a contract (Civ. Code Ga. § 3711)—Reynolds, etc., Mortg. Co. v. Martin, 116 Ga. 495. As against bona fide purchaser —Fisher v. Patterson, 197 Ill. 414. Suit for accounting brought twenty years after accrual of action and acquiescence by plaintiff in defendant's abandonment of contract —Tozier v. Brown, 202 Pa. 359. Delay in enforcing the payment of negotiable notes from the estate of an indorser—Tidball's Ex'rs v. Shenandoah Nat. Bank (Va.) 42 S. E. 867. Unexplained delay of four years with knowledge of fraud in procuring a contract—Gale v. Southern Bldg. & Loan Ass'n, 117 Fed. 732. Lapse of four years after perpetration of an alleged fraud before application for relief—Reynolds, etc., Mortg. Co. v. Martin, 116 Ga. 495. Lapse of time before suit by a surviving partner for an accounting and to obtain the benefit of an equitable defense to notes against the firm —Wilson v. Wilson, 41 Or. 459, 69 Pac. 923. Application for leave to file a replication nunc pro tunc after an order dismissing the cause for failure to file such replication in a suit instituted after many years of litigation and delay regarding timber claims—Potts v. Alexander, 118 Fed. 885. Claim against estate of an administrator for money claimed to have been retained by him belonging to plaintiff, not allowed after 30 years—Gatewood v. Gatewood's Adm'x, 24 Ky. L. R. 931, 70 S. W. 284. 20 years' delay to assert a resulting trust against one who would not recognize it—Quairoli v. Italian Beneficial Soc., 64 N. J. Eq. 205. Bill

Excusable[83] *delay* such as lack of knowledge regarding the facts[84] is not laches, unless there were circumstances which should have demanded inquiry or where,

to collect a legacy nine years after refusal of the executor to pay, the estate in the meantime having been distributed, though the legatee placed the claim in the hands of an attorney immediately on refusal of the executor—Wilson v. Smith, 117 Fed. 707. Delay of thirty years to attack a conveyance of land from one Indian to another approved by the Secretary of the Interior as against the grantee and those claiming under him who have been in possession all the time—Pope v. Falk (Kan.) 72 Pac. 246. Six years after contract began, where the bill does not negative knowledge of the facts by plaintiff at the time of their occurrence—Doane v. Preston, 183 Mass. 569. Delay until long after the death of the immediate parties to a purchase at execution with a trust in favor of the debtor—Moore v. Hemp's Ex'rs, 24 Ky. L. R. 121, 68 S. W. 1. Bill against an innocent purchaser of the latter premises filed two years and six months after knowledge of the severance of a house from the soil, praying a return of the house or an accounting for rents and value thereof, and attempting to establish an equitable lien for such value and rents—Fisher v. Patterson, 197 Ill. 414. Contribution against co-executor's estate for the amount he paid to legatee denied 40 years after the death of the testator—In re Wehrle's Estate, 205 Pa. 62. Two years' delay in prosecution of petition against committee of lunatic, coupled with death of lunatic and administration of his estate, held laches—Consumers' Brew. Co. v. Bush, 19 App. D. C. 588. Ten years' delay in filing a bill to avoid a release for fraud without allegation of mistake, amounts to laches, especially where the fraud is not clearly shown—Lutjen v. Lutjen, 64 N. J. Eq. 773. Ten years' unexplained delay, before suing to cancel a release of rights in an estate for fraud, is laches where fraud is not shown, nor mistake alleged, though the consideration may have been inadequate—Id. Money paid by a county to a state hospital for the insane and applied to its use, cannot be recovered after six years on the ground of mistake and fraudulent concealment of the facts by the hospital trustees—Trustees of State Hospital v. Philadelphia County (Pa.) 54 Atl. 1032. Forfeiture of a mining lease will be enforced where it will protect the landowner against negligence and laches of the lessee—Negaunee Iron Co. v. Iron Cliffs Co. (Mich.) 96 N. W. 468. A delay of fifty years after the death of her husband, during which time the widow still lived, will not constitute such laches as will preclude remaindermen from recovering the land from one to whom she had conveyed her quarantine in the house after her husband's death—Graham v. Stafford, 171 Mo. 692. Where in a partition suit the petitioner first discovered during the taking of testimony that the land which was alleged to belong to his mother was in fact purchased with money belonging to his father's estate, and afterward he made no attempt to regain his rights as his father's sole heir until a decree was enrolled, he was prevented by laches from intervening for that purpose—Rice v. Donald (Md.) 55 Atl. 620. Where one of several intervenors in an equitable suit who was admitted without conditions as a party, remained in the case for 17 months without taking part in the proceedings or offering evidence, he cannot on petition filed after the close of the testimony be allowed full charge of the suit as complainant on an averment that there was collusion between the original parties, of which no other intervenor complains and as to which he offers no evidence except certain testimony in the record, which pertained to other issues and was taken in a previous stage of the litigation—Edwards v. Bay State Gas. Co., 120 Fed. 585.

Conduct not amounting to laches. Sufficiency of facts in a suit for dissolution of a partnership and an accounting to rebut presumption of laches, arising from delay for 12 years—Wilcoxon v. Wilcoxon, 199 Ill. 244. Defendant cannot be held guilty of laches where he defended his title to property when assailed and there was no delay which would not apply equally as well to plaintiff—Marshall v. Meyer, 118 Iowa, 508. Where a note drawing ten per cent interest and well secured, was sued upon eight years after its maturity, recovery is not barred by laches, where the payee's administratrix lived only two years after the maturity, and the administrator succeeding her died before the estate was closed, and it does not appear that the defendants had been injured by the delay—Luke v. Koenen (Iowa) 94 N. W. 278.

83. Delay caused by constant assurance of his agent residing in the vicinity, that a suit would be useless, and by frequent promises that payment of a debt will be secured without suit, is not laches—Cushing v. Schoeneman (Neb.) 96 N. W. 346. Delay due mainly to the adversary's urgent appeals for time and inability to meet his obligation—Hellans v. Prior, 64 S. C. 296. Delay while in possession—Sheldon v. Dunbar 200 Ill. 490. Tenant in common in possession—Brumback v. Brumback, 198 Ill. 66. Where complainants on learning of an adverse claim to lands in another state at once notified the claimants of their intention to assert their rights, they were not chargeable with laches during the period in which both parties were attempting to secure an adjustment of the claims by the United States land office—Hodge v. Palms (C. C. A.) 117 Fed. 396. That complainant's attorney could not attend the trial of their case, is not sufficient—Aultman v. Higbee (Tex. Civ. App.) 74 S. W. 955. See, also, like cases in Default, ante, p. 915.

84. Heirs whose ancestor was domiciled in another state and whose will was there probated, are not chargeable with proceedings for the settlement of his succession in which his land was sold so as to be prevented by laches from asserting their rights in such property, where they brought suit within two years after first knowledge of the adverse claim of the purchaser—Fletcher v. McArthur (C. C. A.) 117 Fed. 393. Sixty-seven years' delay before filing of the bill to cancel for fraud in procurement of deed where complainants only suspected the

after notice of the facts, the party failed to obtain knowledge where it might have been obtained.[85] A member of an Indian tribe is not for that reason released from the necessity of diligence in asserting his rights in equity.[86] A married woman in West Virginia is liable to the consequences of laches as though a feme sole, since she may deal with her separate estate as such.[87] It has been held in New York that no question of laches strictly speaking is involved in an action for fraud under the code; and that whether the equitable doctrine of laches still exists in that state is doubtful.[88]

Application of analogous statutes of limitation.—Generally the time prevailing in analogous cases at law will be adopted in equity to bar causes of action,[89] with the same exceptions.[90] It will especially be done where jurisdiction is concurrent,[91] and as to legal rights sought to be enforced.[92] Equity is disinclined

fraud within three years before commencement of the suit and had no actual proof until within one year—McGee v. Welch, 18 App. D. C. 177. Delay by heirs where an administrator and a widow fraudulently concealed part of the decedent's estate, and represented that he died without other heirs, and the widow's estate on her death later included a large part of the property to which the children of a brother of the decedent were entitled and which was intact and could be reached by the court and for which the administrator had never accounted—Maney v. Casserly (Mich.) 96 N. W. 478. Suit to restrain action on a judgment entered by default, where it appears that defendant to the judgment was assured by plaintiff's attorneys that he might enter appearance at any time and that no advantage should be taken of his delay and that a judgment and default was entered without his knowledge, which he did not discover until two years later when he immediately took steps to have it set aside—Brooks v. Twitchell, 182 Mass. 443.

85. Wall v. Meilke (Minn.) 94 N. W. 688. Circumstances sufficient to excite suspicion —Coolidge v. Rhodes, 199 Ill. 24. Not excused by alleging generally in the bill that they had no knowledge of the fraud until three months before suit, where it is not shown that they made no inquiry though the means of knowledge was accessible—Kessler v. Ensley Co., 123 Fed. 546.

86. The validity of a deed of land belonging to a Shawnee Indian, sold by his guardian while he was a minor, cannot be attacked by the Indian more than 21 years after attaining his majority for want of jurisdiction over the proceedings, where no fraud is shown and the property has meantime greatly increased in value—Dunbar v. Green (Kan.) 72 Pac. 243.

87. Phillips v. Piney Coal Co. (W. Va.) 44 S. E. 774.

88. Code Civ. Proc. § 382, subd. 5—Slayback v. Raymond, 40 Misc. (N. Y.) 601. [Quoting the court of appeals, "whether the equitable doctrine of laches, as distinguished from the statute of limitations, now exists in this state, is open to serious doubt." 156 N. Y. 491; 13 Hun, 273; 39 App. Div. 276; 121 N. Y. 69, cannot be considered an authority on this point.]

89. Parmelee v. Price, 105 Ill. App. 271; Watson v. Texas & P. R. Co. (Tex. Civ. App.) 73 S. W. 830; Sioux City, etc., R. Co. v. O'Brien County, 118 Iowa, 582.

Illustrations. Suit to enforce an equitable lien within the time allowed for the same action at law—Michigan Trust Co. v. Red Cloud (Neb.) 92 N. W. 900. A direct proceeding to set aside a judgment and sale of land thereunder, is not within statute allowing bills of review for a new trial within two years after judgment rendered on service of process by publication, but the four years' limitation applies (Rev. St. 1895, arts. 1375, 3358 construed)—State v. Dashiell (Tex. Civ. App.) 74 S. W. 779. A bill for appointment of commissioners to assign dower filed seven years after the death of the husband is barred by the statute—Crawford v. Watkins (Ga.) 45 S. E. 482. Where a land patent accrued 32 years before intervenors asked for relief and the limitation at law was five years, and the intervenors showed no excuse for delay, they were not entitled to relief in equity, where an innocent purchaser had bought the land relying on the patent—Boynton v. Haggart (C. C. A.) 120 Fed. 819. Where a judgment was recovered but two months before an original bill was brought to subject equitable assets to its payment and the bill was amended five years later to change it to a general creditor's bill, the statute of limitations did not begin to run until the recovery of judgment, and the amended bill was not barred by laches since it was filed within six years from the accrual of the action—Montgomery Iron Works v. Capital City Ins. Co. (Ala.) 34 So. 210.

So in Federal courts—Potts v. Alexander, 118 Fed. 885. That the state statute of limitations gives 10 years for bringing an action to recover land, does not prevent a federal court of equity from refusing to interfere on account of laches by suit to set aside the conveyance for fraud, which can only be done in equity, though the suit was commenced within the 10 years—Kessler v. Ensley Co., 123 Fed. 546.

90. Newberger v. Wells, 51 W. Va. 624.

91. Where the title of complainant to lands on which he bases his right to relief in equity is legal and capable of establishment at law the doctrine of laches will not apply, but his rights will be barred by adverse possession alone, since on general principles equity will follow the law—Higgins Oil & Fuel Co. v. Snow (C. C. A.) 113 Fed. 433.

92. Sibley v. Stacey (W. Va.) 44 S. E. 420; Higgins Oil & Fuel Co. v. Snow (C. C. A.) 113 Fed. 433. A proceeding to enforce

to find laches when limitations have not run.[93] If a suit is brought within the time fixed by the analogous statute of limitations, defendant must show laches to exist either from the face of the bill or by circumstances set up in his answer, but if the suit is brought after the statutory period, complainant must show facts taking the case out of the rule as to laches.[94]

Under the codes, the doctrine of laches will not be applied in equity, where the statute has defined the time within which suit may be brought.[95]

§ 4. *Practice and procedure in general.*—Courts of equity are always open, in the absence of a statute to the contrary.[96] The filing of the bill is the commencement of a suit in equity,[97] and jurisdiction is obtained by service of process thereon or of a substituted service which must conform to all statutory requirements, appearance, or pleading by the defendant.[98] The place or local court wherein a bill must be brought is reserved for treatment in a later article.[99] The distinction between actions at law and suits in equity is strictly maintained in the federal courts.[1]

§ 5. *Parties.*—One party may sue for a number similarly situated.[2] Where on a bill to distribute the assets of a corporation after abandonment by the stockholders, it appears that there were 25,000 shares of stock about one-third of which was held by persons living in all parts of the country and whose residences could

statutory liability of a stockholder, either at law or in equity, is founded on a legal, not an equitable, right, and if the right to enforce such liability is barred at law, the same limitation will be applied by analogy in equity—Hale v. Coffin (C. C. A.) 120 Fed. 470.

93. Hahn v. Gates, 102 Ill. App. 385. Extraordinary circumstances will move it to do so—Ide v. Trorlicht, etc., Carpet Co. (C. C. A.) 115 Fed. 137. Where, by reason of laches of complainant, it is doubtful whether defendant can secure evidence sufficient to fairly present his case or obtain the advantages which he might have had, or avoid any hardships that might have been avoided, if the claim had been made in seasonable time, relief will not be granted in equity though the limitation to be applied to a remedy at law has not expired—Wilson v. Wilson, 41 Or. 459, 69 Pac. 923.

94. Boynton v. Haggart (C. C. A.) 120 Fed. 819.

95. Slayback v. Raymond, 40 Misc. (N. Y.) 601. An action for reformation of a written instrument for mistake is not barred by any statute of limitations in Minnesota—Wall v. Meilke (Minn.) 94 N. W. 688. In Montana the rule of statute that actions for relief not previously provided for as to limitation must commence within five years after accrual of the cause, applies to suits in equity —Mantle v. Speculator Min. Co., 27 Mont. 473, 71 Pac. 665.

96. Webb v. Hicks, 117 Ga. 335; Mitchell v. Turner, 117 Ga. 958.

97. Humane Bit Co. v. Barnet, 117 Fed. 316.

When an action is commenced it is frequently fixed by statute under the codes. In general see Actions ante, p. 20. Under West Virginia statutes filing of bill relates back to issuance of process—Geiser Mfg. Co. v. Chewning, 52 W. Va. 523.

98. Suit to set aside administration, in which no summons was served on the administrator and no pleading filed by him—Costa v. Superior Court, 137 Cal. 79, 69 Pac. 840. No allegation of actual notice and defective affidavit for substituted service—Barker v. Barker, 63 N. J. Eq. 593.

See generally articles, Jurisdiction; Process.

Published service gives jurisdiction only for purposes of the bill—McGaw v. Gortner, 96 Md. 489. Jurisdiction to act upon the person is not obtained by publication. See Jurisdiction; Process. Also, ante, § 2.

99. Venue and Place of Trial.

1. Highland Boy Gold Min. Co. v. Strickley (C. C. A.) 116 Fed. 852. Misjoinder—United States v. Boyd, 118 Fed. 89. Procedure is controlled by the 7th amendment to the Constitution and § 16 of the Judiciary Act of September 24, 1789, and the propriety of bringing a case at law or in equity, must be determined with reference to those provisions—Jones v. Mutual Fidelity Co., 123 Fed. 506. The federal statute requiring their practice to conform as nearly as possible to the state practice did not abolish the distinction between actions at law and suits in equity in federal courts (Rev. St. § 914) —Hill v. Northern Pac. R. Co. (C. C. A.) 113 Fed. 914.

Non-resident defendants served by publication in a suit to subject lands of their ancestor to a debt in favor of plaintiff, are not parties for any other purpose—McGaw v. Gortner (Md.) 54 Atl. 133.

2. Preferred creditors who are constituted trustees to collect and distribute money are not similarly situated to other creditors not preferred—Beecher v. Foster (W. Va.) 42 S. E. 647. Depositors of grain in elevator denied right to sue for all under Hill's Ann. Laws, § 385, merely on the ground of impracticability of joining all—Tobin v. Portland Flouring Mills Co., 41 Or. 269, 68 Pac. 743, 1108. As to who are regarded as parties on a proceeding to punish violation of a bill against named defendants and their "associates, confederates," etc., see Ex parte Richards, 117 Fed. 658.

not be ascertained, the court was properly authorized in its discretion to allow the principal and largest stockholders fairly representing the adverse interests of all to represent such stockholders as defendants and to dispense with the bringing in of all interested parties.[3]

The law making obligations joint and several so that joint obligors are not always necessary parties does not change the rule as to propriety of making all interested persons parties.[4] Where it appears that a third person has an interest in the subject-matter, the court must of its own motion stay the suit and require him to be made a party defendant.[5] The sufficiency of interest to render one a proper or necessary party, depending upon the particular circumstances of the case is discussed by cases in the note but will be exhaustively treated in "Parties."[6]

Defendants sued for an accounting of property should be shown to have a common title or to have come by the property in the same way.[7] There is no misjoinder of defendants where there is a joint defense and the law and testimony with regard to each defendant is the same and their several acts are such as may be included in one bill for an injunction.[8] If a want of parties does not appear from the bill, a demurrer will not reach the defect.[9] Where a defect of parties is not raised by answer or demurrer, it is waived.[10] After a demurrer sustained for misjoinder of complainants, the bill may be amended by dismissal as to the complainant without interest.[11]

Bringing in new parties; intervention.[12]—New parties defendant can be added

3. Noble v. Gadsden Land & Imp. Co., 133 Ala. 250.

4. Craig v. McKnight, 108 Tenn. 690.

5. In partition—Latham v. Tombs (Tex. Civ. App.) 73 S. W. 1060.

6. Suit to recover stock in a corporation sold to person forbidden by its by-laws and to restrain further sale in violation of such by-laws—Champollion v. Corbin, 71 N. H. 78. Persons not in esse who may have an interest in property are not necessary parties to an equitable action for sale thereof, under Pub. Laws 1903, p. 122, c. 99—Smith v. Gudger (N. C.) 45 S. E. 955. Since the county court is not the agent of the county, nor the county a party to proceedings therein to lay out a highway, the county cannot be made a party to a bill by an adjoining land owner to vacate the proceedings—Searcy v. Clay County (Mo.) 75 S. W. 657. Claimant but not the attorney held a necessary party to recover sum from which attorney was to be paid, under Rev. St. 1898, § 2603—Kircher v. Pederson (Wis.) 93 N. W. 813. Suit to quiet title to lands held from state and to cancel other writings affecting title—Bent v. Hall (C. C. A.) 119 Fed. 342. The general rule that complainant cannot be compelled to make another defendant on the latter's application, is particularly true where the bill contains no allegations connecting the third person with the subject-matter of the litigation—Doke v. Williams (Fla.) 34 So. 569. Relief will not be refused in a federal court because of failure to join one as defendant who is out of the jurisdiction, where he has no interest in the subject matter which will be affected by a decree—Mackay v. Gabel, 117 Fed. 873. In a suit by the treasurer of a corporation the proper custodian of its funds and trustee of an express trust in his own name against his predecessor for an accounting of money wrongfully withheld, the corporation need not be joined in the federal court where its joinder would oust jurisdiction, under equity rule 47—Hunter v. Robbins, 117 Fed. 920.

Injunctions. A lessee under an illegal lease is not necessary to a bill to enjoin an officer from further execution of such leases—Cherokee Nation v. Hitchcock, 187 U. S. 294, 47 Law. Ed. 183. Suit to restrain a purchaser from paying any of the price to the grantor's agent who procured the sale and to restrain the agent from receiving it, and cross suit to surrender notes for agent's commission—Daugherty v. Curtis (Iowa) 97 N. W. 67.

Suit for infringement. Licensee—Peters v. Union Biscuit Co., 120 Fed. 679. **To enforce liens** on corporate property—Godchaux v. Morris (C. C. A.) 121 Fed. 482. The heirs of a deceased co-owner—Taylor v. Forbes' Adm'x (Va.) 44 S. E. 888. Creditors over whom priority was claimed held necessary parties to the suit—Beecher v. Foster (W. Va.) 42 S. E. 647.

To set aside or cancel. Grantor or judgment debtor—Homestead Min. Co. v. Reynolds, 30 Colo. 330, 70 Pac. 422; Schneider v. Patton (Mo.) 75 S. W. 155; Mackay v. Gabel, 117 Fed. 873. Co-heir—Williams v. Crabb (C. C. A.) 117 Fed. 193.

7. Griffin v. Henderson, 116 Ga. 310.

8. United States v. Dastervignes, 118 Fed. 199.

9. Walling v. Thomas, 133 Ala. 426.

10. Farmers' & Merchants' Bank v. Robinson, 96 Mo. App. 385.

11. Victor Talking Mach. Co. v. American Graphaphone Co., 118 Fed. 50.

12. Where a suit is referred to the vice chancellor before whom "all proceedings" shall be then had (Chancery Rule 49), the advisory master is deprived of authority to admit new parties. Under rule 49 of the Chancery Practice—Perrine v. Perrine, 63 N. J. Eq. 483.

by defendant only when the allegations of the original petition will warrant it.[13] If an answer is not intended as a mere defense but affects the right of a co-defendant, he must be made a party thereto and relief must be asked against him on the facts.[14]

Leave to file a petition of intervention after a cause has stood for a long time rests in the sound discretion of the trial chancellor and will not be reviewed unless an abuse of such discretion is shown.[15] Where the court, in a suit for distribution of property of an insolvent railroad company, ordered all creditors to appear before a master and prove there the claims, one who asserts a right to preferred payment over other claims may do so by intervention under the order and need not file an original bill.[16] Intervention is limited to the issues, within the scope of the original bill,[17] and the intervenor's allegations must be construed as pleading in connection with the averments of the original bill.[18]

§ 6. *Pleading. A. General rules.*—A pleading will be construed most strongly against the pleader.[19] The rule requiring certainty in pleadings is to furnish the court proper foundation for judgment if the pleadings are held true.[20] Scandalous matter, raising no issues may be expunged.[21] The objection of an adequate remedy at law must be made at the earliest opportunity and before defense upon the merits.[22]

(§ 6) *B. Original bill, petition, or complaint.*—A bill seeking discovery need not be verified, where only incidental to the main object of the suit.[23] A petition, the allegations of which do not authorize relief prayed for, will be dismissed on general demurrer, if there is no prayer for general relief.[24]

Bill or petition.—Continuation of a suit in equity by heirs,[25] or an application by a trustee for direction, where no suit is pending,[26] should be by bill and not by petition. Rights of third persons in subject-matter of a suit should be presented by an appropriate bill and not by petition, though beneficiaries of a trust may intervene by petition, where the trustee is a party.[27] A bill not printed and not accompanied by a certificate that there was no time to print it, nor indorsed by notice to appear, and which does not set forth that it was filed or intended to be filed in a court sitting in equity, is only a petition.[28]

13. Roberts v. Atlanta Real Estate Co. (Ga.) 45 S. E. 308.

14. Turner v. Stewart, 51 W. Va. 493.

15. Gunderson v. Illinois Trust & Sav. Bank, 199 Ill. 422.

Persons allowed to come in to protect interest—Foley v. Grand Hotel Co. (C. C. A.) 121 Fed. 509.

16. Central R. & Banking Co. v. Farmer's Loan & Trust Co., 116 Fed. 700; Farmer's Loan & Trust Co. v. Central R. & Banking Co., Id.

17. Intervention to assert a hostile claim denied in partition—Rice v. Donald (Md.) 55 Atl. 620. On bill by receiver of a railroad filed to restrain the removal of a spur track by another company which connected a brick yard with the main line of receiver's road, petition by the owner of the brick yard intervening to protect his right under a contract with the receiver's company sustained against demurrer—Receiver of Cent. R. & Banking Co. v. Macon, etc., R. Co., 115 Fed. 926.

18. Receiver of Cent. R. & Banking Co. v. Macon, etc., R. Co., 115 Fed. 926.

19. Stockton v. National Bank of Jacksonville (Fla.) 34 So. 897; Johnson v. McKinnon (Fla.) 34 So. 272. Where a bill by heirs for accounting for coal removed by defendants from under streets and lots, alleges that the ancestor of complainants platted and conveyed most of the lots and died seized of two lots, it will be presumed that the coal was removed after such conveyances alleged in the absence of a contrary allegation—Brewster v. Cahill, 199 Ill. 309.

20. Becklenberg v. Becklenberg, 102 Ill. App. 504.

21. Morrison v. Snow (Utah) 72 Pac. 924.

22. United States v. Southern Pac. R. Co., 117 Fed. 544. Where the defense of an adequate remedy at law has not been pleaded in an action for specific performance, plaintiff will not be compelled to abandon the equitable remedy—Le Vie v. Fenlon, 39 Misc. (N. Y.) 265. Defendant in a suit to quiet title, who stipulates for trial of the cause before a master, waives any objection to jurisdiction in equity on the ground that plaintiff's remedy is at law—Sanders v. Village of Riverside (C. C. A.) 118 Fed. 720; Village of Riverside v. Sanders, Id.

23. Montgomery Iron Works v. Capital City Ins. Co. (Ala.) 34 So. 210.

24. Copeland v. Cheney, 116 Ga. 685.

25. Kronenberger v. Heinemann, 104 Ill. App. 156.

26. Stapylton v. Neeley (Fla.) 32 So. 868.

27. Doke v. Williams (Fla.) 34 So. 569.

Exhibits as part of bill.—General allegations in a bill supported by exhibits attached must be taken as qualified and limited by the exhibits.[29] If a bill for infringement of a patent makes profert of the patent, it constitutes a part of the bill and may be examined on demurrer.[30] A description in a bill concerning lands is sufficient especially on interlocutory hearing where it refers for such description to a trust deed attached to the bill.[31]

Sufficiency of allegations.—Every fact necessary to relief must be alleged clearly and definitely.[32] Facts not conclusions must be given.[33] Immaterial matter should not be alleged.[34] Complainant must allege facts showing his hands to be clean,[35] and that he has not neglected to protect his rights at law.[36] Fraud and duress cannot be alleged in a general manner, but the facts constituting them must be given.[37] In a suit to set aside a release for undue influence, particular acts constituting undue influence need not be alleged, it being necessary only to allege the result.[38] The bill must show that complainant is not guilty of laches,[39] but laches need not be denied where not apparent on the face of the bill since

28. Cooke v. Central Dist. Tel. Co., 21 Pa. Super. Ct. 43.

29. Willard v. Davis, 122 Fed. 363.

30. Fowler v. New York (C. C. A.) 121 Fed. 747. A bill by property owners to secure modification of a decree in foreclosure on the property and franchise of a street railway company, to which foreclosure they were not parties, to secure and protect their rights under an agreement held to show equity—Thompson v. Schenectady R. Co., 119 Fed. 634.

31. Whyte v. Spransy, 19 App. D. C. 450.

32. Stockton v. National Bank (Fla.) 34 So. 897; Johnson v. McKinnon (Fla.) 34 So. 272. Jurisdiction cannot be acquired to give an administrator relief in a suit for an accounting from persons alleged to hold property of the estate, where he waives discovery and asks the appointment of a receiver but does not allege their insolvency or irreparable injury, or the amount, character or value of the property sought—Griffin v. Henderson, 116 Ga. 310. A bill to prevent the erection of a telephone pole upon land of plaintiff is without equity where it does not aver that defendant was without authority to erect the pole, that such erection would be unlawful, or that there were such circumstances as would render a legal remedy inadequate—Cooke v. Central Dist. Tel. Co., 21 Pa. Super. Ct. 43.

33. A bill brought by members of a labor union to restrain breach of a contract of employment alleging that defendants, its officers, and agents unlawfully combined to destroy the union, etc., held insufficient as containing only conclusions of law—Boyer v. Western Union Tel. Co., 124 Fed. 246. A simple allegation that the plaintiffs are heirs at law of the decedent, and that as a compromise to a suit contesting her will the executors agreed to turn over to them one-half the estate, is insufficient to show their rights where they were apparently not heirs at law in the state where the action arose, since their full relation and the facts as to the compromise should be set out—Bishop v. York, 118 Fed. 352. A bill alleging that after making plats, a party sold and conveyed certain lots to purchasers in fee simple without an allegation of language in the deeds excluding streets, held to show that the property in the streets passed with the conveyance—Brewster v. Cahill, 199 Ill. 309.

34. A bill for cancellation of a deed executed by complainant and her husband, charges immaterial matter where it alleges coercion by the husband, and that complainant believed the grantee had heard of such conduct and had used influence over the husband to secure the conveyance, such belief not being a matter of issue—Pratt Land & Imp. Co. v. McClain, 135 Ala. 452.

35. Persons seeking to enjoin abatement of stock-pens as a public nuisance on the ground that defendants had no authority to abate them, must allege that they were not a public nuisance—Pittsburgh, etc., R. Co. v. Crothersville, 159 Ind. 330.

36. Petition as showing affirmatively that petitioner had an adequate remedy at law which he neglected to pursue—Hess v. Lell (Neb.) 94 N. W. 975. A bill to quiet title against one adverse claimant must allege that the title of complainant has been successfully tried at law at least once—Boston & M. Consol. Copper, etc., Min. Co. v. Montana Ore Purchasing Co., 188 U. S. 632, 645. A bill asking for relief against a judgment because complainants have a valid legal defense which they were prevented from making on account of inability to obtain the evidence must aver that proper diligence was used in the preparation for trial—Hayes v. United States Phonograph Co. (N. J. Ch.) 55 Atl. 84. In a suit to set aside a judgment for fraud, plaintiff must allege sufficient facts to show that he was not guilty of negligence at the former trial—Miller v. Miller's Estate (Neb.) 95 N. W. 1010.

37. Mortimer v. McMullen, 102 Ill. App. 593.

38. McLeod v. McLeod (Ala.) 34 So. 228.

39. Phillips v. Piney Coal Co. (W. Va.) 44 S. E. 774. A bill showing laches on its face or showing facts bringing the cause of action within the statute of limitations is liable to demurrer on that ground, unless it states facts sufficient to bring the action without the statute or excuse the laches—Newberger v. Wells, 51 W. Va. 624. In a suit to set aside a conveyance for fraud, an allegation that knowledge of the facts was obtained only shortly before filing the bill is sufficient without a statement of facts and

it is defensive matter.[40] Allegations intended only to forestall an anticipated defense and which do not support the primary claim to relief will be stricken out.[41] A bill or complaint asking injunctive relief in equity must show danger of substantial and serious damage,[42] and that such injury will be irreparable,[43] the complaint alleging the specific facts showing such injury;[44] as, for instance, the fact that defendant is insolvent and cannot respond in damages.[45] Relief cannot be granted on equities set up in affidavits supporting a complaint where the complaint itself fails to state a cause of action.[46] The sufficiency of bills or petitions in particular suits will be found in the footnotes.[47]

Multifariousness.—A bill in equity cannot join independent, inconsistent, and repugnant causes of action sufficient in themselves separately.[48] Matters of

circumstances to excuse laches—Coolidge v. Rhodes, 199 Ill. 24.

40. Pratt Land & Imp. Co. v. McClain, 135 Ala. 452.

41. Stevenson v. Morgan, 64 N. J. Eq. 219.

42. Hart v. Hildebrandt, 30 Ind. App. 415.

43. Chappell v. Jasper County Oil Co. (Ind. App.) 66 N. E. 515.

44. Wabash R. Co. v. Engleman (Ind.) 66 N. E. 892; Porter v. Armstrong, 132 N. C. 66.

45. Porter v. Armstrong, 132 N. C. 66.

46. Landes v. Walls (Ind.) 66 N. E. 679.

47. Moore v. Hammond (C. C. A.) 121 Fed. 759. Bill in suit to construe a deed as demurrable for uncertainty and inconsistency in allegations—Hill v. Spencer, 196 Ill. 65. Bill to set aside fraudulent conveyance as to implied allegation of notice—Flook v. Armentrout's Adm'r (Va.) 42 S. E. 686. Bill stating a cause of action for an accounting and injunction in regard to infringement of a patent—Murjahn v. Hall, 119 Fed. 186. Bill for reformation of written instrument in connection with exhibits attached as a statement of the terms of the alleged instrument or of grounds for relief authorizing reformation—Willard v. Davis, 122 Fed. 363. Petition in suit to annul judgment and set aside execution sale for want of jurisdiction because of failure to serve with process and no appearance—Mullins v. Rieger, 169 Mo. 521. Complaint for an accounting in regard to a mining claim by one alleging that he is the owner of a certain interest and asking for general relief—Yarwood v. Johnson, 29 Wash. 643, 70 Pac. 123. A bill to compel defendant to restore a building erected on plaintiff's land and removed by defendant must show in what manner the building was placed on the land—Bowie v. Smith (Md.) 55 Atl. 625. A petition for relief in equity against a judgment must state its nature or show that it might operate to prejudice plaintiff—Van Every v. Sanders (Neb.) 95 N. W. 870. A bill charging an attorney with failure to pay over money collected and asking an accounting must allege a cause for an accounting—Pfau v. Fullenwider, 102 Ill. App. 499. Though complainant is not obliged to show the full extent of his rights as against the other party, he must show that he has rights as against him—Gould v. Barrow, 117 Ga. 458. A petition by an executor to compel persons to account for property of an estate held by them must allege that the property was acquired in the same manner or held in common—Griffin v. Henderson, 116 Ga. 310. A bill to prevent the opening of a highway alleging a valid judgment of the county court decreeing the opening and averring that the surveyor's report in fact departed from the petition for the highway must allege fraud or misrepresentation—Searcy v. Clay County (Mo.) 75 S. W. 657. An allegation in a bill by a corporation, that defendants are citizens and residents of the state where the suit is brought, and non-residents of another state where the corporation resides, is sufficient as to the places of abode of the parties. Under Equity Rule 20—Tonopah Fraction Min. Co. v. Douglass, 123 Fed. 936. Where a complaint is removed from the state court and demurred to for want of facts, it cannot be dismissed because as a bill in equity, it does not give the address, statement of citizenship, or proper prayer, or because erroneously placed on the law docket, these being objections as to form only. (Rev. St. § 954)—Dancel v. United Shoe Mach. Co., 120 Fed. 839. Where one buys land with actual notice of ownership in another than his grantor, and builds thereon at his peril, a bill to reform his deed because of omission by mistake or fraud, asking cancellation of a deed purporting to convey his land need not allege an offer to pay the value of the improvements put on the land—Blackburn v. Perkins (Ala.) 35 So. 250. That it appears in a suit for reformation of a deed because of mistake and fraud, that the transaction was had between the grantor of complainant and defendant in the name of defendant's wife, though the bill alleged that the land was sold to defendant, will not deprive complainant of relief to which he may be entitled—Id. A complaint alleging that defendant, an agent to purchase land, took title in his own name and claimed ownership and asking a decree making defendant a trustee as to the lands for complainant cannot be sustained as a bill for specific performance of the contract of sale, since it was one to establish a trust—Oden v. Lockwood, 136 Ala. 514. A petition purporting to be filed in a pending suit but showing that such suit has terminated is bad—German v. Browne (Ala.) 34 So. 985. General allegations of no sufficient remedy at law, of multiplicity of suits, cloud on title, and irreparable injury, held sufficient to show jurisdiction of a bill by the Cherokee Nation to enjoin the allowance of leases by the secretary of the interior on tribal lands for mining purposes—Cherokee Nation v. Hitchcock, 187 U. S. 294.

48. **Bills held multifarious**—Sawyer v. Atchison, etc., R. Co., 119 Fed. 252; Day v. National Mut. Bldg. & Loan Ass'n of N. Y.

pure legal cognizance alleged in a bill for equitable relief will not render it multifarious.[49] Legal and equitable causes cannot be joined especially where the distinction in forms is preserved as in Federal courts,[50] nor under codes, except as authorized.[51] Particular causes, as legal or equitable, will be found in the footnotes.[52]

(W. Va.) 44 S. E. 779. Bill to set aside a judgment of the county court opening a highway and for damages against road overseers —Searcy v. Clay County (Mo.) 75 S. W. 657. Bill for cancellation of many independent and separate contracts by one defendant with several complainants—Crawford-Adsit Co. v. Fordyce, 100 Ill. App. 362. Bill asking for partition as to certain defendants and removal of cloud from title as to another who is not at all connected with them—Roller v. Clarke, 19 App. D. C. 539. Petition by executor seeking accounting against two defendants alleged to hold property of the estate but failing to allege that they held any of it in common or that they have acquired it in the same way—Griffin v. Henderson, 116 Ga. 310. Bill joining a cause of action against a corporation to foreclose a mortgage, and another against stockholders to recover fraudulent dividends paid out of the income of the mortgaged property—New Hampshire Sav. Bank. v. Richey (C. C. A.) 121 Fed. 956. Bill by a borrower of a building association to have his stock and obligations cancelled and yet seeking as shareholder to call the officers to account and to have the business wound up—Day v. National Mut. Bldg. & Loan Ass'n of N. Y. (W. Va.) 44 S. E. 779. Bill against judgment debtors and another praying not only a discovery and other equitable relief, but a personal judgment against one, is multifarious as to him —Hudson v. Wood, 119 Fed. 764. Bill against several for an account from two; for foreclosure of deed of trust given by all and for a deficiency judgment, where one has no interest in the land, another has an inalienable equity for life, and the others vested remainders therein—Fields v. Gwynn, 19 App. D. C. 99.

Bills held not multifarious. Bill seeking to restrain use of a patented article and also the use of the generic name of that article—Adam v. Folger (C. C. A.) 120 Fed. 260. Bill to condemn land for a street not multifarious because it makes all persons interested in any of the lands parties—Gardiner v. City of Baltimore, 96 Md. 361. Bill by heirs of a husband and wife to recover land not multifarious because title to some land was vested in the husband to other lands in the wife, and to still other lands in both, nor because defendants claimed through various sources of title—Kilgore v. Norman, 119 Fed. 1006. Bill by one of two grantees against the other alleging an overlapping of the grant from a common grantor and asking apportionment not multifarious because it also seeks apportionment against another person claiming under the defendant grantee—Adams v. Wilson (Ala.) 34 So. 831. Bill by a judgment creditor of a corporation against stock subscribers to subject their subscription notes to the judgment, not multifarious for misjoinder of respondents, though the interests as between respondents themselves are distinct and independent—Henderson v. Hall, 134 Ala. 455; Hall v. Henderson, Id. Bill to enjoin the passing over of oyster beds if such relief be not practicable—Simonson v. Cain (Ala.) 34 So. 1019. Bill to restrain diversion of waters not multifarious because such waters are claimed in different rights, where all are affected alike by the acts of defendants—Rincon Water & Power Co. v. Anaheim Union Water Co., 115 Fed. 543. Bill alleging a fraudulent conveyance pursuant to a conspiracy and that certain decrees were fraudulently obtained pursuant to the same conspiracy and asking that such decrees be set aside—Northwestern Land Ass'n v. Grady (Ala.) 33 So. 874. Bill for an injunction to restrain the lowering of the level of a lake where defendants, though acting independently have contributed to the impairment of such level—Draper v. Brown, 115 Wis. 361. Bill by the federal government against several defendants to prevent pasturing two bands of sheep on a reservation where there are no averments showing different rights or interests as between the defendants—Dastervignes v. United States (C. C. A.) 122 Fed. 30. Creditor's bill based on two several judgments both in favor of the plaintiff and against the same defendant attacking as fraudulent a conveyance of property in trust from the judgment defendants to certain of his co-defendants, reserving annuity to the grantor and also an assignment of the annuity to the other co-defendants, not multifarious the relief asked being in the alternative—De Hierapolis v. Lawrence, 115 Fed. 761. Bill seeking relief against several tax bills issued under separate ordinances as a cloud on title—Perkins v. Baer, 95 Mo. App. 70. Bill to set aside a will and a deed by the same person and alleged to have been procured by undue influence of one defendant—Williams v. Crabb (C. C. A.) 117 Fed. 193. Bill by a judgment creditor of a corporation against the corporation and certain stockholders to recover unpaid stock subscriptions and compel payment for bonds issued to the stockholders not paid for, subsequently amended by an allegation that defendants fraudulently received the assets of the corporation for which they did not pay and that actual fraud existed by which the bill was changed to an ordinary creditor's bill and discovery and accounting was asked —Montgomery Iron Works v. Capital City Ins. Co. (Ala.) 34 So. 210. Bill asking foreclosure and relief against an original mortgagee and various transferees parties who become sureties—Miller v. McLaughlin (Mich.) 93 N. W. 435.

49. Letohatchie Baptist Church v. Bullock, 133 Ala. 548.

50. Equitable defenses will not be heard in ejectment—Highland Boy Gold Min. Co. v. Strickley (C. C. A.) 116 Fed. 852. An action by the United States against heirs of a deceased public officer to recover moneys alleged to have been overpaid him on his salary, as received by them in the distribution of his estate, cannot be joined with one against the sureties on his bond to charge them with liability for the same moneys—United States v. Boyd, 118 Fed. 89.

51. A cause of action for alleged abuse

(§ 6) *C. Amended and supplemental bills, complaints, or petitions.*—The federal statute requiring the court to amend all defects or want of form other than those expressed in a demurrer applies to suits in equity.[53] Plaintiff may amend his

of process and malicious prosecution of a civil suit, based on an attempt to foreclose a mortgage in the federal courts cannot be set up as a counterclaim in a later suit in the state court to foreclose the mortgage—President, etc., of Ins. Co. of North America v. Parker (Neb.) 89 N. W. 1040.

52. A petition of intervention in a suit against a receiver on a claim for damages for death is an equitable proceeding and pleadings must follow the rules and practice in equity—Mercantile Trust Co. v. Pittsburgh & W. R. Co. (C. C. A.) 115 Fed. 475. A suit on a contract, in which a conspiracy is alleged by defendant with others to render performance by him impossible and to render him insolvent in order to defeat the rights of complainant, is equitable—Berliner Gramaphone Co. v. Seaman (C. C. A.) 113 Fed. 750. A suit to recover for breach of contract is not equitable and cannot be brought in a federal court of equity merely because the contract gave complainant the right to inspect defendant's books—India Rubber Co. v. Consolidated Rubber Tire Co., 117 Fed. 354. Where complainants sued for value of gas delivered under a contract, and prayed that because of a mutual mistake the contract be reformed, the suit was brought in equity though the relief to which plaintiff was finally shown to be entitled, amounted to a mere money judgment; under Burns' Rev. St. 1901, § 281, authorizing the joinder of all matters of action necessary to a complete remedy—Palmer Steel & Iron Co. v. Heat, Light & Power Co. (Ind.) 66 N. E. 690. An action to recover for legal services from the estate of a decedent is at law—Kingsbury v. Joseph, 94 Mo. App. 298. Where a crossbill asks cancellation of a lease and affirmative relief destructive of plaintiff's right to recover thereon, the suit is one in equity—Lincoln Trust Co. v. Nathaw (Mo.) 74 S. W. 1007. A suit in the nature of a bill in equity either to have a deed to a bank declared a mortgage so as to allow the mortgagor to redeem, or to enforce a vendor's lien, is a pure chancery proceeding; construing Rev. St. 1899, § 691, providing for jury trials in actions to recover money or specific personalty—Yancey v. People's Bank (Mo. App.) 74 S. W. 117. Matters arising under a plea of set-off cannot be heard in a court of law if based on equitable grounds requiring rescission of the contract—Hancock v. Whitehall Tobacco Warehouse Co. (Va.) 41 S. E. 860; Same v. Hubard, Id. Sufficiency of misrepresentations alleged in answer in a suit on a life insurance policy, praying cancellation thereof, to change the suit under statutory provisions into one in equity; construing Rev. St. 1889, §§ 5849, 5850—Kern v. Supreme Council American Legion of Honor, 167 Mo. 471. A suit to have a deed declared a mortgage so as to allow enforcement of a vendor's lien or redemption by the mortgagor is a purely chancery proceeding; construing Rev. St. 1899, § 691, providing for jury trials in actions to recover money or specific personalty—Yancey v. People's Bank (Mo. App.) 74 S. W. 117. A suit to ascertain the amount of money loaned by plaintiff to defendant and to declare a lien on property pledged as security and to foreclose it is in equity and is not as for a money demand—Conde v. Rogers, 74 App. Div. (N. Y.) 147. Conversion involving issues as to whether a bill of sale was merely a security and whether it was procured by fraud does not present issues solely of equitable cognizance—Frick v. Kabaker, 116 Iowa, 494. Where plaintiff in ejectment claimed by purchase from the purchaser at a trustee's sale, and the answer denied the same and that the grantor in the trust deed was indebted to the grantee, and pleaded usury, no grounds appeared for transfer of the cause to equity—North American Trust Co. v. Chappell, 70 Ark. 507. Where the answer alleges that a mistake was made in reducing the agreement sued on to writing the cause should be transferred to the equity docket at defendant's request for reformation of the contract—Grasmier v. Wolf (Iowa) 90 N. W. 813. A suit to set aside a transfer of stock for fraudulent representations of the transferee, to restrain disposal of those holding in trust for him, to compel delivery of stock certificates and to require a reissue to plaintiff by the corporation, is exclusively in equity—Morrison v. Snow (Utah) 72 Pac. 924. A suit by persons claiming to be the owners of mining lands for restitution of the lands and to restrain the taking of ore therefrom, in which the defendants claimed an abandonment of the property and a re-location by themselves, is an action at law, not a suit in equity and plaintiffs are entitled to a jury—Haggin v. Kelly, 136 Cal. 481, 69 Pac. 140. Whether the right and remedy of a corporation to resist a judgment against it, rendered because of collusive fraud of its officers, be legal or equitable, the right of a taxpayer to resist such judgment on behalf of himself and other taxpayers, is legal, and his remedy equitable—Balch v. Beach (Wis.) 95 N. W. 132. Suit for repeated trespass defended by a claim of a highway is legal, though complainant alleges insolvency of defendants and asks an injunction—State ex rel. Hansen v. Hart (Utah) 72 Pac. 938. Ejectment against grantees of a mortgagor cannot be transferred to equity and tried with a bill to redeem from foreclosure though the defense in ejectment is the right to redeem—Robinson v. United Trust (Ark.) 72 S. W. 992. Where it was agreed on an intervening petition in receivership proceedings that under the general denial the receiver might give evidence of set-off merely in defense, the action of the court in later directing the receiver of its own motion to file a further answer of set-off asking judgment over did not constitute the case a new action, and the intervenor was not entitled to a jury to try the set-off; when equity jurisdiction is developed it continues throughout the controversy though the remedy might be conferred at law—Whitcomb v. Stringer (Ind. App.) 63 N. E. 582.

53. Rev. St. § 954—Dancel v. United Shoe Mach. Co., 120 Fed. 839.

bill or petition if the amendment does not make a new cause of action or create a departure in pleading.[54] If the bill states no cause of action, no amendment can be filed,[55] nor can essential averments as to jurisdiction be supplied.[56] Plaintiff may be allowed to amend his bill after proof to conform to such proof,[57] the result being to set aside former defaults or failure to answer.[58] A bill which does not show, and was not intended to show, any defect as to parties in the original bill, or mistake or omission in its allegation of a fact, is not an amended bill.[59] An affidavit is not an amended or supplemental bill, where filed in course of a hearing without leave to file an amended pleading, nor can its statements render one a necessary party not made so by the bill.[60] Amendments will not be compelled.[61] Defendants may cure allowance of improper amendments by electing to treat an amended as an original bill.[62] Application for leave to amend after replication filed must be made by motion supported by affidavit.[63] An amendment will be refused if not presented until the case is ready for hearing.[64] After demurrer sustained for misjoinder of complainants, the bill may be amended by

54. What constitutes a departure in an amendment from a bill for setting aside attachments as fraudulent—McDonnell v. Finch, 131 Ala. 85. Amended bill as departure from original bill by judgment creditors to subject property of partners to claims on ground of conveyance in fraud of creditors—Metcalf v. Arnold, 132 Ala. 74. An amendment of a bill or petition in equity seeking in effect the same relief for which the suit was brought is allowable. Amendment in a suit to prevent foreclosure of a chattel mortgage and for redemption and sale of the property under Rev. Laws, c. 173, § 48—King v. Howes, 181 Mass. 445. If an amendment states reasons for relief more fully and different in some particulars from those in the original bill, it will be allowable in the discretion of the court as not setting forth a different cause of action, where its purpose is the same. The amendment sought to establish a resulting trust from the same transaction and under the same general rule of law—Brainard v. Buck, 184 U. S. 99. **Amendments held not departure or change of form.** Fixing the time when complainants became creditors of defendant; original bill alleging facts showing that they were such creditors—Hauk v. Van Ingen, 196 Ill. 20. Inclusion in partition of tracts of land omitted from the original complaint—Adams v. Hopkins (Cal.) 69 Pac. 228. As to amount claimed as attorney's fees, under Code, § 706, allowing amendment before final decree—American Freehold Land Mortg. Co. v. Pollard, 132 Ala. 155. Showing that complainant is a corporation, the original petition being in the name of a society—Adas Yeshurun Soc. v. Fish, 117 Ga. 345. Praying for partition in kind and not a sale as asked in the original bill—Berry v. Tennessee & C. R. Co., 134 Ala. 618. In suit against indorser, supplying necessary averments and adding as new parties the personal representatives of the makers—Tidball's Ex'rs v. Shenandoah Nat. Bank (Va.) 42 S. E. 867. Changing from bill to quiet title to action under the statute to determine claims and quiet title—Smith v. Gordon, 136 Ala. 495. Substituting a prayer for accounting and for a money judgment with a special lien on the land for one to recover land in which trust funds were wrongfully invested—Jordan v. Downs (Ga.) 45 S. E. 439. Adding a prayer for a personal judgment in a suit to subject lands to a judgment—Schneider v. Patton (Mo.) 75 S. W. 155. **Amendments held to introduce new cause of action.** Alleging that in the trespass and threatened trespass sued for, defendant acted as agent for another and asking that he be made a party defendant and restrained—Roberts v. Atlanta Real Estate Co. (Ga.) 45 S. E. 308. Setting up irregularities in foreclosure sale, where the original bill seeks redemption—Robinson v. United Trust (Ark.) 72 S. W. 992.

55. Mellor v. Smither (C. C. A.) 114 Fed. 116.

56. It must appear at every stage of the cause that the court has jurisdiction—Dickinson v. Consolidated Traction Co., 114 Fed. 232.

57. South Chicago Brew. Co. v. Taylor (Ill.) 68 N. E. 732; Henderson v. Hall, 134 Ala. 455. Where a mother sued to recover balance remaining unpaid on a conveyance of land to her son for a given consideration and he answered that the real consideration was services rendered and to be rendered in the care of his mother and the proof showed that he had wholly failed in this, the mother may file an amended petition asking cancellation of the conveyance—Stephenson v. Stephenson, 24 Ky. L. R. 1873, 72 S. W. 742.

58. South Chicago Brew. Co. v. Taylor (Ill.) 68 N. E. 732.

59. Smith v. Pyrites Min. & Chemical Co. (Va.) 43 S. E. 564.

60. Sidway v. Missouri Land & Live Stock Co., 116 Fed. 381.

61. In a suit by one state against another state, an amendment to the bill raising the issue as to water rights in a river flowing into and through both states will not be compelled on demurrer, however imperfect the bill may be, but its sufficiency for the relief prayed for will await the trial on the merits—Kansas v. Colorado, 185 U. S. 125.

62. Love v. Moser, 109 Tenn. 143.

63. Equity rule 29—Beavers v. Richardson, 118 Fed. 320.

64. Bill for redemption from foreclosure—Robinson v. United Trust (Ark.) 72 S. W. 992.

dismissal as to the complainant without interest.[65] Where complainant has not made out his case by pleading and proof, the bill may be dismissed in vacation without allowing an opportunity to amend.[66] An order sustaining a demurrer to one aspect only of a bill is merely interlocutory and the order may be revised before final decree and the bill amended at any time as to that portion with permission of the court.[67] Where amendments to a bill filed after sworn answer set up no new cause of action or additional facts requiring answer, the denial of the sworn answer applies to the bill as amended, without further oath or verification.[68] The filing of an amended bill,[69] or of an amended and supplemental bill, is in the discretion of the court and will not be reviewed unless that discretion is abused.[70] If the bill makes no cause of action, one cannot be introduced by supplemental bill which has accrued thereafter, but if the original bill states a cause of action, a supplemental bill may be employed to bring in material facts occurring after its filing,[71] and if leave has been given to file a supplemental bill to bring in matters arising after filing the original bill, matters which might also have been included in the original bill may then be included in the amendment.[72] A supplemental bill is not necessary to bring in material facts occurring after the filing of the original bill only to establish the facts in issue.[73] A statement by the chancellor on hearing a master's report does not amount to a decision on the issues, where there is no entry of an order or decree referring to the report, and a supplemental bill may be thereafter filed.[74]

(§ 6) *D. Cross bill or petition.*—Additional facts relating to the subject-matter of the bill may be set up by cross bill and affirmative relief asked,[75] and the rule applies to cross petitions.[76] Relief will not be granted on a cross bill asking an account which could not be stated with equal justice to the parties.[77] Where the

65. Victor Talking Mach. Co. v. American Graph. Co., 118 Fed. 50.

66. Westbrook v. Hayes (Ala.) 34 So. 622.

67. Globe-Wernicke Co. v. Macey (C. C. A.) 119 Fed. 696.

68. Simonson v. Caln (Ala.) 34 So. 1019.

69. Where specific matters omitted in an original complaint in partition are included by an amendment, its allowance is in the discretion of the court whether the original complaint stated a cause of action or not—Adams v. Hopkins (Cal.) 69 Pac. 228.

70. Berliner Gramophone Co. v. Seaman (C. C. A.) 113 Fed. 750, 115 Fed. 806.

71. Mellor v. Smither (C. C. A.) 114 Fed. 116. A bill which states new facts amounting to an entirely new cause of action between different parties and on which a decree could be rendered without referring to the original bill, is not a supplemental bill—Smith v. Pyrites Min. & Chemical Co. (Va.) 43 S. E. 564. A supplemental bill in a partnership accounting is not objectionable as making a different case from the original bill, where it merely states that after the filing of the original bill the parties agreed that the accounts should be stated according to certain schedules and on the accounting the balance was found due plaintiff—McMurtrie v. Guiler (Mass.) 67 N. E. 358.

72. Mellor v. Smither (C. C. A.) 114 Fed. 116.

73. Pennsylvania Co. v. Bond, 99 Ill. App. 535.

74. French v. Commercial Nat. Bank, 199 Ill. 213.

75. Price v. Stratton (Fla.) 33 So. 644. While the Code is silent in Nebraska as to remedies furnished by the old common law or equity practice, they may be employed in bringing a cross suit not inconsistent with the provisions of the Code—Armstrong v. Mayer (Neb.) 95 N. W. 51. A cross-bill to restrain complainant from enjoying the rights asserted and asked to be established by his bill cannot be maintained since those rights must be adjudicated in settling the issues of the bill and answer—Sunset Tel. Co. v. Eureka, 122 Fed. 960. In a suit against a railroad company by a publishing company because of the refusal to carry papers on a certain train another publishing company having a contract for exclusive right of shipment thereby cannot file a cross bill to obtain equities against the complainant on account of expenses relating to the train service—Memphis News Pub. Co. v. Southern R. Co. (Tenn.) 75 S. W. 941.

76. A cross petition for abuse of process by vexatious delay in an action at law involving the same issues during the pendency of which the suit was stayed, held distinct from the original suit and not allowable—Armstrong v. Mayer (Neb.) 95 N. W. 51. In a suit by a trustee under an assignment of a mortgage to foreclose it, judgment creditors of the owner of the equity in the lands, who allege that the assignment is fraudulent against them as creditors of such owner, cannot amend cross bill to allege that the assignment was also fraudulent against them as creditors of the trustee—Carter v. Carter, 63 N. J. Eq. 726.

77. Memphis News Pub. Co v. Southern R. Co. (Tenn.) 75 S. W. 941.

purpose of a cross petition is defensive only, it need not be brought on equitable grounds nor ask equitable relief, but when it asks affirmative relief, it must be limited to equitable matters if not to matters cognizable on equitable grounds.[78] A cross petition in a suit to remove a cloud on title, not authorized under the Burnt Records act and alleging nothing not already stated in the answer and not asking that a conveyance be removed as a cloud on title, may be stricken from the files.[79] A cross bill should not be dismissed on sustaining demurrer for nonjoinder without giving an opportunity to amend.[80] Where cross complainant filed no amended cross bill on being granted leave to do so but proceeded to hearing, the court, in its discretion, may refuse an application to amend made more than six months after the close of the hearing.[81]

(§ 6) *E. Demurrer.*[82] *Grounds.*[83]—The remedy for improper waiver of answer under oath is by motion not by demurrer.[84] A general demurrer will not lie if the bill states any ground for equitable relief;[85] nor to a bill containing matter proper for relief together with matter not calling for relief;[86] nor to a bill praying special relief on several grounds and general relief, if any claim of the bill is allowed;[87] nor because a discovery and an accounting were sought which could not be granted;[88] nor where it seeks to have the whole bill declared bad for objections applying only to parts of it.[89] A demurrer is properly sustained to a petition on the face of which it appears that there is an adequate remedy at law;[90] or to a bill showing laches in assertion of the rights maintained;[91] or to a bill stating a cause within the statute of limitations at law;[92] and whether averments of an equitable petition warrant the relief asked by its prayers will be determined on general demurrer.[93] Any number of grounds for special demurrer will not sustain a general demurrer.[94] A general demurrer will lie to a bill showing laches.[95] Only grounds apparent on the face of the pleading can be raised by demurrer.[96] A

78. But under the Nebraska Code this practice is so far changed that the relief need not be equitable when based on equitable grounds, but the matters set up in the cross petition must be germane to the original suit—Armstrong v. Mayer (Neb.) 95 N. W. 51.

79. Hurd's Rev. St. 1899, c. 116—South Chicago Brew. Co. v. Taylor (Ill.) 68 N. E. 732.

80. Price v. Stratton (Fla.) 33 So. 644.

81. Ferguson Contracting Co. v. Manhattan Trust Co. (C. C. A.) 118 Fed. 791.

82. Sufficiency of demurrer under Chancery Rule 9, in Michigan—Schaub v. Welded Barrel Co. (Mich.) 90 N. W. 335.

83. The federal statute declaring that no declaration or bill in a civil case in the federal courts shall be quashed for defects or want of form, except those specially set down by the party in case of demurrer and requiring the court to amend all defects or want of form other than those expressed in the demurrer, applies to suits in equity (Rev. St. § 954)—Dancel v. United Shoe Mach. Co., 120 Fed. 839.

84. Springfield Co. v. Ely (Fla.) 32 So. 892.

85. Orlando v. Equitable Bldg. & Loan Ass'n (Fla.) 33 So. 986. On general demurrer for want of equity, the bill must be construed most strongly against the pleader, though if there is any ground of equitable relief or any number of grounds for special demurrer the general demurrer will be overruled—Johnson v. McKinnon (Fla.) 34 So. 272. Not to a complaint asking to set aside a will for fraud and also a transfer of property, for want of consideration, on the ground that equity has no jurisdiction in cases of fraud in execution of a will. Equity will take jurisdiction as to fraudulent transfers of property—Delabarre v. McAlpin, 71 App. Div. (N. Y.) 591.

86. Turner v. Stewart, 51 W. Va. 493.

87. Junior Order Bldg. & Loan Ass'n v. Sharpe, 63 N. J. Eq. 500.

88. Gorman v. Stillman (R. I.) 52 Atl. 1088.

89. Orlando v. Equitable Bldg. & Loan Ass'n (Fla.) 33 So. 986.

90. Sharpe v. Hodges, 116 Ga. 795.

91. Phillips v. Piney Coal Co. (W. Va.) 44 S. E. 774; Johnson v. McKinnon (Fla.) 34 So. 272; Potts v. Alexander, 118 Fed. 885; Wilson v. Wilson, 41 Or. 459, 69 Pac. 923. However see Gleason v. Carpenter, 74 Vt. 399.

92. Equity follows the law by analogy—Parmelee v. Price, 105 Ill. App. 271.

93. Copeland v. Cheney, 116 Ga. 685.

94, 95. Johnson v. McKinnon (Fla.) 34 So. 272.

96. A demurrer cannot be sustained to a bill against an administrator to enforce the sale of stock which decedent had agreed should be sold to his fellow shareholders at his death for a value to be agreed upon by arbitration on the ground that the arbitration had been revoked, where the revocation is not shown in the bill—Fitzsimmons v. Lindsay, 205 Pa. 79. Facts in support of a contention that a tender of borrowed money is necessary to maintenance of a suit to avoid a mortgage must be raised by answer and not demurrer where they do not appear on

demurrer will not lie to part of a bill and answer to a part where the different paragraphs are interdependent so that the bill cannot be divided into parts.[97] A joint demurrer will not be sustained unless good as to all parties joining in it.[98]

Effect of, and procedure on, demurrer.—A demurrer admits the allegations of the bill and during its pendency it does not matter whether the bill is properly verified.[99] Whether specifications and drawings of a patent are sufficiently full and clear to enable experts in the art to understand them cannot be determined on demurrer to a bill for infringement.[1] Where a bill by one tenant in common is not sustained as to the right of complainant to erect a monument on certain land removed by defendant, it will not be retained after demurrer to try the issue of damages to the monument by removal.[2] If defendant asks and is given leave to allow his answer to the original bill to stand as answer to the amended bill, he cannot demur thereafter, except as to new matter set up in the amendment.[3] Sustaining a demurrer to an insufficient plea is not ground for reversal, though the proper practice is to set the plea down for hearing on the sufficiency or by motion to strike.[4] After a successful demurrer by two of several defendants claiming in the same right because of failure to state a cause of action against any defendant, the bill is properly dismissed as to all, though the other defendants do not appear.[5] Where the court on demurrer settles the principles in favor of plaintiff without action pro forma on the demurrer, it will be considered that the sufficiency of the bill was settled in rendering the decree, thereby substantially overruling the demurrer.[6] A joint and several demurrer in behalf of two defendants is abandoned after being overruled where it appears that defendants were ruled to answer and failed, and the bill was taken as confessed against them, and no intention appears on their part to stand by their demurrer.[7] Where a bill shows a case in double aspect by charging certain acts as an infringement of a patent and charging unfair competition and asks relief on both grounds, an order sustaining a demurrer, addressed to one aspect of the bill only, is merely interlocutory and may be revised before final decree, and the bill may be amended as to that portion at any time with the permission of the court.[8] A demurrer on file must be considered as waived where the attention of the trial court is not directed to it during the pendency of the cause.[9]

(§ 6) *F. Plea.*—Laches may be raised by plea.[10] A plea alleging laches is insufficient if it fails to state facts sufficient to constitute estoppel by lapse of time.[11] A plea stating a number of facts all tending to one conclusion, namely that the court is without jurisdiction on the subject-matter, is not multifarious.[12] A plea court is without jurisdiction of the subject-matter, is not multifarious.[12] A plea the state may be properly stricken.[13] After a plea has been set down for argu-

the face of the complaint—Lange v. Geiser, 138 Cal. 682, 72 Pac. 343.

97. Sledge v. Dickson (Miss.) 33 So. 282.

98. Brown v. Tallman (N. J. Ch.) 54 Atl. 457. A demurrer to a bill by a judgment creditor against an insolvent corporation to compel discovery of names and holdings of stockholders on the ground that the corporation was chartered subject to a certain statute, and that it did not appear by the bill that the corporation had ever accepted the general statute governing corporations and the liability of stockholders is without merit, where the bill merely alleges that the corporation is a manufacturing company doing business in a certain city—Clark v. Rhode Island Locomotive Works (R. I.) 53 Atl. 47.

99. Sharples v. Baker, 100 Ill. App. 108.

1. Dade v. Boorum & Pease Co., 121 Fed. 135.

2. Capen v. Leach, 182 Mass. 175.

3. Pennsylvania Co. v. Bond, 99 Ill. App. 535.

4. Breeding v. Grantland, 135 Ala. 497.

5. Griffiths v. Griffiths, 198 Ill. 632.

6. Le Sage v. Le Sage, 52 W. Va. 323.

7. Jocelyn v. White, 98 Ill. App. 50.

8. Globe-Wernicke Co. v. Fred Macey Co. (C. C. A.) 119 Fed. 696.

9. Cessna v. Benedict, 98 Ill. App. 440.

10. Potts v. Alexander, 118 Fed. 885.

11. Crafts v. Crafts, 23 R. I. 5.

12. Vacuum Oil Co. v. Eagle Oil Co., 122 Fed. 105.

13. Under rule 48 of the circuit court—Moore v. Clem (Fla.) 34 So. 305.

ment by complainant, facts stated therein must be taken as true.[14] After a plea to the jurisdiction has been filed, duly noticed, and set down for argument at the following term, complainant cannot move to strike it out.[15] If no objection is made to the sufficiency of a plea, defendant is entitled to a dismissal if he proves a good defense thereunder.[16]

(§ 6) *G. Answer.*—After foreclosure is well advanced under a reference, the master may properly refuse a motion for leave to answer over.[17] A defendant who files a demurrer merely for delay will be allowed to answer only on payment of costs and reimbursement of complainant's unnecessary expenses.[18] Facts not appearing on the face of the complaint must be presented by answer and not demurrer.[19] An answer affecting the right of a co-defendant, and asking relief as against him, must be served upon him.[20] Laches,[21] or the existence of an adequate remedy at law, may be raised by answer.[22] Where plaintiff pleads a contract as the ground of his equity, defendant may plead the whole contract as it existed.[23]

Verification and sufficiency.—If the oath of an answer is defective, complainant must except or move to strike it from the files or apply for a decree pro confesso.[24] If amendments to a bill after sworn answer gives no new cause of action or facts requiring answer, the denial of the answer applies to it without further oath or verification.[25] The answer must be responsive to the bill.[26] Defendant is not excused from answering interrogatories filed with a bill by the fact that they are not specifically referred to therein, if he is not prejudiced by the failure.[27] Where defendant in his answer attempts to excuse failure to answer interrogatories, he must set out as specifically the grounds for such refusal as in a de-

14. Metcalf v. American School Furniture Co., 122 Fed. 115.

15. Under rule 213 of the New Jersey chancery court and Chancery act 1902, § 20—Wilson v. American Palace Car Co., 63 N. J. Eq. 557.

16. Holloway v. Southern Building & Loan Ass'n, 136 Ala. 160.

17. Kiddell v. Bristow (S. C.) 45 S. E. 174.

18. Especially where it appears that complainant's counsel resides at a distance from the court—Merrimac Mattress Mfg. Co. v. Schlesinger, 124 Fed. 237.

19. That complainant seeking to avoid a mortgage had made no tender—Lange v. Geiser, 138 Cal. 682, 72 Pac. 343. And see § 5 E, ante, as to what may be raised by demurrer.

20. Turner v. Stewart, 51 W. Va. 493.

21. Potts v. Alexander, 118 Fed. 885.

22. Vannatta v. Lindley, 198 Ill. 40; but where the lack of an adequate remedy at law is necessary to interference of equity for plaintiff, the objection of its presence need not be taken by answer—Everett v. De Fontaine, 78 App. Div. (N. Y.) 219.

23. McCoy v. Kane, 19 Pa. Super. Ct. 187.

24. By setting a cause down for hearing on bill and answer before replication filed and before it is at issue, he will be held to have admitted all its allegations at the hearing regardless of a defective verification—Lee v. Bradley Fertilizer Co. (Fla.) 33 So. 456.

25. Simonson v. Cain (Ala.) 34 So. 1019.

26. An answer confined to facts necessarily required by the bill and other facts inseparably connected so that they constitute one and the same transaction, is responsive when it discharges as well as when it charges the defendant—Maxwell v. Jacksonville Loan & Imp. Co. (Fla.) 34 So. 255. Where an answer to a bill to set aside a conveyance of land for fraud is based on the vacant character of the land, and alleges that defendant is in possession, it is responsive and the bill must be dismissed if no other proof appears—Ropes v. Jenerson (Fla.) 34 So. 955. Answer to bill to set aside a tax sale as evasive and irresponsive and deficient in failing to require complainant to prove the allegations of his bill—Applewhite v. Foxworth, 79 Miss. 773. Equity rule 34 which directs that defendant shall be assigned to answer the bill, or so much thereof as is covered by a plea or demurrer, after the plea or demurrer overruled, as applied in the decisions of the federal supreme court, though such rule is not there construed or explained, controls a defendant desiring to answer after an issue of fact has been determined against him on a plea joined—Westervelt v. Library Bureau (C. C. A.) 118 Fed. 824. Where the interrogatory of a bill to set aside a deed as fraudulent, calls upon defendants to answer whether any valuable consideration was received, what it was, where and when paid, and who were present, and the answer stated that a valuable consideration was paid, which consisted in the liquidation of a debt from the grantor to the grantee in a certain amount for unpaid rent and in cash of a certain amount paid from time to time by currency and check as the business of the grantor required, the responses did not possess the precision and detail required by the bill—O'Connor v. Williams (N. J. Eq.) 53 Atl. 550.

27. Specific reference required by Equity Rule 43—Federal Mfg. & Printing Co. v. International Bank Note Co., 119 Fed. 385.

murrer on the same grounds.[28] Defendant cannot be required to answer as to a trade secret.[29] An answer relevant to particular relief or the costs is not impertinent.[30]

Effect of answer; as evidence; admissions.—A responsive answer is conclusive, unless opposed by two witnesses or by one witness and corroborating facts equal to the testimony of another;[31] however, in West Virginia by statute an answer is not evidence, whether under oath or not, but only puts plaintiff on proof of his bill as denied by the answer.[32] An answer under oath has only the effect of an unsworn answer, where the bill expressly waives a sworn answer,[33] but a bill cannot be amended after a sworn answer has been filed in response to a demand in the original bill so as to waive the sworn answer, especially as to matter set up in the original bill.[34] The answer is taken as true where the case is heard on bill and answer, or on bill, answer, and exhibits,[35] Jurisdictional averments cannot be supplied by allegations of the answer.[36] If complainant introduces defendant's answer in evidence, its denials must be considered as well as its admissions.[37] An answer which admits a fact not mentioned in the note of testimony or order of submission, does not constitute evidence of that fact.[38] Where an unsworn answer in foreclosure denied payment of a debt, but admitted execution of a mortgage, plaintiff's proof consisting of the note, mortgage, and answer, was insufficient.[39]

(§ 6) *H. Replications, exceptions, and motions.*—Where a plea is allowed on argument, complainant may file a replication and contest its truth.[40] A general replication filed to a plea in bar does not admit its sufficiency.[41] Under Code Miss. § 540, no replication to an answer is necessary.[42] Exceptions must be filed to the form of a plea.[43] Exceptions cannot be allowed to the entire answer for insufficiency where a material averment of the bill is denied,[44] nor is failure to answer an immaterial averment ground of exception.[45] A motion to strike out a cross bill for

28. Equity Rule 44—Boyer v. Keller, 113 Fed. 580.

29. Federal Mfg. & Printing Co. v. International Bank Note Co., 119 Fed. 385.

30. Robertson v. Dunne (Fla.) 33 So. 530.

31. Hopkins v. Stoneroad, 21 Pa. Super. Ct. 168. Suit to have plaintiff declared the owner of a third interest in a mortgage—McCoy v. Kane, 19 Pa. Super. Ct. 187. Where a sworn answer is not expressly waived by the bill—Calivada Colonization Co. v. Hays, 119 Fed. 202. Testimony by a wife supporting that of her husband as against an answer in equity is entitled at least to the weight of a corroborating circumstance so as to satisfy the equitable requirement—Sharp v. Behr, 117 Fed. 864. On a motion for dissolution of an injunction to restrain a trustee's sale, a denial by the sworn answer of an allegation in the bill that certain judgment liens are prior to the lien of a trust deed must be taken as true, where no proof is given on the subject—Hudson v. Barham (Va.) 43 S. E. 189.

32. Code 1899, c. 125, §§ 38, 59—Knight v. Nease (W. Va.) 44 S. E. 414.

33. Morrison v. Hardin (Miss.) 33 So. 80.

34. Springfield Co. v. Ely (Fla.) 32 So. 892.

35. Complainant thereby admits all the allegations of the answer whether responsive or not and that he has no ground of relief except as admitted in the answer—Goddard v. Chicago, etc., R. Co., 104 Ill. App. 526; Gates v. City of Grand Rapids (Mich.) 95 N. W. 998; Ropes v. Jenerson (Fla.) 34 So. 955. After complainant secures the suit to be set down for hearing on bill, answer and replication before the three months allowed by Equity Rule No. 71 for taking testimony and a hearing is had by the parties without testimony, and without objection by defendants, they have waived their right to take testimony and their answer is evidence only in so far as it is responsive—Maxwell v. Jacksonville Loan & Imp. Co. (Fla.) 34 So. 255.

36. A defect in a bill by a purchaser at a foreclosure sale for subrogation to the rights of another mortgagee, in that it does not show that the mortgage was a subsisting incumbrance on the land is not cured by an admission in the answer that the satisfaction of the mortgage was void—Tait v. American Freehold Land Mortg. Co., 132 Ala. 193.

37. Scott v. Brassell, 132 Ala. 660.

38. Tait v. American Freehold Land Mortg. Co., 132 Ala. 193.

39. Scott v. Brassell, 132 Ala. 660.

40. Austin v. Hoxsie (Fla.) 32 So. 878.

41. Under Equity Rule 33—Soderberg v. Armstrong, 116 Fed. 709.

42. Where an answer to a bill seeking to subject certain railroad property to payment of taxes alleged that the railroads were constructed by companies under charters which contained exemption privileges, an issue was raised without replication as to what company constructed the road—Yazoo, etc., R. Co. v. Adams (Miss.) 32 So. 937.

43. Formal objections waived by setting plea down for hearing—Vacuum Oil Co. v. Eagle Oil Co., 122 Fed. 105.

44. Moore v. Clem (Fla.) 34 So. 305.

45. Peters v. Tonopah Min. Co., 120 Fed.

irrelevant matter stated is a substitute for a demurrer and raises the question of legal sufficiency of its allowance as the basis for relief.[46]

If a motion to strike out pleas is not tried or submitted for trial, it will be considered abandoned.[47]

(§ 6) *I. Issues, proof, and variance.*—The evidence offered must correspond with the allegation in the pleadings and be confined to the issues.[48] Material averments in the bill, neither admitted nor denied by the answer, must be proved.[49] Where the liabilities of several respondents to a bill are separate and distinct as among themselves, material facts denied by any of them may be proven, though admitted by a majority of them.[50] A certified copy of a corporate charter supplemented by parol testimony is sufficient on the issue of incorporation as against a denial on information and belief.[51]

(§ 6) *J. Objections and waiver thereof.*[52]—Where a case has been sent to a referee by agreement, want of jurisdiction cannot be first raised by defendant after close of the testimony.[53] Misjoinder of causes and parties must be objected to before trial.[54] An order appointing a receiver is not void because an amended bill was not verified, no objection for the defect being taken at the time.[55] An objection that another action for the same cause was pending, made by answer but stricken out during the trial on defendant's motion, is waived.[56] Consent by defendants to amendment and failure to demur to the original bill for omissions waives any defects thereby created.[57] The right to allege error in the overruling of a de-

537. Exception will not lie to an answer in a suit in a federal court, which fails to answer an averment of the bill that a true and correct copy of the plat referred to is attached and made an exhibit, where no rule of pleading requires such exhibits to be attached.—Id.

46. Hanneman v. Richter, 63 N. J. Eq. 753. A motion to strike out that part of an answer in partition denying the title claimed by the bill, as that of tenants in common with defendant under a certain devise, should be denied, since it is merely a substitute for an exception instead of a demurrer, and that part of such answer in question is not impertinent. Chancery Rule 213—Id.

47. Adair v. Feder, 133 Ala. 620.

48. Stockton v. National Bank of Jacksonville (Fla.) 34 So. 897. Proof as to an essential fact is insufficient however full and convincing it may be, unless the fact is alleged in the pleadings—Lyle v. Wynn (Fla.) 34 So. 158. Where in a suit to set aside a conveyance from husband to wife on the ground of fraud of creditors a set-off is not pleaded against the claim by cross-bill, no evidence of such set-off can be introduced—Noble v. Gilliam, 136 Ala. 618. Where a proceeding is brought in joint names of the owner, of a patent and another to restrain infringement, defendant has no concern with the terms of the agreement regarding the patent between the parties plaintiff whether it constitutes an exclusive license to manufacture or an unlawful combination in restraint of trade—Cincinnati Unhairing Co. v. American Fur Refining Co., 120 Fed. 672. Evidence showing an agreement, the existence of which was not alleged in the pleadings, is irrelevant and inadmissible under a cross bill. Cross bill to enforce a statutory lien on railroad property in favor of a sub-contractor under which evidence was introduced showing an agreement by the principal contractor to take certain bonds of the company at a certain price, which the sub-contractor had agreed to receive in part payment for work done—Ferguson Contracting Co. v. Manhattan Trust Co. (C. C. A.) 118 Fed. 791. Variance between allegations of bill and evidence in a suit by a deserted wife to set aside a conveyance by her former husband is without consideration and inimical to her interests and because the homestead was released without her joinder in the deed—Smith v. Kneer, 203 Ill. 264.

49. Glos v. Cratty, 196 Ill. 193.

50. Henderson v. Hall, 134 Ala. 455; Hall v. Henderson, Id.

51. Samuel Bros. & Co. v. Hostetter Co. (C. C. A.) 118 Fed. 257.

52. Complainant waives any objection to a plea in form or substance which may only be taken by exceptions by setting the plea down for argument without replication and admits the truth of all facts well pleaded however inconsistent or contradictory to the bill—Cook v. Sterling Electric Co., 118 Fed. 45. Where a devisee had taken an assignment of claims of his testator to damages because of the operation of an elevated railroad in front of premises belonging to the estate and asks recovery for past damages sustained to the estate in a suit to restrain maintenance of the road, defendant waived any right to have such damages ascertained in an action at law, where he made no objection to the plaintiff's right to recover in an equitable proceeding, though proof was received—Hirsh v. Manhattan R. Co., 84 App. Div. 374.

53. Richmond v. Bennett, 205 Pa. 470.

54. Curran v. Hagerman (Neb.) 92 N. W. 1003.

55. Clark v. Brown (C. C. A.) 119 Fed. 130.

56. Under Code Civ. Proc. §§ 168, 169—Kiddell v. Bristow (S. C.) 45 S. E. 174.

57. Hauk v. Van Ingen, 196 Ill. 20.

murrer to a bill is not lost by attending the taking of testimony before the master and cross-examination of witnesses.[58] A defendant does not waive error in the overruling of a demurrer by failing to give notice and secure entry of record that he had elected to abide by the demurrer.[59] Where, by his pleadings, defendant asks equitable relief, he waives any objection to equitable jurisdiction,[60] such objection, where based on facts appearing on the face of the bill, is waived by failure to demur.[61]

(§ 6) *K. Pleading laches and acquiescence.*—Laches need not be pleaded as a defense, but it is sufficient if it appears from the evidence.[62] It may be raised by plea or answer, or on the hearing, or preliminary to the hearing.[63] Generally, it may be pleaded by demurrer,[64] especially if plaintiff shows requisite facts constituting laches;[65] however, in Vermont, it seems, the rule is otherwise.[66] The statute of limitations may be raised by demurrer.[67]

§ 7. *Taking bill as confessed or default.*—Complainant is not entitled to a decree pro confesso if his complaint is insufficient to support such decree though defendant may be in default;[68] such decree is properly entered after time granted to answer on overruling a demurrer but no answer is filed, unless a sufficient cause for not pleading is shown, or a good cause for further time to plead,[69] and if defendants are not under disability, follows as a matter of course after default entered against them and cannot be assailed if warranted by averments of the bill.[70] Equity rules being extended to proceedings to enforce the bankruptcy act, failure to file an answer to a petition for expunging a claim will give plaintiff a right to a decree pro confesso with the ordinary consequences of such decree.[71] After a bill has been taken for confessed, evidence is introduced only in the discretion of the court and may not be required if facts alleged in the bill and confessed will support a decree.[72] Even after decree pro confesso, the final decree must be based on allegations of the bill and must not grant more than is asked for and shown by it.[73]

§ 8. *Trial by jury of special issues.*[74]—Where a feigned issue is directed to be made, the order should provide for its trial by jury, unless the parties waive a jury.[75]

58. Jocelyn v. White, 201 Ill. 16.

59. Jocelyn v. White, 201 Ill. 16.

60. A defendant asking such relief by answer cannot object that an action to quiet title was brought on the equity side of the docket—McBride v. Whitaker, (Neb.) 99 N. W. 966. In a suit to establish a boundary between adjacent lands defendant, by admitting the dispute and praying that the boundary be established on the line described by him, waived all objection to jurisdiction—Killgore v. Carmichael (Or.) 72 Pac. 637. Answering and going to trial on the merits in a divorce proceeding after the overruling of the bill on the ground of multifariousness, waives any objection which the holder of the legal title to the land claimed by the wife as owned by her husband may have had to the jurisdiction of the court to determine the ownership of the land in the divorce proceeding—VanVleet v. DeWitt, 200 Ill. 153.

61. Negaunee Iron Co. v. Iron Cliffs Co. (Mich.) 96 N. W. 468. Suit to restrain removal of line fence—F. H. Wolf Brick Co. v. Lonyo (Mich.) 93 N. W. 251.

62. Calivada Colonization Co. v. Hays, 119 Fed. 202; this statement is not true in all jurisdictions, see Fletcher Eq. Pl. & Pr. § 275. On a petition of intervention in foreclosure, laches may be considered as a defense without being pleaded—Gunderson v. Illinois Trust & Sav. Bank, 199 Ill. 422.

63. Potts v. Alexander, 118 Fed. 885.

64. Phillips v. Piney Coal & Coke Co. (W. Va.) 44 S. E. 774; Johnson v. McKinnon (Fla.) 34 So. 272; Potts v. Alexander, 118 Fed. 885; Fletcher Eq. Pl. & Pr. §§ 207, 275.

65. Wilson v. Wilson, 41 Or. 459, 69 Pac. 923.

66. Gleason v. Carpenter, 74 Vt. 399.

67. Parmelee v. Price, 105 Ill. App. 271.

68. Wong Him v. Callahan, 119 Fed. 381.

69. Ray v. Frank (Fla.) 32 So. 925.

70. Dunfee v. Mutual B. & L. Ass'n, 101 Ill. App. 477.

71. Gen. Rules in Bankruptcy No. 37—In re Docker-Foster Co., 123 Fed. 190.

72. Jackson Union Tel. Co. v. Ava, etc., Tel. Co., 100 Ill. App. 535.

73. Lyle v. Wynn (Fla.) 34 So. 158.

74. Character of action under Code practice as determining right to jury trial—New Harmony Lodge v. Kansas City, etc., R. Co. (Mo. App.) 74 S. W. 5.

75. Russell v. Chicago & M. Elect. R. Co., 98 Ill. App. 347.

Right to jury trial.—A jury is not a matter of right in an equity cause,[76] but the court in its discretion may submit to the jury any question of fact,[77] where an action is purely one of equity and contains no legal issues, and its action will not be disturbed unless such discretion is abused,[78] and the character of the cause of action as legal or equitable determines the right to a jury under the codes.[79] However, it is generally otherwise as to legal issues,[80] wherein state statutes cannot control the federal courts.[81] After equity jurisdiction is developed, it continues throughout the controversy though the remedy might be conferred at law, so that a jury trial to determine a set-off may be denied.[82] Failure to apply to the court on notice for trial by jury of specific questions of fact is a waiver thereof.[83] It cannot be objected that the judge charged the jury more fully for one party than for the other in a suit in equity, where it appears that he charged fully the defense made by the pleas and evidence of the objecting party.[84] The court may properly refuse to submit certain questions to another jury after a disagreement by the first, and their discharge and a decree on testimony already heard.[85]

Verdict or findings and effect thereof.—The verdict is advisory only,[86] and hence error cannot be assigned on the form in which interrogatories were pro-

76. Maggs v. Morgan, 30 Wash. 604, 71 Pac. 188.

77. Welch v. Tipperry (Neb.) 92 N. W. 582. Where an answer in a suit for settlement and accounting of a partnership alleges a settlement, the issue thereby made may be taken from the jury in the discretion of the chancellor—Ely v. Coontz, 167 Mo. 371. In a suit in the nature of a bill in equity to have a deed to a bank declared a mortgage so as to allow the mortgagor to redeem or to enforce a vendor's lien, a jury trial is not allowable except that the judge may take the jury's verdict on the issues as advisory—Construing Rev. St. 1899, § 691, providing for jury trials in actions to recover money or specific personalty—Yancey v. People's Bank (Mo. App.) 74 S. W. 117.

78. Culp v. Mulvane (Kan.) 71 Pac. 273; Reese's Adm'r v. Youtsey, 24 Ky. L. R. 603, 69 S. W. 708. Were a cross bill in a suit asking a decree concelling a lease and a judgment prays affirmative relief destroying plaintiff's right to recover, it constitutes the suit one in equity in which a trial by jury is properly denied—Lincoln Trust Co. v. Nathan (Mo.) 74 S. W. 1007. Where an appeal is taken from the district court in a proceeding in the probate court admitting to probate a spoliated or destroyed will, a jury trial is not a matter of right—Gallon v Haas (Kan.) 72 Pac. 770. A suit to set aside a transfer of corporate stock because of fraudulent representations of the transferee, to restrain holders of stock in trust for him from disposing of it and to compel delivery of stock certificates and require a re-issue of the stock of plaintiff by the corporation, is exclusively a suit in equity so that neither party has a right to a jury trial—Morrison v. Snow (Utah) 72 Pac. 924.

79. New Harmony Lodge v. Kansas City, etc., R. Co. (Mo. App.) 74 S. W. 5. A jury is not a matter of right under the Code in a suit to restrain maintenance of a nuisance and to recover past damages—Under Code Civ. Proc. § 968—Miller v. Edison Electric Illuminating Co., 78 App. Div. (N. Y.) 390.

80. Where defenses by way of counterclaim are set up in an action to restrain the sale of a negotiable note, defendant may have a jury trial on the issue of damages—Larrabee v. Given (Neb.) 91 N. W. 504. Where a complaint for trespass is denied by an answer alleging a highway to exist at the locus of the alleged trespass, the action is at law entitling either party to a jury on the legal issues though injunctive relief is sought—State ex rel. Hansen v. Hart (Utah) 72 Pac. 938.

81. In a creditor's suit in a federal court against the judgment defendant and another alleged to be his debtor on a mere money demand, the question of the indebtedness of the third person if denied by him cannot be tried by the court though such procedure is authorized by the statute of the state, since that would deprive the alleged debtor of his constitutional right to a jury—Hudson v. Wood, 119 Fed. 764.

82. Whitcomb v. Stringer (Ind. App.) 63 N. E. 582.

83. Under Code Civ. Proc. § 970—Steinway v. Von Bernuth, 82 App. Div. (N. Y.) 596.

84. Jordan v. Downs (Ga.) 45 S. E. 439.

85. Hardy v. Dyas, 203 Ill. 211.

86. Kozacek v. Kozacek, 105 Ill. App. 180; Yancey v. People's Bank (Mo. App.) 74 S. W. 117; Buckers Irr. Mill. & Imp. Co. v. Farmers' Independent Ditch Co. (Colo.) 72 Pac. 49. The issue whether a written receipt for payment of money should be reformed to show that the amount was given in full payment is for the court so that a verdict of the jury is merely advisory—Kammermeyer v. Hilz (Wis.) 92 N. W. 1107. In an action by a creditor against persons alleged to have fraudulently converted and concealed property of his decedent debtor and asking discovery for himself and all other creditors of decedent, on submission of the issues to a jury for advisory findings, the court may refuse to accept such findings but may make new ones, proper in its opinion under the evidence, since the action is to be tried by the court and not as a matter of right by the jury—Culp v. Mulvane (Kan.) 71 Pac. 273.

pounded.[87] Where an indefinite verdict is returned, the court may request the jurors to state the meaning of their answers and suggest that more explicit answers be made.[88] Adoption of a special verdict of a jury on an equitable issue makes it the court's finding.[89] Submission of a particular issue does not take the whole case to the jury so that the court may refuse to consider it.[90]

§ 9. *Hearing or trial; rehearing. A. In general.*—An action to reform a note and another to enforce payment thereon should be tried separately, the first having prior trial,[91] but an action for damages and for restraint of continuance of the wrong contains one cause of action, and a motion to try the equitable issues first must be denied.[92] Complainant may ordinarily discontinue at any time before defendant is entitled to a decree.[93] Rehearing may be granted before decree,[94] but not afterward except for grave error or newly-discovered evidence.[95]

(§ 9) *B. Dismissal.*[96]—A bill will be dismissed where jurisdictional facts are not shown on the hearing,[97] or if the bill is multifarious,[98] or when after hearing on bill and exhibits, the bill does not show a proper case for relief,[99] though not if equity is apparent on the face of the bill though a demurrer might lie,[1] or if the defect may be cured by amendment.[2] A bill by creditors to set aside a fraudulent attachment should be dismissed as to nonresident defendants.[3] If the plea

87. Suit to quiet title—W. H. Taggart Mercantile Co. v. Clack (Ariz.) 71 Pac. 925.

88. Jordan v. Downs (Ga.) 45 S. E. 439.

89. Kammermeyer v. Hilz (Wis.) 92 N. W. 1107.

90. Where on a petition for enforcement of a mechanic's lien, issues were submitted to a jury as to whether notes reported by the auditor on reference of the account, to have been given by one of the defendants to petitioners were received and accepted in payment of the claim, the issue related only to the original receipt of the notes and did not determine that the petitioners had not received in so far the benefit of the notes that they should be charged against them, so that the refusal of the court to consider the whole question on the ground that the jury had determined it was error—Moore v. Jacobs, 182 Mass. 482.

91. Tapley v. Herman, 95 Mo. App. 537.

92. Stoner v. Mau (Wyo.) 72 Pac. 193.

93. He is entitled to a discontinuance on payment of costs where the case has not progressed so as to entitle defendant to decree and no other party has intervened—Forrest v. City Council of Charleston (S. C.) 43 S. E. 952. He may dismiss his bill after close of the evidence, the setting of the cause on the calendar, and an order by the court to stand for hearing but before the hearing, where defendant would be deprived of no substantial right accruing after commencement of the suit, and is entitled to no affirmative relief, though he may be subjected to a subsequent suit—Pennsylvania Globe Gaslight Co. v. Globe Gaslight Co., 121 Fed. 1015. Complainant in a suit for infringement of a patent may not discontinue after the taking of proofs at great expense to defendant, merely to re-try questions involved in a new suit—American Steel & Wire Co. v. Mayer & Englund Co., 121 Fed. 127.

94. Hellams v. Prior, 64 S. C. 543.

95. It cannot be had after decree on the merits on answer filed, unless for grounds sufficient for bill of review for error apparent on its face, or for an original bill to impeach it for fraud, or because of newly-discovered evidence—Snyder v. Middle States Loan, Bldg. & Const. Co., 52 W. Va. 655. Where an amendment to a petition was filed, to conform to the proof, and the decree was not rendered until more than seven months later, and no attempt was made by defendant to take any new testimony, the decree will not be set aside and re-hearing allowed for the introduction of further evidence, the character of which is not shown. Suit to remove cloud on title—South Chicago Brewing Co. v. Taylor (Ill.) 68 N. E. 732.

96. Allowance of voluntary dismissal of bill because of answer showing a set-off growing out of the subject matter of the bill and of such a character that an independent action thereon would be barred by limitation at the time the bill was dismissed but not when filed—Ex parte Jones, 133 Ala. 212.

97. Union Light & Power Co. v. Lichty, 42 Or. 563, 71 Pac. 1044.

98. Day v. National Mut. Bldg. & Loan Ass'n of N. Y. (W. Va.) 44 S. E. 779.

99. Bowie v. Smith (Md.) 55 Atl. 625; Wilson v. Derrwaldt, 100 Ill. App. 396. A bill will be dismissed where the record shows no justice or conscience in plaintiff's claim—Anthes v. Schroeder (Neb.) 92 N. W. 196. A decree dismissing a creditor's bill as to certain defendants is proper, where it appears by the evidence that they had purchased property of the debtor in good faith and paid for it without any knowledge of his debts—Benedict v. T. L. V. Land & Cattle Co. (Neb.) 92 N. W. 210.

1. West v. Louisville & N. R. Co. (Ala.) 34 So. 852.

2. But dismissal will be denied where the bill may be amended by striking out a defective disjunctive averment (Taylor v. Dwyer, 131 Ala. 91). If it does not appear from the original bill that it can be amended so as to entitle complainant to relief, dismissal for want of equity will not be denied, nor the amendment considered as made—Tait v. American Freehold Land Mortg. Co., 132 Ala. 193.

3. Adair & Co. v. Feder, 133 Ala. 620.

is sustained by the proofs, the bill must be dismissed.[4] Dismissal of a bill by plaintiff without prejudice is in the discretion of the court to be allowed in consideration of the rights of both parties.[5] Dismissal of a bill cannot accompany refusal of a preliminary injunction where defendant has not demurred to the bill nor set down the case for hearing on bill and answer and a motion for preliminary injunction was the only matter before the court.[6] Where a defendant defaults and refuses to answer, dismissal of the bill cannot include him though proper as to other defendants.[7] Where the only issue on a bill by the donor of a trust to compel the trustee to refund on death of the beneficiary was plaintiff's right to the funds, the court cannot pass on the trustee's account on dismissal, and direct him to retain the funds for a certain beneficiary.[8] Failure in pleading and proof may be followed by dismissal in vacation without giving an opportunity to amend,[9] but a cross bill, insufficient for failure to join a necessary party defendant, cannot be dismissed on sustaining a demurrer without an opportunity to amend as to such party.[10] After the superior court has entered a final decree granting relief prayed for, it cannot dismiss the bill by decree at a subsequent term.[11] Dismissal of a bill carries the cross bill made up of an answer alleging a set-off not purely equitable in character, and insufficient to support an original bill;[12] but will not affect a cross-bill asking affirmative relief, though it carries with it a cross bill which is merely defensive in its character,[13] or an amended and a supplemental bill filed with the original bill where the order was without reference to the amended pleading, since it was made upon a defective record.[14] Dismissal of a cross bill for want of equity must be determined by inspection of the cross bill alone in its relation to the original bill assuming its statements to be true.[15]

(§ 9) *C. Evidence and its introduction.*[16]—Failure to object to evidence on its introduction will not prevent objection to relevancy on the final hearing.[17] A rule allowing three months for taking testimony after case is at issue means three calendar months excluding the day of filing the replication.[18] The usual equity practice is to try all cases on depositions.[19] A motion to reopen the cause before the master and allow defendants to introduce evidence may be granted, though, before the motion was made, notice was given that a change of venue would be asked.[20] Where the evidence as to material issues is conflicting, the court in its discretion may refuse relief.[21] Fraud need not be proved beyond a reasonable

4. Eveleth v. Southern Cal. R. Co., 123 Fed. 836.
5. Ebner v. Zimmerly (C. C. A.) 118 Fed. 818.
6. Lyndall v. High School Committee, 19 Pa. Super. Ct. 232.
7. Creditor's suit—Benedict v. T. L. V. Land & Cattle Co. (Neb.) 92 N. W. 210.
8. Scofield v. Peck, 182 Mass. 121.
9. Westbrook v. Hayes (Ala.) 34 So. 622.
10. Price v. Stratton (Fla.) 33 So. 644.
11. Ernst Tosetti Brewing Co. v. Koehler, 200 Ill. 369.
12. Ex parte Jones, 133 Ala. 212.
13. Price v. Stratton (Fla.) 33 So. 644.
14. In the appellate court of Virginia, the bill and amended and supplemental bill together constituted one record—Berliner Gramophone Co. v. Seaman (C. C. A.) 113 Fed. 750.
15. Woodruff v. Adair, 131 Ala. 530.
16. Sufficiency of evidence to support a decree locating a boundary line (Killgore v. Carmichael [Or.] 72 Pac. 637) in suit to enforce equitable lien for award for land taken for railroad right of way (Southern R. Co. v. Gregg [Va.] 43 S. E. 570) of fraud on the part of a national bank in the organization and operation of a corporation formed by complainant and stockholders and officers of the bank, rendering it liable to complainant on the contracts of such corporation—Edward P. Allis Co. v. Standard Nat. Bank (C. C. A.) 124 Fed. 55.
17. Suit for infringement of patent—Diamond Drill & Mach. Co. v. Kelly Bros., 120 Fed. 282.
18. Circuit Court Rule No. 71—Maxwell v. Jacksonville Loan & Imp. Co. (Fla.) 34 So 255.
19. Dickerson v. Askew (Miss.) 34 So. 157. The taking of oral proof on notice in a suit to foreclose a vendor's lien is not authorized by Code 1892, § 1764.
20. Brewster v. Cahill, 199 Ill. 309.
21. Blats v. Blats, 117 Ga. 165; Hardy v. Dyas, 203 Ill. 211. Prayer for injunctive relief—Leath v. Hinson, 117 Ga. 589. A de-

doubt, circumstantial or presumptive evidence being sufficient.[22] Generally, one asking cancellation of an instrument for fraud must prove such fraud,[23] but if the instrument was secured by one in a fiduciary relation, the burden is on him to show it free from fraud.[24] Where the case has been submitted for final decree on the register's report and exceptions, the rules of chancery practice requiring the making of a note of testimony offered at the hearing did not apply.[25]

Verdict and findings.—The statute relating to findings of fact does not apply to equitable actions.[26] A mere opinion expressed by a judge of the federal circuit court on a question of fact is not a finding of facts in equity.[27] A special finding that certain ditches intercepted all waters flowing into a certain stream and diverted all its surface and subterranean waters is not in conflict with a general finding that there had been no actual increase to the stream by such ditches.[28] A verdict in a suit for concellation of a contract and deeds thereunder is sufficient where it refers to the description in the deed which is substantially the same as that in the petition and which fully identified the property.[29]

§ 10. *Decree, judgment, or order. A. In general; requisites and sufficiency.*[30] —A decree sustaining a demurrer to a bill is not defective, though it does not state on what ground it is sustained, if any one ground is well taken.[31] Where a petition contained all necessary averments of a bill and was answered by defendant, and the issues were tried by the court on evidence given the court having jurisdiction, its order and judgment amount to a decree in equity settling the accounts.[32] It is immaterial that the decree was not drawn or spread upon the records until after adjournment for the term, where it conforms to the findings announced orally after return of the verdict though somewhat more extensive in detail.[33]

(§ 10) *B. Effect and construction.*—A personal decree is of the same effect and rests on the same basis as a judgment at law.[34] Plaintiff is put out of the case by a decree for interpleader and the cause is ended by a decree determining the rights of various defendants.[35] An order directing a final decree to be entered in accord with the verdict is not conclusive that the jury's findings were adopted without modification.[36] A decree requiring defendant to do certain things and in default thereof directing a certain judgment to be rendered against him is none the less final because defendant defaulted and judgment required was then rendered;[37] but

cree will not be disputed unless plainly wrong where the evidence relating to fraud, upon which it is founded, is conflicting—Sibley v. Stacey (W. Va.) 44 S. E. 420.

22. Knight v. Nease (W. Va.) 44 S. E. 414.

23. Mortimer v. McMullen, 102 Ill. App. 593.

24. Sheehan v. Erbe, 77 App. Div. (N. Y.) 176.

25. Rules 76, 77—Whetstone v. McQueen (Ala.) 34 So. 229.

26. White Crest Canning Co. v. Sims, 30 Wash. 374, 70 Pac. 1003.

27. Hendryx v. Perkins (C. C. A.) 123 Fed. 268.

28. Buckers Irr. Mill. & Imp. Co. v. Farmers' Independent Ditch Co. (Colo.) 72 Pac. 49.

29. American Cotton Co. v. Collier (Tex. Civ. App.) 69 S. W. 1021.

30. Time for entry of final decree after amended bill—Bank of Bramwell v. White (W. Va.) 44 S. E. 287. Sufficiency of decree directing a sale of railroad property in foreclosure as determining the validity of a sub-contractor's lien under an issue raised by the pleadings though such issue had not been tried or had been left to be determined by subsequent reference to a master—Ferguson Contracting Co. v. Manhattan Trust Co. (C. C. A.) 118 Fed. 791.

31. Adams v. Wilson (Ala.) 34 So. 831.

32. For allowance of claim against estate of a deceased partner filed in a territorial court—Esterly v. Rua (C. C. A.) 122 Fed. 609.

33. Buckers Irr. Mill. & Imp. Co. v. Farmers' Independent Ditch Co. (Colo.) 72 Pac. 49.

34. Whalen v. Billings, 104 Ill. App. 281.

35. Duke, Lennon & Co. v. Duke & Woods, 93 Mo. App. 244.

36. Buckers Irr. Mill. & Imp. Co. v. Farmers' Independent Ditch Co. (Colo.) 72 Pac. 49.

37. Requiring that within five days defendant in a suit to subject certain lands conveyed to him to judgments held by the plaintiff should indorse, assign and transfer a promissory note to the clerk of the court to be held for the use and benefit of plaintiff until further order and in default judgment should be given for plaintiff for the face value of the note with interest and

a decree settling rights of claimants to a fund, and directing the commissioner and receiver to bring in all funds not already brought in and report them to the court, is not a final decree.[38] Where the final decree entered shows that the court found the issues in favor of plaintiff, an inference must be drawn that the court found those facts in favor of him which were responsive to the issues and necessary to the decree unless the special findings show otherwise.[39] Where defendant in a suit fails to claim by any form of pleading the benefit of a statute constituting a defense before final decree is entered against him, he is barred thereafter by the principle of res judicata from setting up such defense.[40] A decree purporting to be final, and in effect for defendant on all points of the litigation, cannot retain the case for further adjudication, and so much of it as provides for further jurisdiction is void.[41] Only the consenting parties are bound by a consent decree; and an order entered by consent of all parties represented by counsel after close of the pleading and proofs and submission for final adjudication is binding on all parties appearing at time of the entry.[42]

(§ 10) *C. Measure of relief.*—No decree, even pro confesso, can be rendered unless on a proper pleading giving adequate facts,[43] and the decree must always conform to the allegations and prayer of the pleadings.[44] Discovery cannot be had on a

for costs—Schneider v. Patton (Mo.) 75 S. W. 155.

38. Gunnell's Adm'rs v. Dixon's Adm'rs (Va.) 43 S. E. 340.

39. Buckers Irr. Mill. & Imp. Co. v. Farmers' Independent Ditch Co. (Colo.) 72 Pac. 49.

40. Defense of jury—Snyder v. Middle States Loan, Bldg. & Const. Co., 52 W. Va. 655.

41. City of St. Louis v. Crow, 171 Mo. 272. In creditors' suit against the defendant and one claimed to be his debtor on a mere money demand, if the debt is denied by the alleged debtor, the question of its existence cannot be tried, but complainant may obtain a discovery from such alleged debtor as to his indebtedness, and the right to an equitable lien to become effective when the debt shall be established in an action at law, and may also have a receiver appointed with authority to bring such an action—Hudson v. Wood, 119 Fed. 764.

42. Mylius v. Smith (W. Va.) 44 S. E. 542.

43. Turner v. Stewart, 51 W. Va. 493; City of Orlando v. Equitable B. & L. Ass'n (Fla.) 33 So. 986. After overruling a general demurrer to a bill which contains matter proper for relief and other improper matter, a decree giving relief justifiable only on the improper matter should be reversed—Turner v. Stewart, 51 W. Va. 493. On a hearing on bill, answer and replication in a suit to set aside a conveyance as fraudulent, a decree adjudging the title to the land in controversy to be in defendants and constituting their homestead cannot be entered after it is shown that there is no equity in the bill—Ropes v. Jenerson (Fla.) 34 So. 955.

44. Where the allegations of the bill are sufficient to support a decree, it will stand though giving relief not specifically prayed for, where there is a general prayer for relief—Stewart v. Tennant, 52 W. Va. 559. If the proof and allegations of a bill are at variance, complainant cannot have a decree conforming to either, since relief must be granted on the case made by the bill—Baldwin v. Liverpool & London & Globe Ins. Co. (C. C. A.) 124 Fed. 206. Complainant cannot obtain damages in a suit for cancellation where he asked no legal relief though the facts show him to be entitled to it—Rubie Combination Gold Min. Co. v. Princess Alice Gold Min. Co. (Colo.) 71 Pac. 1121. Where an original petition asked judgment for the balance of the price of land conveyed, and then contained a general prayer for all proper general and equitable relief, cancellation of the deed may be had—Under Code Civ. Proc. § 90—Stephenson v. Stephenson, 24 Ky. L. R. 1873, 72 S. W. 742. While a party may have any relief to which he shows himself entitled under a general prayer, it must be consistent with and founded on the allegations of his bill regardless of the evidence produced—Schneider v. Patton (Mo.) 75 S. W. 155. A personal judgment against a defendant in a suit by a judgment creditor to subject lands of defendant to a certain judgment is unauthorized where the petition contains no allegations from which it may be gathered on what account a personal judgment would be asked—Schneider v. Patton (Mo.) 75 S. W. 155. Where a bill for foreclosure of a mortgage sets up no claim for attorney fees or alleges that such fees had been incurred by complainant and shows no expense in the employment of an attorney and contains no prayer for such allowance and the note and mortgage contain no stipulation for payment of such fees, they cannot be allowed in the decree—Lyle v. Winn (Fla.) 34 So. 158. Though a complaint in an action by one to quiet title to lots owned in severalty alleged that plaintiff deraigned title through a common source under a statute providing that several persons so claiming an interest in land may unite in an action to determine an adverse claim, yet where it appears that each owns his respective lot, a finding that they deraigned title through a common source is immaterial as regards an objection that no evidence has been given to support it, where the question of misjoinder was not raised by answer or demurrer, and the questions of jurisdiction and

bill waiving a sworn answer.[45] Affirmative relief can only be granted a defendant on a cross bill.[46] A prayer for general relief, together with one for the appointment of a receiver only, will not be considered as for other relief than the appointment, unless the petition shows a cause of action for such relief.[47] The facts as they exist at the close of the suit must determine the relief given.[48] After a hearing on a bill, answer, and proofs, and the filing of findings of fact and conclusions of law, a final decree should be rendered on exceptions filed, and not a decree merely dismissing the exceptions.[49] Findings which may prejudice an action at law cannot be incorporated into a decree dismissing a bill.[50]

(§ 10) *D. Modification and amendment; vacation and setting aside; collateral attack.*—The statutory abolition of the writ of error coram nobis in favor of a motion authorizing the setting aside of a judgment for error of fact, at any time within five years, does not apply to decrees.[51] Where an order for appointment of a receiver is the only relief sought, it will be vacated for want of authority in the court.[52] A statute authorizing vacation of a judgment after the term on certain grounds does not apply to a proceeding in equity to vacate a judgment.[53] An interlocutory decree is under the control of the court and may be revised on the merits until entry of a final decree.[54] Mere modification will not destroy the character of a decree as final.[55] Where questions have been settled by final decree, and appeal therefrom has been refused, they cannot be reopened in the same litigation;[56] but an order for a decree is not affected by the rule that after entry of a final decree the court has no further power to deal with the case except on bill of review,[57] and after entry of a decree, it may, for good cause shown, be set aside or modified at the same term in the sound discretion of the court,[58] but at the next term it cannot be vacated[59] or modified, unless for ground sufficient for a bill of review for error apparent in the decree, or for newly-discovered evidence or for an original bill to impeach it as for fraud in procurement.[60] Laches will destroy the right to relief from a decree.[61] An infant may have a decree against him opened by original bill if he proceeds diligently after majority.[62] A decree improperly obtained will be set aside though the party against whose property it runs owes the person in whose favor it is rendered.[63] A decree entered in a case in which a certain person was not a party and of which

the sufficiency of the complaint as stating a cause of action were waived because not taken by demurrer or answer—Construing Civ. Code Proc. §§ 381, 434—Dewey v. Parcells, 137 Cal. 305, 70 Pac. 174.

45. Tillinghast v. Chace, 121 Fed. 435. Where a bill contains no interrogatories and answer under oath is expressly waived, a prayer for discovery may be disregarded—Excelsior Wooden Pipe Co. v. City of Seattle (C. C. A.) 117 Fed. 140.

46. Interstate B. & L. Ass'n v. Edgefield Hotel Co., 120 Fed. 422.

47. Mann v. German-American Inv. Co. (Neb.) 97 N. W. 600.

48. The rule that the right to judgment in actions of law always depends on facts as they exist when the action is commenced, does not apply in equity—Pennsylvania Co. v. Bond, 99 Ill. App. 535.

49. Russell v. Stewart, 204 Pa. 211.

50. Suit for cancellation of a note—Vannatta v. Lindley, 198 Ill. 40.

51. Ernst Tosetti Brew. Co. v. Koehler, 200 Ill. 369.

52. Mann v. German-American Inv. Co. (Neb.) 97 N. W. 600.

53. Code, §§ 4091-4094—Iowa Sav. & Loan Ass'n v. Chase, 118 Iowa, 51.

54. Decree finding unfair competition and ordering accounting—Fairbank Co. v. Windsor (C. C. A.) 124 Fed. 200.

55. Schneider v. Patton (Mo.) 75 S. W. 155.

56. Baker v. Watts (Va.) 44 S. E. 929.

57. White v. Gove (Mass.) 67 N. E. 359.

58. Matthews v. Tyree (W. Va.) 44 S. E. 526.

59. Not for fraud of complainant's solicitor in procuring its entry—Ernst Tosetti Brew. Co. v. Koehler, 200 Ill. 369.

60. Snyder v. Middle States Loan, Bldg. & Const. Co., 52 W. Va. 655.

61. After nine years a bill cannot be maintained to vacate a decree for fraud, where complainant knew of the decree during all the time and shows no excuse for delay—Hendryx v. Perkins (C. C. A.) 114 Fed. 801.

62. Having the right by statute to show cause against the decree, he may do so though the ground is error apparent on the face of the decree—Stewart v. Tennant, 52 W. Va. 559.

63. Vanderpoel v. Knight, 102 Ill. App. 596.

he had no notice, though interested in the subject-matter, is absolutely void as to him and may be attacked collaterally.[64] Every reasonable intendment is in favor of the decree.[65]

Satisfaction, lien, and enforcement.—A decree for money may be enforced by the same remedies as a judgment at law.[66] An action may be brought to enforce a decree rendered in a foreign state awarding costs in favor of plaintiffs;[67] but not on a decree to which plaintiff was not a party, where it had been superseded by appeal to the supreme court when the action was commenced, and the decree had been reversed and the suit dismissed.[68]

§ 11. *Bill of review.*[69]—A bill of review to reverse a decree is barred by release of error therein.[70] A bill of review proper, or an original bill in the nature of a bill of review, must always be brought in the same court that rendered the decree sought to be reviewed; the application must be made there though the supreme court has subsequently affirmed the decree,[71] and leave must be obtained from the court, where the judgment was rendered and enrolled, to file a bill of review for newly-discovered matter,[72] or a supplemental bill in the nature of a bill of review, but notice to parties before giving leave is in the discretion of the court.[73]

Time for bill and laches.—A bill to correct a final decree must be filed within a year after entry, and ignorance of the laws of a state will not excuse a foreign executor for failure to file within the year.[74] If for error of law or error on the face of the record, it must be brought within the statutory period for taking an appeal from the decree,[75] and if for newly-discovered matters, within a reasonable time,[76] but the rule does not apply to a bill to set aside a decree for accident, mistake, or surprise, where facts sufficient for such relief are alleged.[77] After nine years, a bill cannot be maintained where complainant had knowledge of the decree during all the time and the delay is not excused by sufficient facts.[78]

64. Holmes v. Columbia Nat. Bank (Neb.) 97 N. W. 26.

65. Where a complaint in a suit to set aside a decree for error apparent on the record averred that defendant's answer did not aver whether such answer contained new matter so as to show whether there was in fact more than one fund in controversy between the parties, it will be presumed in support of the decree that there was but one fund and that the question of date of deposit of such fund as set forth in the decree was immaterial—Garbade v. Frazier, 42 Or. 384, 71 Pac. 136.

66. Whalen v. Billings, 104 Ill. App. 281. Decrees may be enforced by a writ of capias ad satisfaciendum, under the Illinois statute, in any case where such writ would be proper at law (Hurd's Rev. St. c. 22, §§ 42, 47)—Whalen v. Billings, 104 Ill. App. 281.

67. Davis v. Cohn, 96 Mo. App. 587.

68. Riley Bros. Co. v. Melia (Neb.) 92 N. W. 913.

69. Under the chancery practice in Illinois there are four ways by which a decree may be reviewed for alleged error, viz.: By rehearing in the court that heard the case; by bill of review in the court of the original proceeding and decree; by appeal; and by writ of error—Mathias v. Mathias, 104 Ill. App. 344.

70. Ferrell v. Ferrell (W. Va.) 44 S. E. 187.

71. The superior court of Cook County, Illinois, cannot entertain a bill to review a decree entered in the circuit court of that county, under Const. 1870, art. 6, § 23, which recognizes two courts as different tribunals and Rev. St. c. 37, par. 27, fixing a different time for holding their terms—Mathias v. Mathias, 202 Ill. 125. Where a decree has been entered on the mandate of the appellate court leaving no question to be determined by the court below, the former court should determine the sufficiency of reasons on application for a bill of review though where matters material occurring in the court below after the decision of the cause are concerned or other sufficient reasons appear, the appellate court may send the whole inquiry or part thereof to the lower court for settlement—Keith v. Alger (C. C A.) 124 Fed. 32.

72. Camp Mfg. Co. v. Parker, 121 Fed. 195.

73. Thompson v. Schenectady R. Co., 119 Fed. 634.

74. Williams v. Starkweather (R. I.) 54 Atl. 931.

75. Chamberlin v. Peoria, etc., R. Co. (C. C. A.) 118 Fed. 32; Camp Mfg. Co. v. Parker, 121 Fed. 195.

76. Camp Mfg. Co. v. Parker, 121 Fed. 195. After a decision in the circuit court of appeals in North Carolina, a bill of review filed in the circuit court without leave of the former court must be considered, in determining the reasonableness of its time of filing, as filed on the day when leave to file was afterwards granted by the circuit court of appeals—Id.

77. Dewey v. Stratton (C. C. A.) 114 Fed. 179

Grounds.—Matters going to the jurisdiction are not ground for a bill of review.[79] A bill of review will not lie for error of law not apparent on the face of the decree,[80] newly-discovered evidence, insufficient to warrant a reversal of the decree,[81] or which could by ordinary diligence have been discovered before the decree;[82] and accordingly the bill on that ground must be accompanied by testimony applicable to the allegations of the bill, so that the court can see from examination of the evidence and the bill that the result would be different on a retrial,[83] and a showing of diligence.[84] Allowance of a claim against a decedent's estate may be revised where persons interested appear and defend and set up the invalidity of the claim and its allowance is barred by limitations.[85] Where a decree sustaining a patent is entered after appeal, discovery by defendant of other patents raising the question of anticipation will not justify a bill of review unless some unusual circumstance appears.[86] Since reversal of a decree by a bill of review cannot affect the title of a purchaser under the decree, a bill seeking to set aside a sale of land under a decree in a proceeding for collection of taxes cannot give the relief sought.[87] Persons not parties, who are affected by a decree, should file a supplemental bill in the nature of a bill of review to secure a modification of the decree.[88]

Application and proceedings.[89]—On a bill of review in the federal court to set aside a decree for newly-discovered evidence, diligence as well as the materiality of the evidence must be considered.[90] Leave by the federal supreme court, after affirming a decree of the circuit court, to apply to the latter for leave to file bill of review, removes the bar of the decree of the circuit court leaving the application to be determined by that court on its merits subject to appeal to the court having jurisdiction.[91] One securing dismissal of an appeal because a decree is not final cannot claim afterwards, on application for a bill of review, that such decree was final.[92] Where a bill of review is brought on a decree allowing a credit for services as an attorney on settlement of an administrator's accounts,

78. Hendryx v. Perkins (C. C. A.) 114 Fed. 801.

79. The bill will not lie for error in a decree in tax proceedings where it alleges as the main ground of relief that the chancellor had no jurisdiction—Donaldson v. Nealis, 108 Tenn. 638.

80. Garbade v. Frazier, 42 Or. 384, 71 Pac. 136.

81. Shaffer v. Shaffer, 51 W. Va. 126. It is insufficient if it merely shows the decree to have been technically wrong, and if presented on the hearing would have produced a different decision, but it must also appear that complainant therein is deprived of substantial equity by the decree entered. A decree setting aside the sale of lands to plaintiff and giving him judgment for the purchase money paid will not be set aside on bill of review because of newly discovered evidence that plaintiff had made a conveyance of the lands pending the suit, where it conclusively appears on the trial that the sale was secured by gross fraud and bribery of his agent, in result of which he was compelled to pay an excessive price for the lands, and defendants have suffered no loss of equity by such conveyance—Keith v. Alger (C. C. A.) 124 Fed. 32. A bill cannot be maintained for newly discovered matter alleging fraud in concealing from complainant the actual amount in a tract of land where it appears that there was correspondence between the parties as to the amount of such land before the first suit and the opinion therein considered that subject—Camp Mfg. Co. v. Parker, 121 Fed. 195.

82. Baker v. Watts (Va.) 44 S. E. 929; Camp Mfg. Co. v. Parker, 121 Fed. 195.

83. Lewis v. Topsico, 201 Ill. 320.

84. If brought for evidence of witnesses residing in the same vicinity as the parties to the original suit, and by the same attorney who represented defendants in the original trial, there must be an affidavit or showing of diligence to obtain such facts at the trial, and an allegation of fact showing that they could not have been previously discovered—Lewis v. Topsico, 201 Ill. 320.

85. Taylor v. Crook, 136 Ala. 354.

86. Kissinger-Ison Co. v. Bradford Belting Co. (C. C. A.) 123 Fed. 91.

87. Donaldson v. Nealis, 108 Tenn. 638.

88. Thompson v. Schenectady R. Co., 119 Fed. 634.

89. A bill to vacate a decree for fraud in entry alleging that an agreement was collusively entered into by certain of the defendants to have a trust deed set aside, held not supported by evidence of a single fact showing fraud—Minor v. Minor, 204 Pa. 199.

90. Kissinger-Ison Co. v. Bradford Belting Co. (C. C. A.) 123 Fed. 91.

91. Board of Councilmen v. Deposit Bank (C. C. A.) 124 Fed. 18.

92, 93. Taylor v. Crook, 136 Ala. 354.

whether the evidence supports the findings of fact on which the decree is founded cannot be considered, but only whether the expenses as a proper legal charge under the circumstances.[93]

ESCAPE.[1]

The offense.—An arrest from which an escape was made must have been legal,[2] and it is not an aiding of one detained on an "accusation" if he has been convicted.[3] Intent of a jailer is no part of "negligence" in permitting an escape,[4] otherwise if "misfeasance, malfeasance, or willful neglect" be laid,[5] and an "ignorant" act may fall without either word.[6]

Indictment and trial.—The crime for which imprisonment was adjudged may be alleged generally if the legality of detention be well pleaded.[7] Aiding an "intent to escape" is averred by the words "attempt to escape" which presuppose "intent."[8] A statute requiring an accused officer to show diligence to prevent an escape is satisfied by his showing that he hid the prisoner in a wood to foil lynchers who however effected a capture.[9]

ESCHEAT.

Escheat from alienage results on the death as an alien of one to whom the state had released a former escheat.[10] The state may release an escheat though the indirect result is to withdraw the estate from the statutes against perpetuities.[11] Statutes permitting aliens to take by succession to deceased aliens require the claimant to prove his right.[12] The state may, after they have acquired title to land, repeal laws respecting the inheritable capacity of aliens;[13] and when statutes giving such rights are amended and restricted to certain aliens, the lands of all other aliens again become liable to escheat.[14] Unclaimed money when it passes into a mere debt does not escheat as money.[15]

No proceedings are necessary to escheat a nonresident alien's lands,[16] but when proceedings are required, they must be within statutory limitations of time.[17] Fees of officers in such proceedings must be claimed below.[18]

ESCROWS.

A conditional delivery to a party to the contract does not create an escrow,[19] nor, strictly speaking, does a deposit of deeds with a third person with instruc-

1. Escape or attempts to do so may furnish inculpatory evidence against one charged with other crimes, but the forbearance of a prisoner to escape though he might has not a converse effect. See Indictment and Prosecution (Criminal Evidence).

2. People v. Hochstim, 76 App. Div. (N. Y.) 25.

3. Pen. Code, art. 229—Brannan v. State (Tex. Cr. App.) 72 S. W. 184.

4. Ky. St. § 1339—Lynch v. Com., 24 Ky. L. R. 2180, 73 S. W. 745.

5, 6. Ky. St. § 3748—Lynch v. Com., 24 Ky. L. R. 2180, 73 S. W. 745.

7, 8. State v. Daly, 41 Or. 515, 70 Pac. 706.

9. Direction of verdict of guilty held error—State v. Blackley, 131 N. C. 726. Evidence held to call for instruction on "ignorance" of a jailer suffering an escape—Lynch v. Com., 24 Ky. L. R. 2180, 73 S. W. 745.

10, 11. Richardson v. Amsdon, 85 N. Y. Supp. 342.

12. Hence that the alleged deceased alien was in fact such—Richardson v. Amsdon, 85 N. Y. Supp. 342. Evidence considered—Id.

13. The privilege of inheritance is an expectancy and not vested—Donaldson v. State (Ind.) 67 N. E. 1029.

14. The common law is revived—Donaldson v. State (Ind.) 67 N. E. 1029. The several statutes construed—Id.

15. Union Trust Co. v. Glover (Mo. App.) 74 S. W. 436.

16. Richardson v. Amsdon, 85 N. Y. Supp. 342.

17, 18. 40 years after death of a legatee who died before testator who was last seized is too late (Act May 20, 1889)—In re Bousquet's Estate, 206 Pa. 534.

19. Delivery by tenant of lease and rent notes to an agent of the landlord, accompanied by a condition, that in case a proposed sale of the land to the tenant was consummated they were to be returned—Bemis v. Allen (Iowa) 93 N. W. 50.

tions that they be delivered to the grantee on his coming into being or of age or on the grantor's death.[20]

The escrow is irrevocable after performance of the condition by the other party. Prior to such time it may be revoked if not on an independent consideration.[21]

Where the language of the condition is ambiguous, the surrounding circumstances and conditions may be considered in determining the intent of the parties.[22] If the condition is never fulfilled, the deed is not operative,[23] though delivered,[24] and delivery cannot be demanded.[25]

ESTATES OF DECEDENTS.

§ 1. Necessity or Occasion for Administration and the Kinds Thereof.

§ 2. Jurisdictions and Courts Controlling Administration.

§ 3. The Persons Who Administer and Their Letters. A. Selection and Nomination. B. Procedure to Obtain Administration and Grant of Letters. C. Security or Bond. D. Removals.

§ 4. The Authority, Title, Interest and Relationship of Personal Representatives. A. In General. B. Contracts, Charges, and Investments. C. Title, Interest, or Right in Decedents' Property.

§ 5. The Property; Its Collection, Management and Disposal by Personal Rrepresentatives. A. Assets. B. Collection and Reduction to Possession. C. Inventory and Appraisal. D. Property Allowed Widow or Children. Quarantine. E. Management, Custody, Control and Disposition of Estate.

§ 6. Debts and Liabilities of Estate; Their Establishment and Satisfaction. A. Liability of Estate. B. Liability of Heirs, Devisees and Legatees. C. Exhibition, Establishment, Allowance and Enforcement of Claims. D. Classification, Preferences and Priorities. E. Funds, Assets and Securities for Payment. F. Payment and Satisfaction.

§ 7. Subjection of Realty to Payment of Debts under Order of Court. A. Right to Resort to Realty. B. Procedure to Obtain Order. C. The Order. D. The Sale.

§ 8. Rights and Liabilities between Representatives and Estate. A. Management of, and Dealings with the Estate. B. Representative as Creditor or Debtor. C. Interest on Property or Funds. D. Allowances for Expenses, Costs, Counsel Fees and Funeral Expenses. E. Rights and Liabilities of Co-representatives and Successors. F. Compensation. G. Rights and Liabilities of Sureties and Actions on Bonds.

§ 9. Actions by and against Representatives, and Costs therein.

§ 10. Accounting and Settlement by Representatives. A. Who may Require. B. Procedure. C. The Decree or Order.

§ 11. Distribution and Disposal of Funds; Time for Distribution.

§ 12. Enforcement of Orders and Decrees by Attachment as for a Contempt.

§ 13. Discharge of Personal Representatives.

§ 14. Rights and Liabilities between Beneficiaries of Estate. A. In General. B. Advancements. C. Actions between Beneficiaries.

§ 15. Rights and Liabilities between Beneficiaries and Third Persons.

§ 1. *Necessity or occasion for administration and the kinds thereof.*—Administration by personal representatives must be had to confer jurisdiction on courts

20. Grantor's death. Deeds intended as advancements to grand-children, delivered by a grand-father to his daughter, are held by her as bailee—McKnight v. Reed (Tex. Civ. App.) 71 S. W. 318. Such a delivery is sufficient however to pass title if with intent to relinquish furher control—McKnight v. Reed (Tex. Civ. App.) 71 S. W. 318; Schreckhise v. Wiseman (Va.) 45 S. E. 745; Tarlton v. Griggs, 131 N. C. 216; Seifert v. Seifert (Kan.) 71 Pac. 271. Deposit to be delivered at grantor's death sufficient though depositary would have returned them to the grantor and did deliver one deed to the grantee before the grantor's death at his request—White v. Watts, 118 Iowa, 549. Sufficient that deeds to be delivered to grantees at grantor's death are left with grantee's representative, and grantor relinquishes all control and right to alter disposition of property—Bogan v. Swearingen, 199 Ill. 454. Delivery to a third person with intent to retain the right to recall it until the grantor's death, as evidenced by advertising the property for sale is not sufficient to allow title to pass to the grantee on delivery to him after the grantor's death—Johnson v. Johnson, 24 R. I. 571. Deposit of the deed to be delivered after the grantor's death does not waive consideration expressed to be care of grantor by grantees, his children, until his death —Culy v. Upham (Mich.) 97 N. W. 405. **Grantee's existence or maturity.** A deed delivered to a person to be delivered to the grantee on its coming into being does not pass title until the final delivery as deed delivered to promoters of a grantee corporation to be delivered to the corporation when completely organized—Santaquin Min. Co. v. High Roller Min. Co., 25 Utah, 282, 71 Pac. 77. Otherwise where conditioned on grantee coming of age. Delivery to be kept until grantee came of age without reservation of control is sufficient—Marshall v. Hartzfelt, 98 Mo. App. 178. See Deeds of Conveyance for effect of postponing operation till grantor's death as determining character of instrument as testamentary or otherwise.

21. Evidence held to show compliance by creditors with an agreement by which conveyance of property was to be deposited in escrow in settlement of firm debts to be delivered in case the creditors surrendered

over estates of decedents,[26] though it is not absolutely necessary to probate the estates of all decedents,[27] as where there are no debts against decedent,[28] since in such case the heirs may distribute the estate between themselves,[29] but only the parties who sign the agreement to distribute without administration are bound thereby.[30] Administration may be had on the estate of one presumed to be dead from a continued absence for a specified time.[31]

In some states, the time in which administration can be had has been fixed by statute,[32] which has been held to apply to administration de bonis non as well as to principal administration.[33]

Ancillary administration may be had on property brought into the state in good faith and in the ordinary course of business after the death of a nonresident decedent,[34] but not where it is in the possession of the domiciliary appointee temporarily within the state.[35]

Administration de bonis non can be had only where a vacancy occurs in the principal administration with assets unadministered,[36] as by the death of the principal representative[37] or his discharge after final settlement of his accounts.[38] Appointment and qualification as administrator de bonis non operates as a relinquishment of original letters to the same appointee.[39] However, an appoint-

their evidences of indebtedness—Mechanics' Nat. Bank v. Jones, 76 App. Div. (N. Y.) 534. Deeds deposited to be delivered at the grantor's death may be withdrawn by him if such is the intent at the time of deposit. Evidence held to justify such withdrawal over the objection of the grantees, sons of the grantor who claimed that the deeds were executed in consideration of their leasing the land until the father's death—Everts v. Everts (Iowa) 94 N. W. 496.

22. Construction of condition for delivery of stock in mining corporation on determination of ownership of property sold the corporation in return for the stock—Clarke v. Eureka County Bank, 123 Fed. 922.

23. Deed of re-conveyance placed in escrow by a grantee in an absolute conveyance to secure a debt conditioned for delivery on payment of the debt—Fitch v. Miller, 200 Ill. 170.

24. Passes no title to grantee or bona fide purchaser from him, as against grantor—Mays v. Shields (Ga.) 45 S. E. 63.

25. Stock delivered in escrow to be held until a question of ownership is determined cannot be demanded before such determination—Clarke v. Eureka County Bank, 123 Fed. 922.

26. An action cannot be maintained to recover a legacy against the representative of a deceased co-legatee who took the estate without administration—Mitchell v. Mitchell, 132 N. C. 350.

27. Gwinn v. Melvin (Idaho) 72 Pac. 961. Under Laws S. D. 1901, p. 201, c. 123, § 2 the county court can take possession and apply assets of certain intestates without the appointment of an administrator—Smith v. Terry Peak Miners' Union (S. D.) 94 N. W. 694.

28. Waterhouse v. Churchill, 30 Colo. 415, 70 Pac. 678. Administration is necessary upon the estate of a married woman to protect creditors—McCarthy v. McCarthy, 20 App. D. C. 195.

29. Waterhouse v. Churchill, 30 Colo. 415, 70 Pac. 678; Gwinn v. Melvin (Idaho) 72 Pac. 961. A complaint in an action to recover a chose in action allowed to one of the distributees setting out such a division held sufficient—Granger v. Harriman (Minn.) 94 N. W. 869. Equitable relief, where by a mistake the interests of the heirs of an intestate were ignored in a settlement without administration—Hutchison v. Fuller (S. C.) 45 S. E. 164.

30. Dauel v. Arnold, 201 Ill. 570.

31. Under Burns' Rev. St. 1901, § 2385, etc., relating to the administration of the estates of absentees. An administration under this statute will not be affected by the fact that the absentee is still alive—Romy v. State (Ind. App.) 67 N. E. 998.

32. An application is barred after a lapse of four years under Rev. St. 1887, § 4060; such a proceeding being an action within §§ 4020 & 4080—Gwinn v. Melvin (Idaho) 72 Pac. 961. After such time has elapsed a stranger cannot by procuring letters subject realty to the payment of his claim—Cummings v. Lynn (Iowa) 96 N. W. 857.

33. Act March 15, 1832—In re Hanbest's Estate, 21 Pa. Super. Ct. 427.

34. If brought in for the purpose of securing a resident plaintiff to prosecute an action for negligence the appointment will not be made—Hoes v. New York, etc., R. Co., 173 N. Y. 435.

35. In re McCabe, 84 App. Div. (N. Y.) 145.

36. Ala. Code, § 111—Sands v. Hickey (Ala.) 33 So. 827. The executor of the deceased executor does not become the representative of the estate in trust by operation of law—Jepson v. Martin, 116 Ga. 772. Where the residuary legatee failed to pay a specific legacy, but had procured a discharge from the probate court without notice to the legatee, an administrator de bonis non may be appointed under Comp. Laws, § 9334—Cole v. Shaw (Mich.) 96 N. W. 573.

37. Cushman v. Albee, 183 Mass. 108. In Alabama the power of the husband as administrator in right of marriage ceases with the wife's death—Sands v. Hickey (Ala.) 33 So. 827.

38, 39. Henley v. Johnston, 134 Ala. 646.

ment before a vacancy actually occurs has only the effect of an excess of power and is not void in toto.[40]

§ 2. *Jurisdictions and courts controlling administration.*—Residence and situs of property govern the jurisdiction of the probate courts of particular counties to administer,[41] though the existence of assets is not essential to confer jurisdiction to appoint an administrator.[42] In case of nonresident decedents administration can be had only where assets are within the state,[43] though under the statutes of Utah this is held not to be the rule.[44] Where assets within the jurisdiction are essential, it has been held that it is sufficient if they were brought within the state in good faith after the death of decedent,[45] but not if brought in by the domiciliary representative for temporary purposes;[46] nor is a recognizance bond property within the state.[47]

While the court having power to appoint personal representatives has jurisdiction to determine disputed jurisdictional facts[48] the mere fact that the court granted administration is not conclusive evidence of jurisdiction.[49]

§ 3. *The persons who administer and their letters. A. Selection and nomination.*—It is not essential that the applicant be a resident of the state.[50] A divorced wife cannot administer the estate of her deceased former husband.[51] The trustee in bankruptcy of an heir entitled to share may be appointed,[52] and the public administrator will be preferred to a relative not entitled to share in the estate.[53] A person who is prosecuting a pending action against an estate is not a proper person.[54] Objections to the disposition of the appointee executor and his moral character are not necessarily sufficient to withhold letters of administration.[55]

Laches in applying for appointment by the person entitled thereto is a waiver of his preference,[56] and an agreement on consideration of the relinquishment of the right to administer is void as against public policy.[57]

(§ 3) *B. Procedure to obtain administration and grant of letters.*—An unverified petition unsupported by evidence is insufficient on which to base the application.[58]

The subsequent discovery of a will merely renders the appointment of an administrator as in case of intestacy voidable.[59]

40. Sands v. Hickey (Ala.) 33 So. 827.

41. Ewing v. Mallison, 65 Kan. 484, 70 Pac. 369. The statute relating to the administration on the estates of absentees confers jurisdiction on the county wherein the property of the absentees is situated irrespective of their last residence—Romy v. State (Ind. App.) 67 N. E. 998.

42. Holburn v. Pfanmiller's Adm'r, 24 Ky. L. R. 1613, 71 S. W. 940.

43. Wright v. Roberts, 116 Ga. 194.

44. Rev. St. 1898, § 3774—In re Tasanen's Estate, 25 Utah, 396, 71 Pac. 984.

45. Hoes v. New York, etc., R. Co., 173 N. Y. 435.

46. In re McCabe, 84 App. Div. (N. Y.) 145.

47. Filer v. Rainey, 120 Fed. 718.

48. The surrogate in New Jersey may determine the residence of decedent when residence is contested—In re Russell's Estate, 64 N. J. Eq. 313.

49. Ewing v. Mallison, 65 Kan. 484, 70 Pac. 369.

50. Foley v. Cudahy Packing Co. (Iowa) 93 N. W. 284.

51. In re Swales' Estate, 172 N. Y. 651. She cannot set up the invalidity of the decree which she obtained in a foreign state, (In re Swales' Estate, 172 N. Y. 651) but she is not barred of her right to administer by a foreign decree in favor of the deceased obtained on the same grounds for which she obtained a prior decree of separation in the state of the application for administration. Her decree barred action in the foreign state based on the same cause —In re Heins' Estate, 22 Pa. Super. Ct. 31.

52. Mich. Comp. Laws 1897, § 9324—Osmun v. Galbraith (Mich.) 92 N. W. 101.

53. So held where decedent left a surviving non-resident parent, under Code Civ. Proc. N. Y. § 6669—In re Gilchrist's Estate, 79 App. Div. (N. Y.) 637.

54. Cogswell v. Hall (Mass.) 67 N. E. 638.

55. Saxe v. Saxe (Wis.) 97 N. W. 187.

56. A delay of nearly three years by the husband after the death of his wife, to apply, and then merely appearing in an objection to an application by another, is a waiver—In re Sutton's Estate, 31 Wash. 340, 71 Pac. 1012.

57. In re Lewis' Estate, 21 Pa. Super. Ct. 393.

58. In re Pina's Estate, 138 Cal. XIX, 71 Pac. 171.

The grant of letters is conclusive until revoked in a direct proceeding or an appeal[60] as to the competency of the appointee[61] or the existence of a vacancy in the principal administration at the time of the appointment de bonis non;[62] and while it may be collaterally attacked for want of jurisdiction[63] or fraud[64] yet all presumptions are in favor of jurisdiction.[65]

The effect of an appeal from an appointment of an administrator is to oust the jurisdiction of the appointing court in the proceeding.[66]

(§ 3) *C. Security or bond.*—An executor is entitled to notice of an application to compel him to give bond.[67] If he is also residuary legatee he should not be required to give security to return an inventory.[68] In a proceeding by the sureties to be released if the administrator files an account and a new bond the order may be entered without further citation to the persons interested in the estate, the account not being objected to by the surety.[69] A representative's bond, though not in statutory form may be held valid as a common-law bond.[70]

(§ 3) *D. Removals.*—Generally, the power of removal is discretionary.[71] Misconduct in office or jeopardy of the estate are grounds for removal,[72] but mere accident in delaying to file an inventory within the proper time,[73] or a temporary residence without the state,[74] is not; nor will the representative be removed where it would affect the estate adversely,[75] and instead of revoking letters testamentary, the executor may be required to give bond.[76]

The court is not required to suspend the powers of a representative pending proceedings for his removal,[77] and an appointment of an administrator pendente

59. Under Code Ala. § 113—Sands v. Hickey (Ala.) 33 So. 827.

60. The probate court of one county cannot while an appointment in another county is in force appoint an administrator—In re Davison's Estate (Mo. App.) 73 S. W. 373. While a decree granting letters of administration to an executor stands, the probate court has no power to grant letters to a co-executor—Cogswell v. Hall (Mass.) 67 N. E. 638.

61. Larson v. Union Pac. R. Co. (Neb.) 97 N. W. 313. It will be presumed that the appointing court had before it the written request of the persons entitled to an administrator that the public administrator be appointed—McCooey v. New York, etc., R. Co., 182 Mass. 205.

62. Henley v. Johnston, 134 Ala. 646; Sands v. Hickey (Ala.) 33 So. 827.

63. Ewing v Mallison, 65 Kan. 484, 70 Pac. 369; Barney v. Babcock's Estate, 115 Wis. 409; McCooey v. New York, etc., R. Co., 182 Mass. 205. The question of jurisdiction as dependent upon residence of deceased may be raised collaterally—Ewing v. Mallison, 65 Kan. 484, 70 Pac. 369. The decision of the Orphan's Court that the widow's release was obtained by fraud is not res judicata—In re Myers' Estate, 205 Pa. 413.

64. So held as to an ancillary appointment where assets of a nonresident decedent were brought within the state merely for the purpose of procuring a resident plaintiff to prosecute an action for negligence—Hoes v. New York, etc., R. Co., 173 N. Y. 435.

65. Henley v. Johnston, 134 Ala. 646; Jepson v. Martin, 116 Ga. 772; McCooey v. New York, etc., R. Co., 182 Mass. 205.

66. After an appeal from the county to the district court, the county court is without jurisdiction to adjudge the appointee in contempt for agreeing as administrator to change venue to another county though it had appointed him temporary administrator pending the appeal—Ex parte Robertson (Tex. Cr. App.) 72 S. W. 859. See further the title Appeal & Review, ante.

67. State v. Clark, 24 R. I. 470.

68. State v. Clark, 24 R. I. 470. So provided by many statutes [Editor].

69. In re Sogaard's Estate, 39 Misc. (N. Y.) 519.

70. Awtrey v. Campbell (Ga.) 45 S. E. 301.

71. Clancy v. McElroy, 30 Wash. 567, 70 Pac. 1095.

72. As where the administratrix permitted the most valuable asset, a liquor store, to be sold under a chattel mortgage under an arrangement whereby one who had been in her employ became a purchaser and executed a new chattel mortgage and assisted in procurement of renewal of a lease to the same person, and carried on the business in his name with her assistance and for her benefit—In re Heyen's Estate, 40 Misc. (N. Y.) 511. Or delay in administration coupled with the filing of a petition in voluntary bankruptcy—In re Truesdell's Estate, 40 Misc. (N. Y.) 336.

73. Clancy v. McElroy, 30 Wash. 567, 70 Pac. 1095.

74. New York Civ. Proc. § 268, subd. 6, authorizes revocation of letters testamentary, where the executor "has moved" from the state—In re McKnight, 80 App. Div. (N. Y.) 284.

75. Succession of Willis, 109 La. 281.

76. Under N. Y. Code Civ. Proc § 2472, subd. 2, § 2481—In re Wischmann, 80 App. Div. (N. Y.) 520.

77. In re Healy's Estate, 137 Cal. 474, 70 Pac. 455.

lite should be made only where there is some reasonable ground to apprehend that in the absence of such an appointment a loss will occur to the estate.[78]

The objection that the party had no capacity to petition for the removal must be raised by demurrer.[79]

An order on a petition for the revocation of letters of administration being appealable[80] it will be conclusively presumed to have been made on sufficient evidence and not ordinarily subject to collateral attack.[81]

§ 4. *The authority, title, interest, and relationship of personal representatives. A. In general.*—If the appointee executor and trustee merely qualifies as the former, he holds the property as executor,[82] and his duties and functions as such continue until his final account has been filed and settled.[83] A discharge[84] or death terminates his relationship.[85] The administrator de bonis non succeeds to all the rights of the appointee.[86]

In the absence of contrary evidence, the execution of a writing as administrator is prima facie proof of authority of the signer as representative,[87] and in the case of a widow signing as administratrix it will be presumed to have been as administratrix of the estate of her deceased husband.[88]

(§ 4) *B. Contracts, charges, and investments.*—Generally, an executor[89] or an administrator in his capacity as such cannot bind the estate by an original undertaking on his part;[90] and if not binding on the estate, it cannot be enforced against the heirs.[91] A contract signed "A. Estate B, Administrator," is the individual obligation of the administrator.[92] An assignment by a personal representative as such does not necessarily pass any interest which he may have personally in the subject-matter.[93]

78. Pending an appeal to the prerogative court from an order removing an executor, such court has jurisdiction to appoint an administrator pendente lite—In re Marsh's Estate (N. J. Prerog.) 55 Atl. 299.

79. In re Tasanen's Estate, 25 Utah, 396, 71 Pac. 984.

80. In re Tasanen's Estate, 25 Utah, 396, 71 Pac. 984; In re Sutton's Estate, 31 Wash. 340, 71 Pac. 1012.

81. A temporary injunction restraining the co-administrator from taking possession under an order removing his co-executor and directing such surrender will be dissolved—Howell v. Dinneen (S. D.) 94 N. W. 698.

82. Wallber v. Wilmanns, 116 Wis. 246.

83. Wallber v. Wilmanns, 116 Wis. 246. A final settlement and distribution is not conclusive that he has ceased to be executor—Whetstone v. McQueen (Ala.) 34 So. 229.

84. The authority of an agent of a personal representative terminates upon the discharge of the representative as such—Upton v. Dennis (Mich.) 94 N. W. 728.

85. McClellan v. Mangum (Tex. Civ. App.) 75 S. W. 840.

86. Goodwynne v. Bellerby, 116 Ga. 901.

87. Murray v. Barden, 132 N. C. 136.

88. Pittsburg, etc., R. Co. v. Gipe (Ind.) 65 N. E. 1034.

89. By the mere execution by renewal of a promissory note, a new promise is not created to pay the original note executed by decedent—Hughes v. Treadaway, 116 Ga. 663. The execution of a promissory note by an executrix also life tenant under the will is not binding on the estate—Whitten v. Bank of Fincastle, 100 Va. 546. Without authorization by the will or order of court, an executor has no power to bind the estate by borrowing money for its use—Rice v. Strange, 24 Ky. L. R. 1945, 72 S. W. 756. Under a mere power given to executors to keep property together for a specified term of years they have not power to consent to a mortgage by one of the heirs on his undivided interest—Garman v. Hawley (Mich.) 93 N. W. 871. Under power to "handle, manage and control the estate, and to sell, realize and convey, by deed or other conveyance * * * in such a manner as may seem right and proper," the executor had power to transfer a purchase money note belonging to the estate, as collateral security for money borrowed by him—Prieto v. Leonards (Tex. Civ. App.) 74 S. W. 41. The question whether the executor had power to employ assistants or agents cannot be determined in an action to construe the will, but must be determined on the accounting of the executor—Russell v. Hilton, 80 App. Div. (N. Y.) 178. An executor who was personally liable on notes, the principal assets of the estate, may loan the amount thereof in consideration of another becoming his surety and as indemnity, to be paid to the estate when it could be settled which was not until the death of the widow—Brown's Ex'r v. Dunn's Estate (Vt.) 55 Atl. 364.

90. Craig v. Anderson (Neb.) 92 N. W. 640.

91. Contract with an attorney for services to be rendered the estate—In re Bruning's Estate (Iowa) 96 N. W. 780.

92. And in an action thereon a pleading of plene administravit is an insufficient answer—Glisson v. E. A. Weil & Co., 117 Ga. 842.

93. Richtmyer v. Lasher, 77 App. Div. (N. Y.) 574.

An administrator may employ as counsel for the estate an attorney for one of the heirs in a suit between the heirs.[94] If authorized to sell under a will the executor may employ an agent to make the sale and agree to compensate him therefor.[95]

The court having jurisdiction of the estate may authorize[96] or direct the personal representative of a deceased person to perform a contract entered into by deceased during his life,[97] and the heirs are necessary parties where a contract of sale of realty is sought to be enforced.[98] Specific performance of a contract of sale may be enforced by the representatives of the deceased vendor[99] or they may exercise the contracted option to rescind.[1]

To continue decedents' business for other than the purpose of reduction to money there must be an express authorization in the will;[2] an oral request of the decedent before his death is insufficient.[3] If the will directs the sole surviving partner to continue the business, the personal representative of the deceased partner and such survivor become partners and liable as such,[4] but if an executor voluntarily continues the business of the deceased he will be charged to account for only the net profits.[5]

Generally, the making of improvements on realty by executors[6] or investments as the purchase of realty at their own foreclosure sale, should only be done on leave of court.[7]

(§ 4) *C. Title, interest, or right in decedents' property.*—The title to all personalty passes to the domiciliary representative no matter where situated.[8] Ordinarily an administrator has no rights in the lands of a decedent who left heirs except to subject them to the payment of decedent's debts,[9] nor is he under obligation to take possession until it is necessary for the protection of creditors[10] or until an order has been entered directing him to take possession,[11] which can be granted only when it is necessary for the payment of debts,[12] and which applies

94. In re Healy's Estate, 137 Cal. 474, 70 Pac. 455.

95. Ingham v. Ryan (Colo. App.) 71 Pac. 899.

96. Contract for sale of realty—May v. Boyd, 97 Me. 398.

97. Fitzsimmons v. Lindsay, 205 Pa. 79; In re Huggins' Estate, 204 Pa. 167. No matter what the form of the application to the court may be, whether in the nature of a bill in equity or not—Wheeler v. Wheeler, 105 Ill. App. 48.

98. A decree made in such a proceeding to which the heir is not a party, may be collaterally attacked on such ground—Holmes v. Columbia Nat. Bank (Neb.) 97 N. W. 26. Recitals in such a decree will not be extended to include other than record parties—Id. Relief granted in such a proceeding—Id.

99. In the absence of fraud and collusion and unless the property is homestead, any allegation of the personal representative of the deceased vendor in suit for specific performance is binding on all persons interested in the estate, e. g., an allegation that the property is homestead—Solt v. Anderson (Neb.) 93 N. W. 205. The decree should direct payment of the purchase money to the heirs—Id.

1. Oakes v. Gillilan (Neb.) 95 N. W. 511.

2. In re Peck, 79 App. Div. (N. Y.) 296.

3. In re McCollum, 80 App. Div. (N. Y.) 362.

4. City Nat. Bank v. Stone (Mich.) 92 N. W. 99.

5. In re Peck, 79 App. Div. (N. Y.) 296.

6. Improvement approved though made without leave of the court—Henry v. Henderson (Miss.) 33 So. 960.

7. An order granting such authority held to limit the bid by the executors to an amount equal to the face of the note secured by the mortgage—Warfield v. Hume, 91 Mo. App. 541.

8. In re McCabe, 84 App. Div. (N. Y.) 145.

9. Halstead v. Coen (Ind. App.) 67 N. E. 957. He cannot therefore maintain a bill to quiet title—Bailey v. Larrance, 104 Ill. App. 662. It is the duty of the administrator to pay taxes and insurance, and spend money in repairing the realty—State v. Taylor (Mo. App.) 74 S. W. 1032. Before assignment of dower the widow is entitled to possession of the real estate on which deceased had given a trust deed which covenanted that he should remain in possession until default in payment. Particularly where she is the administratrix of deceased grantor, since as such she is the holder of the term of years created by the covenant—Wilkes v. Wilkes, 18 App. D. C. 90.

10. Tunnicliffe v. Fox (Neb.) 94 N. W. 1032.

11. Johnson v. McKinnon (Fla.) 34 So. 272. If he has not been in possession or directed to take possession by the court, he cannot defend in ejectment—Finlayson v. Love (Fla.) 33 So. 306.

12. Where there is no showing that the personal estate was insufficient to pay debts,

to a temporary administrator appointed pending the contest of the will.[13] He cannot therefore maintain an action to avoid a fraudulent conveyance by decedent until there is a deficiency in assets.[14] An administrator has no interest or possessory rights in homestead lands of the deceased,[15] but until the widow's homestead is set apart and segregated, the widow as executrix is entitled to the control of the entire track.[16] The possession of realty by an administrator is not adverse to the heirs.[17]

The personal representative has the same but no better title than his decedent had[18] which vests by relation from the time of death[19] and he holds the property in trust for all the creditors.[20]

Possession of personalty by the heirs before the appointment is not wrongful.[21]

§ 5. *The property; its collection, management and disposal by personal representatives. A. Assets.*—Jewelry, such as a watch, watch-chain, watch-charm, rings, and diamonds, are assets.[22] Insurance money received under a policy payable to the estate of the deceased is ordinarily an asset.[23] The recovery for injuries resulting in death by the representative is not generally considered assets.[24] Income accruing on a life estate prior to the death of the life tenant are assets of his estate.[25] A recovery for injuries to the realty paid after the death of the remainderman are assets of his estate subject to the life estate.[26] A right of action to recover for a trespass on realty during the life of the owner is an asset passing to his representative on his death.[27] Unpaid purchase money passes to the administrator of the deceased vendor as personalty[28] even if the contract of

orders authorizing the administrator to complete buildings commenced by the deceased and to take charge of the improved real estate, and to insure buildings thereon, are void, and the administrator will not be allowed the expenses therein as credits, but will not be charged with rents accruing after death collected by him—Langston v. Canterbury, 173 Mo. 122.

13. Union Trust Co. v. Soderer, 171 Mo. 675.

14. Bagley v. Harmon, 91 Mo. App. 22. But under Mass. Pub. Sts. c. 134, § 15, the representative must first obtain possession by entry or action and sell within a year after possession—Tyndale v. Stanwood, 182 Mass. 534. The heirs have no right to avoid an executed gift by the deceased ancestor, though it was procured by fraud or undue influence—Bishop v. Leonard, 123 Fed. 981.

15. Finlayson v. Love (Fla.) 33 So. 306.

16. Cammack v. Rogers (Tex. Civ. App.) 74 S. W. 945.

17. And if he passed possession to his wife and continued to reside thereon, there is no visible change of possession—Ashford v. Ashford, 136 Ala. 631.

18. Lahey v. Broderick (N. H.) 55 Atl. 354.

19. Flynn v. Flynn, 183 Mass. 365.

20. Though the estate is administered under a will free from the control of the county court—Farmers' & Merchants' Nat. Bank v. Bell (Tex. Civ. App.) 71 S. W. 570.

21. Hardy v. Wallis, 103 Ill. App. 141.

22. Coffinberry v. Madden, 30 Ind. App. 360.

23. Pietri v. Seguenot, 96 Mo. App. 258. Evidence in an action by an administrator held sufficient to show that a policy of insurance held by a creditor of the decedent was taken out to secure the creditor and not by the creditor in his own right—Strode v. Meyer Bros. Drug Co. (Mo. App.) 74 S. W. 379. Evidence held sufficient to show a policy of insurance an asset of the estate—Phoenix Mut. Life Ins. Co. v. Opper, 75 Conn. 295. The application for insurance contained a direction to pay on death to the person whom the applicant would name in his will, and the policy was made payable to the deceased, his personal representatives or assigns, held that the policy was assets and the legatee was entitled to the surplus proceeds after the payment of the debts of the estate of insured—Leonard v. Harney, 173 N. Y. 352.

Statute governs in N. Y. as to fraternal and mutual benefit insurance.

24. See Woerner, Adm'n, § 306, p. 647; and subject Death by Wrongful Act, ante, p. 865. The general administrator of a deceased person is the proper party to maintain an action to recover for the wrongful death of the decedent—Lake Erie & W. R. Co. v. Charman (Ind.) 67 N. E. 923. An administratrix has authority to compromise a claim for wrongful death of her deceased husband without leave of court—Pittsburg, etc., R. Co. v. Gipe (Ind.) 65 N. E. 1034. The administratrix and sole distributee may compromise an action brought by her to recover for the wrongful death of the intestate's husband—Mattoon Gas Light Co. v. Dolan, 105 Ill. App. 1.

25. People's Nat. Bank v. Cleveland, 117 Ga. 908.

26. De Witt v. Lehigh Val. R. Co., 21 Pa. Super. Ct. 10.

27. Code 1892, §§ 1916, 1917. Heirs cannot sue therefor—Conklin v. Alabama & R. R. Co. (Miss.) 32 So. 920.

28. Clapp v. Tower, 11 N. D. 556; Solt v. Anderson (Neb.) 93 N. W. 205. In the hands of an officer under a sale under execution prior to the death of decedent—Carr v. Berry, 116 Ga. 372.

sale with deceased was renewed by his representative;[29] but if the land is the homestead of the deceased vendor his administrator is entitled only to the surplus over the statutory limit.[30] Though the executor be given power of sale, rents accruing subsequent to the death of the decedent are not assets.[31] Under a deed of trust by decedent whereby he was to receive the income during life and on his death the trustee was to pay over to "his heirs, executors, or administrators (the remainder) as the same may in and by the law be provided" the trustor's executor is entitled to the remainder.[32]

While the representative as such has no interest in property held by deceased in trust though he was one of the beneficiaries,[33] it not being an asset,[34] yet he is entitled to possession of such property.[35] The presumption is that a judgment in favor of a representative as such is his personal judgment but is subject to be removed by slight evidence showing that it was in fact a judgment in favor of the estate.[36]

(§ 5) *B. Collection and reduction to possession.*—The personal representative being entitled to the possession of personalty can alone sue to recover;[37] the heirs being entitled to sue only when there is no necessity for administration,[38] though they may be made parties to an action to recover assets procured from the deceased by fraud.[39] The representative of a deceased legatee may enforce a provision in the testator's will directing the payment of the legatee's debts.[40] The personal representative is not estopped to claim restitution of property sold under a void execution merely because he was present and purchased at the sale,[41] nor is he estopped to claim title because he took possession as representative.[42] A representative can compromise a debt due the estate only on leave obtained.[43]

Only unadministered assets vests in the administrator de bonis non[44] to recover which he may sue his predecessors,[45] but personalty mingled with the ad-

29. Clapp v. Tower, 11 N. D. 556.

30. Solt v. Anderson (Neb.) 93 N. W. 205.

31. Bittle v. Clement (N. J. Eq.) 54 Atl. 138. Rents and profits of realty which had descended to an intestate held not such assets which would pass to the administrator —Appeal of Ward, 75 Conn. 598.

32. Heintz v. Hoover, 138 Cal. 372, 71 Pac. 447.

33. In an action against him for an accounting of the rents and profits, the judgment should be against him personally—Anderson v. Northrop (Fla.) 33 So. 419.

34. In re Belt's Estate, 29 Wash. 535, 70 Pac. 74.

35. But is liable to account to the beneficiary in his individual or representative capacity—In re Belt's Estate, 29 Wash. 535, 70 Pac. 74. The representative of a deceased public officer who died in possession of funds coming to him by virtue of his office which he had mingled with personal funds, is entitled to the possession thereof for the purposes of administration—O'Brien v. New England Trust Co., 183 Mass. 186. In Vermont, the probate court may direct the representatives to convey property held by the deceased in trust to the person entitled thereto. Property purchased by the husband and deeded to the wife is not such a trust as would confer jurisdiction to the probate court to direct the deceased wife's representatives to convey—Wilder's Ex'x v. Wilder (Vt.) 53 Atl. 1072.

36. Sufficiency of evidence to rebut the presumption—Dozier v. McWhorter, 117 Ga. 786.

37. Mitchell v. Mitchell, 132 N. C. 350. The widow cannot sue to recover property alleged to have been transferred by the deceased husband in fraud of her marital rights—Flynn v. Flynn, 183 Mass. 365. The heirs cannot sue to recover for trespass to personalty committed during decedent's life—Conklin v. Alabama & V. R. Co. (Miss.) 32 So. 920. Evidence in an action to recover assets held sufficient to warrant the submission of the cause to the jury—Motz v. Motz, 82 N. Y. Supp. 926.

38. Sun Life Ins. Co. v. Phillips (Tex. Civ. App.) 70 S. W. 603.

39. Keys v. McDermott (Wis.) 93 N. W. 553; Gay v. Mooney, 67 N. J. Law, 687.

40. Such a direction is in the nature of a legacy—Hallock v. Hallock, 79 App. Div. (N. Y.) 508.

41. Under Code Civ. Proc. § 957—Black v. Vermont Marble Co., 137 Cal. 683, 70 Pac. 776.

42. In re Belt's Estate, 29 Wash. 535, 70 Pac. 74.

43. The surrogate has power to allow a compromise of a claim by accepting stock in a foreign corporation to which the property in dispute was to be transferred which was in possession of one claiming right thereto as surviving partner of the deceased—In re Gilman's Estate, 82 App. Div. (N. Y.) 186.

44. Meservey v. Kalloch, 97 Me. 91.

45. Such an administrator is not within Rev. St. Me. 72, §§ 10, 16—Meservey v. Kalloch, 97 Me. 91; American Surety Co. v. Piatt (Kan.) 72 Pac. 775. Instructions in an action by a successor to recover assets from his

ministrator's personalty so as to be incapable of identification are not assets passing to the administrator de bonis non.[46] In a proceeding to recover the assets an issue of title may be tried by jury.[47] For the conversion of assets by the administrator, the remedy of the special administrator is by an accounting.[48]

The petition must describe the personalty sought to be recovered from the heirs by action.[49] Mere insolvency of an estate is not a defense to an action by the representative to recover for a tort to the estate.[50] Equity having jurisdiction of a suit by an administrator to declare a trust in favor of the decedent in lands may, as a part of the relief, direct a sale thereof.[51]

(§ 5) *C. Inventory and appraisal.*—There should be an inventory returned.[52] An additional inventory of newly-discovered property may be filed.[53]

Only persons interested in the estate can compel the filing of an inventory by the representative.[54]

It is not ground of objection to an inventory that it failed to include as an asset a personal claim against the estate which was not intended to be enforced,[55] but the inventory of the representative of a deceased representative must include a claim paid to heirs as shown by the accounts of the latter.[56] If the personalty had all been disposed of by will and there was but one small debt which was apportioned among the beneficiaries under the will, there is no necessity for making an inventory.[57]

An administrator cannot be compelled to inventory property not an asset.[58] The mere direction to inventory certain property is not conclusive that such property is an asset.[59]

It will be presumed that property with which he charges himself is an asset;[60] yet he is not estopped thereby from claiming ownership.[61]

The personal representative has nothing to do with the appointment of appraisers.[62]

(§ 5) *D. Property allowed widow or children. Quarantine.*—The widow's allowance is determined by the terms of the various statutes.[63]

predecessor held sufficient—Tunnicliffe v. Fox (Neb.) 94 N. W. 1032.

46. Reed v. Hume, 25 Utah, 248, 70 Pac. 998; Meservey v. Kallock, 97 Me. 91.

47. In probate court—In re Murphy's Estate, 30 Wash. 9, 70 Pac. 109. In Pennsylvania, the Orphan's court may award such an issue to the common pleas to determine the title of claimant—In re Huggins' Estate, 204 Pa. 167.

48. Iowa Code, § 3393—Garretson v. Kinkead, 118 Iowa, 383. If the personal representative takes possession of realty under the supposition that it belonged to the decedent, he will be allowed only for such payment made to protect the property, where the person entitled thereto had received a direct benefit by such payment—Walker v. Neil (Ga.) 45 S. E. 387. He cannot have the property subjected to re-payment of the taxes when decreed to be the property of the daughter—Id.

49. Union Trust Co. v. Soderer, 171 Mo. 675.

50. Brown v. Howell, 68 N. J. Law, 292.

51. Suit to recover funds of decedent wrongfully converted into realty. If the minor heir by his guardian had full knowledge of the proceeding and acquiesced therein he will be estopped to question the title of the purchaser—Buchanan v. Ammerman, 21 Pa. Super. Ct. 439.

52. In proceedings for an accounting the executor should not be penalized for failure to file an inventory—Mulford v. Mulford (N. J. Ch.) 53 Atl. 79.

53. As expressly authorized by Sayles' Ann. Civ. St. 1897, § 1973—Texas Loan Agency v. Dingee (Tex. Civ. App.) 75 S. W. 866.

54. Petition held insufficient to show petitioner a creditor—In re Huntington's Estate, 39 Misc. (N. Y.) 477.

55, 56. In re Glenn's Estate, 23 Ohio Circ. R. 397.

57. In re Murphy's Estate, 30 Wash. 9, 70 Pac. 109.

58. Merely because property was recovered by representatives, as such, does not of itself show that such property is an asset—In re Belt's Estate, 29 Wash. 535, 70 Pac. 74.

59. The probate court has jurisdiction to determine whether certain property is an asset merely for the purpose of compelling an inventory. The finding however is not conclusive in another form—In re Belt's Estate, 29 Wash. 535, 70 Pac. 74.

60. In re Fague's Estate, 19 Pa. Super. Ct. 638.

61. In re Murphy's Estate, 30 Wash. 9, 70 Pac. 109; Tunnicliffe v. Fox (Neb.) 94 N. W. 1032.

62. Held in action on bond for breach of duty—O'Brian v. Wilson (Miss.) 33 So. 946.

63. The widow's statutory exemption in-

The widow's allowance for support does not depend upon the testacy, intestacy[64] or the solvency of the deceased husband[65] or the fact that she could support herself and children from the income of her own property;[66] and if the income from property which she held as a devisee was insufficient for her support without resorting to the principal fund, she may properly be allowed for a year's support.[67] Under the Georgia statutes she is not entitled to homestead and a year's support where the aggregate of the two exceed the amount which may be set apart as a homestead and exemption,[68] yet she will not be deprived of her year's support merely because she and her children resided for a year on the deceased's homestead property.[69]

An antenuptial contract whereby she agreed not to claim any interest in any property of her husband bars her right to support,[70] but only where deceased left no minor children surviving.[71] She may lose her right by electing to take under the will of the deceased husband.[72] A decree of separation and alimony obtained by the wife during life bars her right, as widow, to an allowance.[73]

The legal title to specific property set apart by statute to the widow vests immediately in her[74] which she may recover by action;[75] if, however, the widow took possession of personalty of less value than her exemption, the representative of deceased cannot be charged therewith.[76] Where the statute provides that if the deceased's estate did not exceed a certain sum the widow may have the same set aside to her free from debts she takes subject to a purchase-money mortgage on such property.[77] If real property is set off to the widow it is subject to a valid pre-existing lien thereon.[78] The widow's demand for her statutory allowance inures to the benefit of her assignee.[79]

The allowance to the deceased's family should be generally made on notice.[80]

cludes only such personal articles of which the deceased died possessed and not money—In re Sprague's Estate, 85 N. Y. Supp. 303.

The amount of the allowance is within the discretion of the court—Maney v. Casserly (Mich.) 96 N. W. 478.

It is only where minor children are members of the family of the deceased that they can share in the allowance for a year's support to the widow and children under the statute, (Goss v. Harris, 117 Ga. 345) or when it is necessary for their support that personal property can be set apart—Stewin v. Thrift, 30 Wash. 36, 70 Pac. 116. An allowance for the maintenance of the minor children may be made from the estate of the deceased mother. Under 2 Ballinger's Wash. Ann. Codes & St. § 6220—In re Murphy's Estate, 30 Wash. 9, 70 Pac. 109. Ohio Rev. St. § 6040—In re Glenn's Estate, 23 Ohio Circ. R. 397.

64. Busby v. Busby (Iowa) 95 N. W. 191.

65. That bankruptcy proceedings were pending against deceased at the time of his death will not bar the widow's statutory allowance—In re Parschen, 119 Fed. 976.

66. Busby v. Busby (Iowa) 95 N. W. 191.

67. Under the facts the representatives of the estate were held estopped by laches to move to vacate an order granting the widow an allowance for a year's support—Busby v. Busby (Iowa) 95 N. W. 191.

68. Green v. Hambrick (Ga.) 45 S. E. 420. That the widow also had a homestead set apart from the estate of her deceased husband is not ground for collateral attack on a judgment setting apart a year's support—Groover v. Brown (Ga.) 45 S. E. 310.

69. Bardwell v. Edwards (Ga.) 45 S. E. 40.

70. Perkins v. Brinkley (N. C.) 45 S. E. 465.

71. Zachmann v. Zachmann, 201 Ill. 380.

72. Nelson v. Lyster (Tex. Civ. App.) 74 S. W. 54. A failure for six months to elect not to take under the will, will bar the widow's right to a year's support—Perkins v. Brinkley (N. C.) 45 S. E. 465.

73. In re Evans' Estate, 21 Pa. Super. Ct. 430.

74. Code, § 2713—Crawford v. Nassoy, 173 N. Y. 163.

75. She need not proceed in the surrogate's court—Crawford v. Nassoy, 173 N. Y. 163.

76. Her exemption not having been set apart to her—O'Brian v. Wilson (Miss.) 33 So. 946.

77. Under Burns' Rev. St. Ind. 1901, §§ 2575, 2578—Warner v. Warner, 30 Ind. App. 578.

78. Wade v. Freese (Tex. Civ. App.) 71 S. W. 69. Sayles' Rev. Civ. St. 1888, 1889, art. 2053, providing that no property on which liens had been given by husband and wife, so as to be binding on her, or on which vendor's lien exists, shall be set apart as exempt until the discharge of the debt secured, applies to insolvent estates—Parlin & Orendorff Co. v. Davis' Estate (Tex. Civ. App.) 74 S. W. 951.

79. The joinder of the widow with the assignee in an action for her statutory allowance is not fatal—Brown v. Bernhamer, 159 Ind. 538.

80. An order made without notice may be validated by an order after hearing on no-

In Texas, the probate court has no jurisdiction of such an application where by the will it was provided that no action should be had in such court with reference to the estate other than the probate of the will and filing of the inventory.[81] In an action to recover it is essential that she aver the existence of funds sufficient to pay the allowance at the time of the demand.[82]

The estate in remainder of heirs in homestead set apart to the widow and heirs is subject to sale for payment of the widow's award.[83] If the widow was appointed executrix and devised a life estate but failed to have her award allowed, but did not waive the same, it will not constitute a lien on the realty after her death.[84] An order granting a monthly allowance to the widow for support is subject to modification pending administration on the estate.[85] An appeal from the allowance may be taken by the executor.[86]

The widow is entitled to quarantine in the mansion house and plantation until dower is assigned,[87] which right is assignable,[88] and a conveyance by her after the husband's death operates as an assignment thereof.[89] She may lose her quarantine right by having abandoned her husband during his life and lived in adultery.[90]

(§ 5) *E. Management, custody, control, and disposition of estate.*—In some states by a special statutory provision the court having probate jurisdiction may take charge of the estate of the intestate and dispose of the same without the appointment of an administrator.[91] The executor is entitled to have corporate stock belonging to the estate transferred on the books of the corporation in his own name,[92] and an administrator may pay dues on building and loan stock pledged by the decedent without leave of court.[93]

In some states the representative can transfer personalty only on leave of court,[94] though the court may ratify a transfer made without leave.[95] In selling personalty, the representatives must obtain the best possible price.[96]

Leave of court is necessary to authorize the representative to borrow money and give security therefor, since he cannot bind the estate by an original undertaking.[97] A decree or order authorizing him to mortgage realty is not conclusive on a creditor not made a party,[98] and it may be collaterally attacked for want of jurisdiction.[99]

tice—In re Murphy's Estate, 30 Wash. 9, 70 Pac. 109.

81. Nelson v. Lyster (Tex. Civ. App.) 74 S. W. 54.

82. Complaint held sufficient to state the existence of funds—Brown v. Bernhamer, 159 Ind. 538. Where she brings the action for her statutory allowance it is not necessary that she annex to her complaint her deceased husband's will giving her such property as she was entitled to under the statute—Id. The entire estate should be assigned to the widow as her statutory allowance where it is within the limit, though part of the land was the separate property of the husband and though prior to his death a declaration of homestead had been filed by the widow alone (Code Civ. Proc. § 1469)—In re Neff's Estate, 139 Cal. 71, 72 Pac. 632.

83. In re Tittel's Estate, 139 Cal. 149, 72 Pac. 909.

84. Brack v. Boyd, 202 Ill. 440.

85. James' Estate v. O'Neill (Neb.) 97 N. W. 22.

86. Lane v. Thorn, 103 Ill. App. 215.

87. Casteel v. Potter (Mo.) 75 S. W. 597. A verdict in favor of a daughter in an action to recover the property on the ground that the will which did not provide for the daughter was invalid—De Roche v. Myers (N. J. Law) 54 Atl. 558.

88. Phillips v. Presson, 172 Mo. 24.

89. In such a case a purchaser is entitled to possession until dower is assigned or during the widow's life at the pleasure of the remaindermen—Graham v. Stafford, 171 Mo. 692.

90. Lyons v. Lyons (Mo. App.) 74 S. W. 467.

91. A person appointed by the county court to take physical possession of property under laws 1901, p. 201, ch. 123, § 2, has no capacity as agent of the court to sue to recover assets—Smith v. Terry Peak Miners' Union (S. D.) 94 N. W. 694.

92. London, Paris & American Bank v. Aronstein (C. C. A.) 117 Fed. 601.

93. State v. Taylor (Mo. App.) 74 S. W. 1032.

94. So of land contract by decedent—Hovorka v. Havlik (Neb.) 93 N. W. 990.

95. Holt v. Rust-Owen Lumber Co. (Neb.) 96 N. W. 613.

96. Where they were obliged to pay $375 for the unexpired term under decedent's lease and sub-let the property for $225 they will not be charged the difference—In re Peck, 79 App. Div. (N. Y.) 296.

Executors have power to convert realty into personalty only when so authorized by the court or the will.[1] If a sale is directed as part of the administration by a will which fails to designate by whom it should be made, it may be executed by the person named as executor,[2] but if the will fails to nominate an executor, the power cannot be executed by the appointed representative.[3] A personal power of sale terminates on the discharge of the executor,[4] and cannot be exercised by the administrator with the will annexed on the theory that the direction of sale operated as an equitable conversion into personalty.[5] If a personal power be given to co-executors, it may be exercised by the survivors,[6] but not by one of the executors alone.[7] It may be executed through an attorney.[8] The exercise of a discretionary power of sale will not be reviewed by the courts.[9] A power to sell for debts is not affected by the fact that an action was pending by the creditor asking a settlement of the estate.[10] The will governs the time for the exercise of the power of sale.[11] The rule of caveat emptor applies to sales of executors.[12] A deed signed by an administrator is a good color of title, though it does not purport on its face to evidence execution under an order of the court.[13] Purchase-money notes given to an executor cannot be enforced until due.[14]

§ 6. *Debts and liabilities of estate; their establishment and satisfaction. A. Liability of estate.*—Before a claim can be allowed it must appear to have been an obligation of the decedent.[15] While relationship to deceased affords a presumption

97. See ante, § 4 B.

98. Hughes v. Treadaway, 116 Ga. 663.

99. That the order provided for the payment only of certain claims and not a ratable payment is an error in the exercise of jurisdiction and not ground for collateral attack—Stambach v. Emerson, 139 Cal. 282, 72 Pac. 991.

1. Will held to confer a power of sale on the executors—Bedford v. Bedford (Tenn.) 75 S. W. 1017; In re Rowley, 38 Misc. (N. Y.) 622. Will construed and held to confer power on the executor to sell realty for payment of debts—Mersman v. Worthington's Ex'rs, 24 Ky. L. R. 2115, 72 S. W. 1094. Will held to charge the expenses of converting realty into personalty for the purposes of the will to be a charge against the realty—Matthews v. Tyree (W. Va.) 44 S. E. 526.

2. It is error to appoint the executor as a trustee to make the sale under Rev. Sts. 1898, § 2128—Lawrence v. Barber, 116 Wis. 294.

3. Shannon's Code, § 3976, does not apply in such case but that power is devolved on chancery—McElroy v. McElroy (Tenn.) 73 S. W. 105.

4. Title not vesting in the executor as trustee—Boland v. Tiernay, 118 Iowa, 59. By consenting to a decree discharging the executor, the devisee is not estopped from claiming title to land as such, sold under power by the executor after the termination of his authority as such—Boland v. Tiernay, 118 Iowa, 59.

5. In Tennessee prior to 1851, the power to convert realty into personalty under a will was personal to the executor and could not be exercised by the administrator with the will annexed—McElroy v. McElroy (Tenn.) 73 S. W. 105; Scott v. Douglas, 39 Misc. (N. Y.) 555.

6. Bedford v. Bedford (Tenn.) 75 S. W. 1017.

7. Lynch v. Buckley, 82 App. Div. (N. Y.) 614.

8. Gates v. Dudgeon, 173 N. Y. 426.

9. Bedford v. Bedford (Tenn.) 75 S. W. 1017. Only parties to the proceeding can move for a new trial of objections to a confirmation of sale under power in the will—In re Richards' Estate, 139 Cal. 72, 72 Pac. 633.

10. Mersman v. Worthington's Ex'rs, 24 Ky. L. R. 2115, 72 S. W. 1094.

11. Will construed as to the time of the exercise of the power to sell particular property—O'Reilly v. Platt, 80 App. Div. (N. Y.) 348.

12. A plea in an action on promissory notes given in consideration of a transfer of realty that neither the deceased nor the executor had title, is properly stricken out—Keen v. McAfee, 116 Ga. 728. Where the surviving husband and executor under the will of the deceased wife giving him power to sell, conveyed to his second wife without consideration, the mortgagee under a mortgage executed by himself and wife, is chargeable with notice of his want of power to place the legal title in his wife and to mortgage any of the property of the estate—Neary v. Neary (Neb.) 97 N. W. 302. Purchaser from an agent is bound to know that he was authorized to sell—Lynch v. Buckley, 82 App. Div. (N. Y.) 614.

13. The deed in this case was given under authority given by heirs to dispose of property at private sale for the purpose of saving time and expense—Street v. Collier (Ga.) 45 S. E. 294.

14. In an action to recover on notes given in consideration of the transfer of realty, the executors can recover only on the notes then actually due—Keen v. McAfee, 116 Ga. 728.

15. Unless it appeared that the defendant requested that medical attendance be given to his tenants, a claim therefor against his estate will not be allowed—Baker v. Dawson, 131 N. C. 227. A claim for medical services rendered deceased's widow given a life estate by the will of her deceased husband is

that services rendered him are gratuitous,[16] yet recovery can be had on an implied contract to pay therefor,[17] though in some states an express contract, either parol or in writing, must be proved.[18] Stronger proof however is required in support of claims made by relatives for personal services than is required on general claims by strangers,[19] and it must be supported by direct or indirect evidence of a clear and unequivocal character.[20] An express agreement of deceased to pay one not a relative may be shown by facts and circumstances.[21] After establishing the agreement to pay the claimant need not prove nonpayment.[22]

The estate of deceased joint debtor is liable only in the event that the surviving joint debtors are insolvent.[23] Counsel fees allowed in an action by the wife for support during the life of her deceased husband is a proper claim against his estate after his death,[24] as is alimony allowed for life under a decree entered on consent.[25] Money received by a deceased representative, whether rightfully or not, is a proper claim against his estate.[26] Taxes accrued on realty at the time of a conveyance thereof by deceased is not a personal debt.[27]

Where the estate had received the benefit of a tort committed by the decedent, it may be subjected to liability.[28] It cannot however be charged with the torts of the representatives,[29] though committed for the benefit of the estate and under order of the court.[30] If the testator disposed of property which he held as bailee, the executor's possession is not tortious.[31]

not a proper claim against his estate, though the personal representative had assets belonging to the life estate to which she was entitled—Gray v. Seeley's Estate (Mich.) 94 N. W. 1061.

16. Woerner, Adm'n, § 396; Shannon v. Carter (Mo. App.) 72 S. W. 495. Before claim against the estate of a deceased father for services rendered by a child, can be allowed, it must appear that such child had been emancipated, and emancipation will not be presumed—Tuohy v. Trail, 19 App. D. C. 79.

17. Shannon v. Carter (Mo. App.) 72 S. W. 495; Allen v. Allen (Mo. App.) 74 S. W. 396. Recovery for services by a child, rendered deceased, can be had only from the time of the request therefor up to the death—Shannon v. Carter (Mo. App.) 72 S. W. 495.

18. Hinkle v. Sage, 67 Ohio St. 256.

19. In re Warner's Estate, 39 Misc. (N. Y.) 432; In re Pray, 40 Misc. (N. Y.) 516. Admissibility of evidence on the trial of a claim for services, by a member of the family—Ellis v. Baird (Ind. App.) 67 N. E. 960; Gill v. Donovan, 96 Md. 518; Allen v. Allen (Mo. App.) 74 S. W. 396; by one not a relative—Bonebrake v. Trauer (Kan.) 72 Pac. 521; Cunningham v. Hewitt, 84 App. Div. (N. Y.) 114. Evidence held sufficient to show an agreement to pay for services rendered by a niece (Neish v. Gannon, 198 Ill. 219) daughter (Shannon v. Carter [Mo. App.] 72 S. W. 495) mother during her life (Wessinger v. Roberts [S. C.] 45 S. E. 169; In re Payne's Estate, 204 Pa. 535) daughter-in-law (Allen v. Allen [Mo. App.] 74 S. W. 396) a sister (Wright v. Reed, 118 Iowa, 333). Evidence held insufficient to establish a claim by a niece (Gaunce v. Barlow, 24 Ky. L. R. 929, 70 S. W. 284) cousin (Hanly v. Potts, 52 W. Va. 263) sister (In re Warner's Estate, 39 Misc. [N. Y.] 432). Evidence held insufficient to sustain a claim for board —In re Wilmot's Estate, 39 Misc. (N. Y.) 686. Evidence held insufficient to show an intent to charge for board and clothing furnished deceased brother—Succession of Oubre, 109 La. 516; sufficient to support a claim by a wife against her husband for board before marriage—In re Hamilton, 70 App. Div. (N. Y.) 73. A written document, "I * * * being of sound mind, desire that * * *, for her services day and night and diligent nursing, may receive $250 after my death," is not evidence of a promise to pay the sum mentioned nor is it a valid testamentary disposition but the person mentioned may only recover the sum agreed upon to be paid for the services rendered as nurse—Stadermann v. Heins, 78 App. Div. (N. Y.) 563. Instructions in an action by a daughter to recover held proper—Shannon v. Carter, 72 S. W. (Mo. App.) 495.

20. Hinkle v. Sage, 67 Ohio St. 256.

21. Oates v. Erskine's Estate, 116 Wis. 586. Evidence that a note given to claimant who held a confidential relation towards deceased insufficient to show that it was a valid obligation against the estate of the maker—Varick v. Hitt (N. J. Eq.) 55 Atl. 139.

22. Ralley v. O'Connor, 173 N. Y. 621.

23. Booth Bros. v. Baird, 83 App. Div. (N. Y.) 495.

24. Kellogg v. Stoddard, 40 Misc. (N. Y.) 92.

25. Hassaurek v. Hassaurek's Adm'r (Ohio) 67 N. E. 1066.

26. Overstreet v. Reddick, 117 Ga. 331.

27. In re Mertens' Estate, 39 Misc. (N. Y.) 512.

28. An action will lie against the executor to recover for unlawfully cutting and removing timber from public land by decedent —United States v. Bean, 120 Fed. 719.

29. Blum v. Dabritz, 78 N. Y. S. 207, as for the wrongful eviction of a tenant holding under a lease executed by the deceased—Id. 39 Misc. (N. Y.) 800. Complaint in an action for tort construed and held that a demurrer

A covenant of warranty is personal and binding on the representatives of the covenantor.[32]

The expenses accruing in the ordinary course of administration are proper items to be proved.[33] While funeral charges are not, strictly speaking, debts due from decedent, they will be allowed when reasonable though not ordered or authorized by the representative,[34] so also expenditures for a monument.[35] Claims or demands against decedents' estates generally carry interest,[36] but not compound interest nor is it to be computed with annual rests in the absence of specific agreement.[37]

(6) *B. Liability of heirs, devisees, and legatees.*—If property is bequeathed subject to the payment of the testator's debts, the beneficiary takes cum onere.[38] It is only where the heirs, devisees, or legatees have received property through their ancestor that they can be made liable for his debts,[39] severally to the amount each received from the estate,[40] and if the devisee buys in the land devised on foreclosure sale he does not hold as devisee.[41] The residuary legatee is not liable for debts until he gives a bond as such under the statute.[42] The debts of decedent cannot be charged against a devisee who did not sign the agreement between the devisees to apportion the debts among themselves.[43] The heirs take subject to liens existing against the property.[44] Taxes accrued or realty at the time of the death of the owner are not a personal debt of the deceased owner.[45] Taxes accrued before death of the testator on realty devised in trust ought to be paid out of the general estate and not be made a charge on the lands.[46] Statutes of limitations barring rights of action against heirs

by the representative in his capacity as such, properly sustained—Id.

30. On refusal of the executor to surrender personalty to the mortgagee entitled to possession thereto under the contract, he will be personally liable—Mathew v. Mathew, 138 Cal. 334, 71 Pac. 344.

31. Moran v. Morrill, 78 App. Div. (N. Y.) 440.

32. An action for breach of warranty against the administrator of the deceased grantor may be maintained though no real assets descended to the heirs of the warrantor. Since like any other action on a covenant sounding in damages the judgment will be satisfied out of the assets whether personal or real—Wiggins v. Pender, 132 N. C. 628.

33. Nicholas v. Sands, 136 Ala. 267. Where the deceased partner devised the good will and business to the survivor, on condition that he pay certain legacies, and if assets were insufficient to conduct the business until there were sufficient to pay, an obligation entered into by the partnership formed between the survivor and his sons is not an obligation of the estate of the deceased partner, the legatee survivor having taken possession as such and paid the legacies charged—Fleming v. Fleming, 204 Pa. St. 648.

34. Foley v. Broeksmit (Iowa) 93 N. W. 344.

35. The contract for a monument costing $1,050. held unwarranted—In re Smith, 75 App. Div. (N. Y.) 339.

36. Clift v. Mercer, 79 App. Div. (N. Y.) 369.

37. Anderson v. Northrop (Fla.) 33 So. 419.

38. The heirs of such devisee are estopped from denying that the land is so subject—Meddis v. Kenney (Mo.) 75 S. W. 633. Where testator devised the entire estate, both personalty and realty to the widow, the land will be held subject to the payment of debts—Kiesewetter v. Kress, 24 Ky. L. R. 1239, 70 S. W. 1065.

39. Where by agreement between the representatives and the legatees the estate was placed in trust for their use for life, no right of action accrued under the Code of Civ. Proc. § 1837, against the legatees—New York v. United States Trust Co., 78 App. Div. (N. Y.) 366. In Louisiana, on acceptance of the succession, the heirs are liable for the debts of decedent. Evidence held insufficient to show acceptance of succession by the heirs—Griffin v. Burris, 109 La. 216. On the acceptance of a residuary legacy, the legatee after giving bond as such, is liable for the payment of the decedent's debts—Pym v. Pym (Wis.) 96 N. W. 429. An action under Code, §§ 1837, 1860, to charge decedent's debts against the heirs will not fail simply because it appears that they took as devisees—Matteson v. Palser, 173 N. Y. 404. Where the deceased mortgagor executed a deed of trust reserving the income for life and on death the realty to go to her children the latter cannot be personally decreed to pay the deficiency on mortgage foreclosure as heirs, there being no proof of fraudulent intent in making the conveyance or that the property at the time was not sufficient to pay the debts—Matteson v. Palser, 173 N. Y. 404.

40. Haines v. Haines (N. J. Law) 54 Atl. 401.

41. Byrne v. Condon, 68 N. J. Law, 439.

42. Under Rev. St. 1898, § 3975—Pym v. Pym (Wis.) 96 N. W. 429.

43. Dauel v. Arnold, 201 Ill. 570.

44. Lien for omitted taxes—Commonwealth v. Zweigart's Adm'r, 24 Ky. L. R. 2147, 73 S. W. 758.

45. In re Hewitt, 40 Misc. (N. Y.) 322.

46. In re Doheny, 171 N. Y. 691.

or devisees for liabilities of decedents have been held to apply to suits in equity as well as actions at law.[47] The heir in an action against him on a claim against his ancestor may plead that it was barred as against the decedent.[48] The recovery will be limited to the value of the lands inherited in the condition in which they were at the time of the descent cast where the heir had conveyed the land.[49] If the heir had not aliened land the judgment should direct that the amount be levied on the lands inherited.[50]

(§ 6) *C. Exhibition, establishment, allowance, and enforcement of claims.*—It is essential to the allowance of a claim to the estate of a decedent that it be presented[51] in the form required by the statute,[52] but this does not apply to claims by the United States.[53] A representative may by his acts waive exhibition of a claim.[54] The general rule is that the claim must be presented to the representative before action can be brought thereon,[55] but this applies only to demands against decedent and not to demands against his representatives.[56] The bringing of an action against the personal representative in North Carolina, is a sufficient filing of the claim.[57] The failure to present the claim within the statutory time will bar an action thereon, though the personal representative still has personalty in his possession.[58] In Alabama the common-law rule that the mere fact of want of notice of a claim will not excuse the personal representative from payment if the assets were sufficient and though he had made a bona fide distribution thereof prevails.[59] A claim for interest against the estate of a deceased trustee by the cestui must be proven as an ordinary claim.[60] In some instances claims against decedent's estate not yet due may be presented,[61] and if such a claim matures after the time for the presentation of claims but before distribution it should be presented.[62] A contracted indebtedness payable upon the death of a certain person is not a contingent claim.[63]

A claim which would have been the proper subject of a set-off in the lifetime of the deceased may be so availed of against his administrator in enforcing a claim of the estate against the debtor, particularly if the estate is insolvent,[64] and in

47. Maine Rev. St. c. 87, § 16, applied by a federal court to a suit against a legatee to enforce the ancestor's liability as a stockholder in a foreign corporation—Hale v. Coffin (C. C. A.) 120 Fed. 470.

48. Haines v. Haines (N. J. Law) 54 Atl. 401. An answer in an action against heirs to recover a debt of their ancestor permitted to be amended to conform to the fact and relief granted generally—Reid v. Pringle (N. J. Law) 54 Atl. 837.

49, 50. Haines v. Haines (N. J. Law) 54 Atl. 401.

51. Berryhill v. Gasquoine, 88 Minn. 281. Claimant held guilty of such negligence as would bar right to have the estate reopened for the purpose of presenting his claim—Potter v. Brentlinger, 117 Iowa, 536. The failure to claim attorney's fees as stipulated in the note by the deceased maker, and procuring an allowance for the face of the note with interest, will operate as a bar to an action for such attorney's fees—Nease v. James (Tex. Civ. App.) 72 S. W. 87.

52. Cheairs v. Cheairs (Miss.) 33 So. 414. In many states the claim is presented by filing in the court of probate. See post, Presentation to Court, etc.

53. United States v. Bean, 120 Fed. 719.

54. As by appealing from its allowance by the probate court—Wencker v. Thompson's Adm'r. 96 Mo. App. 59.

55. If the action is against the administrator and heirs, the administrator should file an affidavit showing absence of a demand before suit together with the statutory affidavit—Tichenor v. Wood, 24 Ky. L. R. 1109, 70 S. W. 837.

56. As a claim for usury paid the administrator—Crenshaw v. Duff's Ex'r, 24 Ky. L. R. 718, 69 S. W. 962.

57. McLeod v. Graham, 132 N. C. 473.

58. Orphan's Court Act, § 75, has no application to an action to collect a claim—Cunningham v. Stanford (N. J. Law) 54 Atl. 245.

59. Whetstone v. McQueen (Ala.) 34 So. 229.

60. Elizalde v. Elizalde, 137 Cal. 634, 66 Pac. 369, 70 Pac. 861.

61. Under Rev. St. c. 3, § 67, a claim under a contract to pay rent for an entire term with a provision that such term may be shortened upon certain contingencies, may be presented—McElroy's Estate v. Brooke, 104 Ill. App. 220.

62. And if not so presented the heirs cannot be made liable therefor under Minn. Gen. St. 1894, § 5918, et seq.—Hunt v. Burns (Minn.) 95 N. W. 1110.

63. Brown's Ex'r v. Dunn's Estate (Vt.) 55 Atl. 364.

64. Helms v. Harclerode, 65 Kan. 736, 70 Pac. 866. Where the deceased before death agreed that an account stated be credited on the note held against accountant, the latter

such case it need not have first been presented,[65] otherwise if the estate is solvent.[66] A claim against a decedent, however, cannot be set off against a claim under a contract with the representative,[67] or against a judgment against claimant for the conversion of decedent's assets.[68]

On the question of whether debts secured by mortgage must be presented before the security can be enforced, the decisions are conflicting. In New York and Missouri they need not be presented,[69] but in Pennsylvania and Texas the contrary holds.[70]

A judgment obtained against a decedent during life must be exhibited,[71] but it need not be filed until after it has been affirmed on appeal.[72]

Special statutes of limitation.—The time within which claims may be filed or presented against an estate has been fixed in most jurisdictions by statute,[73] which must be complied with to prevent a bar,[74] and such statutes have been held to apply to claims of nonresidents,[75] and to begin to run from the time of the publication of the notice of the appointment of the representative.[76] Because the administrator had not filed an inventory[77] or an appeal from the probate of the will was pending is not an excuse for failure to present the claim within the statutory time,[78] and merely because the estate is not settled is not ground for equal relief on a barred claim.[79]

An action to enforce a claim is barred if not brought within the statutory time[80] after presentation and disallowance[81] or waiver of presentation.[82] The statute has

may plead it in an action on the note without first presenting it to the probate court—Parker v. Wells (Neb.) 94 N. W. 717.

65. Hall v. Greene (R. I.) 52 Atl. 1087.

66. Troup v. Mechanics' Nat. Bank, 24 R. I. 377.

67. Hancock v. Hancock's Adm'r, 24 Ky. L. R. 664, 69 S. W. 757.

68. Particularly where the estate is insolvent—Succession of Gragard (La.) 34 So. 742, 743.

69. In re Eadie, 39 Misc. (N. Y.) 117. A claimant must first exhaust his mortgage security on land before payment can be made out of the general fund, whether the mortgage was executed or assumed by the deceased. Mo. Rev. St. 1899, § 191. Will construed and held to intend that the debt secured be paid out of the general fund—Knight v. Newkirk, 92 Mo. App. 258.

70. Where realty is subject to administration, it is necessary to preserve a mortgage lien thereon that it be presented to the personal representative of the deceased mortgagor for allowance, though given to secure the purchase money; and though it provides that on default the trustee might sell, notwithstanding the death of the mortgagor—Texas Loan Agency v. Dingee (Tex. Civ. App.) 75 S. W. 866. A claim for attorney's fees as provided in the mortgage may be allowed—In re Rowe's Estate, 22 Pa. Super. Ct. 597.

71. Wencker v. Thompson's Adm'r, 96 Mo. App. 59. It is error to direct that an execution issue to enforce a judgment on a claim which had been appealed—Bennett's Estate v. Taylor (Neb.) 96 N. W. 669. Where an insolvent estate was being administered under a will independent of the court, judgments against decedent cannot be enforced by execution, since in such case the representative holds the property in trust for the benefit of all creditors—Farmers', etc., Nat. Bank v. Bell (Tex. Civ. App.) 71 S. W. 570.

72. Ryans v. Boogher, 169 Mo. 673.

73. After the expiration of twelve months from the granting of administration on the estate of a deceased partner all claims of the surviving partner arising out of partnership transactions are barred—Willis v. Sutton, 116 Ga. 283. A claim for services rendered as attorney in procuring probate of a will accrues on the probate of the will—Taylor v. Crook, 136 Ala. 354.

74. Kornegay v. Mayer, 135 Ala. 141. The indorsement by the clerk that the claim is allowed and registered is insufficient—Cheairs v. Cheairs (Miss.) 33 So. 414.

75. Hale v. Coffin (C. C. A.) 120 Fed. 470, 114 Fed. 567.

76. The time begins to run from the time of the publication of a notice of appointment as administrator de bonis non and not from the time of the appointment of the executor, who did not publish notice of the appointment—Lynch v. Farnell, 24 R. I. 496.

77. Particularly where the assets of the estate were shown by the guardian's report and the administrator's application for appointment—In re Jacob's Estate (Iowa) 93 N. W. 94.

78. Butler v. Templeton, 115 Wis. 382.

79. In re Jacob's Estate (Iowa) 93 N. W. 94.

80. An action to recover a year's support allowed a widow is barred if not brought within two years. It is therefore no ground for exception to the inventory of the assets that the claim for a year's allowance against her deceased husband's estate was not included—In re Glenn's Estate, 23 Ohio Circ. R. 397; Tuohy v. Trail, 19 App. D. C. 79. Claim held barred under the facts—Melton v. Martin (Mont.) 72 Pac. 414.

81. Miller v. Ewing, 68 Ohio St. 176; In re Glenn's Estate, 23 Ohio Circ. R. 397. After rejection of a claim by representatives the creditor must consent to a hearing thereon in court within the statutory time (N. Y.

been held to apply to scire facias to revive an action against the representatives of a deceased defendant.[83]

Nonresidence[84] or the death of the representative will not suspend the running of the statute.[85] The representative cannot by any act waive the bar of the statute,[86] as by a payment on account[87] or a new promise.[88] This rule applies to the realty as well as the personalty of the estate.[89] In New Jersey he may by a new promise remove the bar.[90]

General statutes of limitation[91] while suspended by the death of the debtor are revived by the appointment of a representative of his estate,[92] and are not suspended by a presentation of the claim,[93] though in Virginia an order directing an account of debts against the estate,[94] and in Louisiana the approval of the representative's accounts recognizing the claim[95] suspends the operation of the statute.

Presentation to representative.—It is not necessary that a claimant shall formally present a claim evidenced by writing and require an indorsement of allowance thereon,[96] and if formally presented it need not be verified.[97] The attorney for the estate may disallow a claim presented to the representative.[98] The consent in open court to the allowance of a claim by an executor without notice to his coexecutor is sufficient.[99] The mere failure to object to an account presented is insufficient to show that the representative had stated the account and relieved the claimant from the necessity of establishing it.[1] The rights of a creditor of an estate cannot be prejudiced by failure of the administrator to file the claim within the statutory time after it had been proved and allowed.[2]

Presentation to court having jurisdiction of estate.—A disputed claim may be allowed on the final settlement of the accounts of representatives only where the parties had consented to such hearing.[3] Where a claim is presented to the court having jurisdiction over the estate written pleadings are not necessary,[4] nor do the rules governing pleading apply.[5] If the demand is filed in such form as to unmistakably disclose the nature of the transaction which gave rise to it it is sufficient.[6] A waiver of a notice of claim by the representative is a waiver of the objection to the sufficiency of its presentment to the court.[7] Since written pleadings

Code Civ. Proc. § 1822)—In re Brown, 76 App. Div. (N. Y.) 185.

82. If the waiver was by appeal from allowance by the court, the day of appeal will be considered the date of presentation—Wencker v. Thompson's Adm'r, 96 Mo. App. 59.

83. Green v. Barrett, 123 Fed. 349.

84. Va. 1887, § 2933 does not apply—Kesterson v. Hill (Va.) 45 S. E. 288.

85. Pub. St. c. 189, § 8, limiting the time in which action should be brought to three years of the granting of letters, applies to the original granting of letters, and not to the time of granting of letters de bonis non—Thompson v. Hoxsie, 24 R. I. 493.

86. Cockrell v. Seasongood (Miss.) 33 So. 77; Miller v. Ewing, 68 Ohio St. 176.

87. Lynch v. Farnell, 24 R. I. 496.

88, 89. Findley v. Cunningham (W. Va.) 44 S. E. 472.

90. Hewes v. Hurff (N. J. Err. & App.) 55 Atl. 275.

91. See generally the title Limitation of Actions.

92. The general statute will apply where the court had fixed no time for the presentation of claims—Appeal of Mason, 75 Conn. 406.

93. MacNeill v. Gallagher, 24 R. I. 490.

94. Robinett's Adm'r v. Mitchell (Va.) 45 S. E. 287.

95. Succession of Willis, 109 La. 281.

96. If he presents the writing and requires a partial payment giving the administrator time for payment of the balance is sufficient—Miller v. Ewing, 68 Ohio St. 176.

97. Nicholas v. Sands, 136 Ala. 267.

98. Miller v. Ewing, 68 Ohio St. 176.

99. Cross v. Long (Kan.) 71 Pac. 524.

1. Withers v. Sandlin (Fla.) 32 So. 829.

2. Under Cal. Civ. Code, § 1497—Bell v. Mills (C. C. A.) 123 Fed. 24.

3. N. Y. Code Civ. Proc. § 1882, provides that a written consent by both parties for such a hearing may be filed—In re Warner's Estate, 39 Misc. (N. Y.) 432.

4. Thomson v. Barker, 102 Ill. App. 304.

5. Stanley's Estate v. Pence (Ind.) 66 N. E. 51. The denial of motion to compel claimant to make his petition more definite and certain after a trial, held not prejudicial error—Bonebrake v. Tauer (Kan.) 72 Pac. 521.

6. Claim held to evidence sufficient personalty—Monumental Bronze Co. v. Doty (Mo. App.) 73 S. W. 234.

7. Monumental Bronze Co. v. Doty (Mo. App.) 73 S. W. 234.

are not required effect may be given to the statute of limitations though not raised by objection or pleading.[8]

The jurisdiction of the probate courts over disputed claims depends upon the statutes creating them. In Illinois, Missouri and Texas they are given general jurisdiction over all claims both legal and equitable,[9] in New York the surrogate's jurisdiction is ousted by raising issues of fact[10] or equitable defenses.[11] A statutory reference of a claim in New York bars all further proceeding thereon in the surrogate's court.[12] The probate court in Iowa has no jurisdiction to determine the individual liability of heirs on a contract made by the personal representative of the estate.[13]

Neither party is entitled to a jury trial,[14] though issues of fact may be sent to a jury.[15]

Claims against decedent's estate should be allowed only when established by satisfactory evidence.[16] Admissions by heirs of deceased are not evidence of indebtedness against the estate.[17] If the claim has been established the representatives have the burden of proving payment,[18] even though the claimant did not prove his allegation of nonpayment.[19] The objecting party has the burden of showing that the claim allowed but not paid by the representative is invalid.[20]

The allowance of a claim by the probate court makes the claimant a judgment creditor of the estate,[21] and entitled to a lien against the property.[22]

The decree is conclusive as to the matters in issue and on the parties brought into the proceedings,[23] and on the creditors not made parties,[24] unless impeached for

8. Under Code Civ. Proc. N. Y. § 2718, pleadings are not required on a reference of a rejected claim—Simons v. Steele, 82 App. Div. (N. Y.) 202; McBride v. Ulmer, 30 Ind. App. 154; Wencker v. Thompson's Adm'r, 96 Mo. App. 59.

9. Thomson v. Barker, 102 Ill. App. 304. A claim as remaindermen against the estate of a deceased life tenant is enforceable in the probate court—Deiterman v. Ruppel, 200 Ill. 199. A claim for damages under a contract by a decedent to hold claimants harmless from damage by fire may be determined by the probate court. Under Rev. St. Mo. 1899, § 192—Wabash R. Co. v. Ordelheide, 172 Mo. 436. The district court had jurisdiction to determine the validity of a trust deed given to secure it—Ryon v. George (Tex. Civ. App.) 75 S. W. 48. The district court has no original jurisdiction to allow claims against the estate of a decedent—Craig v. Anderson (Neb.) 92 N. W. 640.

10. In re Huntington's Estate, 39 Misc. (N. Y.) 477.

11. The surrogate in New York can only determine to whom the judgment claim belongs and as to payments made thereon—In re Wait's Estate, 39 Misc. (N. Y.) 74.

12. The surrogate has no authority to render an affirmative judgment on the counterclaim in favor of the estate—In re Wilmot's Estate, 39 Misc. (N. Y.) 686.

13. In re Bruning's Estate (Iowa) 96 N. W. 780.

14. Alaska Code, § 823—Esterly v. Rua (C. C. A.) 122 Fed. 609.

15. As questions whether an interlineation on a note presented was written before the signature, and whether there was a fiduciary relation between the parties, such as would impose upon the creditors the burden of proving consideration—In re Dutton's Estate, 205 Pa. 244. Personal property act, § 7 does not deprive personal representatives of such right—Montgomery v. Boyd, 78 App. Div. (N. Y.) 64.

16. Kingan & Co. v. Burns' Estate, 104 Ill. App. 661. Particularly where the claim covers a long period of time—Hart v. Tuite, 75 App. Div. (N. Y.) 323. Admissibility of evidence—Crampton v. Newton's Estate (Mich.) 93 N. W. 250. The ex parte affidavit of claimant's agent is insufficient to support an allowance of a disputed claim—Kingan & Co. v. Burns' Estate, 104 Ill. App. 661. On sufficiency of evidence to support claim see—Galloway's Adm'r v. Galloway, 24 Ky. L. R. 857, 70 S. W. 48; Allsop v. Deposit Bank of Owensboro, 24 Ky. L. R. 762, 69 S. W. 1102; Simpson v. Scheutz (Ind. App.) 67 N. E. 457; Curd v. Wissler (Iowa) 95 N. W. 266; In re Wilmot's Estate, 39 Misc. (N. Y.) 686; Succession of Alexander (La.) 35 So. 273.

17. Kornegay v. Mayer, 135 Ala. 141.

18. Best v. Best's Adm'r, 25 Ky. L. R. 93, 74 S. W. 738. Evidence of payment held admissible under the issue—Garretson v. Kinkead, 118 Iowa, 383. Evidence held sufficient to show that claimant's claim had been paid by decedent—Cummings v. Lynn (Iowa) 96 N. W. 857.

19. Hurley v. Ryan, 137 Cal. 461, 70 Pac. 292.

20. In re Knab, 38 Misc. (N. Y.) 717.

21. Under Rev. St. Mo. 1899, §§ 192, 1580, 3713—Funk v. Seehorn (Mo. App.) 74 S. W. 445.

22. Funk v. Seehorn (Mo. App.) 74 S. W. 445.

23. If a creditor presents his claim before the commissioner appointed in suit by administrator under W. Va. Code 1899, c. 86, § 7, the decree on demand is confusing as to the claimant and the representative and the party purchasing land of the estate under the decree made—Hurxthal v. St. Lawrence

fraud, accident or mistake.[25] The rejection of a claim not presented in statutory form is not an adjudication which would bar a subsequent action thereon.[26]

The surrogate's court must have heard evidence and made findings of fact to sustain the validity of a decree in a statutory proceeding to direct payment of a claim.[27]

The personal representative can obtain a review of an allowance of a claim[28] only by giving the statutory bond,[29] and it is his duty to follow the appeal when taken by claimant without further or other notice than the taking and the perfection of the right to appeal.[30] The claim is usually tried anew on appeal without further or formal pleadings.[31] The finding on conflicting evidence will not be disturbed on appeal.[32]

Actions and suits to enforce claims.—In New Jersey, an action to enforce a claim cannot be commenced until six months after the granting of letters.[33] It is not an essential condition precedent to an action on a rejected claim that it be filed.[34] A resident creditor of a nonresident decedent may sue to subject decedent's interest in personalty which had been fraudulently transferred and which was situate within the state,[35] and a judgment creditor whose judgment was enforceable against the estate if there were assets in the hands of the personal representative may maintain a proceeding in aid of his execution to subject money in the hands of the debtors of the estate.[36] To all actions wherein a claim against an estate is sought to be proved, as an action by a creditor to subject property fraudulently conveyed, the representative is a necessary party,[37] but it is not error to refuse to direct the joinder of an insolvent co-executor.[38] To a suit to determine the validity of a trust deed

Boom Co. (W. Va.) 44 S. E. 520. And in an action to avoid a fraudulent conveyance by the decedent, the allowance of a claim based on a promissory note, cannot be collaterally attacked on the ground that the note was without consideration—Clark v. Thias. 173 Mo. 628. The decree of the District Court of Alaska on a claim by a surviving partner against the estate of a deceased partner on pleadings regularly filed, will be regarded as a decree in suit of equity settling the partnership accounts—Esterly v. Rua (C. C. A.) 122 Fed. 609.

24. Since upon the allowance any creditor feeling aggrieved could appeal. Such a judgment therefore cannot be vacated at a subsequent term—Ford v. First Nat. Bank, 201 Ill. 120. The county court's classification of a claim in a judgment of allowance is conclusive.—Id.

25. Ford v. First Nat. Bank, 201 Ill. 120.

26. In the federal court (Ball. Ann. Codes & St. Wash. §§ 6226, 6230, 6233)—United States v. Fidelity Trust Co. (C. C. A.) 121 Fed. 766.

27. As where an issue was raised by the answer of executor to a proceeding by a creditor to compel payment, under Code Civ. Proc. § 2722, as to funds in their hands applicable to such payment—In re Sherwood's Estate, 75 App. Div. (N. Y.) 342.

28. If the order was made in the absence of the administrator where no answer or objection was filed against the claim, the administrator may bring error against the allowance under Code Civ. Proc. § 580—Herman v. Beck (Neb.) 94 N. W. 512.

29. Rev. St. Ohio, § 6408, authorizing the trustee to appeal without bond does not apply to an executor appealing on accounting, and notice of an intention to take an appeal is insufficient—Downing v. Downing, 23 Ohio Circ. R. 389. In order to entitle one to appeal from the decision of the commissioner of claims, it is essential that the bond required be approved by the judge of probate before it is filed (Comp. Laws Mich. §§ 9386, 9387, 9395)—Bartlett v. Frazer (Mich.) 95 N. W. 721.

30. Ford v. First Nat. Bank, 201 Ill. 120.

31. Wencker v. Thompson's Adm'r, 96 Mo. App. 59. New defenses such as pleas of non est factum and nil debet to a claim against deceased surety on a bond or objections cannot be interposed,—thus an objection to a claim against estate of deceased surety that it did not include the name of one of the sureties; the description of the bond being sufficiently specific so that the claim would constitute a bar to another suit—Thomson v. Black, 200 Ill. 465.

32. In re Young's Estate, 204 Pa. 32.

33. In New Jersey it is held that the statute does not apply to an action to foreclose a mortgage on decedent's land—Ayres v. Shepherd, 64 N. J. Eq. 166.

34. Only claims allowed need be filed—Saxton v. Musselman (S. D.) 95 N. W. 291.

35. The refusal of the foreign representative to take out ancillary letters will be construed as a refusal to sue—Montgomery v. Boyd, 78 App. Div. (N. Y.) 64.

36. Rev. St. Ohio, § 5464, permitting such actions in aid of execution, applies to estates of decedents—Lauer v. Smith, 24 Ohio Circ. R. 47.

37. Montgomery v. Boyd, 78 App. Div. (N. Y.) 64.

38. Robinett's Adm'r v. Mitchell (Va.) 46 S. E. 287.

rejected as a claim, the trustee is not a necessary party,[39] and a plea of limitations is not an admission of the validity of the claim.[40] The judgment on a claim against the estate need not state that it be paid in due course of administration.[41] A judgment against a representative as representative is a personal judgment against him.[42]

(§ 6) *D. Classification, preferences, and priorities.*[43]—All valid existing liens on personalty, as a chattel mortgage, should be first paid out of the proceeds.[44] The attorney of the representative has not a lien on the estate for services rendered,[45] nor is a physician entitled to priority of payment for services rendered the family of deceased.[46] A statute making funeral expenses a prior claim against the assets does not apply to estates in the course of administration at the time of its passage.[47] The decedent's debts are entitled to priority over debts of another assumed by the will.[48]

The allowance for a year's support to the widow is entitled to priority over a landlord's lien.[49] A mortgage debt, whether for purchase money or not, is entitled to priority over the widow's exemption.[50] Out of the proceeds of the sale to pay debts, the widow is entitled first to have set apart to her the deficiency in the homestead allotted.[51] A legatee is entitled to priority of payment of his legacy out of the surplus proceeds from a sale of the homestead under a mortgage foreclosure as against decedent's general creditors.[52]

A lien on property is not waived by presenting the amount of the claim.[53]

The court making the ancillary appointment is without jurisdiction to determine the insolvency of a nonresident decedent and direct a surrender of the assets to the principal administrator so that all creditors would receive an equal percentage of their claims.[54]

Proceedings for reclassification can only be maintained by creditors.[55]

(§ 6) *E. Funds, assets, and securities for payment.*—All the property of the deceased not exempt is subject to the payment of his debts, though the residuary legatee gave bond as such under the statute,[56] but the personalty should first be subjected.[57] Property fraudulently conveyed by decedent may be subjected.[58]

39. Pym v. Pym (Wis.) 96 N. W. 429.

40. Succession of Oubre, 109 La. 516.

41. Particularly where the action was brought in the federal court on a claim against the deceased as a surety on a federal official bond; in such case it will be paid according to the laws of the state and subject to the priority given by U. S. Rev. St. §§ 3466, 3467—Smythe v. United States, 188 U. S. 156.

42. To bind the estate it must direct that the recovery is to be levied on the goods and chattels of the estate—Thompson v. Mann (W. Va.) 44 S. E. 246.

43. The widow's election to take her award in money on approval by the court constitutes it a claim of the second class—Lane v. Thorn, 103 Ill. App. 215.

44. Baker v. Becker (Kan.) 72 Pac. 860.

45. Waite v. Willis, 42 Or. 288, 70 Pac. 1034.

46. Baker v. Dawson, 131 N. C. 227.

47. In re Kalbfleisch's Estate, 78 App. Div. (N. Y.) 464.

48. As where the husband directed payment of his widow's debts after her death—Hallock v. Hallock, 79 App. Div. (N. Y.) 508.

49. In re Laurence's Estate (Tex. Civ. App.) 74 S. W. 779.

50. In re Rowe's Estate, 22 Pa. Super. Ct. 597. The holder of a pre-existing lien on the realty of decedent may have a decree setting apart such realty to the widow set aside and have the land sold to enforce his lien; such setting aside the property to the widow is not a partition and distribution of the estate so as to divest the court of authority to charge the property with a lien—Wade v. Freese (Tex. Civ. App.) 71 S. W. 69.

51. Shea v. Shea's Adm'r, 24 Ky. L. R. 1702, 72 S. W. 7.

52. Under Rev. Sts. 1898, §§ 2271, 3862, the will not making debts a charge—Kuener v. Prohl (Wis.) 97 N. W. 201.

53. Mathew v. Mathew, 138 Cal. 334, 71 Pac. 344.

54. Lewis v. Rutherford (Ark.) 72 S. W. 373.

55. Petition showing allowance of petitioner's claim by the probate court held sufficient to show a petitioner a creditor—Ford v. First Nat. Bank, 201 Ill. 120.

56. Rev. St. 1898, § 3795—Pym v. Pym (Wis.) 96 N. W. 429.

57. The liability on a contract relating to the use of certain realty cannot be satisfied from the rents of the realty, where the personal estate is sufficient for the payment of debts—Baptist Female University v. Border, 132 N. C. 476.

58. Tyndale v. Stanwood, 182 Mass. 534.

Accretions arising on personalty subsequent to the death of intestate may be applied towards payment of debts and expenses,[59] and creditors entitled to the proceeds of the sale are entitled to the accretions arising from the investment of such fund between the time of sale and distribution.[60] The proceeds of realty sold under direction in the will are personalty subject to the payment of testator's debts,[61] though the sale was directed merely for the purpose of distribution or payment of legacies,[62] and though the realty sold was situated without the state;[63] but a discretionary power to sell or divide[64] or a power of sale for the purpose of making division, does not effect a conversion of the realty and personalty so as to subject it to the payment of debts.[65] If there is sufficient property not specifically devised resort cannot be had against specific devises for payment of debts of the testator,[66] and before a specific devise can be subjected, realty devised to the widow who elected to take her statutory distributive share must first be resorted to.[67] A specific legacy less the "expenses of administration" is not subject to the representative's commissions or transfer taxes.[68] Unless the debts are charged against the realty both realty and personalty being specifically devised, both should contribute ratably.[69]

(§ 6) *F. Payment and satisfaction.*[70]—Generally payment of claims should be made only after allowance and authorization by the court,[71] but if by a compromise without authority the estate was benefited, the representative will be allowed the payment.[72] The partial payment of claims may be decreed though the estate is insolvent and no judicial settlement of the administrator's accounts has been had.[73] It is not an objection to the payment of claims of petitioning creditors that other creditors not joined may contest the allowance on the final settlement of the administrator's accounts.[74]

§ 7. *Subjection of realty to payment of debts under order of court. A. Right to resort to realty.*—Whether decedent's realty may be subjected to the payment of the debts of decedent must be determined by the laws of the state wherein the property is situated.[75] Generally it can be resorted to for the purpose of creating a fund with which to pay the debts of the decedent,[76] but only where there is an insufficiency of personal assets,[77] and the existence of debts and insufficiency of personalty may be shown by a decree of insolvency.[78] If an imperative power to sell to pay debts is given by the will, the statutory right should not be resorted to,[79] otherwise if the power is discretionary.[80]

59. As life tenant in the personalty of his deceased intestate wife the husband is not entitled to interest accruing on a judgment in favor of the wife accruing after her death but only to the income of the surplus personalty after payment of debts and expenses of the administration—Hunter v. Hersperger, 96 Md. 292.

60. In re Campbell's Estate, 22 Pa. Super. Ct. 430.

61. In re Newell's Estate, 38 Misc. (N. Y.) 563; Lynch v. Spicer (W. Va.) 44 S. E. 255.

62. In re Newell's Estate, 38 Misc. (N. Y.) 563.

63. Though they were obliged to take out ancillary letters in the state where the land is situate—In re Newell's Estate, 38 Misc. (N. Y.) 563.

64. Bedford v. Bedford (Tenn.) 75 S. W. 1017.

65. Taylor v. Crook, 136 Ala. 354.

66. In re Martin, 25 R. I. 1.

67. Baptist Female University v. Borden, 132 N. C. 476.

68. In re Pray, 40 Misc. (N. Y.) 516.

69. Will construed and held to devise personalty specifically—Dauel v. Arnold, 201 Ill. 570; In re Martin, 25 R. I. 1.

70. See the title Payment and Tender, as to what is a payment.

71. Consent of one heir will not estop another heir to object to the allowance—Johnson v. Pulver (Neb.) 95 N. W. 697.

72. In re Wagner, 40 Misc. (N. Y.) 490.

73. In re Miner's Estate, 39 Misc. (N. Y.) 605.

74. In re Miner's Estate, 39 Misc. (N. Y.) 605.

75. The court is without jurisdiction to direct a sale of decedent's land situate without the state for the payment of debts, since it will be presumed, in the absence of proof that the common law existed in that state—Seldner v. Katz, 96 Md. 212.

76. Wilson v. Wilson, 109 La. 1075, 34 So. 94.

77. Henley v. Johnston, 134 Ala. 646; In re Snow (Me.) 53 Atl. 116. It must be averred and proved that a sale is necessary for the payment of debts, under Rev. Sts. c. 71, § 1—In re Snow (Me.) 53 Atl. 116.

Only such claims as have been presented[81] and not barred by the statute of limitations may be enforced against the realty,[82] though under the statute of Maryland it is held that only claims enforceable against decedent during life can be so enforced.[83] The right to apply for sale of realty for the purpose of paying the expenses of the administrator may be barred by lapse of time.[84] Taxes not due are not such a debt as would justify a resort to realty.[85] Expenses of administration[86] and the widow's allowance[87] are provable in some states against the realty.

The homestead of a surviving widow[88] or land devised in lieu of dower and homestead, if not in excess of her rights as widow, cannot be subjected to the payment of debts,[89] though the value above the homestead may be.[90]

(§ 7) *B. Procedure to obtain order.*—Proceedings must be had before the estate is settled.[91] Jurisdiction is in the courts designated by statute.[92] The question whether the land sought to be sold had been fraudulently conveyed by the deceased cannot be determined.[93]

In Alabama the personal representative alone can apply for leave to sell realty for the payment of debts.[94] It is essential that all persons interested in the realty be made parties,[95] including minor heirs[96] for whom a guardian ad litem must be appointed.[97] The administrator of an insolvent intestate who had executed a deed of trust for the benefit of creditors may be joined with the trustees.[98]

Some notice is essential.[99] Constructive notice may be sufficient.[1]

If the proceedings to obtain leave to sell are instituted by order to show cause,

78. Henley v. Johnston, 134 Ala. 646.

79. In re Rowley, 38 Misc. (N. Y.) 622.

80. Parker v. Beer, 173 N. Y. 332.

81. Cheairs v. Cheairs (Miss.) 33 So. 414.

82. Which applies to a claim by an attorney for procuring the probate of the will of the deceased—Taylor v. Crook, 136 Ala. 354.

83. A claim for damages for refusal to convey under an option given by deceased to purchase is not a debt due, where the deceased died before the expiration of the life of the option and before election to take by claimant—McGaw v. Gortner, 93 Md. 489.

84. An application made eight years after the grant of letters no excuse for the delay being given except for a short portion of the time held to bar the application—Mackin v. Hobbs, 116 Wis. 528.

85. Holburn v. Pfanmiller's Adm'r, 24 Ky. L. R. 1613, 71 S. W. 940.

86. In re Roach's Estate, 139 Cal. 17, 72 Pac. 393; Deppe v. Cilley (Minn.) 94 N. W. 679. An attorney cannot have the realty sold to enforce his claim for services in probating the will—Taylor v. Crook, 136 Ala. 354.

87. It is so expressly provided by Rev. Sts. 1895, arts. 2037, 2043, under certain conditions which will be presumed to have existed in favor of the purchaser as against the widow—Johnson v. Weatherford (Tex. Civ. App.) 71 S. W. 789.

88. The widow cannot be estopped to claim the land sold as her homestead. Though she failed to prosecute a proceeding for allotment and abandoned objections to the petition for leave to sell and even bid for the land at the sale—Houf v. Brown, 171 Mo. 207. The entire lot being exempt as a homestead for the widow and children, the purchaser thereof at the administrator's sale cannot have the homestead exempt set apart by appraisal.—Id. A will which devises to the widow all realty and personalty which should remain after payment of his just debts and funeral expenses does not authorize a resort to his homestead for the payment of his debts—Pym v. Pym (Wis.) 96 N. W. 429.

89. Dauel v. Arnold, 201 Ill. 570.

90. W. J. Perry Live Stock Commission Co. v. Biggs (Neb.) 94 N. W. 712.

91. If the executrix under a nonintervention will had settled the estate a sale on her application to the probate court to pay expenses of administration is void—English-McCaffery Logging Co. v. Clowe, 29 Wash. 721, 70 Pac. 138.

92. Where the judge of the court having probate jurisdiction was disqualified to act, jurisdiction may be conferred on the circuit court by his certifying the cause as authorized by Rev. Sts. 1899, § 1760—Meddis v. Kenney (Mo.) 75 S. W. 633.

93. The remedy in such case is provided by Pub. Sts. c. 134, § 15, by action or by entry and taking possession—Tyndale v. Stanwood, 182 Mass. 534.

94. Henley v. Johnston, 134 Ala. 646. This question depends largely on local statutes [Editor].

95. Taylor v. Crook, 136 Ala. 354.

96. Hill v. Taylor (Mo. App.) 74 S. W. 9.

97. If the petition for the appointment is not verified and no affidavit filed showing that no general guardian had been appointed, it is error to overrule exceptions to the confirmation of the sale—Catlett v. Catlett's Adm'r, 24 Ky. L. R. 1986, 72 S. W. 781.

98. Sufficiency of allegation of title—Robinson v. McDowell (N. C.) 45 S. E. 545.

99. Private sale on order without notice is void—Fussell v. Dennard (Ga.) 45 S. E. 247.

1. Where the estate had been long pending and the heirs had constructive notice provided by statute an order of sale will not be set aside because the heirs had not received a notice of the filing of the petition for sale—In re Leonis' Estate, 138 Cal. 194, 71 Pac. 171.

the order need not contain a description of the property,[2] but if by petition it must aver the necessity for such proceeding,[3] it must accurately describe the land sought to be subjected,[4] and show the title of the deceased,[5] but the precise character of his interest need not be specifically set out.[6] It need not be averred that the property is encumbered.[7] If the parcel of realty is more than sufficient to pay claims, the petition must aver that a sale of a part thereof would depreciate the balance.[8]

A denial of the existence of the necessity for resort to the realty is a good answer.[9] Any heir may object to an application by the administrator to sell lands of the estate,[10] nor need notice of such objections be given the other heirs.[11] The objection that the petition did not allege that certain lands described had been conveyed by the devisee in bad faith must be raised by answer.[12] The application may be postponed.[13] That the time for hearing on the application was set for a day less than the statutory time is a mere irregularity not invalidating the proceedings.[14] Where the mode of service by publication is specially prescribed the procedure on publication in ordinary actions is not applicable.[15] A jury trial is not a matter of right in a proceeding to subject the decedent's lands to the payment of debts.[16] The administrator has the burden of proving the filing or presentment of claims under a plea of the statute of nonclaim.[17] Admissions by the heirs of deceased are not evidence of indebtedness against the estate.[18]

(§ 7) *C. The order.*—Inadequacy of price is not ground for vacating the order.[19]

If an order of sale was regularly made and the court had jurisdiction, and was not appealed from, it is binding on all[20] on the question of necessity for the sale.[21] That the notice for a hearing on application was set at a date short of the required time,[22] or that no order of confirmation of sale was found on the record ten years after the sale, is not ground for a collateral attack on the purchaser's title;[23] but if the record discloses that no notice was given of an application for an order directing a sale the order authorizing a private sale is void.[24]

2. In re Roach's Estate, 139 Cal. 17, 72 Pac. 393.

3. In re Snow (Me.) 53 Atl. 116. Petition held sufficient—In re Roach's Estate, 139 Cal. 17, 72 Pac. 393.

4. A petition is invalid if it fails to indicate with any degree of accuracy the section, township and range—Henley v. Johnston, 134 Ala. 646. Where the petition did not describe the land and an order granted thereon also failed to describe the land a conveyance thereof is void—Roberts v. Thomason (Mo.) 74 S. W. 624. A petition containing a description, "50 acres on the east side of the west half of the S. E. quarter of Section 15, and fractional N. W. end of N. E. quarter of Section 22, in all * * * containing 75 acres," is an insufficient description as to the lands in Section 22—Kornegay v. Mayer, 135 Ala. 141.

5. Petition held to sufficiently show title —Henley v. Johnston, 134 Ala. 646.

6, 7. Tyndale v. Stanwood, 182 Mass. 534.

8. In re Snow (Me.) 53 Atl. 116.

9. Finch v. Du Bignon, 117 Ga. 113. Sufficiency of answer—Dauel v. Arnold, 201 Ill. 570.

10, 11. Grant v. Noel (Ga.) 45 S. E. 279.

12. Galloway v. Galloway (S. C.) 45 S. E. 108.

13. Application for sale by administrator postponed until after expiration of lease held proper—Magruder v. Hornot (La.) 34 So. 696.

14. Haight v. Hayes (Neb.) 92 N. W. 297.

15. Held that the court need not wait until the statutory time after publication—In re Roach's Estate, 139 Cal. 17, 72 Pac. 393. Code Civ. Proc. (N. Y.) § 441, governing service of summons by publication does not apply—In re Denton's Estate, 40 Misc. (N. Y.) 326.

16. Where the answer raises no issue involving the recovery of money only or of specific property—Gregory v. Perry (S. C.) 45 S. E. 4.

17. Evidence of the name of a claimant alone is insufficient to show a presentment—Kornegay v. Mayer, 135 Ala. 141.

18. Kornegay v. Mayer, 135 Ala. 141.

19. The objection should be made on confirmation—In re Leonis' Estate, 138 Cal. 194, 71 Pac. 171.

20. In re Leonis' Estate, 138 Cal. 194, 71 Pac. 171; Smith v. Huffman, 132 N. C. 600. Order is void when made after settlement of estate—English-McCaffery Logging Co. v. Clowe, 29 Wash. 721, 70 Pac. 138.

21. Dyson v. Jones, 65 S. C. 308; Haight v. Hayes (Neb.) 92 N. W. 297; In re Leonis' Estate, 138 Cal. 194, 71 Pac. 171.

22. Haight v. Hayes (Neb.) 92 N. W. 297.

23. Mott v. Ft. Edward Water Works Co., 79 App. Div. (N. Y.) 179.

24. Fussell v. Dennard (Ga.) 45 S. E. 247.

Heirs of the deceased may appeal from the order authorizing a sale for the payment of debts,[25] but an executor cannot appeal from an order directing a sale for the payment of the widow's award.[26] In Utah such an order is not appealable as a final order.[27] The purchaser may appeal from an order vacating the decree of sale, though taken after the expiration of the time for appeal from the latter.[28] In the absence of evidence in the record, the findings of fact will not be reviewed.[29] On appeal, it will be presumed that it was proper to resort to the particular piece of realty directed to be sold.[30] In Maine the necessity for resort to realty must be proved on appeal, the decree of sale not being evidence of the fact.[31]

(§ 7) *D. The sale.*—The time within which the sale is required to be made will be computed from the time of entry of an order modifying the original order of sale.[32] The court may extend the time.[33] Sales by personal representatives under order granting leave for the payment of debts should be public.[34] A statute validating private sales by personal representatives defeats a pending action to avoid a sale on such ground.[35]

Statutory requirements of notice must be met.[36]

The representative's return of sale must show that the property was sold for the payment of debts.[37] A premature confirmation of sale is a mere irregularity which will not invalidate it.[38] That the accepted bid is far below the estimated value of the property,[39] or if the property was not offered in a manner which would be likely to bring the best price, the sale will not be confirmed.[40] The value of the land at the time of the sale determines the adequacy of the price.[41] Objections to the sale must be made on confirmation,[42] and cannot be first raised on appeal.[43] It will be presumed that the officer appointed to make the sale followed the statutory requirements.[44]

Equity has jurisdiction of a suit to avoid a sale of realty by the representative procured by fraud,[45] though the right to have it set aside may be lost by laches.[46]

25. Applied to a sale by the husband of community property—In re Wickersham's Estate (Cal.) 70 Pac. 1079.

26. Lane v. Thorn, 103 Ill. App. 215.

27. In re Williamson's Estate (Utah) 72 Pac. 2.

28. In re Leonis' Estate, 138 Cal. 194, 71 Pac. 171.

29. In re Roach's Estate, 139 Cal. 17, 72 Pac. 393. The appellate court has no jurisdiction to determine the application on the merits where the record does not show what disposition has been made of the proceeding—Knerr v. McDonald, 30 Ind. App. 600.

30. In re Roach's Estate, 139 Cal. 17, 72 Pac. 393.

31. In re Snow, 96 Me. 570.

32. After the expiration of a year from the grant of a license to sell, the court can extend the time for sale not exceeding the limit fixed by Rev. St. 1898, § 3889—Mackin v. Hobbs, 116 Wis. 528. The sale must be made within two years after order granted—Id.

33. Mackin v. Hobbs, 116 Wis. 528.

34. In Pennsylvania, prior to act May 9, 1889, a personal representative who had procured an order for the sale of realty for the payment of debts was not authorized to sell at a private sale—Kiskaddon v. Dodds, 21 Pa. Super. Ct. 351. The remainderman held not estopped under the facts from suing nineteen years after the making of a sale to avoid it on the ground that it was private—Id.

35. Kiskaddon v. Dodds, 21 Pa. Super. Ct. 351.

36. A purchaser of timber rights and saw mills connected therewith, at a private sale, under an order authorizing it, where no notice of the intended sale had been published, acquires no title—Fussell v. Dennard (Ga.) 45 S. E. 247. That the posted notices of sale did not contain the sale commissioner's signature will not of itself invalidate the sale—Allsop v. Deposit Bank of Owensboro, 24 Ky. L. R. 762, 69 S. W. 1102.

37. Applied to return of sale of community property under power in will of the deceased spouse—In re Wickersham's Estate (Cal.) 70 Pac. 1079.

38. As where the order of sale, and the execution and delivery of the deed all take place at the same term of court (Burns' Rev. St. 1901, § 2512)—Custer v. Holler (Ind.) 67 N. E. 228.

39, 40. Ryan v. Wilson, 64 N. J. Eq. 797.

41. "Disproportionate to the value" as used in Code Civ. Proc. § 1552 means disproportionate to the value at the time of the bid—In re Leonis' Estate, 138 Cal. 194, 71 Pac. 171.

42. In re Leonis' Estate, 138 Cal. 194, 71 Pac. 171.

43. There is an objection that the notice was not published in the requisite time—Meddis v. Kenney (Mo.) 75 S. W. 633.

44. That the notice of sale was posted the required length of time—Allsop v. Deposit Bank of Owensboro, 24 Ky. L. R. 762, 69 S. W. 1102.

45. McAdow v. Boten (Kan.) 72 Pac. 529.

By accepting the benefits of a sale, the heirs may be estopped to set up its invalidity,[47] and the recovery of a judgment against the administrator by the heirs, in part for the proceeds of land sold operates as a ratification of the sale.[48]

The rule of caveat emptor applies to sales by representatives.[49] The purchaser is not bound to see that the proceeds are applied on the payment of the debts.[50] On resale for a less price after failure of the purchaser to complete his contract he will be liable for the difference in the price together with the costs of the resale.[51] Generally, the purchaser of land at a sale for the purpose of payment of debts is entitled to the rents from the date of the confirmation of the sale, and he cannot recover rent for the period of time announced at the sale that possession would be withheld.[52]

The temporary administrator may complete the sale made by the original representative by enforcing the bid and executing a deed without leave of court.[53]

§ 8. *Rights and liabilities between representatives and estate. A. Management of, and dealings with the estate.*—The representative is bound only to exercise the care of a prudent man in the management of his own business.[54] Any misconduct,[55] or neglect of official duty by a representative[56] or his agent renders him personally liable for the resulting loss.[57] A representative is liable for such property as is actually shown to be in his hands at the time of the settlement of his accounts,[58] and if at such time he is insolvent and has no funds or property, he will be held liable as representative, though he claims to have transferred such sum to himself as guardian for the sole distributee.[59] He is properly charged with assets received prior to his appointment.[60]

If the representative fails to exercise due diligence in attempting to collect debts due the estate, he will be personally charged therewith,[61] as where, by an agreement

"If the proceedings were unfair" as used in Code Civ. Proc. § 1552, warranting the setting aside of a sale, means some irregularity as to the notice or fraud and collusion among bidders—In re Leonis' Estate, 138 Cal. 194, 71 Pac. 171. As to sufficiency of instruction in an action to avoid sale on the ground of fraud, see—Morrow v. Cole, 132 N. C. 678.

Fraud. Because the personal representative assisted in establishing the claim against the estate, (Morrow v. Cole, 132 N. C. 678) or that the purchaser had been imposed on and bought at an excessive price, are not alone grounds for setting aside the sale particularly where the administratrix purchased at the appraised value and retained the property for more than a year making payment and only one creditor was represented in the proceeding to avoid the sale and none of the heirs (Benson v. Benson, 97 Mo. App. 460) nor is the fact that the grantee of the purchasers knew that a certain person was claiming as heir of deceased sufficient to put him on inquiry as to fraud in procuring the sale—Morrow v. Cole, 132 N. C. 678.

46. Twelve years after the discovery of fraud held sufficient to bar the proceeding —Eames v. Manly (C. C. A.) 117 Fed. 387.

47. Battle v. Wright, 116 Ga. 218. By receiving a distributive share of the proceeds of a sale of land to pay debts, the heir is estopped to question the validity of the deed—Meddis v. Kenney (Mo.) 75 S. W. 633.

48. Battle v. Wright, 116 Ga. 218.

49. Keen v. McAfee, 116 Ga. 728.

50. Applied where the survivor in community sold to pay community debts—Cruse v. Barclay (Tex. Civ. App.) 70 S. W. 358.

51. Thomas v. Caldwell, 136 Ala. 518.

52. Broadwell v. Sammons, 24 Ky. L. R. 814, 69 S. W. 1084.

53. Goodwynne v. Bellerby, 116 Ga. 901.

54. O'Brian Bros. v. Wilson (Miss.) 33 So. 946.

55. As where an administrator wrongfully obtained control of the intestate's business and property at less than full value and where he failed to account for part of the assets—In re Feierabend, 38 Misc. (N. Y.) 524.

56. If the personal representative co-mingles funds in such a manner that he is unable to separate the funds on his accounting, he will be personally charged for any loss occurring to the estate—In re Hayes, 40 Misc. (N. Y.) 500. The executor should not be charged for failure to surrender premises rented by the deceased by the month, where delay was caused by a contest of the will wherein his fitness to administer was also questioned—In re Murray's Estate, 40 Misc. (N. Y.) 433. For a depreciation in realty resulting from a neglect of performance of their duties, the executors are jointly liable—In re Irvine's Estate, 203 Pa. 602.

57. The administrator is personally liable for funds of the estate paid by him to rectify errors made by his attorney in an action—In re Hayes, 40 Misc. (N. Y.) 500.

58, 59. State v. Whitehouse, 75 Conn. 410.

60. In re Lovell's Estate, 21 Pa. Super. Ct. 378.

61. Carpenter v. Stowe's Estate, 75 Vt. 114; In re Hutton's Estate, 92 Mo. App. 132; In re Irvine's Estate, 203 Pa. 602. An administrator cannot be charged for failure

to extend time of payment, a solvent surety was released, the maker being insolvent,[62] though it must first appear that the debt was due and payable.[63]

For unauthorized payments, as when the claim had not been allowed, the representative will not be credited,[64] though made with the consent of one of the heirs;[65] but if by an unauthorized compromise of a claim the estate was benefited, he should not be personally charged with the payment,[66] nor will payment of distributive shares before the debts are paid be credited.[67]

The representative is not chargeable with rents until he takes possession of the realty for the purpose of payment of debts, though the will effected an equitable conversion of the realty,[68] but he will be personally charged with rents during the time in which he wrongfully withheld possession from the heirs.[69] He cannot be held liable for injuries committed to the freehold by the purchaser at a void sale where he had never been in possession or control, or aided or abetted in the injuries.[70]

Since personal representatives cannot deal with the estate to their own individual profit[71] they cannot directly[72] or through a third person purchase at their own sales;[73] they may, however, in the absence of fraud, purchase at a foreclosure sale of decedent's property,[74] or buy the interest of an heir[75] or claims for money received by decedent as guardian, where such funds never came into the hands of the representative.[76] If the personal representative purchased realty with estate assets taking title in his own name he may be compelled to reconvey the same to persons entitled thereto.[77] On avoidance of a sale, it is not necessary to reimburse the representative the consideration, where he had collected the rents and profits equal in amount thereto.[78] To enforce the payment of the purchase price of property sold to an administrator, the remedy of the co-administrator is to enforce the decree settling the accounts of his co-administrator and charging him with the purchase money and not by bill to enforce a vendor's lien.[79] Any profits which the representative made by dealing with the funds of the estate will be charged against him.[80]

to enter deficiency judgment in mortgage foreclosure proceedings where such judgments would have been worthless—In re Hayes, 40 Misc. (N. Y.) 500. He cannot be charged with property of which he had no knowledge or by the exercise of ordinary diligence could not have discovered—O'Brian Bros. v. Wilson (Miss.) 33 So. 946.

62. Foster v. Foster, 24 Ky. L. R. 1396, 71 S. W. 524.

63. He cannot be charged with a judgment which the representative knew in fact to have been paid deceased—Mulford v. Mulford (N. J. Eq.) 53 Atl. 79.

64. Langston v. Canterbury, 173 Mo. 122.

65. Johnson v. Pulver (Neb.) 95 N. W. 697.

66. In re Wagner, 40 Misc. (N. Y.) 490.

67. Keiningham v. Keiningham's Ex'r, 24 Ky. L. R. 1330, 71 S. W. 497. Though the payments were made on advice of counsel and the probate judge—James v. West, 67 Ohio St. 28.

68. Tunnicliffe v. Fox (Neb.) 94 N. W. 1032.

69. Maney v. Casserly (Mich.) 96 N. W. 478.

70. Morrow v. Cole, 132 N. C. 678.

71. In re Peck, 79 App. Div. (N. Y.) 296. Sufficiency of complaint in an action to recover stock purchased with assets of the estate by a co-executor and transferred as collateral security—Ruggles v. O'Brien, 79 App. Div. (N. Y.) 641. If the personal representative wrongfully disposes of the personalty to his own advantage, he will be compelled to pay the creditors of the deceased—In re Brady's Estate, 21 Pa. Super. Ct. 397. Funds received by the executor as extra compensation in the performance of duties as officers of a corporation in which the decedent was interested, held not a part of the profits of the corporation belonging to the estate—In re Schaefer, 171 N. Y. 686.

72. Cole v. Boyd (Neb.) 93 N. W. 1003.

73. Sufficiency of evidence to support a verdict setting aside a sale to the husband of the administratrix—Lowery v. Idelson (Ga.) 45 S. E. 51.

74. O'Brian Bros. v. Wilson (Miss.) 33 So. 946.

75. If by the conveyance title of undiscovered property passed it will be decreed to be held by the representative in trust and a reconveyance directed—Shelby v. Creighton (Neb.) 96 N. W. 382.

76. Murray v. Barden, 132 N. C. 136.

77. Evidence held sufficient to show that the administrator purchased an heir's interest with proceeds of certain personalty belonging to the estate—Stone v. Burge, 24 Ky. L. R. 2424, 74 S. W. 250.

78. Cole v. Boyd (Neb.) 93 N. W. 1003.

79. Langley v. Langley, 135 Ala. 383.

(§ 8) *B. Representative as creditor or debtor.*—The representative may pay himself on appointment for services rendered the deceased as his general guardian.[81] A representative may retain sufficient assets to pay his personal claim[82] if he reports it though it became barred during administration,[83] or a claim against the estate may be enforced by bill in equity against the co-executor.[84] A claim for expenses for services rendered by an administrator under a void appointment can be allowed only on notice as on an accounting.[85] By the acceptance of administration, debts due decedent by the representative will be treated as funds in his hands,[86] unless at the time of the acceptance he was and continued to be during the entire administration insolvent,[87] and he has the burden of proof to establish the fact of insolvency;[88] this does not, however apply if he became insolvent pending his administration.[89] Commissions to which the personal representative may be entitled may be applied in payment of a claim by the estate against him.[90]

(§ 8) *C. Interest on property or funds.*—If the representative unnecessarily retains the funds and delays making final settlement of his accounts[91] or if he uses the funds in the conduct of his own business he will be charged with interest,[92] though there had been no demand for a settlement;[93] but that the money was involved in litigation and unproductive will relieve him from liability.[94] He is chargeable with interest on a sum retained by him as compensation before final settlement,[95] but not on funds held by the deceased as trustee.[96] Interest may be allowed against administrators from the time of the refusal to pay the widow's statutory allowance,[97] and on funds not accounted for from the time of his death.[98] Simple interest only is allowed on rents received to which third persons were en-

80. As where he purchased with estate funds outstanding claims at a discount and paid himself in full—In re Rainforth's Estate, 40 Misc. (N. Y.) 609.

81. Reed v. Hume, 25 Utah, 248, 70 Pac. 998. The insertion of a claim against himself in an inventory filed by an executor is not of itself sufficient to sustain a plea of set off in an action by him against the estate—Siebert v. Steinmeyer, 204 Pa. 419.

82. Evidence held insufficient to establish a claim by the personal representative against the estate—In re Arkenburgh, 171 N. Y. 688; In re Rosell's Estate, 82 App. Div. (N. Y.) 463.

83. But where he made no return until after action was brought to compel an accounting and long after the period of limitation had expired the presumption that the return setting up such retainer is correct and that the claim is just may be overcome by slight evidence—Willis v. Sutton, 116 Ga. 283.

84. As a claim for board and attendance furnished testator—Ely v. Ely (N. J. Sup.) 53 Atl. 1125.

85. Such claim does not come within Wis. Rev. St. 1898, § 3838—Brown v. McGee's Estate (Wis.) 94 N. W. 363.

86. Devisson v. Akin, 42 Or. 177, 70 Pac. 507. As where he was the principal on a secured note or where it was due from a partnership firm in which the representative was a member—James v. West, 67 Ohio St. 28; In re Howell's Estate (Neb.) 92 N. W. 760.

87, 88, 89. In re Howell's Estate (Neb.) 92 N. W. 760.

90. In re Brintnall, 40 Misc. (N. Y.) 67.

91. Kenan v. Graham, 135 Ala. 585. The fact that the court had ordered but one payment of fifty per cent to creditors will not operate to excuse retention of large sums without report during several years, nor will a failure of the court to order a payment out of the unreported funds entitle the administrator to retain all of the profits which his own bank in which he deposited the funds could make—Johnson v. Pulver (Neb.) 95 N. W. 697. In the absence of bad faith, delay in the settlement of the estate, or that the money could have been invested to better advantage, the personal representatives should not be charged with interest—In re Woodbury's Estate, 40 Misc. (N. Y.) 143. Where executors were directed to invest funds which they retained from May 1, 1866, until March, 1867, they will not be charged with interest during such time—Mulford v. Mulford (N. J. Eq.) 53 Atl. 79.

92. If a representative borrows money from the estate, he will be chargeable with interest, at the rate of not less than five, or more than 6%—In re Flynn's Estate, 21 Pa. Super. Ct. 126; In re Burke's Estate, 96 Mo. App. 295.

93. After two years—Haskins v. Martin, 103 Ill. App. 115.

94. James v. West, 67 Ohio St. 28.

95. Kenan v. Graham, 135 Ala. 585.

96. Elizalde v. Elizalde, 137 Cal. 634, 66 Pac. 369, 70 Pac. 861.

97. Which may be recovered in the action for the recovery of the allowance—Brown v. Bernhamer, 159 Ind. 538.

98. At six per cent—Maney v. Casserly (Mich.) 96 N. W. 478.

titled under an independent right and not as heirs.[99] A consent to a discharge is a waiver of the right to compel the representative to pay interest.[1]

(§ 8) *D. Allowances for expenses, costs, counsel fees, and funeral expenses.*—That the appointment was void because of lack of jurisdiction on the part of the appointing court is not ground for refusing reimbursement for money expended in good faith;[2] merely because the person employed as agent by the representative is a relative is not ground for refusing to allow the representative the compensation paid.[3] Traveling expenses not necessary in the performance of duties as representatives are not chargeable.[4]

If the deceased in his lifetime procured a burial lot and a monument the expense of procuring one by the representative will not be allowed,[5] and only a reasonable allowance should be granted for funeral expenses.[6]

A representative may be personally charged with the costs of the accounting,[7] as where he rendered complicated accounts necessitating an audit[8] or where he had used the estate funds to speculate in claims against the estate;[9] but if no material benefit resulted to the estate by reason of the contest the contestants will not be allowed the costs.[10]

The executor is entitled to a reasonable allowance for attorney's services in procuring the probate of the will[11] as well as to resist a caveat interposed before the will had been admitted;[12] but he will not be allowed costs and expenses of a proceeding between legatees to contest validity of a will though he made a successful defense.[13] For legal services rendered the representative in the administration of the estate he should be allowed a reasonable sum,[14] and an extra compensation may be allowed for legal services performed by himself,[15] but he will not be allowed for services which could have been rendered by himself without the assistance of counsel.[16]

(§ 8) *E. Rights and liabilities of co-representatives and successors.*—Executors are jointly liable for all funds coming into their hands unaccounted for.[17] To

99. Anderson v. Northrop (Fla.) 33 So. 419.

1. Tucker v. Stewart (Iowa) 97 N. W. 148.

2. Brown v. McGee's Estate (Wis.) 94 N. W. 363.

3. If the executor has several pieces of rented realty he may properly employ his son to collect the rents paying him customary rates therefor—In re Wagner, 40 Misc. (N. Y.) 490.

4. In re Biggars, 39 Misc. (N. Y.) 426.

5. In re Woodbury's Estate, 40 Misc. (N. Y.) 143.

6. A witness' estimate as to value is not binding on the court or jury—Foley v. Broeksmit (Iowa) 93 N. W. 344.

7. In re Holmes, 79 App. Div. (N. Y.) 264.

8. Though where he mingled his administration accounts with the accounts in the conduct of the realty on request of the heirs, he will not be charged with the costs of the audit—In re Young's Estate, 204 Pa. 32.

9. In re Rainforth's Estate, 40 Misc. (N. Y.) 609.

10. In re Eadie, 39 Misc. (N. Y.) 117.

11. Taylor v. Crook, 136 Ala. 354. That the devisees notified him that they would employ their own counsel pending contest is not ground for refusal of such allowance—Reed v. Reed, 24 Ky. L. R. 2438, 74 S. W. 207. The amount of allowance of counsel fees in probate held proper—Id.

12. Tuohy v. Hanlon, 18 App. D. C. 225.

13. In re Fry's Estate, 96 Mo. App. 208.

14. McKee v. Soher, 138 Cal. 367, 71 Pac. 438, 649. It is so expressly provided by Rev. St. 1889, § 223—Langston v. Canterbury, 173 Mo. 122. The amount of fees for counsel in aiding the preparation of the accounts and the judicial settlement thereof is within the discretion of the court. Code Civ. Proc. §§ 2561, 2562, does not limit the amount of such fees—In re Mitchell, 39 Misc. (N. Y.) 120. On the executor's general statement that the attorneys' services rendered were for the giving of advice he will not be allowed an additional sum for such attorneys of $500, $650 having been allowed to another attorney—In re Peck, 79 App. Div. (N. Y.) 296. The attorneys for the personal representative should be allowed a reasonable sum for services of attorney rendered in a proceeding for the distribution of the estate—Clark v. Young, 24 Ky. L. R. 2395, 74 S. W. 245. Allowance for extra services held proper—Id.

15. Under Wis. Rev. St. 1898, § 3929, the allowance of an account for extra service held not an abuse of discretion on the part of the court because not presented in detail —In re Ryan's Estate (Wis.) 94 N. W. 342.

16. In re Murray's Estate, 40 Misc. (N. Y.) 433.

17. In re Irvine's Estate, 203 Pa. 602.

render an executor liable for a devastavit of his co-executor, it must appear that he was guilty of negligence in the performance of his duty.[18]

(§ 8) *F. Compensation.*—Representatives cannot retain specific sums claimed as a commission before the final settlement of their accounts.[19]

While the mere neglect of duty will not operate as a forfeiture of compensation,[20] it will not be allowed where the personal representative is surcharged with large sums because of mismanagement[21] or where he failed to comply with an order directing an account[22] or where he speculated with the funds of the state for personal profit.[23] Failure to perform the duties as representative will operate as a waiver of the right to compensation.[24] That the appointment was void by reason of lack of jurisdiction in the appointing court is not reason for depriving him of compensation for services rendered in good faith.[25] If the representative continued the deceased's business without authorization he will not be allowed compensation for services rendered therein.[26] The representative will be allowed only the statutory commissions[27] or such as are reasonable[28] computed on such transactions as the statute contemplates.[29] For carrying on the business of the deceased under directions in the will for a stated time the executor is entitled only to reasonable compensation, and not to the statutory commission on gross receipts or the disbursements.[30]

In most states where extraordinary services have been rendered an extra allowance beyond the statutory commissions may be granted,[31] and the apportionment thereof between the co-representatives should be made by the court granting the same,[32] the amount being within the discretion of the court.[33]

(§ 8) *G. Rights and liabilities of sureties and actions on bonds.*—Since a debt due decedent by a solvent representative is considered funds in his hands[34] it may be enforced against the sureties on his administration bond,[35] and to avoid such liability they have the burden of showing insolvency of the representative at the time of the appointment.[36] It is a breach of the bond to pay claims without

18. In re Hunt, 38 Misc. (N. Y.) 613. Executor held not liable for the state funds on the bankruptcy of his co-executor—In re Hoagland, 79 App. Div. (N. Y.) 56.

19. Kenan v. Graham, 135 Ala. 585.

20. In re Brintnall, 40 Misc. (N. Y.) 67. Failure to reduce note to possession which during the lifetime of the intestate passed into the maker's hands is not such negligence, particularly where the representative was charged with the principal and interest of the note—In re Baker, 172 N. Y. 617.

21. In re Hayes, 40 Misc. (N. Y.) 500.

22. An injunction restraining the executor from transferring or incumbering alleged partnership effects of his intestate is not an excuse for failure to comply with an order directing him to render an account—West v. Municipal Court, 25 R. I. 84.

23. In re Rainforth's Estate, 40 Misc. (N. Y.) 609.

24. Foster v. Foster, 24 Ky. L. R. 1396, 71 S. W. 524.

25. Brown v. McGee's Estate (Wis.) 94 N. W. 363.

26. In re Peck, 79 App. Div. (N. Y.) 296.

27. So held though the will directed that the executors "be paid liberally"—Kenan v. Graham, 135 Ala. 585.

28. Four and a half per cent allowance on personalty amounting to $263,000 reduced to three per cent—In re Young's Estate, 204 Pa. 32.

29. Commissions will not be allowed on a specific legacy (In re Whipple, 81 App. Div. [N. Y.] 589) or on property which is not an asset but goes to the devisees or heirs in kind—Glover v. Check, 24 Ky. L. R. 1281, 71 S. W. 438.

They should be allowed on the amount of personalty collected and not as inventoried (Webb v. Peck [Mich.] 92 N. W. 104) and only on such sums actually paid out and received during the life of the representative—In re Whipple, 81 App. Div. (N. Y.) 589.

If commissions had been allowed on funds of the estate, he will not be allowed further commissions on investments made with the funds—In re Davidson's Estate, 204 Pa. 381.

30. Lamar v. Lamar (Ga.) 45 S. E. 498.

31. An extra allowance held excessive and reduced—Glover v. Check, 24 Ky. L. R. 1281, 71 S. W. 438. Extra allowance for legal services rendered by himself—In re Ryan's Estate (Wis.) 94 N. W. 342.

32. The court on appeal from an order allowing the additional compensation will remand the cause for apportionment—Glover v. Check, 24 Ky. L. R. 1783, 72 S. W. 302.

33. The opinions of a witness as to what would be a fair compensation is not admissible—Kenan v. Graham, 135 Ala. 585. Allowance held not excessive—In re Ryan's Estate (Wis.) 94 N. W. 342.

34. See ante, § 8B.

35. James v. West, 67 Ohio St. 28.

36. Keegan v. Smith, 172 N. Y. 624.

authorization[37] or to fail to take solvent notes in consideration of a sale of personalty as directed by an order of the probate court.[38] Nonpayment of a claim is not a breach where the estate would be exhausted by the payment of preferred or prior claims,[39] but the mere fact that the estate was insolvent[40] or that a decree of probable insolvency had been entered is not a bar to a pending action on the bond by a creditor of the estate.[41]

Until liability has been fixed and the representative has failed to pay no action can be maintained on his bond,[42] and an accounting is an essential pre-requisite,[43] but this does not apply to an action by an administrator de bonis non against the removed representative and his sureties,[44] nor is it in such case necessary that a demand be made before suit brought or a judgment be procured against the removed representative.[45] After issuance of a citation therefor and failure of the representative to account the action may be maintained.[46]

Any person damaged by the breach of the bond[47] as a creditor entitled to payment of his claim[48] or widow or next of kin of decedent are entitled to sue,[49] and several persons interested may jointly enforce the liability.[50] The administrator de bonis non may maintain the action to recover unadministered assets.[51] A judgment creditor may sue without first obtaining leave of court.[52]

It is only where a single creditor seeks to surcharge or falsify the accounts settled by a personal representative that equity will have jurisdiction of his bill against the personal representative and his bond.[53]

A claim against the estate of a deceased surety on an executor's bond may be filed in the probate court in the name of the actual claimant.[54] The fact that no claim was filed against the estate of a deceased surety on an executor's bond will not bar an action against the surety's legatee, where the executor's account had not been filed until after the surety's estate had been settled.[55]

The special statute of limitations barring claims against an estate does not apply to an action on the bond of a representative by his successor,[56] and the time in which distributees may sue does not begin to run until after a judgment has been had determining the amount to which they are entitled.[57] The sureties are estopped to question the validity of the appointment,[58] and it is not a defense that

37, 38. State v. Taylor (Mo. App.) 74 S W. 1032.

39. Under Me. Rev. St. c. 66, § 2. Where it is shown that the estate was exhausted by payment of the first four classes of claims, the non-liability of the sureties on the bond for claims of other classes was settled—Burgess v. Young, 97 Me. 386.

40. It would have been the duty of the probate court when the administratrix represented the estate insolvent to appoint commissioners or to pass upon claims presented —Fuller v. Dupont (Mass.) 67 N. E. 662.

41. Since in such case the action could be stayed until determination of the insolvency proceedings under Rev. Laws, c. 142, § 2—McKim v. Roosa (Mass.) 67 N. E. 651.

42. Garvey v. United States Fidelity & Guaranty Co., 77 App. Div. (N. Y.) 391. Under Wis. Rev. St. 1898, § 4014 it is not a prerequisite to an action that a devastavit and default be determined as against the representative—Wallber v. Wilmanns, 116 Wis. 246.

43. Reed v. Hume, 25 Utah, 248, 70 Pac. 998.

44. American Surety Co. v. Platt (Kan.) 72 Pac. 775.

45. Fuller v. Dupont (Mass.) 67 N. E. 662.

46. Probate Court v. Potter (R. I.) 52 Atl. 1085.

47, 48. State v. Taylor (Mo. App.) 74 S. W. 1032.

49. Meservey v. Kalloch, 97 Me. 91. In some states the suit runs by the name of the state or the court of probate to the use of the damnified person [Editor].

50. That the writ issued under Gen. Laws, c. 220, § 21, was indorsed and issued at the instance of more than one interested party is not ground for a demurrer—Probate Court v. Potter (R. I.) 52 Atl. 1085.

51. Meservey v. Kalloch, 97 Me. 91; American Surety Co. v. Platt (Kan.) 72 Pac. 775.

52. Under Rev. St. Mass. c. 149, § 20—McKim v. Roosa (Mass.) 67 N. E. 651.

53. Thompson v. Mann (W. Va.) 44 S. E. 246.

54. Even though under the state statute actions on such bonds must be brought in the name of the people—Thomson v. Black, 200 Ill. 465.

55. Wallber v. Wilmanns, 116 Wis. 246.

56. Fuller v. Dupont (Mass.) 67 N. E. 662.

57. Craddock v. Browning, 24 Ky. L. R. 1074, 70 S. W. 684.

58. Romy v. State (Ind. App.) 67 N. E.

the settlement of accounts was procured by fraud.[59] A mere mistake of the amount claimed as distributee in an action by him as such on the bond is not fatal.[60] Interest may be allowed and should be computed from the date of the allowance of the representative's account.[61] The judgment may be for the full amount of the estate.[62]

§ 9. *Actions by and against representatives and costs therein.*—A successor may prosecute actions instituted by his predecessor without authorization from the court.[63] Actions affecting assets may be brought by persons interested in the estate only when the personal representative refuses to sue.[64] An executor may sue for a construction of the will of his testator to ascertain the rights of the beneficiaries.[65]

Since the administrator takes no interest in the realty[66] he cannot maintain a suit to declare a resulting trust in favor of decedent[67] or to affect the title in realty,[68] though under the code of N. Dakota he may maintain such actions;[69] but where resort to the realty will be necessary for the payment of debts he may maintain an action to set aside a void attachment lien,[70] and he has such an interest in the land as would entitle him to be made a party plaintiff to an action to restrain the commission of waste thereon.[71] In all actions affecting the realty the heirs or persons interested therein should be made parties.[72]

Property or funds in the hands of personal representatives being in custodia legis cannot be reached by attachment[73] or garnishment.[74]

Foreign appointees may maintain actions against residents,[75] but actions against them must be brought in the state of the appointment unless there are assets in the state and they qualify therein,[76] and in such case the action may be maintained if they fail to take out ancillary letters.[77] An action against a foreign executor to recover a legacy may be maintained if he is found within the state.[78]

An appearance by one of two defendant co-executors binds both.[79]

998. In an action on the bond of an administrator of an absentee under the Indiana statute, the sureties are estopped to question the validity of the appointment on the ground that the absentee was still alive at the time of the appointment—Id.

59. Since decrees settling the accounts of representatives cannot be collaterally attacked—State v. Carroll (Mo. App.) 74 S. W. 468.

60. Sufficiency of complaint in an action against the administrator and his bondsmen by a distributee—Miller v. Ganser, 87 Minn. 345.

61. Fuller v. Dupont (Mass.) 67 N. E. 662.

62. Though the executor was beneficiary under the will, no final order to settle the accounts or distribute the estate having been made—Wallber v. Wilmanns, 116 Wis. 246.

63. Goodwynne v. Bellerby, 116 Ga. 901. Revival of actions by and against decedents, see Abatement and Revival.

64. It is not necessary to the maintenance of a suit for an accounting by a creditor against the administrator and the county judge alleging the fraudulent retention of fees, that the administrator shall refuse to sue—McGlave v. Fitzgerald (Neb.) 93 N. W. 692. The legatee may recover property bequeathed from third persons on the executors giving consent to the legacy—People's Nat. Bank v. Cleveland, 117 Ga. 908.

65. Leggett v. Stevens, 77 App. Div. (N. Y.) 612.

66. See ante, § 4C.

67. Johnston v. Johnston, 173 Mo. 91.

68. Bailey v. Larrance, 104 Ill. App. 662.

69. Rev. Codes 1899, §§ 6372, 6380, 6460, 6461—Blakemore v. Roberts (N. D.) 96 N. W. 1029.

70. Munger v. Doolan (Conn.) 55 Atl. 169.

71. Halstead v. Coen (Ind. App.) 67 N. E. 957.

72. Under Laws 1887, c. 147, as amended by Laws 1901, c. 186, on death of a mortgagee before payment, all his rights and powers as mortgagee pass to his personal representatives. On death of the mortgagee pending an action to foreclose, his executor, to continue the action must make the mortgagee's heirs parties—Hughes v. Gay, 132 N. C. 50. Action to avoid a conveyance by deceased because procured by fraud—Gaines v. Gaines, 116 Ga. 475, 476.

73. Gorman v. Stillman (R. I.) 52 Atl. 1088.

74. Williams v. Smith (Wis.) 93 N. W. 464.

75. A foreign administrator may maintain an action for the wrongful death of the intestate without ancillary appointment, where the cause of action arose in the state of his appointment—Boulden v. Pennsylvania R. Co., 205 Pa. 264.

76. So held under the statutes of Illinois—Filer v. Rainey, 120 Fed. 718.

77. Montgomery v. Boyd, 78 App. Div. (N. Y.) 64.

78. Keiningham v. Keiningham's Ex'r, 24 Ky. L. R. 1330, 71 S. W. 497.

79. Montgomery v. Boyd, 78 App. Div. (N. Y.) 64.

The description in the body of the pleading controls the caption in determining whether the action is brought in the individual or representative capacity,[80] and if nothing appears in the body to indicate that the action is brought in the representative capacity, the words "executor" or "administrator" in the caption will be treated as surplusage;[81] so also if the claim is in the representative's individual capacity an allegation of representative capacity will be treated as descriptio personae.[82] It is not fatal that the complaint in an action where the representative sues in such capacity and individually does not state his capacity.[83] Where time of appointment is alleged it is not necessary to plead the death of decedent.[84] Representative capacity is not in issue if not made so by special plea.[85]

Certified copies of letters of administration are sufficient proof of authority to maintain the action.[86]

The general rule is that where the representative is unsuccessful he will be charged with costs.[87] Where the action was caused by the wrongful acts of the representatives[88] or where he has been guilty of misconduct or bad faith in defending it he should be personally charged with the costs.[89] Since under the statute whereby a claim which was not presented within the time required if put in action will not carry costs it is improper to tax disbursements.[90] If the claim sued on was materially reduced by the representative's contest thereof he should not be charged with costs,[91] though plaintiff consented on the trial to a reduction.[92] An allowance in addition to costs may be granted where the representative unreasonably refused or neglected to pay.[93] If a judgment against a personal representative does not in terms make the costs chargeable against the estate, the representative is personally liable.[94] If the representative appeals from a judgment as a legatee the costs may be taxed against him personally.[95]

§ 10. *Accounting and settlement by representatives. A. Who may require.*—Only parties interested in the estate can compel representatives to account.[96] A

80. If the complaint describes the plaintiff as "A. B., executor," omitting the word "as" and in the body of the complaint states that he sues as executor, it sufficiently shows the action to have been brought in a representative capacity—Englehart v. Richter, 136 Ala. 562. Sufficiency of declaration as to authority of plaintiff executrix in an action to recover assets—Acton v. Walker's Ex'x, 24 Ky. L. R. 2377, 74 S. W. 231. A complaint in an action against an administrator held not defective because of a failure to show that the defendant contracted individually or in his representative capacity—Magoun v. Magoun, 84 App. Div. (N. Y.) 232.

81. Williamson v. Stevens, 84 App. Div. (N. Y.) 518.

82. Hayden v. Kirby (Tex. Civ. App.) 72 S. W. 198. The representative capacity of plaintiffs as executors need not be set out in the complaint in an action to quiet title—San Francisco & F. Land Co. v. Hartung, 138 Cal. 223, 71 Pac. 337.

83. Steele v. Gilmour Mfg. Co., 77 App. Div. (N. Y.) 199.

84. Stanley v. Sierra Nevada Silver Min. Co., 118 Fed. 931.

85. Harte v. Fraser, 104 Ill. App. 201.

86. Sands v. Hickey (Ala.) 33 So. 827. In the justice's court he need not prove his capacity though his statement says that he sues as executor—Knoche v. Perry, 90 Mo. App. 483.

87. As where he fails in a suit to subject property to the payment of decedent's debts —Holburn v. Pfanmiller's Adm'r, 24 Ky. L. R. 1613, 71 S. W. 940.

88. The personal representative is properly charged with costs of an action to prevent him from committing waste—Steinway v. Von Bernuth, 82 App. Div. (N. Y.) 596.

89. Opitz v. Karel (Wis.) 95 N. W. 948. The representative will be charged with the usual costs on payment of a claim after suit brought against him. If after foreclosure was instituted he will be charged with costs accruing to the time of payment, including $500 as attorney's fees—Hall v. Metcalfe, 24 Ky. L. R. 1660, 72 S. W. 18. Costs and extra allowance are proper in action against the personal representative to foreclose a mortgage executed by the deceased —Richards v. Stillman, 172 N. Y. 632.

90. Code Civ. Proc. § 1836. Though on reference of such a claim it was stipulated that the disbursements and expenses of the reference should be taxed as part of the costs of the case, the plaintiff being under the Code not entitled to tax his costs, it is improper to tax the disbursements, that is, the reference fees, witness fees and other proper charges—Nichols v. Moloughney, 82 N. Y. Supp. 949.

91, 92. Healy v. Malcolm, 75 App. Div. (N. Y.) 422.

93. Weeks v. Coe, 76 App. Div. (N. Y.) 310.

94. McCarthy v. Speed (S. D.) 94 N. W. 411.

95. Roberts v. Lamberton (Wis.) 94 N. W. 650.

96. A grand-child of the testator held not to have such an interest as will entitle him

legatee in remainder after the expiration of a life estate created by will vesting in the life tenants the right to use both principal and income for specific purposes has such an interest as will entitle him to compel an accounting by the executrix.[97] A creditor may maintain an action for an accounting against the administrator and judge on the ground of retention of illegal fees, though he may have other remedies.[98] The granting of an order by the court having probate jurisdiction directing the filing of an account by personal representatives on petition of a creditor is discretionary.[99]

(§ 10) *B. Procedure.*—Courts of equity and probate courts have concurrent jurisdiction to settle the accounts of representatives,[1] but the court first assuming has exclusive jurisdiction,[2] though on the ground of surprise equity will assume jurisdiction.[3] A representative can be compelled to account only for funds which came into his hands as such.[4] The probate court cannot therefore settle the accounts of an executor as testamentary trustee,[5] though the fact that the executor was also appointed testamentary trustee will not affect the jurisdiction of the court to compel an accounting as executor.[6] A sole surviving partner and executor of the deceased partner may be compelled to settle his accounts in the probate court.[7] In Texas, the death of the representative ousts the court of jurisdiction to determine the rights between deceased and the estate which he represented.[8] In New York,

to maintain the proceedings—Tunnicliffe v. Fox (Neb.) 94 N. W. 1032.

97. Where the executrix was by will directed to support the widow and an imbecile son during life the residuary legatee may compel the executrix to file a supplemental accounting, showing in detail her transactions with the principal of the estate, and an itemized statement of all the income received, and a statement in detail of the payments made under the provisions in the will, and this though the executrix was also the widow and life tenant under the will—In re Hunt's Estate, 84 App. Div. (N. Y.) 159.

98. The remedies to re-tax costs, or action on the administrator's bond or to recover penalties for taking illegal fees not being exclusive—McGlave v. Fitzgerald (Neb.) 93 N. W. 692.

99. Code Civ. Proc. § 2727, answer held insufficient to warrant the denial of a petition for such an accounting—In re Blum's Estate, 83 App. Div. (N. Y.) 161.

1. Haughian v. Conlon, 39 Misc. (N. Y.) 584. Equity has jurisdiction of a suit to protect the trust estate against the executor acting as trustee and to afford complete relief by compelling an accounting. As where a sole executor and trustee of an estate was co-executor of another estate of which his wife was executrix and residuary legatee and he was joining with her in the assertion of claims against the former estate, though no conspiracy is proved—Steinway v. Von Bernuth, 82 App. Div. (N. Y.) 596. Action against the co-representative to recover assets held not to be an action for conversion but one in equity for the adjustment of the interests of the parties—Ruggles v. O'Brien, 79 App. Div. (N. Y.) 641.

2. To oust jurisdiction pending proceedings before the surrogate must be pleaded—Haughian v. Conlon, 39 Misc. (N. Y.) 584.

3. The proceedings in the orphan's court being a surprise to the executor who was unable to prepare his defense at once, where he asks by bill to be allowed to settle in a court of equity and to foreclose certain mortgages connected with the estate—Mulford v. Mulford (N. J. Eq.) 53 Atl. 79.

4. A general guardian on a subsequent appointment of administrator of the deceased parent of his ward, cannot be compelled to account for sums paid to him as guardian from an estate in which the mother was the sole distributee—In re Maybee's Estate, 40 Misc. (N. Y.) 518. The Surrogate has no jurisdiction on the settlement of the account of the executors of a deceased stockholder in a corporation who were also officers and directors therein, to determine whether the executors have used their powers as officers and directors in voting extra compensation to themselves or in distributing the corporation's property—In re Shaefer, 171 N. Y. 686. The probate court has jurisdiction to direct a surrender of the rents collected and reported to the court to the person entitled thereto though the land was rented by the representative without authority—Lyons v. Lyons (Mo. App.) 74 S. W. 467.

5. In re Belt's Estate, 29 Wash. 535, 70 Pac. 74. Where the executor and testamentary trustee had settled the estate without an accounting in court, and leaving in his hands the residuary estate in trust after the death of the beneficiary, the probate court has no jurisdiction to settle the accounts as executor including the trust property—Canfield v. Canfield (C. C. A.) 118 Fed. 1.

6. Wallber v. Wilmanns, 116 Wis. 246.

7. In re Dummett, 38 Misc. (N. Y.) 477; In re Mertens' Estate, 39 Misc. (N. Y.) 512. Under the Alaska Code, the District Court has jurisdiction to determine the claim by a surviving partner against the estate of his deceased partner, which involves an accounting of the partnership affairs (31 U. S. Stat. 457, §§ 790-794)—Esterly v. Rua (C. C. A.) 122 Fed. 609.

8. McClellan v. Mangum (Tex. Civ. App.) 75 S. W. 840.

on death of the representative pending settlement, a revivor thereof may be had.[9] The probate court has jurisdiction to compel an accounting by a removed personal representative.[10]

The domiciliary court cannot compel the representative to account for foreign assets accounted for before the court appointing him ancillary representative,[11] nor can the court making the ancillary appointment compel an account of assets without the state of such appointment which had been accounted for to the domiciliary court.[12] The court making the ancillary appointment is without jurisdiction to adjudicate on claims of the estate against the representative,[13] nor can he be charged with property whose legal situs was without the state of such ancillary or domiciliary appointment.[14] The residence of the agent of a personal representative having possession of assets which in fact were without the state cannot be considered in determining the question of jurisdiction of the probate court over such assets.[15] In Kentucky, a foreign representative may be compelled to account for property held in the state.[16]

Delay in a proceeding to compel an accounting will not oust the court of jurisdiction.[17]

All persons interested in the estate should be made parties to the proceeding for the settlement of the representative's accounts.[18] If there are unknown persons interested who have not been cited the settlement is void.[19]

Accounts of co-representatives should be joint.[20]

The sureties on the representative's bond[21] or any person interested in the estate may interpose objections to the account.[22] The payment of claims may be questioned on the settlement.[23] A contested account may be referred.[24] The

9. The successor of a deceased representative is entitled to notice of an application to revive an accounting pending at the time of his predecessor's death—In re Tredwell's Estate, 77 App. Div. (N. Y.) 155. Under Code Civ. Proc. § 2606 amending laws 1902, c. 349, an appearance in response to a citation by the administrator with the will annexed to compel the representatives of the deceased representative to account, is insufficient to warrant the making of an order of revivor of the pending account—In re Tredwell's Estate, 77 App. Div. (N. Y.) 155. The appearance of an administrator with the will annexed in support of a motion to vacate an order reviving an account pending at the time of the death of the accounting representative is insufficient to confer power to grant another order reviving such pending account—Id.

10. In re Morrison's Estate, 68 Ohio St. 252.

11. The statutes of the state of ancillary appointment not giving the right to administer the property of a nonresident decedent situated in the state by his foreign representative—In re Crawford, 68 Ohio St. 58.

12, 13, 14, 15. Tunnicliffe v. Fox (Neb.) 94 N. W. 1032.

16. Hussey v. Sargent (Ky.) 75 S. W. 211.

17. Wallber v. Wilmanns, 116 Wis. 246. An agreement between the legatees held not to deprive the surrogate of jurisdiction to compel an accounting by the representative of the estate—Kells v. People's Trust Co., 82 App. Div. (N. Y.) 548.

18. Canfield v. Canfield (C. C. A.) 118 Fed. 1; In re Killan's Estate, 172 N. Y. 547; In re Mertens' Estate, 39 Misc. (N. Y.) 512. The executrix of her husband's estate, both she and her husband having been successively the representatives of another estate is a person interested in the latter is a proper party to a proceeding on the settlement of her accounts—In re Walton's Estate, 38 Misc. (N. Y.) 723.

19. New York Code Civ. Proc. §§ 2518-2523—In re Killan's Estate, 172 N. Y. 547.

20. In re Smith's Estate, 40 Misc. (N. Y.) 331.

21. Co-executors, sureties on the bond of another executor, may object to an accounting and distribution before the expiration of the time within which claims may be filed against the estate—Yakel v. Yakel, 96 Md. 240.

22. In re Walton's Estate, 38 Misc. (N. Y.) 723. Sole distributee held estopped to question credit for compensation by agreement with the representative to allow him the same—Cummings v. Robinson, 95 Md. 759. Facts held sufficient to show that a legatee receiving notice of the representative's accounting was not estopped to file exceptions to the report—In re Cummings' Estate (Iowa) 94 N. W. 1117.

23. A decree discharging special administrators appointed pending contest of the will and directing a transfer of the assets to themselves as executors, made on notice to all parties interested, is not res judicata of claims paid by such special administrators—In re Doheny, 171 N. Y. 691.

24. Objections to an intermediate account may be referred, though no reference was pending on objections to the final account—James v. West, 67 Ohio St. 28. That there was a failure to report on all the issues referred is not ground for setting aside the report, the court having power to hear fur-

contestant generally has the burden of proof,[25] but the representative has the burden of proving the justness and necessity of payment of administration expenses.[26] Depositions may be taken and received.[27]

(§ 10) *C. The decree or order.*—On consolidation of separate proceedings for the settlement of the accounts by co-administrators a single order directing distribution by both is proper.[28] A decree finding a balance due in the hands of a personal representative may properly direct the ultimate issuance of execution against him individually.[29]

A decree settling the accounts is binding on all persons made parties to the proceeding,[30] and on the sureties on the bonds of the representative,[31] and is conclusive as to all matters determined.[32] It is not subject to collateral attack,[33] even on the ground of fraud.[34] It does not necessarily show that the representative has been divested of his administrative capacity.[35] The settlement of the accounts as ancillary representative is conclusive on the court on settlement of the accounts of the domiciliary appointee.[36] A creditor not a party but who was entitled to be heard may intervene for the purpose of an appeal without becoming a party by petition, nor need he file exceptions to the findings,[37] and a municipal corporation to whom taxes are due from the estate is a creditor entitled to such remedy by appeal.[38] If the executor gave a bond on his appointment it is not necessary that he file a bond in order to appeal.[39] On review the only question open is whether the particular items questioned are legal charges under the evidence.[40] The settlement may be affirmed in part and reversed in part,[41] and on reversal such part may be remanded to the court below for findings as to the facts.[42] A co-executor may move to vacate the settlement of the estate by his co-executors without notice to him.[43] Unless it clearly appears that an allowance for attorney's fees was unreasonable all the parties having acted in good faith there is no ground for reopening the account.[44] The allowance of a motion to

ther testimony and supply the omission, or the court may also supply additional findings on evidence heard before it, or refer to another commissioner—Id. The finding of the referee on the settlement of a representative's accounts is not conclusive on the surrogate—In re Schaefer, 171 N. Y. 686.

25. In re Wagner, 40 Misc. (N. Y.) 490.

26. In re Peck, 79 App. Div. (N. Y.) 296; In re Rainsforth's Estate, 40 Misc. (N. Y.) 609.

27. In re Killan's Estate, 172 N. Y. 547. A non-resident surviving heir may procure an order therefor for his own examination on his application for an accounting—Id. All persons appointed to appear on an accounting may be joined in an application for a commission to examine the sole surviving non-resident heir and be represented in the execution thereof—Id.

28. In re Smith's Estate, 40 Misc. (N. Y.) 331.

29. Whetstone v. McQueen (Ala.) 34 So. 229.

30. In re Stevens, 40 Misc. (N. Y.) 377. On an infant represented by his guardian—In re Turner, 79 App. Div. (N. Y.) 495. No presumption can supply lack of proof of citation or notice of appearance by the heir—Miguez v. Delcambre, 109 La. 1090.

31. Barney v. Babcock's Estate, 115 Wis. 409; Wallber v. Wilmanns, 116 Wis. 246.

32. As to the amount of personalty which a legatee is entitled to receive—Skillin v. Central Trust Co., 80 App. Div. (N. Y.) 206. If it declares that the executor holds the balance in trust for specific purposes under the will it is conclusive as to the existence of the trust—In re Chase's Estate, 40 Misc. (N. Y.) 616.

33. In re Stevens, 40 Misc. (N. Y.) 377.

34. It can only be attacked by a direct suit in equity—State v. Carroll (Mo. App.) 74 S. W. 468.

35. Whetstone v. McQueen (Ala.) 34 So. 229.

36. In re Crawford, 68 Ohio St. 58.

37. Code Civ. Proc. N. Y. § 2569—In re Sullivan, 84 App. Div. (N. Y.) 51.

38. That the administrator has been guilty of unwarrantable delay in the settlement of the estate, whereby unnecessary taxes have accumulated, and that he should be charged with same personally, is not an objection to the city's right to appeal—In re Sullivan, 84 App. Div. (N. Y.) 51.

39. In re Sidwell's Estate, 67 Ohio St. 464. The executor of a deceased executrix is within Rev. St. § 6408, and entitled to appeal from the settlement of the account without giving a bond—Id.

40. The sufficiency of the evidence will not be considered—Taylor v. Crook, 136 Ala. 354.

41, 42. James v. West, 67 Ohio St. 28.

43. Code, art. 93, § 241, art. 90, §§ 1, 2, do not preclude such a proceeding—Yakel v. Yakel, 96 Md. 240.

44. Geesey v. Geesey, 96 Md. 630.

open a decree to permit the introduction of further testimony is within the discretion of the court.[45] That the order dismissing the petition to vacate an order settling the accounts of a representative was without prejudice will not prevent the petitioner from appealing from the dismissal.[46]

A suit in equity will lie to set aside the settlement on the ground of fraud.[47] After an estate has been settled and distribution made under order the heirs entitled to share in the estate who had been fraudulently deprived thereof have no adequate remedy in the probate court and may resort to equity to recover.[48]

§ 11. *Distribution and disposal of funds.*[49] *Time for distribution.*—Distribution should not be made until after payment of the debts of decedent.[50]

It is the administrator's duty to apply for an order of distribution after the estate has been settled.[51] The mere pendency of an action to declare liens on distributive shares in the hands of the administrator is not ground for delaying distribution,[52] nor is the right of the heirs of a deceased legatee to compel payment of the legacy to the estate affected by the validity or invalidity of the will of such legatee.[53] The administrator has the burden of showing an excuse for not making distribution within the legal time.[54]

Interests, shares, and adjustment thereof.[55] The representative may set off against a distributive share a claim due from the distributee to the estate,[56] though an action thereon would have been barred by limitations.[57] Unless the will so intends, a legacy will not operate as an extinguishment of a debt.[58] If the heir's indebtedness is greater than the amount of his distributive share he should be credited with this amount.[59] A representative who has paid out money on account of last sickness and funeral expenses of an adult child has a charge on such child's distributive share for reimbursement.[60]

Mode of distribution, and persons who may receive shares.—Distribution may be demanded in specie.[61] It is not necessary that the distributee be required to give a refunding bond on payment of his distributive share, where the time for

45. In re Cummings' Estate (Iowa) 94 N. W. 1117.

46. The time within which second petition could have been filed having expired—Yakel v. Yakel, 96 Md. 240.

47. State v. Carroll (Mo. App.) 74 S. W. 468. If brought within five years after the discovery—Tucker v. Stewart (Iowa) 97 N. W. 148. Evidence held insufficient to establish fraud—Smith v. Buchanan (Iowa) 96 N. W. 1086.

48. Maney v. Casserly (Mich.) 96 N. W. 478. Held not barred by laches from obtaining equitable relief—Id.

49. Interpretation of will to determine as to payment of legacies will be treated under Wills.

50. Coulter v. Bradley, 30 Ind. App. 421. The administrator's liability to pay the debts in such case where the assets were insufficient cannot be avoided because he acted on advice of counsel and the probate judge—James v. West, 67 Ohio St. 28. The heirs may obtain possession by paying the debts or securing their payment—Succession of Willis, 109 La. 281.

51. Haskins v. Martin, 103 Ill. App. 115.

52. In re Davis' Estate, 27 Mont. 490, 71 Pac. 757.

53. In re Wickersham's Estate, 138 Cal. 355, 70 Pac. 1076.

54. Haskins v. Martin, 103 Ill. App. 115.

55. Receipt for share is evidence of payment of full interest—In re Murphy, 80 App. Div. (N. Y.) 238. Priorities between general demonstrative and specific legacies, see post, § 14A. See, also, Advancements, post, § 14B.

56. Johnston v. Cutchin (N. C.) 45 S. E. 522. A deduction directed by will from the share of the legatee held to include all indebtedness of such legatee to the decedent, and a promissory note made by the legatee to the decedent was therefore not a proper subject of a set-off against his share—In re Cummings' Estate (Iowa) 94 N. W. 1117.

57. In re Timerson, 39 Misc. (N. Y.) 675; Woodruff v. Woodruff, 23 Ohio Circ. R. 408; Holden v. Spier, 65 Kan. 412, 70 Pac. 348.

58. Sharp v. Wightman (Pa.) 54 Atl. 888.

59. In re Warner's Estate, 39 Misc. (N. Y.) 432.

60. In re Murphy's Estate, 30 Wash. 9, 70 Pac. 109.

61. Where the estate had been fully settled and all legacies paid, corporate stock in the hands of the representative should be delivered to the residuary legatee and not ordered to be sold—Lane v. Albertson, 78 App. Div. (N. Y.) 607. The widow on election not to take under the will of her deceased husband is entitled to her distributive share of securities and investments paid her in specie, when it was not necessary to dispose of the same to create a fund for the purpose of payment of debts of the estate—Baptist Female University v. Borden, 132 N. C. 476.

the presentation of the payment of claims has been barred by the statute.[62] If the representative is also guardian of infant heirs, he may transfer their shares to himself as guardian without an order of court,[63] and if appointed guardian in a foreign state it is not essential that he should also have procured a domestic appointment.[64] A voluntary payment by an administrator to the nonresident foreign guardian is valid.[65] In case of death of the ward without owing debts, payment may be made to his surviving heir without the intervention of administration on his estate.[66]

Interest.—Legacies will bear interest from the time when they are due and payable,[67] but this does not apply to the surviving spouse's statutory distributive share.[68] A partial payment of a specific legacy must first be applied to the deduction of accrued interest.[69] If the representative desires to avoid paying interest on legacies by a tender of payment he must keep the tender good.[70]

Procedure.—All the parties to an agreement fixing the shares of the estate to which each shall be entitled in settlement of a contest of a will may petition for a partial distribution under a statute authorizing it,[71] and all the heirs should be made parties to proceedings for a general distribution of the estate.[72] Infants interested must be represented by guardian.[73] All persons interested in the estate are entitled to notice of the application for an order of distribution.[74]

The court of probate jurisdiction has power in proceedings for distribution to determine who is entitled to share,[75] or the court may require trial of the issues raised by the persons claiming to be heirs and entitled to share.[76] The probate court may inquire into the indebtedness of a distributee to the estate and order a deduction,[77] and determine whether legacies are a charge upon the realty.[78] It has power to direct a deposit in court of surplus funds in the representative's hands only where special reasons are alleged therefor.[79]

62. Klicka v. Klicka, 105 Ill. App. 369.

63. A mere declaration of intention to hold the estate as guardian is sufficient—State v. Whitehouse, 75 Conn. 410.

64. If it appears that he had given a bond in the state of appointment and that there were no debts against the decedent in the state of appointment as administrator—State v. Whitehouse, 75 Conn. 410.

65. Pub. St. Mass. c. 139, §§ 39, 40, were intended merely to enable the administrator to protect himself by a domestic decree—Gardiner v. Thorndike (Mass.) 66 N. E. 633.

66. Under Code Civ. Proc. § 2384—In re Maybee's Estate, 40 Misc. (N. Y.) 518. A direction by will to pay a person's debts is a legacy to him which his personal representative may enforce—Hallock v. Hallock, 79 App. Div. (N. Y.) 508.

67. Facts held to show that the trustees of a trust fund created by a will were entitled to interest on such fund, and that a deposit in the bank of a fund by the executor with knowledge of one of the persons subsequently appointed trustee was not a tender so as to avoid interest—In re Blake's Estate, 137 Cal. 429, 70 Pac. 303.

68. Since such share cannot be known until the amount of the personal property subject to distribution has been ascertained—Hutchings v. Davis, 68 Ohio St. 160.

69. Morton's Ex'r v. Trustees of Church Home, 24 Ky. L. R. 1122, 70 S. W. 841.

70. In re Godwin's Estate, 22 Pa. Super. Ct. 469.

71. In re Davis' Estate, 27 Mont. 490, 71 Pac. 757. Sufficiency of petition for distribution—Gaines v. Gaines, 116 Ga. 476. Sufficiency of petition by an executor for leave to sell realty for the purpose of making distribution among devisees—Zehnder v. Schoenbachler, 24 Ky. L. R. 947, 70 S. W. 278. Construction of an agreement between heirs as to the distribution of the estate—Chauvet v. Ives, 173 N. Y. 192.

72. Succession of Bothick, 109 La. 1.

73. In re Davis' Estate, 27 Mont. 490, 71 Pac. 757.

74. Baker v. Lumpee, 91 Mo. App. 560.

75. Reformed Presbyterian Church v. McMillan (Wash.) 72 Pac. 502. Rev. St. § 3980, authorizing an action for such purpose, does not apply where administration is pending—Garr v. Davidson, 25 Utah, 335, 71 Pac. 481.

76. As where on an appeal from a settlement of the accounts of the representative, persons claimed to be heirs and that they were omitted from the will by mistake, claiming also there was an intestacy as to the residue estate, and this even though relationship is admitted—Goff v. Britton, 182 Mass. 293.

77. Holden v. Spier, 65 Kan. 412, 70 Pac. 348.

78. Legacies being given in excess of the personalty and power of sale resting in the executors who accounted for the proceeds on such accounting, the Surrogate may determine whether such legacies were a charge on the land—In re Plummer's Estate, 38 Misc. (N. Y.) 536.

79. Merely that the executor was leaving the city for a trip to a distant state and that it was apprehended that he might not

A *decree of distribution* which does not dispose of the entire estate is void.[80] A decree settling the account and directing distribution is conclusive on the parties to the proceeding as to the amount of personalty a legatee was entitled to.[81]

Wherever an issue of fact is made in a proceeding for distribution of an estate, a motion for a *new trial,* and a re-examination of issues may be had.[82]

The personal representative can *appeal* from a decree of distribution only when he is aggrieved thereby,[83] as where there is a dispute as to the amount due from him.[84] If he is also a beneficiary he must appeal in his individual capacity.[85] Whether the representative is a party aggrieved cannot be determined on a motion to dismiss the appeal.[86] The effect of an appeal from an order of distribution is to vacate the order.[87] On a motion to dismiss an appeal from an order denying a motion for a new trial, the merits of the controversy cannot be examined.[88] Only statutory costs can be awarded on appeal from a decree of distribution.[89]

All the legatees should be made parties to an action by a legatee to enforce payment of his share,[90] and the legatees must aver in the complaint that there was sufficient personalty in the hands of the executor or real estate which it was the intention of the testator should be charged with the legacy.[91]

§ 12. *Enforcement of orders and decrees by attachment as for a contempt.*—The failure of personal representatives to comply with orders directing the performance of duties may generally be enforced by committing him as for a contempt,[92] as orders directing the payment of legacies,[93] or an order directing him to deposit certain property belonging to the decedent in court.[94] The mere adjudication of a representative as a bankrupt is not ground for discharging him from a committal.[95] An executor will not be punished criminally for failure to pay a claim.[96]

§ 13. *Discharge of personal representatives.*—The mere settlement of the accounts of a personal representative does not ipso facto discharge him.[97] A legatee is entitled to notice of application for a discharge of the executor,[98] and the decree

pay over the money promptly if not ordered to do so before return, is not sufficient ground—Reed v. Reed, 24 Ky. L. R. 2438, 74 S. W. 207.

80. Succession of Bothick, 109 La. 1. A decree of distribution construed and held not to include the distribution of homestead property of the decedent—Fraser v. Farmers' & M. Sav. Bank (Minn.) 95 N. W. 307.

81. Skillin v. Central Trust Co., 80 App. Div. (N. Y.) 206. The court refused to disturb a settlement after the lapse of eleven years—Harman v. Avritt, 24 Ky. L. R. 1919, 72 S. W. 751.

82. In re Davis' Estate, 27 Mont. 235, 70 Pac. 721.

83. Succession of Marks, 108 La. 685; Lamar v. Lamar (Ga.) 45 S. E. 498.

84. In re Godwin's Estate, 22 Pa. Super. Ct. 469.

85. In re Fuhrman's Estate, 21 Pa. Super. Ct. 27.

86. In re Davis' Estate, 27 Mont. 235, 70 Pac. 721.

87. The appeal being a trial de novo in the circuit court—Klicka v. Klicka, 105 Ill. App. 369.

88. In re Davis' Estate, 27 Mont. 235, 70 Pac. 721.

89. In re McMahon's Estate (Wis.) 94 N. W. 351.

90. Parker v. Cobb, 131 N. C. 25.

91. Coulter v. Bradley, 30 Ind. App. 421.

92. As where on being ordered to account he fills the printed blank with the word "nothing" written in each of the schedules and claiming that he no longer acted as executor (In re People's Trust Co., 37 Misc. [N. Y.] 239) or if he refuses to answer questions as to taxable property of the estate at appraisal—In re Bishop's Estate, 82 App. Div. (N. Y.) 112. See, also, 40 Misc. (N. Y.) 64.

93. Under N. Y. Civ. Proc. § 2555—In re Holmes' Estate, 79 App. Div. (N. Y.) 267.

94. Excuse held insufficient to purge the contempt and he was not allowed to withdraw personal funds deposited in court—Reed v. Reed, 24 Ky. L. R. 2438, 74 S. W. 207.

95. Evidence considered and held not to purge the administrator of contempt—In re Collins, 39 Misc. (N. Y.) 753.

96. Miss. Code 1892, § 1063, making it a felony for an executor to convert assets or failure to pay, etc., does not apply—State v. Pannell (Miss.) 34 So. 388.

97. Whetstone v. McQueen (Ala.) 34 So. 229. An order releasing the executor from all liability as such on his paying a particular sum to those entitled thereto and directing that his bond remain in force until further order of the court did not discharge the executor so as to deprive the court of jurisdiction to appoint an administrator de bonis non—Barney v. Babcock's Estate, 115 Wis. 409.

98. Cole v. Shaw (Mich.) 96 N. W. 573. The beneficiary of an annuity is entitled to

is not binding on a person interested not made a party to the proceeding.[99] If procured by fraud it will be vacated.[1] The receipt for a share is proof, until contradicted, that the signer received the full amount of interest to which he was entitled.[2] A discharge of the representative of a deceased representative will not estop the heirs of the latter estate from attacking the discharge of the deceased on the ground of fraud.[3]

§ 14. *Rights and liabilities between beneficiaries of estate. A. In general.*[4]—A division of decedent's property made before death and accepted by the heirs is binding upon them.[5] If the heirs entered into actual occupancy after death of the donor their rights would be the same as if they had inherited in common and made a parol allotment,[6] and the fact that the realty subsequently enhanced in value will not entitle the other heirs who received personalty to share therein.[7] If, however, the ancestor distributed his estate so as to deprive an heir of his right to share he may recover from the heirs receiving the property.[8] If there is no administration the heirs may contest the validity of a transfer of realty by decedent to an heir on the ground of fraud.[9]

A contract by a minor legatee whereby he stipulated to receive a sum less than his legacy is not binding.[10] Such contracts to be binding must be based on a consideration.[11]

Whether the legacies are charged upon realty devised is to be determined from a construction of the will,[12] and in the absence of direction in the will realty can be resorted to only after exhaustion of the personalty.[13] In the absence of personalty, realty not specifically devised will be first subjected.[14] If there was no fund out of which demonstrative legacies could be paid, they will share pro rata with the general legatees.[15] Though the entire residue be exhausted the residuary legatee cannot call on either specific or general legacies or devises to abate in his favor.[16]

notice of application for discharge of the residuary legatee as executrix—Id.

99. Cole v. Shaw (Mich.) 96 N. W. 573.

1. It is a sufficient fraud if the representative stated that he had paid over to persons entitled thereto specific sums in cash, when in fact only notes had been given—Tucker v. Stewart (Iowa) 97 N. W. 148.

2. In re Murphy, 80 App. Div. (N. Y.) 238.

3. Coleman v. Howell, 131 N. C. 125.

4. Liability for decedent's debts, see ante, § 6B. Election by beneficiaries to take under the statute see Election of Remedies and Rights. For contracts to devise; the rights as dependent on an interpretation of the will and for abatement, ademption and satisfaction of bequests, see Wills.

5. Hackleman v. Hackleman, 199 Ill. 84; White v. Watts, 118 Iowa, 549.

6. Hackleman v. Hackleman, 199 Ill. 84.

7. White v. Watts, 118 Iowa, 549.

8. An heir must collate whatever he has received in excess of his portion unless it was given as an extra portion; the intention to give an extra portion must be shown by unequivocal testimony and will not be presumed from the fact that the donations were in the form of contracts of sale (Clark v. Hedden, 109 La. 147) and if he makes a prima facie showing that the transaction was gratuitous the defendants have the burden of showing that they were onerous—Id. Collation of revenues is due, though the donations were in form of sales, unless thereby the excluded heir was kept in ignorance of the donations, from the death only when suit is brought within one year, otherwise from the time of judicial demand—Id. Declarations of testator in writing as to why an heir was omitted from distribution made before death should not be disregarded in toto because untrue in part—Id. Evidence that the sale by a mother to one son and daughter was a simulated sale and with intent to place the property beyond the reach of another son—Laporte v. Laporte, 109 La. 958. Property held not subject to collation—Succession of Lamotte (La.) 34 So. 122.

9. Snyder v. Snyder (Mich.) 92 N. W. 353.

10. In re Cummings' Estate (Iowa) 94 N. W. 1117.

11. In re Cummings' Estate (Iowa) 94 N. W. 1117. Evidence held insufficient to show an agreement between the legatees that a specific sum should be deducted from the share of one of the legatees—Id.

12. Lynch v. Spicer (W. Va.) 44 S. E. 255 On a deficiency of personalty by reason of the widow's election to take her statutory distributive share the legatee could not compel a sale of real estate for the payment of legacies—Baptist Female University v. Borden, 132 N. C. 476.

13. Silk v. Merry, 23 Ohio Circ. R. 218.

14. Under Act 1894, c. 438—Ewell v. McGregor, 96 Md. 357.

15. In re Warner's Estate, 39 Misc. (N Y.) 432.

16. In re Martin, 25 R. I. 1.

Subject to the debts and widow's distributive share on her election not to take under the will demonstrative legacies are entitled to priority over general legacies.[17]

(§ 14) *B. Advancements.*—An advancement is the giving by anticipation the whole or part of what is supposed a child would be entitled to on the death of the parent making it,[18] and a voluntary conveyance from a parent to a child will be presumed to be intended as an advancement,[19] though the conveyance was through a third person.[20] If a child was allowed to use land belonging to the deceased without payment of rent during her life, the reasonable value of the use of the land may be treated as an advancement to her.[21] If a husband purchases realty taking title in wife's name it will be presumed it was intended as an advancement to her.[22] A release of an expectant estate is an advancement if based on a consideration,[23] and like any other advancement[24] must, if required by statute, be in writing.[25] Advancements made by a testator prior to the execution of his will though designated as such at the time made are to be taken as gifts and cannot be deducted from the legatee's share unless the will so directs in specific terms.[26] Advancements made cannot be brought into hotchpot.[27]

(§ 14) *C. Actions between beneficiaries.*—To an action to determine the right of devisees or legatees all of the devisees and legatees should be made parties,[28] and it is not a breach of an administrator's duty that he fails to intervene in such an action.[29] Of actions between legatees to determine their rights the court in which administration is pending has not exclusive jurisdiction.[30]

Persons claiming to be heirs of an intestate must prove that there are no other persons of the statutory classes who would take before them.[31] An heir claiming particular property has the burden of proving that the property belonged to the ancestor.[32]

§ 15. *Rights and liabilities between beneficiaries and third persons.*—The title of a bona fide purchaser from an heir is not affected by the subsequent discovery

17. Baptist Female University v. Borden, 132 N. C. 476.

18. Waldron v. Taylor (W. Va.) 45 S. E. 336. The release of an expectant estate on conveyance to the expectant heir is a sufficient consideration and such heir was entitled to enforce a covenant of warranty in the deed against the other heirs and widow—Longshore v. Longshore, 200 Ill. 470. Evidence held sufficient to show gifts to have been advancements—Tye v. Tye, 24 Ky. L. R. 637, 69 S. W. 718; Dobbins v. Humphreys, 171 Mo. 198. Evidence held insufficient to show an advancement to a son—Hedges v. Hedges, 24 Ky. L. R. 2220, 73 S. W. 1112. Sufficiency of evidence as to amount of advancement—Dobbins v. Humphreys, 171 Mo. 198.

19. Ellis v. Newell (Iowa) 94 N. W. 463. An agreement by a husband on the wife's procuring a divorce that he would convey a part of his property for the support and education of their minor children, held not to have been intended as an advancement though he stated that he did not intend that she should have any more of his property—Bissell v. Bissell (Iowa) 94 N. W. 465; Heyward v. Middleton, 65 S. C. 493.

20, 21. Hamilton v. Moore, 24 Ky. L. R. 982, 70 S. W. 402.

22. To overcome this presumption, the evidence must not only be distinct and credible but it must preponderate. The conduct of a husband in taking charge of the property, improving it and managing it as though it were his own property, is inconsistent with the presumption of an advancement—Chambers v. Michael (Ark.) 74 S. W. 516.

23. Gary v. Newton, 201 Ill. 170.

24. Under 2 Starr & C. St. 2d Ed. p. 1432—Gary v. Newton, 201 Ill. 170.

25. Gary v. Newton, 201 Ill. 170.

26. In re Cummings' Estate (Iowa) 94 N. W. 1117.

27. Waldron v. Taylor (W. Va.) 45 S. E. 336.

28. Spurlock v. Burnett, 170 Mo. 372; Parker v. Cobb, 131 N. C. 25. Sufficiency of petition in an action to establish heirship—Craig v. Welch-Hackley Coal & Oil Co., 24 Ky. L. R. 2225, 73 S. W. 1035.

29. As an action by an heir on an alleged contract with the ancestor whereby such heir would be entitled after administration to all property remaining in the hands of the administrator—In re Healy's Estate, 137 Cal. 474, 70 Pac. 455.

30. As an action to set aside an assignment of legacies on the ground of fraud (Ward v. Du Pree [S. D.] 94 N. W. 397) or an action to set aside a conveyance to an heir—Snyder v. Snyder (Mich.) 92 N. W. 353.

31. An admission held not to relieve persons claiming as heirs of the necessity of making a prima facie case—Sorenson v. Sorenson (Neb.) 94 N. W. 540.

32. In re Ruchizky's Estate, 205 Pa. 105

of a will.[33] Neither the representative nor the distributees can dispute the right of the court to direct the payment of a distributee's share to his assignee, the court having recognized the assignment and the assignor not questioning it,[34] but a decree directing the payment to the assignee is not res adjudicata of the right of a judgment creditor to enforce his lien against the share.[35]

The legatee's creditor cannot attach the share in the representative's possession,[36] but he may maintain a suit in equity to subject it to the payment of the claim before the executor has rendered his account.[37] Such a proceeding does not take the administration of the estate from the probate court.[38] The bill in such case need not aver that there would be sufficient left after the payment of debts for the payment of legacies, where it avers that the executor has a sum in his hands belonging to the legatee.[39]

The interest of an heir in a residuary estate[40] or in the ancestor's land subject to homestead may be subject to levy and sale under execution on judgment against him.[41] The rights of a devisee may be subjected to payment of his debts though under the will he is prohibited from disposing of the same until he arrives at a certain age.[42] An oral agreement with the ancestor to release his expectancy cannot be set up to avoid liability of the heirs' share to payment of judgment debts.[43] The share of the distributee who executed the mortgage alone can be subjected to payment.[44] The heirs' share in the personalty should be subjected to the payment of his debts before resort can be had to the realty.[45]

ESTOPPEL.

§ 1. Kinds of Estoppel.
§ 2. By Record.
§ 3. By Deed.
§ 4. In Pais.

Many common applications of the doctrine of estoppel are so closely related

33. Under Kansas Wills Act, § 50, the purchaser has the burden of showing that he had no knowledge of the existence of the will—Markley v. Kramer (Kan.) 72 Pac. 221. The purchaser of a devisee is entitled to have the will of the ancestor of the devisee probated—Hanley v. Kraftczyk (Wis.) 96 N. W. 820.

34. In re Davis' Estate, 27 Mont. 490, 71 Pac. 757. Construction of an assignment by heirs of their share of the estate—Lasley v. Preston (Mich.) 93 N. W. 253.

35. Martinovich v. Marsicano, 137 Cal. 354, 70 Pac. 459. To an action by a trustee of a legatee under a trust created for the benefit of creditors to set aside conflicting assignments of the legatee, the representatives of the ancestor's estate are not necessary parties—Tompkins v. Tompkins, 123 Fed. 207.

36. Gorman v. Stillman (R. I.) 52 Atl. 1088.

37. Gorman v. Stillman (R. I.) 52 Atl. 1088. The judgment creditor of the heirs of a deceased heir who claimed to own property in indivision with heirs of the ancestor, has sufficient interest to sustain an action against the said heirs, to ascertain whether the debtors are entitled to anything after settlement of respective rights—Succession of Bothick (La.) 34 So. 163. Under the facts held that the rights of judgment creditors of heirs of a deceased heir and the co-heirs of the latter must be established contradictorily, one with the other—Id.

38, 39. Gorman v. Stillman (R. I.) 52 Atl. 1088.

40. But the purchaser will be deferred until by proper administration of the estate it can be ascertained what share of the proceeds the heirs would be entitled to—Hardy v. Wallis, 103 Ill. App. 141. Under a will giving the widow charge of all of the testate's property and income thereof during her life, and on her death his executor to take and dispose of the remainder and divide it among his children, his son has no such interest as could be levied on for the payment of his debts—Harris v. Kittle (Ga.) 45 S. E. 729.

41. Dinsmoor v. Rowse, 200 Ill. 555.

42. Smith v. Smith, 24 Ky. L. R. 2261, 73 S. W. 1028.

43. If the agreement be held valid the heir would hold the share taken in trust for the benefit of the other heirs, and being a secret trust cannot be enforced against the heirs' judgment creditors—Gary v. Newton, 201 Ill. 170.

44. The share of the widow, who executed a mortgage on the homestead, on partition will be subjected to its payment—Saunders v. Strobel, 64 S. C. 489. Where the residuary estate is to be divided under the will between two heirs the surplus remaining on foreclosure of a mortgage on the homestead of decedent will be divided equally between one heir and the mortgagee of the other's interest—Kuener v. Prohl (Wis.) 97 N. W. 201.

45. A judgment directing the reverse ap-

to other subject-matters that it is deemed best to treat them elsewhere; the more important being estoppel to claim that a corporation acted ultra vires or to aver want of authority in a corporate officer or agent,[46] to deny partnership,[47] to question the existence or scope of an agent's authority,[48] and the estoppel of a tenant to dispute his landlord's title.[49]

§ 1. *Kinds of estoppel.*—Estoppels arise from records, from deeds, and from matter in pais.[50] An estoppel by judgment prevails over one by deed.[51]

§ 2. *By record.*—Estoppel by judgment is elsewhere treated,[52] and the conclusiveness of judicial and official records, being often ruled on principles of evidence rather than of estoppel, is excluded.[53]

§ 3. *By deed.*—A party and his privies,[54] when no fraud intervenes,[55] are estopped to deny that which he has by deed or other specialty asserted,[56] e. g., his own title,[57] easements appurtenant,[58] or boundaries.[59] Conversely, the grantee cannot derogate the title under which he claims,[60] but may reinforce his title.[61]

Where one conveys with warranty, after-acquired title enures to the grantee.[62] or his privies.[63] The rule does not apply where title is taken in a different right

plication is not prejudicial to the heir debtor where his entire share is less than the debt enforced—Oppenheimer v. Collins, 115 Wis. 283, 60 L. R. A. 406.

46. See Corporations.

47. See Partnership.

48. See Agency.

49. See Landlord and Tenant.

50. See §§ 2-4 post. See Cyc. Law Dict., "Estoppel," for definitions and cases stating same.

51. Boynton v. Haggart (C. C. A.) 120 Fed. 819.

52. See Former Adjudication.

53. See Evidence, § 5.

54. Sinclair v. Huntley, 131 N. C. 243.

55. Call v. Shewmaker, 24 Ky. L. R. 686, 69 S. W. 749.

56. Inadequate dedication held not to operate as an estoppel—Klug v. Jeffers, 85 N. Y. Supp. 423. Recitals in a bond are conclusive on the obligors—Stroud v. Hancock, 116 Ga. 332; Proudfoot v. Gudichsen, 102 Ill. App. 482. Receiptors cannot deny that the sheriff had possession of the goods—Colbath v. Hoefer (Or.) 73 Pac. 10.

57. Van Husan v. Omaha Bridge & T. R. Co., 118 Iowa, 366. Mortgagor cannot deny his title, if mortgage contains words which under 1 Starr & C. St. p. 924, § 11 amount to full covenants—Roderick v. McMeekin (Ill.) 68 N. E. 473. Where one has an interest in land and a claim against it he is estopped to assert his claim against one to whom he has mortgaged his interest —Butler v. Butler (S. C.) 45 S. E. 184. Chattel mortgagor cannot deny that he owned the goods—Layson v. Cooper, 174 Mo. 211. Grantor with warranty may claim from grantee for use and occupation before the deed —Woodcock v. Baldwin (La.) 34 So. 440.

58. Grantor is estopped to deny grantee's easement in streets described in a plat referred to in the deed—Cleaver v. Mahanke (Iowa) 94 N. W. 279; Drew v. Wiswall (Mass.) 67 N. E. 666; Driscoll v. Smith (Mass.) 68 N. E. 210; Mann v. Bergmann, 203 Ill. 406.

59. Summerfield v. White (W. Va.) 46 S. E. 154.

60. The grantee is estopped to deny that the grantor had a title to convey (Muller v. Hoth [La.] 34 So. 162) but two deeds, one of which has expired by limitation and the other of which has never been delivered, do not estop grantee to dispute grantor's title—Drake v. Howell (N. C.) 45 S. E. 539. One claiming under a deed cannot question its validity—Granger v. Sallier (La.) 34 So. 431. One claiming rights in land under contract from a certain person, cannot deny the title of that person's grantee—Monds v. Elizabeth City Lumber Co., 131 N. C. 20. The rule that where a deed is subject to certain incumbrances the grantee cannot dispute their validity (see Mortgages) does not apply to an incumbrance not known to either party (Gill v. Patton, 118 Iowa, 88) nor does the assumption of a first mortgage estop the grantee to attack a second—Welbon v. Webster (Minn.) 94 N. W. 550. Mortgagee cannot hold adversely—Stancill v. Spain (N. C.) 45 S. E. 466. Grantee cannot claim in derogation of an express reservation—Hughes v. South Bay School Dist. (Wash.) 73 Pac. 778. One entering into possession under a qualified grant is estopped to assert any greater interest—Knickerbocker Ice Co. v. New York, 85 App. Div. (N. Y.) 530. The grantee of a patentee cannot by obtaining a new patent destroy reservations in his deed—Sandy River Cannel Coal Co. v. White House Cannel Coal Co., 24 Ky. L. R. 1653, 72 S. W. 298.

61. Hanley v. Kraftczyk (Wis.) 96 N. W. 820.

62. Hallyburton v. Slagle, 132 N. C. 947. Conveyance by remainderman (Nichols v. Guthrie, 109 Tenn. 535) or expectant heir—Johnson v. Johnson, 170 Mo. 34, 59 L. R. A. 748. Covenant that grantor and his heirs would never claim adversely—Shepherd v. Kahle (Wis.) 97 N. W. 506.

Where the deed was void because the land was adversely held (Altemus v. Nichols [Ky.] 74 S. W. 221) or where the grantor had no title of record (Wheeler v. Young [Conn.] 55 Atl. 670) after acquired title does not pass.

63. Subsequently acquired title does not accrue to a purchaser at tax sale for taxes levied against grantee (Wilson v. Fisher, 172 Mo. 10) but does inure to one hold-

or capacity.[64] The subsequently acquired title must amount to an estate in the land,[65] and no larger quantum of estate will enure than was originally conveyed.[66]

§ 4. *In pais.*—The general doctrine of estoppel in pais is that one cannot deny the existence of a state of facts on which he has by false representation,[67] silence, or acquiescence,[68] or misleading conduct,[69] or asseverations of title or

ing by quitclaim from the grantee—Johnson v. Johnson, 170 Mo. 34.

64. One conveying lands impressed with a trust may subsequently acquire the interest of the beneficiary—Condit v. Bigalow (N. J. Eq.) 54 Atl. 160.

One conveying for a corporation cannot set up title subsequently acquired by him personally—Central Coal & Iron Co. v. Walker's Ex'x, 24 Ky. L. R. 2191, 73 S. W. 778.

65. The equitable interest arising from a contract to purchase does not inure to the grantee where it was afterward lost by default—Kentucky Land & Immigration Co. v. Crabtree, 24 Ky. L. R. 743, 70 S. W. 31. Purchase of emblements from tenant does not accrue to grantee—Simanek v. Nemetz (Wis.) 97 N. W. 508.

66. Conveyance of an easement does not carry after acquired rights—Horne v. Hutchins (N. H.) 55 Atl. 361. **Quitclaim** does not pass after acquired title (Taylor v. Wainman, 116 Ga. 795; Morrison v. Whiteside, 116 Ga. 459) nor any deed not containing covenants of seisin or warranty (Altemus v. Nickell, 24 Ky. L. R. 2401, 74 S. W. 245) but a quitclaim with habendum to grantee and his heirs forever will—West Seattle Land & Imp. Co. v. Novelty Mill Co., 31 Wash. 435, 72 Pac. 69; Garlick v. Pittsburgh & W. R. Co., 67 Ohio St. 223. **Mortgage** without covenants does not attach to subsequently acquired title—Donovan v. Twist, 85 App. Div. (N. Y.) 130.

67. By owner to subcontractor as to terms of contract—Rath v. Orr (Iowa) 93 N. W. 489. By wife that borrowed money was for her separate estate (National Lumberman's Bank v. Miller [Mich.] 91 N. W. 1024) by carrier that it held bills of lading—Schlichting v. Chicago, etc., R. Co. (Iowa) 96 N. W. 959.

One obtaining property for another by representing himself as the latter's agent, cannot deny such person's ownership thereof—State v. Whitworth, 30 Wash. 47, 70 Pac. 254. Directors representing that the stock was paid up are estopped to deny liability on a contract because it was not—Dwinnell v. Minneapolis F. & M. Mut. Ins. Co. (Minn.) 97 N. W. 110.

Must be actual or constructive intent that the representations should be acted on—Booth v. Lenox (Fla.) 34 So. 566. Representation by one that his signature was genuine works an estoppel notwithstanding the statute of frauds—Union Cent. Life Ins. Co. v. Johnson's Adm'x (Ky.) 76 S. W. 335.

Statements as to future action of city council, being of opinion, do not estop—Marsh v. City of Bridgeport, 75 Conn. 495.

Representation as to amount of "present" debt held to work an estoppel as to such amount as against security thereafter given —Williams v. Verity, 98 Mo. App. 654.

68. The mental condition of one failing to assert title is to be considered—Guernsey v. Fulmer (Kan.) 71 Pac. 578. No estoppel can be predicated on failure to deny a statement in the party's presence unless it is clear that he heard it—Powers v. McKnight (Tex. Civ. App.) 73 S. W. 549.

Illustrations. Allowing party to act on faith of note estops maker from setting up defects which he then knew—Waterman v. Waterman, 85 N. Y. Supp. 377. Acquiescence in insufficient notice to terminate lease—Baltimore Dental Ass'n v. Fuller (Va.) 44 S. E. 771. 30 years' acquiescence in oral establishment of boundary—Campbell v. Combs (Ky.) 77 S. W. 923. Acquiescence in breach of terms of lease—Stoddard v. Gallagher (Mich.) 94 N. W. 1051. Subscriber not objecting to construction after time limited cannot cancel subscription—Horton v. Erie Preserving Co., 85 N. Y. Supp. 503.

Permitting expenditures or improvements. Allowing another to expend money on lands (Price v. Stratton [Fla.] 33 So. 644; First German Reformed Church v. Summit County Com'rs, 23 Ohio Circ. R. 553; Wolfinger v. McFarland [N. J. Eq.] 54 Atl. 862; Lowther Oil Co. v. Miller-Sibley Oil Co. [W. Va.] 44 S. E. 433; Despard v. Bennett [W. Va.] 44 S. E. 448; Lydick v. Gill [Neb.] 94 N. W. 109; Cobban v. Hecklen, 27 Mont. 245, 70 Pac. 805) or allowing property to be purchased as that of another (Barchent v. Selleck [Minn.] 95 N. W. 455) without asserting claim of title.

Concealment of marriage held to estop to assert homestead rights—Cahill v. Dickson (Tex. Civ. App.) 77 S. W. 281. Acquiescence in appropriation of water rights by another estops to claim the same—Orient Min. Co. v. Freckleton (Utah) 74 Pac. 652. Allowing improvements on faith of contract to sell estops to plead statute of frauds—Coleridge Creamery Co. v. Jenkins (Neb.) 92 N. W. 123. Permitting expenditure under contract with knowledge of ground of rescission—Beardsley v. Clem, 137 Cal. 328, 70 Pac. 175. Government held "estopped" to question validity of patent to land—United States v. Stinson (C. C. A.) 125 Fed. 907.

Knowledge of person claiming estoppel. There is no estoppel if the person making the improvement knew of the adverse interest (Bright v. Allan, 203 Pa. 394; Price v. Stratton [Fla.] 33 So. 644) or relied on records and was not misled (Strahl v. Smith, 30 Colo. 392, 70 Pac. 677) nor where record title is plain (Sanborn v. Van Duyne [Minn.] 96 N. W. 41) nor where the improvements were made under an express condition with owner which has been broken (Griswold v. Minneapolis, etc., R. C. [N. D.] 97 N. W. 538) nor where notice of claim was given though it was misunderstood—Rhodes v. Stone, 25 Ky. L. R. 921, 76 S. W. 533. One continuously in possession of land is not estopped to assert his cotenancy therein against one to whom his cotenant attempted to convey the whole —Truth Lodge v. Barton (Iowa) 93 N. W. 106.

Knowledge or intent of person estopped and duty to speak. Intent to deceive is not necessary (Lydick v. Gill [Neb.] 94 N. W. 109), but the party must know of his rights

right,[70] induced another to act[71] to his prejudice,[72] and without his fault or negli-

(St. Louis Safe Deposit & Sav. Bank v. Kennett Estate [Mo. App.] 74 S. W. 474, discussing the rules of estoppel generally; Parkey v. Ramsey [Tenn.] 76 S. W. 812) though it has been held that an owner inducing purchase from another is estopped though he was ignorant of his own title (Chambers v. Bookman [S. C.] 46 S. E. 39; Ward v. Cameron [Tex. Civ. App.] 76 S. W. 240) and such an estoppel does not prevent the setting up of after acquired title—Kentucky Union Co. v. Patton, 24 Ky. L. R. 701, 69 S. W. 791.

Silence of heirs during the life of their ancestor—Snyder v. Elliott, 171 Md. 362. There is no estoppel where owner did not know of encroachment until it was complete—Pocahontas Light & Water Co. v. Browning (W. Va.) 44 S. E. 267.

69. Insurance company inadvertently sending out premium notice at the wrong rate is not estopped to demand premiums for the rest of the term at the true rate—Smallwood v. Life Ins. Co. of Virginia (N. C.) 45 S. E. 519. Employer approving accounts based on the theory that the employe is entitled to a certain salary is estopped to deny it after he has continued in the service on the faith thereof—Moller v. Gates Land Co. (Wis.) 97 N. W. 174. Allowing certain members of a church to vote on all questions estops the other members from questioning their right—Davie v. Heal, 86 App. Div. (N. Y.) 517.

Clothing another with apparent authority. One putting record title to land in another is estopped as against one extending credit on the faith thereof (Rieschick v. Klingelhoefer, 91 Mo. App. 430) but possession of personal property gives no apparent right to sell the same—Rogers v. Dutton, 182 Mass. 187; McGinley v. Brechtel (Neb.) 95 N. W. 32. Where a husband takes title in his own name on a purchase by the wife, without her knowledge, she is not estopped—Woolsey v. Henn, 83 N. Y. Supp. 394.

Party held estopped to allege that he had discharged his attorney—Butcher v. Quinn, 86 App. Div. (N. Y.) 391. This subject is more fully discussed in Agency, ante, p. 45; and, as to corporate agents and officers in Corporations, ante, p. 773.

Giving appearance of solvency. One giving notes to bank to make it solvent is estopped to allege want of consideration therefor against creditors—Skordal v. Stanton (Minn.) 95 N. W. 449; Murphy v. Gumaer (Colo. App.) 70 Pac. 800. Furnishing money to a debenture company for its guaranty fund—Christian v. Michigan Debenture Co. (Mich.) 96 N. W. 22. Creditor held not estopped by statement to prospective creditors that he would not press his claim—Rosencranz v. Swofford Bros. Dry Goods Co. (Mo.) 75 S. W. 445. One who was induced by fraud to buy corporate stock giving his notes therefor and as part of the contract entering into the employ of the corporation is not estopped by the sale of his notes as such employe to later defend for the fraud—Deppen v. German-American Title Co., 24 Ky. L. R. 1110, 70 S. W. 868.

70. Recital of sale of certain land to A in a surrender of land to execution, is an estoppel as to one purchasing the land of A—York v. East Jellico Coal Co., 25 Ky. L. R. 927, 76 S. W. 532. One disclaiming title cannot set up a claim against one who purchased from another on the faith thereof though the disclaimer was made in ignorance of his rights—Ward v. Cameron (Tex. Civ. App.) 76 S. W. 240; Chambers v. Bookman (S. C.) 46 S. E. 39. But see Parkey v. Ramsey (Tenn.) 76 S. W. 812. Exporter estopped to deny title as against one buying on faith of his custom house declaration—Simar v. Shea, 85 N. Y. Supp. 457. Admission by owner of verbal authority to another to sell is an estoppel in favor of one claiming under such person—Northington v. Granade (Ga.) 45 S. E. 447. Where there was a contract to cut timber on shares a statement by the owner to the subcontractor that he had received his share estops him to claim any of the remainder against the subcontractor—Plotts v. Warburton, 20 Pa. Super. Ct. 496.

71. One cannot claim an estoppel from that by which his conduct was not influenced—First Nat. Bank v. Ragsdale, 171 Mo. 168; Booth v. Lenox (Fla.) 34 So. 566; Waggoner v. Dodson (Tex.) 73 S. W. 517; Evans v. Odem, 30 Ind. App. 207; Roach v. Springer (Tex. Civ. App.) 75 S. W. 933. Relying on record title, and not on silence of owner—Strahl v. Smith, 30 Colo. 392, 70 Pac. 677. Full knowledge of facts—Gray v. Zelmer (Kan.) 72 Pac. 228; Perkins Lumber Co. v. Thomas, 117 Ga. 441; Bright v. Allan, 203 Pa. 394; Price v. Stratton (Fla.) 33 So. 644; Beacon Trust Co. v. Souther (Mass.) 67 N. E. 345. Record title plain—Sanborn v. VanDuyne (Minn.) 96 N. W. 41. No estoppel to attack encroachment where it was not known until after construction was complete—Pocahontas Light & Water Co. v. Browning (W. Va.) 44 S. E. 267. A statement by an injured employe exonerating the employer from liability is a mere admission and not an estoppel—Southern Bauxite Min. & Mfg. Co. v. Fuller, 116 Ga. 695. Silence does not estop an adjoining owner to object to an encroachment on a highway—Ackerman v. True, 175 N. Y. 353. Debts not shown to have been incurred on faith of promise to pay for services—Shugart v. Shugart (Tenn.) 76 S. W. 821.

72. Lawrence v. Cannavan (Conn.) 56 Atl. 556; Conway v. Supreme Council, 137 Cal. 384, 70 Pac. 223; Columbus State Bank v. Carrig (Neb.) 92 N. W. 324. Part payment of debt not an estoppel to deny balance when no rights of creditors are prejudiced—O'Malley v. Wagner (Ky.) 76 S. W. 356; Winegardner v. Equitable Loan Co. (Iowa) 94 N. W. 1110. Abandonment of an action without prejudice is not sufficient though costs were incurred—Hughes v. New York Life Ins. Co. (Wash.) 72 Pac. 452. A promise by the maker of a note to pay the same, made to one who stated that he held it only for collection, does not estop the maker to set up a counterclaim (Stuart v. Harmon [Ky.] 72 S. W. 365) nor does a promise to pay made to an indorsee estop the maker to allege defenses of which the indorsee had notice—Wilson v. Riddler, 92 Mo. App. 335. One who has given distinct notice of his refusal to waive delay in performance is not estopped by failure to promptly re-

gence;[73] nor can he assert to another's prejudice, matters inconsistent with his own contracts,[74] or repudiate a transaction from which he has received benefits.[75] The

turn securities—Barrett v. Twin City Power Co., 118 Fed. 861.

73. First Nat. Bank v. Andrews (Tex. Civ. App.) 77 S. W. 956. Negligence in not reading contract does not estop where there was fraud—Spelts v. Ward (Neb.) 96 N. W. 56; Le Mond v. Harrison (Colo. App.) 70 Pac. 956. Representations by agent of building association in conflict with the terms of the contract do not in the absence of fraud create an estoppel—Noah v. German-American Bldg. Ass'n (Ind. App.) 68 N. E. 615.

74. A grantee who joins in an agreement extending time for payment of a mortgage on the land cannot deny knowledge of an assumption of such mortgage in his deed—Cruzen v. Pottle (Neb.) 91 N. W. 858. One who has contracted for the abandonment by another of a competing enterprise cannot later assert that the price paid was excessive—Barrett v. Twin City Power Co., 118 Fed. 861. Lien claimants contracting for payment of a mortgage with knowledge of a defense thereto cannot thereafter urge the same—Jones v. Garrigues, 75 App. Div. (N. Y.) 539. The maker of a note is not estopped from showing fraud by paying discount on several renewals where they were not for his benefit—Adams v. Ashman, 203 Pa. 536. Giving of a bond to dissolve a mechanic's lien which bond recited that the construction contract was made by obligor's agent on his behalf estops him from claiming that he was not liable on the contract—Congress Const. Co. v. Worcester Brew. Co., 182 Mass. 355. Acquiescence by one having an equitable interest in a judgment to a compromise thereof—Moore v. Cloquet Lbr. Co., 87 Minn. 264. One who has given an absolute deed as security for a note is not estopped to assert the true nature thereof against an assignee with notice by receiving from the assignee a receipt for the property as a payment—State v. Mellette (S. D.) 92 N. W. 395. Where consumer equips his house for use of gas and company furnishes it without questioning contract for five years it cannot claim that provision therein for continuance as long as consumer desired lacked mutuality—Corbet v. Oil City Fuel Supply Co., 21 Pa. Super. Ct. 80. A principal performing a contract made by his agent is estopped to hold the agent for any excess of power therein—Hale Elevator Co. v. Hale, 201 Ill. 131. Payment of dues under protest after reduction of the amount of death benefit does not estop the member to allege invalidity of such reduction—Williams v. Supreme Council, A. L. of H., 80 App. Div. (N. Y.) 402. One procuring surrender of note and collateral in exchange for a new note is estopped to deny that the other party owned the note surrendered—Zuendt v. Doerner (Mo. App.) 73 S. W. 873. Purchasing part of wife's goods as separate property estops husband to allege that they were not—Standard Furniture Co. v. Van Alstine, 31 Wash. 499, 72 Pac. 119. Agent estopped to claim that he acted for himself after allowing principal to assume the results of his action—Seacoast R. Co. v. Wood (N. J. Eq.) 56 Atl. 337. A contract to remove an unauthorized dam does not estop the party from obtaining legislative authority to build another—Manigault v. Ward, 123 Fed. 707. A member of an assessment association may retain a bond sent him as evidence of his membership without estoppel to claim under the constitution rights denied by such bond—Knights Templars' & M. Life Indemnity Co. v. Vail (Ill.) 68 N. E. 1103. A depositor who accepts an agreement by which the bank is allowed to reopen cannot allege its invalidity—State v. Germania Bank (Minn.) 95 N. W. 1116. Owner making payments on estimates cannot later object that they were made by the wrong person—Hopkins v. International Lumber Co. (Wash.) 73 Pac. 1113. Where one accepts a transfer as sufficient and rights are given up on the faith thereof he cannot afterwards question it—Davis v. National Surety Co. (Cal.) 72 Pac. 1001. Guarantor delivering fidelity bond held estopped to deny that premium was paid—Pacific Nat. Bank v. Aetna Indemnity Co. (Wash.) 74 Pac. 590. Practical construction of contract—Masterson v. Heitmann (Tex. Civ. App.) 77 S. W. 983. City enforcing obligation of franchise cannot deny its validity—New Orleans, S. F. & L. R. Co. v. New Orleans, 109 La. 194.

75. One borrowing from a married woman is estopped to deny her capacity to sue on the note—Richards v. Bippus, 18 App. D. C. 293. One holding property under a decree cannot question its validity—Lincoln v. Lincoln St. R. Co. (Neb.) 93 N. W. 766. Informal execution cannot be urged after receiving benefits—Winslow v. Baltimore & O. R. Co., 188 U. S. 646; Collins v. Cobe, 104 Ill. App. 142. Clerk receiving compensation under contract including services as notary cannot claim that contract to receive less than legal notary fees is invalid—Second Nat. Bank v. Ferguson, 24 Ky. L. R. 1298, 71 S. W. 429. Receiving security at creditors' meeting estops to attack security given another creditor—Conde v. Lee, 171 N. Y. 662. One who has repaired a drainage ditch and derived benefit from it cannot enjoin it as a nuisance—Grosjean v. Lulow, 118 Iowa, 346. One receiving the purchase price at a trustee's sale cannot impeach the purchaser's title for defects in the trustee's appointment—White v. Jenkins (Miss.) 33 So. 287. Stockholders cannot allege that a contract whereby a person should become an officer of the corporation and purchase certain stock to be repurchased at the end of his incumbency was against public policy where they have received the benefits thereof for four years—Bonta v. Gridley, 77 App. Div. (N. Y.) 33. Where one receives more value than he is entitled to by partition and the other lands have passed into the hands of third persons he cannot allege want of jurisdiction to make the partition—Greer v. Ford (Tex. Civ. App.) 72 S. W. 73. Acceptance of income from trust for many years estops the beneficiary to question the validity of the trust—Dresser v. Travis, 39 Misc. (N. Y.) 358. Chattel mortgagor cannot deny that he owned the goods—Layson v. Cooper, 174 Mo. 211. One taking lands by a devise cannot dispute the lien of a debt with which the same was charged—Ballard v. Gamplin (Ind.) 67 N. E. 505. Creditors accepting proceeds of an assignee's sale cannot attack the assignment—Lacy v. Gunn (Cal.)

doctrine that one assuming a certain position in the course of judicial proceedings is precluded thereby from another inconsistent therewith though not in strictness one of estoppel is closely related thereto.[76] Election between counts,[77] estoppel to claim appellate review,[78] waiver of and election between objections,[79] and the doctrine of election between inconsistent positions, are elsewhere treated,[80] as are the related questions of ratification and waiver.[81]

Extent. Persons benefited or bound.—An estoppel in pais does not extend beyond the reasonable inferences from the words or conduct creating it,[82] nor apply to after-acquired rights,[83] and is effective only between the parties and their privies.[84]

74 Pac. 156. One enforcing the terms of an alleged contract cannot afterward deny its contractual character—Grafeman Dairy Co. v. St. Louis Dairy Co., 96 Mo. App. 495. Where a party to a contract takes additional security from an assignee thereof he cannot deny its assignability—Flackenstein Bros. Co. v. Flackenstein (N. J. Eq.) 53 Atl. 1043. Assignment of insurance by beneficiary precludes from attacking validity—Farmers' & T. Bank v. Johnson, 118 Iowa, 282. **Receiving insurance premiums.** Insurance company continuing to receive premiums with notice of a defense to the policy is estopped to raise the same—Alexander v. Grand Lodge, A. O. U. W. (Iowa) 93 N. W. 508. This branch of the subject is inextricable from the doctrine of waiver, and will be specifically treated in Insurance.

76. One procuring his own appointment as tutor of his child and filing an account as such cannot allege her illegitimacy as a defense to an attack on his account—Succession of Emonot, 109 La. 359. Disclaimer estops to object to any decree in rem—Bankers' Bldg. & Loan Ass'n v. Thomas (Neb.) 92 N. W. 1044. Stipulation from a position inconsistent therewith—Dupree v. Duke, 30 Tex. Civ. App. 360. Admission in a brief in a previous stage of the case does not—Leavenworth Light & Heating Co. v. Waller, 65 Kan. 514, 70 Pac. 365. Stipulation by creditors that the expenses of obtaining judgment by an assignee for benefit of creditors were satisfactory estops them to object to his claim for commissions on such judgment—Woodcock v. Reilly (S. D.) 92 N. W. 10. Purchase of property at an execution sale does not estop the debtor from claiming restitution on reversal of the judgment—Black v. Vermont Marble Co., 137 Cal. 683, 70 Pac. 776. Admission of promise to pay according to the tenor of a note does not estop defendant to claim that the note was delivered on condition—New Haven Mfg. Co. v. New Haven Pulp & Board Co. (Conn.) 55 Atl. 604. Where one interested in an estate asks confirmation of the administrator's account he cannot allege error therein—In re Sherwood's Estate (Pa.) 56 Atl. 20. Request for postponement after time to enter judgment has expired does not estop to object to subsequent rendition where there was no prejudice to the other party—Lawrence v. Cannavan (Conn.) 56 Atl. 556. That in a former bill one styled himself a citizen does not estop him from showing in a second bill that he is an alien—Marthinson v. Winyah Lumber Co., 125 Fed. 633. Unsuccessful attempt to prove cause of accident does not estop plaintiff to invoke doctrine of res ipse loquitur—Cassady v. Old Colony St. R. Co. (Mass.) 68 N. E. 10. Statement as to issues by which no one was misled is not binding—Steedman v. South Carolina & G. E. R. Co. (S. C.) 45 S. E. 84. One suing on a substituted bond cannot afterwards claim on that first given—Hesser v. Rowley (Cal.) 73 Pac. 156. One giving bond to discharge an attachment cannot urge irregularities in attachment proceedings as a defense—Metcalf v. Bockoven (Neb.) 96 N. W. 406. The court expresses doubt as to whether want of jurisdiction could be urged.

A plaintiff cannot claim that defendants joined by him are not proper parties—Gleason v. Hawkins (Wash.) 73 Pac. 533. Same, cross bill—Bourke v Hefter, 104 Ill. App. 126. One who avers that a contract has never become operative cannot urge that prior contracts merged therein—Stagg v. St. Jean (Mont.) 74 Pac. 740. Obtaining dismissal of appeal because judgment was not final estops to object against bill of review that it was—Taylor v. Crook, 136 Ala. 354. Giving evidence of a dedication in mitigation of damages in one suit does not estop the party from denying dedication in others—Hast v. Piedmont & C. R. Co., 52 W. Va. 396. One suing to establish a lien created by a certain sale cannot avoid the sale—Henry v. Thomas (Tex. Civ. App.) 74 S. W. 599. Averment of defendant's negligence does not estop plaintiff from an amended complaint alleging that he did not know of such negligence when original complaint was made—Savannah, F. & W. R. Co. v. Pollard, 116 Ga. 297. Implied admission in answer of existence of contract estops defendant from objection to its introduction in evidence—Bushnell v. Farmers' Mut. Ins. Co., 91 Mo. App. 523.

77. See Pleading.

78. See Appeal and Review.

79. See Saving Questions for Review.

80. Election of Rights and Remedies.

81. See Ratification; Waiver.

82. Hall v. Moore (Neb.) 92 N. W. 294.

83. Estoppel to set up present title by silence while improvements were made on the faith of a conveyance by another does not apply to after acquired title—Kentucky Union Co. v. Patton, 24 Ky. L. R. 701, 69 S. W. 791. Consent to a chattel mortgage does not estop the party from attacking the same for sales by mortgagor permitted by mortgagee—Brinker v. Ashenfelter (Neb.) 95 N. W. 1124. Silence by heirs during life of their ancestor—Snyder v. Elliott, 171 Mo. 362. Where one contracted to sell two tracts and represented that he was unable to obtain title to one whereupon the purchaser paid the full price for the other, after acquired title ac-

Application to government or municipalities.—While estoppel does not ordinarily operate against a governmental body, it applies to municipalities in the exercise of their private powers,[85] and the underlying principles of estoppel have been applied against the federal government when it seeks the aid of equity.[86]

Pleading.—Estoppel as an element of a cause of action,[87] or as a defense,[88] must be specifically pleaded;[89] but trial of the issue without objection waives failure to plead it.[90] Where the distinction between legal and equitable rights is strictly preserved, estoppel in pais is not available in ejectment,[91] but the general rule is that courts of law will take cognizance of an estoppel.

EVIDENCE.

§ 1. Necessity and Duty of Adducing Evidence. A. Judicial Notice. B. Presumptions and Burden of Proof.
§ 2. Relevancy and Materiality.
§ 3. Competency or Kind of Evidence in General.
§ 4. Best and Secondary Evidence.
§ 5. Parol Evidence to Explain or Vary Writing.
§ 6. Hearsay. A. General Rules. B. Res Gestae. C. Admissions or Declarations against Interest.
§ 7. Documentary Evidence. A. In General—Private Writings. B. Books of Account. C. Public and Judicial Records and Documents. D. Proceedings to Procure Production of Documents.
§ 8. Evidence Adduced in Former Proceedings.
§ 9. Expert and Opinion Evidence. A. Conclusions and Nonexpert Opinions. B. Subjects of Expert Testimony. C. Qualification of Experts. D. Basis of Expert Testimony and Examination of Experts.
§ 10. Real or Demonstrative Evidence.
§ 11. Quantity Required and Probative Effect.

Scope of article.—This article treats specifically of the competency of evidence; the competency of witnesses and the rules governing their examination being entirely excluded,[1] and questions of relevancy and sufficiency of evidence except so far as

crues to the purchaser—Guthrie v. Martin, 76 App. Div. (N. Y.) 385.

84. Booth v. Lenox (Fla.) 34 So. 566; Coe College v. Cedar Rapids (Iowa) 95 N. W. 267. Recitals in a conveyance are not binding on strangers—Davis v. Moyels (Vt.) 56 Atl. 174. Stockholders acting on behalf of the corporation are bound by an estoppel against it—Kessler v. Ensley, 123 Fed. 546. Consent by a widow personally does not estop her as administratrix under a subsequent appointment—Rohn v. Rohn (Ill.) 68 N. E. 369. Estoppel of residuary legatee to dispute specific legacy operates also against creditor of former—Austin v. Buckman (Wis.) 95 N. W. 128. Company formed to take title to irrigation rights for benefit of purchasers held not in privity with irrigation company—Blakely v. Ft. Lyon Canal Co. (Colo.) 73 Pac. 249. Owners of stolen money are not bound by an estoppel of the person receiving it to his creditors—Lord v. Seymour, 83 N. Y. Supp. 88. Estoppel as to sureties to deny another's title does not operate in favor of creditors—Citizens' Bank v. Burrus (Mo.) 77 S. W. 748.

85. City cannot question the validity of permits to lay tracks after they have been acted on—People v. Blocki, 203 Ill. 363. A viaduct after it is laid under permission ambiguous as to the width thereof—Village of Winnetka v. Chicago & M. Elec. R. Co. (Ill.) 68 N. E. 407.

Village held not estopped by action of trustees in approving grade crossing without authority of railroad commissioners—Village of Bolivar v. Pittsburg, etc., R. Co., 84 N. Y. Supp. 678. State board of land commissioners held not estopped by act of its register, he having no authority in respect thereto—Florence Oil & Refining Co. v. Orman (Colo. App.) 73 Pac. 628. No estoppel to repeal vacation of street where nothing was done in reliance thereon—City of Ashland v. Northern Pac. R. Co. (Wis.) 96 N. W. 688. Levy of taxes on land does not estop a city or state to claim title thereto—Turner v. Mobile, 135 Ala. 73; Slattery v. Heilperin (La.) 34 So. 139; City of Uniontown v. Berry, 24 Ky. L. R. 1692, 72 S. W. 295. No estoppel from allowing occupation of unopened street—Russell v. Lincoln, 200 Ill. 511.

86. United States v. Stinson (C. C. A.) 125 Fed. 907.

87. Taylor v. Patton (Ind.) 66 N. E. 91.

88. Adams v. Adams (Ind.) 66 N. E. 153; Carthage v. Carthage Light Co., 97 Mo. App. 20; Western Realty Co. v. Musser, 97 Mo. App. 114; Leschen & Sons Rope Co. v. Craig (Colo. App.) 71 Pac. 885; Wisconsin Farm Land Co. v. Bullard (Wis.) 96 N. W. 833; Carnahan v. Brewster (Neb.) 96 N. W. 590; Read v. Citizens' St. R. Co. (Tenn.) 75 S. W. 1056; Union St. R. Co. v. First Nat. Bank (Or.) 72 Pac. 586; George B. Loving Co. v. Hesperian Cattle Co. (Mo.) 75 S. W. 1095; Union State Bank v. Hutton (Neb.) 95 N. W. 1061; Pratt v. Hawes (Wis.) 95 N. W. 965.

89. Averment of facts without designating the plea as one of estoppel held sufficient—Rieschick v. Klingelhoefer, 91 Mo. App. 430.

90. McDonnell v. De Soto Sav. & Bldg. Ass'n (Mo.) 75 S. W. 438.

91. Grubbs v. Boon, 201 Ill. 98; Haney v. Breeden, 100 Va. 781; Wakefield v. Van Tassell, 202 Ill. 41.

1. Examination of Witnesses; Witnesses.

they illustrate some general rule being excluded to titles dealing with the particular subject or issue to which the evidence is addressed. Evidence in criminal prosecutions is also treated elsewhere,[2] though occasional holdings of undoubted general application have been included.

§ 1. *Necessity and duty of adducing evidence. A. Judicial notice.*—The courts will take judicial notice of matters of common knowledge,[3] of well established principles of science,[4] of the mortality tables,[5] of the intoxicating character of liquors,[6] of generally established customs,[7] of the usages of business,[8] of matters of history,[9] of the laws of nature,[10] of the coincidence of days of the week and of the month,[11] of the powers of political bodies,[12] of the political divisions of the state[13] and their population,[14] of notaries public and their residence,[15] of the organization and terms of courts of record.[16]

A court will especially take judicial notice of its own sessions[17] and of its rec-

2. Indictment & Prosecution.

3. Of the vicious nature of mules—Borden v. Falk Co., 97 Mo. App. 566. That the assessed value of property is less than its actual value—State v. Savage (Neb.) 91 N. W. 716. Of common knowledge as to the state of an art in determining the novelty of a patented device—Farmers' Mfg. Co v Spruks Mfg Co., 119 Fed. 594. That dynamite is a dangerous explosive—Fitzsimons & Connell Co. v. Braun, 199 Ill. 390. That the traffic in and shipment of live stock increases yearly—Chinn v. Chicago & A. R. Co. (Mo App.) 75 S. W. 375. That methods of instruction have changed in the last twenty-five years, so that competency to teach then is no evidence of present competency—People v. Maxwell, 84 N. Y. Supp. 947. While this ruling is put on the ground of judicial notice, it would seem that the doctrine of irrelevance of conditions remote in point of time furnishes a sounder basis.

4. That coal deposits generate gas—Poor v. Watson, 92 Mo. App. 89. Of the nature of vaccination—Commonwealth v. Pear (Mass.) 66 N. E. 719.

5. Nelson v. Branford Lighting & Water Co., 75 Conn. 548.

6. That whisky (Hodge v. State, 116 Ga. 852) and beer (Sothman v. State [Neb.] 92 N. W. 303) are intoxicating, and that bock beer is a malt liquor—Pedigo v. Commonwealth, 24 Ky. L. R. 1029, 70 S. W. 659.

7. Crawford Co. v. Hathaway (Neb.) 93 N. W. 781.

8. That drafts on New York are at a premium—Citizens' State Bank v. Cowles, 39 Misc. (N. Y.) 571. That telegraph wires strung on poles are necessarily incident to the operation of a railroad will be judicially noticed but not the time required for their repair—Youree v. Vicksburg, etc., R. Co. (La.) 34 So. 779.

Not of colloquial terms ("sack raft")—The Mary, 123 Fed. 609.

9. That savings banks were chartered long before the National Banking Act—State v. Franklin County Sav. Bank & Trust Co., 74 Vt. 246.

10. Of the hour when the sun rises and sets (Montenes v. Metropolitan Street R. Co., 77 App. Div. [N. Y.] 493) or when daylight begins (Cincinnati, etc., R. Co. v. Worthington, 30 Ind. App. 663) and in so doing may consult the almanac—Montenes v. Metropolitan St. R. Co., 77 App. Div. (N. Y.) 493.

That rice cannot be grown without water—Barr v. Cardiff (Tex. Civ. App.) 75 S. W. 341.

11. Jordan v. Chicago & A. R. Co., 92 Mo. App. 84; Dorough v. Equitable Mortg. Co. (Ga.) 45 S. E. 22; Ryer v. Prudential Ins. Co., 82 N. Y. Supp. 971.

12. Conventions—State v. Liudahl, 11 N. D. 320.

13. Of the county in which a given township is located—City Nat. Bank v. Goodloe, etc., Commission Co., 93 Mo. App. 123. Of the corporate capacity of the city of St. Louis—State v. Nolle, 96 Mo. App. 524. That a county seat established by statute is within the county—State v. Buralli (Nev.) 71 Pac. 532. That a certain city is the county seat (Flynt v. Eagle Pass Coal & Coke Co. [Tex. Civ. App.] 77 S. W. 831). Of the county in which a certain section, town and range is located—Parker v. Burton, 172 Mo. 85. That the county seat is not always located at the largest city in the county—Maricopa County v. Burnett (Ariz.) 71 Pac. 908. That two towns in the same state were in opposite directions from a third town—McGrew v. Missouri Pac. Ry. Co. (Mo.) 76 S. W. 995. Not of the fact that a point a certain distance from an unincorporated village was in a certain county—Anderson v. Commonwealth (Va.) 42 S. E. 865. **Internal economy.** Not of the "house line" on a certain street—New York v. Childs, 84 N. Y. Supp. 164. Nor the width of streets—Coe College v. Cedar Rapids (Iowa) 95 N. W. 267.

14. Of population of a county as shown by U. S. census—Board of Com'rs v. Garty (Ind.) 68 N. E. 1012. Or that a city is of the first class—Ft. Scott v. Elliott (Kan.) 74 Pac. 609. But the population of city cannot be judicially noticed to be greater than is stated by public records—Adams v. Elwood (N. Y.) 68 N. E. 126.

15. That a person taking an affidavit was a notary in a certain county—Black v. Minneapolis, etc., R. Co. (Iowa) 96 N. W. 984. Of what ward of a city in the county where the court sits a notary has been appointed for—Russell v. Huntsville Ry., Light & Power Co. (Ala.) 34 So. 855.

16. Who are judges—Indianapolis St. R. Co. v. Lawn, 30 Ind. App. 515. Of the commencement of terms of court as fixed by statute but not their adjournment—Hadley v Bernero, 97 Mo. App. 314; Lanckton v. United States, 18 App. D. C. 348; Emery v. League (Tex. Civ. App.) 72 S. W. 603; Moss v. Sugar Ridge Tp. (Ind.) 68 N. E. 896.

ords,[18] but not of the sessions of another court,[19] nor will a federal court judicially notice the rules of a state court.[20]

Judicial notice is taken of public statutes,[21] of executive rules made and published pursuant to statute;[22] but not of city ordinances,[23] though courts having jurisdiction of a prosecution under an ordinance take judicial notice of such ordinance.[24] Notice will not be taken of a foreign law,[25] the statute of another state,[26] nor of the laws of an Indian nation.[27]

(§ 1) *B. Presumptions and burden of proof.*—The so-called conclusive presumptions are mere rules of law and form no part of the law of evidence.[28] Presumptions properly so called may be divided into those arising by way of logical deduction or inference from facts in evidence, and those arising independently of deduction and based on considerations of convenience or public policy. Of the first class are the presumption of death from continued absence,[29] of the continuance of a state of facts once shown to exist[30] that a witness withheld,[31] or a document destroyed or not produced,[32] is unfavorable to the party withholding it, and a great variety of specific presumptions based on the ordinary course of human conduct and dealings, illustrations of which will be found in the note.[33] Among those presump-

17. Hadley v. Bernero, 97 Mo. App. 314.

18. Stewart v. Rosengren (Neb.) 92 N. W. 586. Of ancillary proceedings in the same suit—Jeffries v. Smith (Tex. Civ App.) 73 S. W. 48.

19. Hadley v. Bernero, 97 Mo. App 314.

20. Randall v. New England Order of Protection, 118 Fed. 782.

21. Rolla State Bank v. Borgfeld, 93 Mo App. 62. And of facts depending on them, such as the terms of court (Lanckton v United States, 18 App. D. C. 348; Hadley v. Bernero, 97 Mo. App. 314) or that a county seat fixed by statute was in the county—State v. Buralli (Nev.) 71 Pac. 532.

22. Larson v. First Nat. Bank (Neb.) 92 N. W. 729.

23. Lasher v. Littell, 104 Ill. App. 211. The width of city streets not established by charter will not be judicially noticed—Coe College v. Cedar Rapids (Iowa) 95 N. W. 267. Ky. St. § 2761 provides that judicial notice shall be taken of ordinances—Woolley v. Louisville, 24 Ky. L. R. 1357, 71 S. W. 893

24. On appeal in such prosecution the reviewing court likewise takes notice of the ordinance—Strauss v. Village of Conneaut, 23 Ohio Circ. R. 320.

25. McCurdy v. Alaska & C Commercial Co., 102 Ill. App. 120 The existence of the civil law as the basis of Mexican jurisprudence will be noticed, but not whether a particular rule thereof is in force—Banco De Sonora v. Bankers' Mut. Casualty Co. (Iowa) 95 N. W. 232.

26. Old Wayne Mut. Life Ass'n v. Flynn (Ind. App.) 68 N. E. 327; Ferd Heim Brew Co. v. Gimber (Kan.) 72 Pac. 859; Southern Ill. & M. Bridge Co. v. Stone, 174 Mo. 1. The judicial interpretation of laws of another state will not be noticed—Pacific Exp Co. v. Pitman (Tex. Civ. App.) 71 S. W. 312 The statute providing for such judicial notice does not extend to private laws—Miller v. Johnston (Ark.) 72 S. W. 371.

27. Kelly v. Churchill (Ind. T.) 69 S. W. 817; Sass v. Thomas (Ind. T.) 69 S. W. 893.

28. Common presumptions of this class are that of the incapacity of infants (see Infants) and of a grant from continued possession of land (see Adverse Possession).

29. In re Board of Education, 173 N. Y. 321; Willcox v. Trenton Potteries Co., 64 N. J. Eq. 173; Travelers' Ins. Co. v. Rosch, 23 Ohio Circ. R. 491.

30. Continuance in force of street railroad rule—Paquin v. St. Louis R. Co., 90 Mo App. 118. Of a foreign statute—Seaboard Air Line R v. Phillips, 117 Ga. 98. Continuance of life—Chicago, etc., R. Co v. Young (Neb.) 93 N. W. 922. Of domicile—In re Russell's Estate, 64 N. J. Eq. 313. Of public character of funds deposited by a public officer—Baker v. Williams Banking Co., 42 Or. 213, 70 Pac. 711. Of insanity once adjudicated—Eakin v. Hawkins, 52 W. Va. 124. A person absent for 20 years will not be presumed to have continued unmarried—Johnson v. Johnson, 170 Mo. 34.

31. Minch v. New York R. Co., 80 App. Div. (N. Y.) 324; Katafiasz v. Toledo Consol. Elec. Co., 24 Ohio Circ. R. 127; Johnson v Levy, 109 La. 1036; Michigan Cent. R. Co. v. Butler, 23 Ohio Circ. R. 459; Vandervort v. Fouse, 52 W. Va. 214. The rule does not apply where the witness was equally accessible to either party (Yula v. New York R Co., 39 Misc. (N. Y.) 59; Erie R. Co v. Kane (C. C. A.) 118 Fed. 223; Shannon v Castner, 21 Pa. Super. Ct. 294) or is beyond the jurisdiction—Fremont v Metropolitan St R. Co., 83 App. Div. (N Y.) 414.

32. Thompson v. Chappell, 91 Mo App. 297; Heller v. Beal, 23 Ohio Circ R 540

33. That a deed in the hands of grantee was delivered (Inman v. Swearingen 198 Ill. 437) on the day of its date (Atlantic City v. New Auditorium Pier Co., 63 N J Eq 644) and the same presumptions apply to a note—Wells v. Hobson, 91 Mo App. 379. That cohabitation meretricious at its inception so continued—Henry v. Taylor (S. D.) 93 N. W 641. That services rendered between persons in immediate family relations are gratuitous—Sloan v. Dale, 90 Mo App. 87 That a conveyance to a wife on consideration paid by the husband was a gift from him to her and not charged with a trust—Johnson v. Johnson, 96 Md. 144; Flanner v. Butler, 131 N. C. 155. That a railroad company owns and operates an engine running on its tracks—Brooks v. Missouri Pac. R.

tions dictated by public policy or convenience and which affect in the first instance the burden of proof are such presumptions as that official acts are regularly and legally done,[34] that judicial proceedings were regular and within the jurisdiction of the court,[35] that every man is sane[36] and solvent,[37] that every woman is chaste,[38] that men act in good faith and with innocent motives,[39] and without culpable negligence.[40]

There is no such general presumption of survivorship in common disaster.[41]

It will be presumed that the law of a foreign country[42] or of another state[43] is the same as that of the forum.

Co., 98 Mo. App. 166. That the holder of a negotiable instrument is the owner thereof —National Revere Bank v National Bank of Republic, 172 N. Y. 102; Beaman v. Ward, 132 N. C. 68; Michigan Mut Life Ins Co. v. Klatt (Neb.) 92 N. W. 325; Watford v. Windham, 64 S C. 509. The signature to a note is presumed to have been affixed before delivery and on the day of its date—Wells v. Hobson, 91 Mo. App. 379. The authorities are in conflict as to whether the holder of a note is presumed to be a purchaser in good faith. That he is, see Black v. First Nat. Bank, 96 Md. 399; Hahn v. Bradley, 92 Mo. App. 399. That he is not, where it appears that the note was procured by fraud see McGill v. Young (S. D.) 92 N W. 1066. Execution of chattel mortgage is not presumptive evidence of title in mortgagor—Syck v. Bossingham (Iowa) 94 N. W. 920.

34. State v. Savage (Neb.) 91 N. W. 716; Sheafer v Mitchell, 109 Tenn. 181; Watkins v. Havighorst (Okl.) 74 Pac. 318; Pine Tree Lumber Co v. Fargo (N. D.) 96 N. W. 357; Brown v Helsley (Neb.) 96 N. W. 187. Where work is begun under a franchise it will be presumed that the requisite consent of officials thereto was obtained—McWethy v Aurora Elec. Light & Power Co., 202 Ill. 218. Where a street railroad was authorized, it will be presumed that the requisite consent of property owners was filed—Mercer County Traction Co. v. United New Jersey R & C. Co., 64 N. J. Eq. 588. It will be presumed that a patent was countersigned by the recorder of the land office though the abstract does not show it—McLeod v. Lloyd (Or) 71 Pac. 795

But the presumption in favor of official acts does not obtain where a forfeiture is sought to be established by such acts—Irwin v Mayes (Tex Civ. App.) 73 S. W. 33.

35. Coveney v Phiscator (Mich) 93 N W. 619; National Bank v. Home Security Co., 65 Kan. 642. 70 Pac. 646; Talbot v. Roe, 171 Mo. 421, Haupt v. Simington, 27 Mont. 480. 71 Pac 672. Judgment of another state presumed valid—Gottlieb v. Alton Grain Co., 87 App Div. (N. Y.) 380. And see article on Courts.

36. Dickerson v. Northwestern Mut. Life Ins. Co , 200 Ill. 270; Davis v. State (Fla.) 32 So 822 And though it appears that one committed suicide it will be presumed that he was sane—Royal Circle v. Achterrath (Ill.) 68 N. E 492. But after an adjudication of insanity the presumption of the continuance of that state obtains--Eakin v. Hawkins. 52 W. Va. 124. The operation of this presumption where insanity is alleged as a defense to crime will be treated in Indictment and Prosecution.

37. Warren v. Robison, 25 Utah, 205, 70 Pac. 989; Lewis v. Boardman, 78 App. Div. (N. Y.) 394.

38. Griffin v. State, 109 Tenn. 17; Puckett v. State (Ark.) 70 S. W. 1041.

39. Mortimer v. McMullen, 102 Ill. App. 593. Adverse possession presumed to have been in good faith—Baxley v Baxley, 117 Ga. 60. That alterations in an instrument were made before delivery—Consumers' Ice Co. v. Jennings (Va.) 42 S. E. 879. That a will was not procured by fraud or undue influence—Swearingen v. Inman, 198 Ill. 255; Crossan v. Crossan, 169 Mo. 631; In re Holman's Will, 42 Or. 345, 70 Pac. 908. Alleged fraudulent conveyances—Culp v. Mulvane (Kan.) 71 Pac. 273; Edwards v. Anderson (Tex. Civ. App.) 71 S. W. 555. Malice in the institution of a prosecution is not to be presumed—Richards v. Jewett Bros., 118 Iowa, 629; Boush v. Fidelity & Deposit Co. (Va.) 42 S. E. 877. That representations by an applicant for insurance were made in good faith—Alden v. Supreme Tent, K. of M., 78 App. Div. (N. Y.) 18. That insured did not commit suicide —Cox v. Royal Tribe, 42 Or. 365, 71 Pac. 73; Travelers' Ins. Co. v. Rosch, 23 Ohio Circ. R. 491; Western Travelers' Ass'n v. Holbrook (Neb.) 91 N. W. 276.

40. Brooks v. Louisville R Co., 24 Ky. L. R. 1318, 71 S. W. 507; Franklin v. Missouri R. Co., 97 Mo. App. 473; Klos v. Hudson River Ore & Iron Co., 77 App. Div. (N. Y.) 566. And see articles on Master and Servant and Negligence.

41. Age, sex or condition of the parties creates none—Young Women's Christian Home v. French, 187 U. S. 401, 47 Law. Ed. 233; Faul v. Hulick, 18 App. D. C. 9; Middeke v Balder, 198 Ill. 590; Males v. Sovereign Camp, W. of W. (Tex. Civ. App) 70 S. W. 108.

42. Mittenthal v. Mascagni, 183 Mass 19. It will be presumed that the laws of every country give a right to compensation for personal injuries—Mackey v. Mexican Cent. R Co., 78 N. Y. Supp. 966.

43. Barringer v. Ryder (Iowa) 93 N W. 56; Fidelity Ins., etc., Co. v. Nelson, 30 Wash. 340, 70 Pac. 961; Second Nat. Bank v Smith (Wis.) 94 N. W. 664; Dinkins v. Crunden-Martin Woodenware Co. (Mo. App.) 73 S. W. 246; Peter Adams Paper Co. v. Cassard (Pa.) 55 Atl. 949. A statute shown to exist in another state will be presumed to have continued in force—Seaboard Air Line R. v. Phillips, 117 Ga. 98; Poll v. Hicks (Kan.) 72 Pac. 847; Dignan v. Nelson (Utah) 72 Pac. 936. In some states this presumption does not obtain as to statute law and the presumption is that the common law is in force —Baltimore R. Co. v. Adams, 159 Ind. 688; Price v. Clevenger (Mo. App.) 74 S. W. 894;

Burden of proof.—Wherever a presumption of this latter class arises, the burden is of course on the party against whom the same operates to rebut it. No cases relating to the general doctrine of burden of proof were decided within the period covered by this issue and the burden of proving particular facts is not deemed of sufficient general value to be here treated, but will be found under the titles relating to the particular subjects or issues.

§ 2. *Relevancy and materiality.*[44]—Every fact tending to strengthen the probabilities on one side or the other is logically relevant,[45] but evidence as to a party's character is not relevant to render improbable acts inconsistent therewith.[46]

Where acts are alleged to be negligent, evidence that they were or were not in accordance with the usual practice is relevant.[47] Though the evidence must ordinarily be confined to the transaction in issue, evidence of previous similar transactions are sometimes deemed relevant,[48] evidence of previous similar accidents from the same cause being the most common illustration,[49] but only under similar condi-

Wells v. Gress (Ga.) 45 S. E. 418; Rosemand v. Southern Ry., 66 S. C. 91.

44. Only the most general holdings are here given, the relevancy of evidence to a particular issue being considered as peculiar to that subject matter and treated under the appropriate title.

45. Glassberg v. Olson (Minn.) 94 N. W. 554; Chamberlain v. Chamberlain Banking House (Neb.) 93 N. W. 1021. Much latitude is allowed where circumstantial evidence is resorted to—Mosby v. McKee, etc., Commission Co., 91 Mo. App. 500. Evidence that in a certain year a party paid no taxes on money at interest is relevant in support of his testimony that he had no knowledge of a transaction as part of which a note was alleged to have been made to him—Shannon v. Castner, 21 Pa. Super. Ct. 294. Evidence that a certain laborer received no more wages than other members of the gang is irrelevant on the issue whether he was a vice principal—Fritz v. Western Union Tel. Co., 25 Utah. 263, 71 Pac. 209.

46. Evidence of character of defendant and of person aggrieved in criminal prosecutions is treated in Indictment and Prosecution and related criminal titles there referred to; evidence of character to support or discredit witness in Witnesses. Good repute of defendant in civil action for homicide, (Morgan v. Barnhill [C. C. A.] 118 Fed. 24) of a clerk sued for money embezzled, (Adams v. Elseffer [Mich.] 92 N. W. 772) of one alleged to have fraudulently conveyed property (Ellwood v. Walter, 103 Ill. App. 219) of one alleged to have suppressed a will (McElroy v. Phink [Tex.] 76 S. W. 753) of bad character for honesty of one sued for wrongful distress (Hurst v. Benson [Tex. Civ. App.] 71 S. W. 417) and reputation of deceased for sobriety in an action for death by wrongful act—Chesapeake R. Co. v. Riddle's Adm'x, 24 Ky. L. R. 1687, 72 S. W. 22 have all been held inadmissible. But such evidence is admissible where evidence assailing the party's character has been admitted on behalf of the other party (Louisville, etc., R. Co. v. Steenberger, 24 Ky. L. R. 761, 69 S. W. 1094) though evidence incidentally aspersing the party's character will not admit such proof—McCowen v. Gulf R. Co. (Tex. Civ. App.) 73 S. W. 46.

47. It may be shown that work was done in the usual manner, to rebut a charge that the method was unsafe (Stauning v. Great Northern Ry. Co., 88 Minn. 480; Hamilton v. Mendota Coal & Min. Co. [Iowa] 94 N. W. 282; Central of Georgia R. Co. v. Goodson [Ga.] 45 S. E. 680) and in support of such a claim the contrary may be shown—Devaney v. Degnon-McLean Const. Co., 79 App. Div. (N. Y.) 62; Fritz v. Western Union Tel. Co., 25 Utah. 263, 71 Pac. 209. Thus rules governing the same kind of work promulgated by other employes may be shown—Devoe v. New York Cent. R. Co., 174 N. Y. 1.

But it must appear that the usage was known to the party seeking to avail himself thereof—Bourbonnais v. West Boylston Mfg. Co. (Mass.) 68 N. E. 232. That improved appliances are in use by other employers is not competent unless it is shown that such improvements are practicable and produce greater safety—Bryce v. Burlington R. Co. (Iowa) 93 N. W. 275.

In like manner, evidence that employes worked in the usual way is admissible to show absence of contributory negligence—Ham v. Lake Shore R. Co., 23 Ohio Circ. R. 496; International R. Co. v. Bearden (Tex. Civ. App.) 71 S. W. 558; Galveston R. Co. v. Puente (Tex. Civ. App.) 70 S. W. 362. Thus, manner of using defective street by others at about the same time is admissible to rebut contributory negligence—City of Charlottesville v. Stratton's Adm'r (Va.) 45 S. E. 737.

48. Salary of plaintiff's predecessor admissible on quantum meruit for services—Meislahn v. Irving Nat. Bank, 172 N. Y. 631. Other forgeries (Kingsbury v. Waco State Bank [Tex. Civ. App.] 70 S. W. 551) or other acts of adultery (Goldie v. Goldie, 39 Misc. [N. Y.] 389) than those forming the subject of the action are not admissible. Evidence of similar misrepresentations to other persons similarly situated with reference to the same transaction is admissible—Barbar v. Martin (Neb.) 93 N. W. 722.

49. City of Kingfisher v. Altizer (Okl.) 74 Pac. 107; Smith v. Seattle (Wash.) 74 Pac. 674. This matter will be more specifically treated in the forthcoming article on Negligence. In action for injuries caused by slipping of belt, evidence that the belt had slipped on previous occasions is admissible (Houston Biscuit Co. v. Dial, 135 Ala. 168) as is evidence that other persons had been injured by the same cogwheels (Dorsett v.

tions.[50] Evidence of conditions after the transaction in issue is not relevant unless it appears that they have not changed,[51] and evidence of subsequent precautions to prevent recurrence of injury is inadmissible.[52]

On an issue as to the value of land, evidence as to the price paid for similar property in the vicinity is admissible,[53] but no other evidence of the value of adjoining lands than actual sales is within this rule.[54] The price paid by the owner of land is admissible as to its present value unless conditions have changed,[55] but not offers received by the owner.[56] Where detention from place of employment is alleged, the earnings of others in similar employment there is admissible.[57]

Evidence explanatory of facts in evidence or tending to rebut inference therefrom is relevant,[58] and where the admissions or declarations of a party are introduced, he is entitled to explain the same,[59] and the entire conversation or document in which the admission is made is admissible.[60]

Clement-Ross Mfg. Co., 131 N. C. 254) evidence that other cattle were made sick by feed for negligent sale of which action is brought—Houston Cotton Oil Co. v. Trammell (Tex. Civ. App.) 72 S. W. 244. On issue whether obstruction was calculated to frighten horses, evidence that other horses were frightened thereby is admissible—Galt v. Woliver, 103 Ill. App. 71; Nye v. Dibley, 88 Minn. 465. Evidence of other fires started by a certain engine at about the time of that in question is admissible—Galveston, etc., R. Co. v. Chittim (Tex. Civ. App.) 71 S. W. 294. But in Missouri and California it is otherwise held, evidence of previous injuries by same appliance (Edwards v. Barber Asphalt Co., 92 Mo. App. 221; Roche v. Llewellyn Ironworks Co. [Cal.] 74 Pac. 147) or by same defect in sidewalk (Smart v. Kansas City, 91 Mo. App. 586) being excluded.

Evidence of contributory negligence of employe on other occasions is inadmissible—International R. Co. v. Ives (Tex. Civ. App.) 71 S. W. 772; Aiken v. Holyoke St. R. Co. (Mass.) 68 N. E. 238.

50. Florida Cent. R. Co. v. Mooney (Fla.) 33 So. 1010. Derailment of another car on a different track (Central of Georgia R. Co. v. Duffey, 116 Ga. 346) flooding of other cellars at different times and from different causes (Louisville Water Co. v. Weis, 25 Ky. L. R. 808, 76 S. W. 356) have been held irrelevant. Evidence that no overflow resulted from maintenance of previous dam is irrelevant unless it is shown to have been similar in height and construction to that complained of (Crossen v. Grandy, 42 Or. 282, 70 Pac. 906) and proof of satisfactory working of appliances similar to that claimed to be defective is irrelevant unless conditions are shown to be similar—Jewell Filter Co. v. Kirk, 200 Ill. 382.

51. Chicago v. Early, 104 Ill. App. 398. But conditions immediately afterward may be shown—Slack v. Harris, 200 Ill. 96. Fact that turn table was unlocked after an accident but on the same day held admissible—Chicago, etc., R. Co. v. Krayenbuhl (Neb.) 91 N. W. 880.

52. By some courts this class of evidence is deemed irrelevant; by others it is excluded on the theory that public policy forbids treating such precautions as an implied admission of negligence—Georgia Southern & F. R. Co. v. Cartledge, 116 Ga. 164; McGarr v. National & P. Worsted Mills, 24 R. I. 447; Elias v. Lancaster City, 203 Pa. 638.

53. Loloff v. Sterling (Colo.) 71 Pac. 1113; Board of Levee Com'rs v. Nelms (Miss.) 34 So. 149; Dady v. Condit, 104 Ill. App. 507; St. Louis S. W. R. Co. v. Hughes (Tex. Civ. App.) 73 S. W. 976; Belding v. Archer, 131 N. C. 287; Houston v. Western Washington R. Co., 204 Pa. 321; Faust v. Hosford (Iowa) 93 N. W. 58. But this class of evidence is excluded in New York—Robinson v. New York El. R. Co., 175 N. Y. 219; Rosenblum v. Riley, 84 N. Y. Supp. 884. It has been held that sales of vacant land were relevant as to the value of improved land—O'Malley v. Commonwealth, 182 Mass. 196. But see contra, Fox v. Robbins (Tex. Civ. App.) 70 S. W. 597. Yield of adjoining lands may be shown on issue of damage by destruction of crop—Condon v. Des Moines Mut. Hail Ass'n (Iowa) 94 N. W. 477. Prices paid to others during the season are relevant as to market price—Robichaux v. Segura Sugar Co. (La.) 34 So. 744. Admissibility of evidence as to land values will be found discussed with considerable fullness in the article on Eminent Domain.

54. Opinions as to value—Bullock v. Lake Drummond Canal Co., 132 N. C. 179; Sirk v. Emery (Mass.) 67 N. E. 668. Price at which adjacent lands are held by owner—Eastern Tex. R. Co. v. Scurlock (Tex. Civ. App.) 75 S. W. 366.

55. Wells, Fargo Exp. Co. v. Williams (Tex. Civ. App.) 71 S. W. 314. But not where the purchase was in connection with other lands for a lump sum; or as part settlement for an existing claim against an insolvent—Lanquist v. Chicago, 200 Ill. 69. Or was made several years before the time of inquiry—Id.; McNicol v. Collins, 30 Wash. 318, 70 Pac. 753. The fact that property was sold to a public board does not show that it was a forced sale so as to render the price inadmissible—O'Malley v. Commonwealth, 182 Mass. 196.

56. Walker v. Farrell, 84 N. Y. Supp. 182; Stewart v. James (Neb.) 95 N. W. 778; Wells, Fargo Exp. Co. v. Williams (Tex. Civ. App.) 71 S. W. 314.

57. Johnson v. San Juan Fish Co., 31 Wash. 238, 71 Pac. 787.

58. Where it appears that injured person did not have medical attendance he may show that he could not afford it—Muller v. Hale, 138 Cal. 163, 71 Pac. 81.

A witness may explain away discrediting evidence. See Witnesses.

59. Coldren v. Le Gore, 118 Iowa, 212.

§ 3. *Competency or kind of evidence in general.*[61]—Conversations otherwise admissible are not to be excluded because had over a telephone.[62] Merely negative evidence unless of a conclusive nature is not competent.[63] Though evidence be incompetent, it is admissible to rebut similar incompetent evidence introduced by the adverse party.[64]

§ 4. *Best and secondary evidence.*—The rule in its most general form is that evidence must be the best of which the nature of the case admits,[65] its most common application being the exclusion of oral evidence to prove the contents of a writing,[66] and a fortiori of specialties,[67] books of account,[68] and judicial,[69] official,[70] or corpo-

Mistake in a writing—Ritchey v. Seeley (Neb.) 93 N. W. 977. Proof of changes in master's report to limit admissions implied from consent to entry of order thereon—In re Duncan, 64 S. C. 461. Where an expert has testified to construction of certain rules other rules inconsistent with his opinion are admissible though not otherwise relevant—Missouri, etc., R. Co. v. Owens (Tex. Civ. App.) 75 S. W. 579.

60. Elizabeth City Cotton Mills v. Loeb (C. C. A.) 119 Fed. 154; Pittsburgh, etc., R. Co. v. Story, 104 Ill. App. 132; Hewlett v. Hyden (Ind. T.) 69 S. W. 839. An admission in an answer may be introduced without introducing accompanying denials of other parts of the cause of action—Lewis v. Norfolk R. Co., 132 N. C. 382. Where a letter has been introduced for an admission therein, the other party may introduce all the correspondence on that subject—Lewis Pub. Co. v. Lenz, 86 App. Div. (N. Y.) 451.

61. Includes only the few miscellaneous rulings as to competency of evidence not covered by the general rules of competency represented by the following sections.

62. Galt v. Woliver, 103 Ill. App. 71. But there must be proof over the identity of the persons speaking—Kimbark v. Illinois Car & Equipment Co., 103 Ill. App. 632. Conversation by telephone admissible where adverse party admits that there was a conversation. The court intimates a doubt as to whether preliminary evidence, as of recognition of voice, is necessary in any event—Lincoln Mill Co. v. Wissler (Neb.) 95 N. W. 857.

63. That no effort was made to apprehend any person for murder is incompetent on an issue as to suicide—Treat v. Merchants Life Ass'n. 198 Ill. 431. Evidence of an employe that he never saw the machinery inspected is inadmissible—Duntley v. Inman, Poulson & Co., 42 Or. 334, 70 Pac. 529.

64. Shannon v. Castner, 21 Pa. Super. Ct. 294; Yank v. Bordeaux (Mont.) 74 Pac. 77; McNicol v. Collins, 30 Wash. 318, 70 Pac. 753; San Antonio, etc., R. Co. v. Griffith (Tex. Civ. App.) 70 S. W. 438. Expert testimony—Hutter v. DeQ. Bottle Stopper Co., 119 Fed. 190. Character evidence—Louisville & N. R. Co. v. Steenberger, 24 Ky. L. R. 761, 69 S. W. 1094. But only where the attack on character is direct—McCowen v. Gulf R. Co. (Tex. Civ. App.) 73 S. W. 46. Though a conversation is hearsay, if evidence as to the same is introduced by one party the other may prove his version of it—Johnson v. Doon (Mich.) 91 N. W. 742; Droege v. Baxter, 77 App. Div. (N. Y.) 78. Evidence of the arrest of defendant's employe for the transaction in issue authorizes evidence that he was discharged after arraignment—James v. Metropolitan St. R. Co., 80 App. Div. (N. Y.) 364. Evidence that plaintiff made no complaint of injury authorizes proof of complaints by him—Missouri, etc., R. Co. v. Hawk (Tex. Civ. App.) 69 S. W. 1037. But in an action for damage caused to a building by an explosion, evidence that the explosion did not damage one adjoining building does not authorize evidence that it did damage another—Fitzsimmons & Connell Co v. Braun, 199 Ill. 390. Where defendant in a personal injury case shows the appliances used elsewhere in his mine he cannot object to evidence that they are more secure than that complained of—Brazil Block Coal Co. v. Gibson (Ind.) 66 N. E. 882. Where a party shows the manner in which an account is kept the other party may prove at whose request it was done—Hill Bros. v. Bank of Seneca (Mo. App.) 73 S. W. 307.

65. The Ulalia, 37 Ct. Cl. 466.

66. Mahaney v. Carr, 175 N. Y. 454. There is an exception in case of written notices, that served and that retained being considered duplicate originals—Eisenhart v. Slaymaker, 14 Serg. & R. (Pa.) 153 (leading case); Florida Cent., etc., R. Co. v. Seymour (Fla.) 33 So. 424.

67. Graham v. Warren (Miss.) 33 So. 71 Title to land (Arnold v. Cofer, 135 Ala. 364; Wright v. Roberts, 116 Ga. 194) or the conveyance thereof (Houck v. Patty [Mo. App.] 73 S. W. 389) cannot be shown by parol.

68. Wilson v. Morse, 117 Iowa, 581; Rogers v. O'Barr (Tex. Civ. App.) 76 S. W. 593.

69. Judgment cannot be proved by parol—Rosenberg v. Goldstein, 38 Misc. (N. Y.) 753. Record is not the best evidence of services rendered by an attorney in the action—Cahill v. Baird (Cal.) 70 Pac. 1061. The docket entry is the best evidence of the filing of a claim against a decedent's estate—Kornegay v. Mayer, 135 Ala. 141. The decree is the best evidence of the condemnation of a vessel in admiralty—The Ulalia, 37 Ct. Cl. 466. That a person participated in a certain action may be shown by parol—Daly v. Everett Pulp & Paper Co., 31 Wash. 252, 71 Pac. 1014. Under Code Civ. Proc. § 1922 the legal existence of a justice court in another state may be proved by the testimony of the justice—Banister v. Campbell, 138 Cal. 455, 71 Pac. 504. Original papers filed in court are not secondary to certified copies—Bradley Timber Co. v. White (C. C. A.) 121 Fed. 779. Docket entries of a referee in bankruptcy are the best evidence of matters therein stated—Davis v. Ives, 75 Conn. 611.

70. Municipal authorization of the digging of a ditch cannot be proved by parol—Town of Jackson v. Ellis, 116 Ga. 719. Contents of a petition on file with the town clerk cannot be proved by parol—Seigel v.

rate records,[71] and private copies stand on the same footing as oral evidence.[72] As to the existence of a writing, however, the general rule seems to be that parol evidence is admissible.[73] Where the contents of a writing is only collaterally in issue, the rule does not apply.[74]

The rule requires, however, only the best evidence available, and where the primary evidence is lost or destroyed[75] beyond the jurisdiction,[76] or in the hands of the adverse party,[77] secondary evidence is admissible; but there must be preliminary proof of the destruction of the writing,[78] or, if it is alleged to be lost that after diligent search it cannot be found, the sufficiency of such proof being generally in the discretion of the court.[79]

Town of Liberty (Wis.) 95 N. W. 402. The contents of the tax rolls cannot be proved by parol—Montpelier Sav. Bank & Trust Co. v. School District, 115 Wis. 622. But a witness may testify that an examination of the tax records did not show the filing of a certain return—Vizard v. Moody, 117 Ga. 67. An official plat is not better evidence than a plat made by a witness who has surveyed the land—City of Chicago v. Le Moyne (C. C. A.) 119 Fed. 662. The fact that an examination of certain accounts has been made by the public examiner may be moved by parol—Culver v. Caldwell (Ala.) 34 So. 13.

71. Corcoran v. Sonora Min. & Mill. Co. (Idaho) 71 Pac. 127. Corporate resolution fixing salary of officer may be shown by parol—Selley v. American Lubricator Co. (Iowa) 93 N. W. 590. As to whether entry of corporate proceedings in the minute book excludes oral evidence of such proceedings the authorities are in conflict. The better rule on reason would seem to be that it does not—Blanton v. Kentucky Distilleries & Warehouse Co., 120 Fed. 318. But the weight of authority seems to be that it does—Central Elec. Co. v. Sprague Elec. Co. (C. C. A.) 120 Fed. 925.

72. Peycke v. Shinn (Neb.) 94 N. W. 135. Copy of report by police officer—Crane v. Bennett, 77 App. Div. (N. Y.) 102. Copy of book entries—Smith v. Castle, 81 App. Div. (N. Y.) 638. Letter press copy of letter—Heller v. Heine, 38 Misc (N. Y.) 816; Haas v. Chubb (Kan.) 74 Pac. 230.

73. A witness may testify that certain proceeding before an exchange committee was instituted by written charges—Collins v. McGuire, 76 App. Div. (N. Y.) 443. Or that he bought a railroad ticket between certain stations—Oliver v. Columbia R Co., 65 S. C. 1.

74. Belding v. Archer, 131 N. C. 287; Lipscomb v. Citizens' Bank (Kan.) 71 Pac. 583. Where the authority of an agent to make a contract is denied in a suit thereon such authority is not collaterally in issue but the best evidence thereof must be produced—Continental Fire Ass'n v. Bearden (Tex. Civ. App.) 69 S. W. 982. The amount paid by a garnishee may be shown by parol in a collateral proceeding.—Curtis v. Parker & Co., 136 Ala. 217.

75. Larson v. Cox (Neb.) 93 N. W. 1011; Conkling v. Nicholas (Mich.) 95 N. W. 745; Hodge v. Palms (C. C. A.) 117 Fed. 396; The Ulalia, 37 Ct. Cl. 466; Brookshier v. Chillicothe Town Mut. Fire Ins. Co., 91 Mo. App. 599; City of South Omaha v. Wrzensinski (Neb.) 92 N. W. 1045; Smith v. Ridlay (Tex. Civ. App.) 70 S. W. 235; Blanton v. Kentucky Distilleries & Warehouse Co., 120 Fed. 318; State v. Conser, 24 Ohio Circ. R. 270; Lochridge v. Corbett (Tex. Civ. App.) 73 S. W. 96; Thistlewaite v. Pierce, 30 Ind. App. 642. The rule admitting secondary evidence applies to proof of judgment, execution, etc., under Comp. Laws, § 10,203, relating to proceedings in aid of execution—Crane v. Waldron (Mich.) 94 N. W. 593.

76. Where the recipient of a letter was a non-resident and died before the trial secondary evidence of the contents of the letter may be received—Hirsch v. C. W. Leatherbee Lumber Co. (N. J. Law) 55 Atl. 645. But see Central Elec. Co. v. Sprague Elec. Co. (C. C. A.) 120 Fed. 925.

77. Gulf, etc., R. Co. v. Harris (Tex. Civ. App.) 72 S. W. 71; Nunn v. Jordan, 31 Wash. 506, 72 Pac. 124. Copies of papers in the hands of the adverse party, and forming part of its private records which it cannot be compelled to surrender, are admissible—Speiser v. Phœnix Mut. Life Ins. Co. (Wis.) 97 N. W. 207.

78. Zollman v. Tarr, 93 Mo. App. 234. Testimony by the recipient of letters that he has destroyed them is sufficient—June v. Labadie (Mich.) 92 N. W. 937. Proof of the loss of a railroad service telegram is sufficient to admit secondary evidence where there is no evidence of a practice of making office duplicates—Southern R. Co. v. Howell (Ala.) 34 So. 6.

79. Evidence of diligent search necessary—Samuelson v. Gale Mfg. Co. (Neb.) 95 N. W. 809. Preliminary evidence of loss is in the discretion of the trial judge—Cox v. McDonald (Ga.) 45 S. E. 401. Circumstantial evidence of loss is sufficient—Bright v. Allan, 203 Pa. 386. Where the loss of a paper belonging to a corporation is otherwise proved the proof is not invalidated by testimony of the president that he thinks he gave it to one person who denies receiving it and that he has seen it in the hands of another whose whereabouts is unknown—Dupee v. Chicago Horse Shoe Co. (C. C. A.) 117 Fed. 40. Proof by the grantee that he could not find certain deeds is not invalidated by a statement that he may have given them to a certain person, where that person is absent and his whereabouts is unknown—Denny v. Broadway Nat. Bank (Ga.) 44 S. E. 982. Proof that the justice who had certain records is dead and that they are not in the clerk's office, without showing inquiry of the justice's family, is insufficient—Smith v. Garris, 131 N. C. 34. Testimony that witness did not think he had a deed and had made some search but does not remember what is insufficient—Orchard v. Collier, 171 Mo. 390. Testimony that witness had laid certain papers on his

Where the writing is in the hands of the adverse party, notice must be given to produce the same at the trial, to admit secondary evidence on his failure to do so.[80] Where a proper foundation is laid for secondary evidence, letter press[81] or other copies[82] are admissible, as is oral evidence.[83]

§ 5. *Parol evidence to explain or vary writing.*—A rule which the later authorities deem one of substantive law,[84] but which is ordinarily considered as part of the law of evidence, is that where a contract is reduced to writing it will be presumed that the parties intended thereby to place their agreement beyond the uncertainties of oral testimony and accordingly if the written terms are unambiguous, oral evidence is inadmissible to vary, modify, or contradict them;[85] and a fortiori

desk and that a few days later they were not on the desk and that he had searched for them and could not find them is sufficient—Stuart v. Mitchum, 135 Ala. 546.

Superior Court Rule 42 allowing copies of instruments "between the parties litigant" to be admitted on an affidavit of loss of the original does not apply to instruments between third persons—Cox v. McDonald (Ga.) 45 S. E. 401. Under a statute making an affidavit that the party is unable to "procure" the original prima facie evidence of loss, an affidavit that he cannot "produce" it is sufficient—Williamson v. Work (Tex. Civ. App.) 77 S. W. 266.

Order of Proof. It is in discretion of the court to admit secondary evidence on a promise to supply later the necessary foundation—Haller v. Gibson, 30 Ind. App. 10. And see article on Trial.

80. Hess-Mott Co. v. Brown, 84 N. Y. Supp. 168; Union Surety & Guaranty Co. v. Tenney, 200 Ill. 349. A mere statement of counsel that notice has been given is insufficient—Landt v. McCullough, 103 Ill. App. 668. A notice given during the trial to produce a paper at the office of defendant in another town is not sufficient—Continental Fire Ass'n v. Bearden (Tex. Civ. App.) 69 S. W. 982. Where there is evidence that the document is lost (Cleveland, etc., R. Co. v. Patton, 104 Ill. App. 550) or destroyed (Bickley v. Bickley, 136 Ala. 548) notice to produce is unnecessary.

81. Union Surety & Guaranty Co. v. Tenney, 200 Ill. 349.

82. Hagey v. Schroeder, 30 Ind. App. 151; City of South Omaha v. Wrzensinski (Neb.) 92 S. W. 1045; Orchard v. Collier, 171 Mo. 390; Peycke v. Shinn (Neb.) 94 N. W. 135.

83. Members of the family who have listened to the reading and discussion of letters may testify to their contents the letters being lost—Brier v. Davis (Iowa) 96 N. W. 983.

84. Pitcairn v. Philip Hiss Co. (C. C. A.) 125 Fed. 110.

85. Foote & Davies Co. v. Malony, 115 Ga. 985; Hart v. Hart (Wis.) 94 N. W. 890; Norfolk Beet Sugar Co. v. Berger (Neb.) 95 N. W. 336; Sims v. Greenfield R. Co. (Mo. App.) 74 S. W. 421; Rose v. Lanyon Zinc Co. (Kan.) 74 Pac. 625; Oil Creek Gold Min. Co. v. Fairbanks, Morse & Co. (Colo. App.) 74 Pac. 543; Lawder & Sons Co. v. Albert Mackie Grocer Co. (Md.) 54 Atl. 634; Bullard v. Brewer (Ga.) 45 S. E. 711; Arthur v. Baron De Hirsch Fund (C. C. A.) 121 Fed. 791; J. I. Case Threshing Mach. Co. v. Hall (Tex. Civ. App.) 73 S. W. 835; Douglass v. Campbell, 24 Ohio Circ. R. 241; Finck v. Bauer, 40 Misc. (N. Y.) 218; Drumm-Flato Commission Co. v. Barnard (Kan.) 72 Pac. 257; Heard v. Tappan, 116 Ga. 930; Sexton v. Barrie, 102 Ill. App. 586; Consumer's Ice Co. v. Jennings (Va.) 42 S. E. 879; Mefford v. Sell (Neb.) 92 N. W. 148; Rolfs v. Atchison R. Co. (Kan.) 71 Pac. 526; Johnson v. Zweigart, 24 Ky. L. R. 1323, 71 S. W. 445; Wear Bros. v. Schmelzer, 92 Mo. App. 314; New Idea Pattern Co. v. Whelan, 75 Conn. 455; National Computing Scale Co. v. Eaves, 116 Ga. 511; Wilson v. Hinnant, 117 Ga. 46; Grand Lodge, A. O. U. W., v. Bunkers, 23 Ohio Circ. R. 487; Walther v. Stampfli, 91 Mo. App. 398; Dady v. O'Rourke, 172 N. Y. 447.

Bills and Notes—Brewer v. Grogan, 116 Ga. 60. Evidence of contemporaneous agreement depriving note of negotiability not admissible—Mallory v. Fitzgerald's Estate (Neb.) 95 N. W. 601. Maker of a promissory note may show an agreement for payment in labor—Ramsey v. Capshaw (Ark.) 75 S. W. 479.

Deeds, Leases and Patents to Land. Not admissible to vary unambiguous deed as to property (Uihlein v. Matthews, 172 N. Y. 154; Van Husan v. Omaha Bridge & T. R. Co., 118 Iowa, 366; Riehlman v. Field, 81 App. Div. [N. Y.] 526) or estate conveyed—Cauble v. Worsham (Tex.) 70 S. W. 737; Mays v. Shields (Ga.) 45 S. E. 68. It may be shown by parol that a mortgage was given not only for existing debts but as a continuing security—Lippincott v. Lawrie (Wis.) 97 N. W. 179. Term of tenancy as specifically stated in lease cannot be varied by parol—Equitable Life Assur. Soc. v. Schum, 40 Misc. (N. Y.) 657. Unambiguous field notes referred to in a patent cannot be varied—Giddings v. Winfree (Tex. Civ. App.) 73 S. W. 1066.

Bill of Lading—De Sola v. Pomares, 119 Fed. 373. Endorsement of a bill of lading for transfer does not imply a contract in law, it not being a negotiable instrument, and accordingly the real nature of the contract may be shown by parol—Walker v. First Nat. Bank (Or.) 72 Pac. 635. Special contract as to time of delivery cannot be shown to vary a bill of lading—Sloman v. National Exp. Co. (Mich.) 95 N. W. 999. Where a bill of lading did not specify the route parol evidence as to the agreement in respect thereto is admissible—Louisville & N. R. Co. v. Duncan (Ala.) 34 So. 988.

Receipts. A receipt is not a contract within the rule and may be contradicted by parol (Lacraberi v. Wise [Cal.] 71 Pac. 175; Meislahn v. Irving Nat. Bank, 172 N. Y. 631; Rarden v. Cunningham, 136 Ala. 263; Komp v. Raymond, 175 N. Y. 102) and this has been held to include a receipt for goods "in good condition" (Comerford v. Smith, 82

to vary official or judicial records,[86] and prior and contemporaneous oral agreements, are not admissible unless they relate to a distinct subject-matter,[87] or one upon

App. Div. [N. Y.] 638) but a contract embodied in a receipt stands on the same footing as other contracts—Grier v. Mutual Life Ins. Co., 132 N. C. 542. A recital of full satisfaction of certain claims has been held to be contractual and not to be varied by parol—Vacheron v. Hildebrant, 39 Misc. (N. Y.) 61. A receipt in full on account of a certain purchase does not preclude evidence that the buyer did not finally accept the goods and waive defects—Seeger v. Manitowoc Steam Boiler Works (Wis.) 97 N. W. 485.

Customs and usages. Evidence of usage is not admissible to contravene the terms of a contract—Currie v. Syndicate Des Cultivators, 104 Ill. App. 165; Withers v. Moore (Cal.) 71 Pac. 697; McIntosh v. Pendleton, 75 App. Div. (N. Y.) 621; Swift v. Occidental Min. & Petroleum Co. (Cal.) 74 Pac. 700. Contract requiring seller to pay duties, etc., on cargo cannot be modified by evidence of usage that reductions of duty operated to the benefit of the purchaser—Withers v. Moore (Cal.) 74 Pac. 159. As to usage to explain ambiguous contract, see infra, this section, page 1144.

Showing representative capacity of obligor. It is generally held that one signing a contract apparently a personal obligation cannot show that he signed as agent for another—Bohn Mfg. Co. v. Reif (Wis.) 93 N. W. 466; American Alkali Co. v. Bean, 125 Fed. 823. It may however be shown that joint makers of a note signed as partners—Markham v. Cover (Mo. App.) 72 S. W. 474.

86. To show what was included in an adjudication—Rubel v. Title Guarantee & Trust Co., 199 Ill. 110; Oster v. Broe (Ind.) 64 N. E. 918. But see Waterhouse v. Levine, 182 Mass. 407; Cassidy v. Mudgett, 71 N. H. 491. But the judgment cannot be impeached by such evidence—Rubel v. Title Guarantee & Trust Co., 199 Ill. 110. To show that a continuance was granted—Speirs Fish Co. v. Robbins, 182 Mass. 128. To show the date when costs were taxed—State v. Stinebaker, 90 Mo. App. 280. Contracts of the fiscal court cannot be varied by parol—Danville, etc., Turnpike Road Co. v. Lincoln County Fiscal Court (Ky.) 77 S. W. 379. A letter of the judge is inadmissible to contradict the record of his court—Bent v. Stone (Mass.) 68 N. E. 46.

Assessment roll cannot be varied by parol as to date of assessment—Allen v. McKay (Cal.) 72 Pac. 713.

87. Rector v. Hartford Deposit Co., 102 Ill. App. 554; Martens v. Pittock (Neb.) 92 N. W. 1038; Drischman v. McManemin, 68 N. J. Law, 337; Fuller & Co. v. Schrenk, 171 N. Y. 671; Bowery Bank v. Hart, 77 App. Div. (N. Y.) 121; Ross v. Portland Coffee & Spice Co., 30 Wash. 647, 71 Pac. 184; Christopher, etc., Foundry Co. v. Yeager, 202 Ill. 486; Peterson v. Ferbrache (Neb.) 93 N. W. 1011; Sutton v. Griebel, 118 Iowa, 78; Over v. Walzer, 103 Ill. App. 104; Ferguson Contracting Co. v. Manhattan Trust Co. (C. C. A.) 118 Fed. 791; Grubbs v. Boon, 201 Ill. 98; Colwell v. Brown, 103 Ill. App. 22; Cannon v. Michigan Mut. Life Ins. Co., 103 Ill. App. 414; Colonial & U. S. Mortg. Co. v. Jeter (Ark.) 71 S. W. 945; Franklin v. Browning (C. C. A.) 117 Fed. 226; Gam v. Cordrey (Del.) 53 Atl. 334; Tyson v. Neill (Idaho) 70 Pac. 790; Arnold v. Scharbauer, 118 Fed. 1008; Howard v. Scott, 98 Mo. App. 509; John O'Brien Lumber Co. v. Wilkinson (Wis.) 94 N. W. 337; Sargent v. Cooley (N. D.) 94 N. W. 576; Mead v. Dunlevie, 174 N. Y. 108; First Nat. Bank v. Wells, 98 Mo. App. 573.

The agreement to be proved by parol must relate to a subject distinct from that to which the writing relates—Johnson v. Kindred State Bank (N. D.) 96 N. W. 588. Parol evidence is held inadmissible to prove contemporaneous agreement by lessor to repair (Thompson Foundry & Mach. Works v. Glass, 136 Ala. 648) by mortgagee to extend time of payment (Connersville Buggy Co. v. Lowry [Mo. App.] 77 S. W. 771) by employer to pay bonus (McGarrigle v McCosker, 83 App. Div. [N. Y.] 184) to show that one adopting child by written articles agreed to make her his heir (Brantingham v. Huff, 174 N. Y. 53). To show a collateral agreement as to the purpose for which money secured by mortgage was to be used in an action to enforce the mortgage as a purchase price lien (Crow v. Kellman [Tex. Civ. App.] 70 S. W. 564) to show collateral agreement as to good will in connection with a bill of sale silent thereon (Walther v. Stampfli, 91 Mo. App. 398) to show agreement not to reengage in business as collateral to a contract for sale of business including good will (Zanturjian v. Boornazian [R. I.] 55 Atl. 199) to show oral warranty in connection with written contract of sale (Kummer v. Dubuque Turbine & Roller Mills Co. [Neb.] 93 N. W. 938) to show that seller agreed to secure the release of liens—Ruckman v. Imbler Lumber Co., 42 Or. 231, 70 Pac. 811.

On written contract to ship all lumber by vessels of a party oral evidence of the understanding as to amount to be shipped is inadmissible—Dennis v. Slyfield (C. C. A.) 117 Fed. 474. Where there is a written agreement for appraisal of loss a parol agreement that a certain sum would be paid in any event cannot be shown—Townsend v. Greenwich Ins. Co., 39 Misc. (N. Y.) 87. Where a lease provided for a renewal at such sum as lessor might in the meantime receive an offer of, a parol agreement that if no offers were made the renewal should be at the same rate cannot be shown—Slaughter v. De Vitt (Tex. Civ. App.) 71 S. W. 616.

Collateral agreements held admissible. Where the written order for goods does not purport to contain any of the conditions of the sale, parol evidence of a warranty is admissible—Puget Sound Iron & Steel Works v. Clemmons (Wash.) 72 Pac. 465. An agreement by grantor to construct certain streets near the premises does not vary a deed—Drew v. Wiswall (Mass.) 67 N. E. 666. Parol evidence of negotiations consistent with the contract is admissible—Colvin v. McCormick Cotton Oil Co., 66 S. C. 61. The fact that rules are printed on the same sheet with a time table stating when it took effect does not preclude oral evidence of when the rules took effect—Lake Erie & W. R. Co. v. Charman (Ind.) 67 N. E. 923. Writing contem-

which the writing is incomplete.[88] Parol evidence is admissible to explain a writing where it is ambiguous,[89] to show grounds of invalidity not apparent on its

poraneous with order may be shown though it conflicts with printed terms on order blank—Eastern Mfg. Co. v. Brenk (Tex. Civ. App.) 73 S. W. 538.

88. Guttentag v. Whitney, 79 App. Div. (N. Y.) 596. A parol agreement as to possession contemporaneous with a bill of sale is admissible—Clark v. Shannon, 117 Iowa, 645. It may be proved that the date inserted in a blank was contrary to the agreement of the parties—Pacific Mut. Ins. Co. v. Shaffer (Tex. Civ. App.) 70 S. W. 566. The purpose for which an assignment was made may be shown by parol—Matthews v. Capital Fire Ins. Co., 115 Wis. 272. Agreement of a carrier as to watering stock, etc., may be shown though there was a written bill of lading—Illinois Cent. R. Co. v. Eblen, 24 Ky. L. R. 1609, 71 S. W. 919. One of the parties to a building contract may show a contemporaneous agreement that the materials were to be purchased in eastern markets—Creedon v. Patrick (Neb.) 91 N. W. 872. Parol agreement as to time of payment may be shown when the written contract is silent thereon—Ashe v. Carolina R. Co., 65 S. C. 134. A written contract of employment to gather certain cattle does not exclude a contemporaneous oral employment to gather other cattle—Lonabaugh v. Morrow (Wyo.) 70 Pac. 724. Where one agreed in writing to make "a satisfactory provision of settlement" of a certain mortgage it may be shown by parol that he was to pay it—Lawrence v. Sullivan, 79 App. Div. (N. Y.) 453. A contract of sale providing for sight draft with bill of lading attached is not varied by a subsequent agreement as to the bank on which such draft should be drawn —Town v. Jepson (Mich.) 95 N. W. 742. A letter merely confirming a previous sale is not a contract and the terms of the sale may be shown by parol—Courtney v. Knabe & Co. Mfg. Co. (Md.) 55 Atl. 614.

89. **Ambiguity of particular contracts.** Where the Christian name of a party is left blank in the contract it may be shown by parol—La Vie v. Tooze (Or.) 74 Pac. 210. And where there are two persons of the same name parol evidence is admissible to show who was referred to by an instrument—Newberry v. Norfolk & S. R. Co. (N. C.) 45 S. E. 356. Where there was a written bill of sale and a collateral agreement in writing for a resale on certain terms, parol evidence is admissible to show whether the transaction was a sale or a loan—Farmer v. Farmer & Son Type Founding Co., 83 App. Div. (N. Y.) 218. Where a letter was written in French and the meaning of a word therein was ambiguous, the evidence of the writer's French teacher as to his suggestion of such word and the meaning which he told the writer attached thereto was held, by a divided court, to be inadmissible—Commonwealth Title Ins. & Trust Co. v. Coleman (Pa.) 55 Atl. 320. Where the description of the contract secured by a bond is ambiguous, the contract may be identified by parol—Nelson v. Willey (Md.) 55 Atl. 527.

There is no ambiguity admitting parol explanation in a contract to keep a building "in a good habitable condition" (Jordan v. Neal [Miss.] 33 So. 17) or in the clause "with privilege of longer" in a lease (Howard v. Tomicich [Miss.] 33 So. 493) nor in a contract for the building of a road because it is silent as to the material (Trustees, etc., of Town of Southampton v. Jessup, 173 N. Y. 84) but parol evidence has been admitted to explain a contract "to establish and maintain a freight and passenger depot—Murray v. Northwestern R. Co., 64 S. C. 520.

A contract to furnish paper "same as has been furnished during the last 12 months" is ambiguous as to whether the reference to past delivery limits the quantity or only indicates the quality—Excelsior Wrapper Co. v. Messinger (Wis.) 93 N. W. 459. Where a contract provides for work to be done in the same manner as during the previous year, parol evidence is admissible—Oliver v. Oregon Sugar Co., 42 Or. 276, 70 Pac. 902. Articles of incorporation for the sale of "directory machines" may be explained by showing the make of machine intended—National Mechanical Directory Co. v. Polk (C. C. A.) 121 Fed. 742.

A contract for rent "for the first three years at $3,000" is clear that the $3,000 is for the entire three years and parol evidence that $3,000 per year was intended is inadmissible—Liebeskind v. Moore Co., 84 N. Y. Supp. 850. Order held ambiguous as to whether it was continuing—Burmister & Sons Co. v. Empire Gold Min. & Mill. Co. (Ariz.), 71 Pac. 961. Contract for railroad construction held unambiguous—Atchison, etc., R. Co. v. Truskett (Kan.) 72 Pac. 562. Patent to land held to present ambiguity admitting oral evidence—Dillingham v. Smith (Tex. Civ. App.) 70 S. W. 791.

Agreement to erect a "complete plant" held not ambiguous—Rooney v. Thomson, 84 N. Y. Supp. 263. Contract for procuring insurance held ambiguous as to whether it included property outside the state—Tanenbaum v. Levy, 83 App. Div. (N. Y.) 319. There is no ambiguity in a release of damages for specified physical injuries which will admit evidence that other injuries were then unknown—Moore v. Missouri R. Co. (Tex. Civ. App.) 69 S. W. 997. Contract for piping water to residence held ambiguous as to whether contract was to pipe only from main point of diversion or from sources of supply—Daly v. Ruddell, 137 Cal. 671, 70 Pac. 784.

Customs and usages. Usage is admissible to explain ambiguities—Gehl v. Milwaukee Produce Co. (Wis.) 93 N. W. 26; Hayes v. Union Mercantile Co., 27 Mont. 264, 70 Pac. 975; Richardson v. Cornforth (C. C. A.) 118 Fed. 325. Thus it may be shown that by usage words used in a contract have acquired a peculiar sense (Ocean S. S. Co. v. Aetna Ins. Co., 121 Fed. 882) or that timber of certain dimensions meant in the green and not after shrinkage—Rastetter v. Reynolds (Ind.) 66 N. E. 612. As to usage to contravene unambiguous terms, see supra, this section, page 1143.

Technical words. Parol evidence is always admissible to explain the meaning of technical words and phrases used in a contract—Hinote v. Brigman (Fla.) 33 So. 303; Heyworth v. Miller Grain & Elevator Co., 174 Mo. 171; Cannon v. Hunt, 116 Ga. 452; Glenn

face,[90] to show what the consideration was or that it has failed,[91] and under this rule proof of conditions precedent to the taking effect of the contract has been admitted,[92] as has evidence of performance of a parol contract to secure which the written obligation was given.[93] The real nature of the instrument may be shown,

v. Strickland, 21 Pa. Super. Ct. 88. It has been held inadmissible to show that "gas" meant gas from a gas well only not gas from an oil well—Burton v. Forest Oil Co., 204 Pa. 349.

To identify subject matter. Where the description in a deed is indefinite parol evidence is admissible to identify the property (Keplinger v. Woolsey [Neb.] 93 N. W. 1008; Sloan v. King [Tex. Civ. App.] 77 S. W. 48; Fidelity Mut. Fire Ins. Co. v. Murphy [Neb.] 95 N. W. 702; Stancill v. Spain [N. C.] 45 S. E. 466; Orvis v. Elmira R. Co. 172 N. Y. 656) but where a description is patently inadequate, parol evidence is inadmissible (Cammack v. Prather [Tex. Civ. App.] 74 S. W. 354; Goodsell v. Rutland-Canadian R. Co. [Vt.] 56 Atl. 7) and an offer of "my lot" is too indefinite (Farthing v. Rochelle, 131 N. C. 563) as is a mortgage on "seventy more or less of corn in field" (Augustine v. McDowell [Iowa] 94 N. W. 918) though a description of land as that of a party "adjoining on the east" to certain premises may be rendered certain by parol—Heyward v. Willmarth, 87 App. Div. (N. Y.) 125. And parol evidence is not admissible to identify the property described in a contract in a suit to have it specifically enforced—Farthing v. Rochelle, 131 N. C. 562; Knight v. Alexander, 42 Or. 521, 71 Pac. 657.

A description of coal lands held not open to proof that a particular vein and not all coal within the boundaries given was intended—King v. New York & C. Gas Coal Co., 204 Pa. 628. Description of building of a certain street number and "additions" held ambiguous as to whether it included an adjoining building having a separate street number—Connecticut Fire Ins. Co. v. Hilbrant (Tex. Civ. App.) 73 S. W. 558. Where chattel mortgage covers all the goods in a certain store, the goods may be identified by parol—Davis v. Turner (C. C. A.) 120 Fed. 605. Plat referred to in deed as part of description may be identified by parol—Snooks v. Wingfield, 52 W. Va. 441.

90. **Fraud.** Le Bleu v. Savoie, 109 La. 680; Leicher v. Keeney, 98 Mo. App. 394; American Cotton Co. v. Collier (Tex. Civ. App.) 69 S. W. 1021; Hurlbert v. Kellogg Lumber Co., 115 Wis. 225; Telluride Power Transmission Co. v. Crane Co., 103 Ill. App. 647; Rambo v. Patterson (Mich.) 95 N. W. 722. And where fraud is charged parol evidence of the understanding of the parties is admissible to rebut the charge—Sloan v. Rose (Va.) 43 S. E. 329.

Mistake—Kee v. Davis, 137 Cal. 456, 70 Pac. 294; Gwaltney v. Provident Sav. Life Assur. Soc., 132 N. C. 925; Wieneke v. Deputy (Ind. App.) 68 N. E. 921; Windell v. Readman Warehouse Co., 30 Wash. 469, 71 Pac. 56; Equitable Trust Co. v. Milligan (Ind. App.) 65 N. E. 1044; Butler v. State (Miss.) 33 So. 847 That the contract was not correctly reduced to writing—Fidelity Mut. Fire Ins. Co. v. Lowe (Neb.) 93 N. W. 749. That blanks were not filled in accordance with the understanding of the parties—Gribble v. Everett (Mo. App.) 71 S. W. 1124; Windell v. Readman Warehouse Co., 30 Wash. 469, 71 Pac. 56. Fraud or mistake must be pleaded—Krueger v. Nicola, 205 Pa. 38; New Idea Pattern Co. v. Whelan, 75 Conn. 455. And it has been held that reformation must be asked where mistake is claimed in the statement of an account—Nystuen v. Hanson (Iowa) 91 N. W. 1071.

Subsequent conduct of parties. Invalidity of a chattel mortgage by reason of acts of ownership permitted to the mortgagor may be shown by parol—Stevens v. Curran (Mont.) 72 Pac. 753.

91. Wade v. Bent, 24 Ky. L. R. 1294, 71 S. W. 444; Linkswiler v. Hoffman, 109 La. 948; Conklin v. Hancock, 67 Ohio St. 455; Henry v. Zurtlieh, 203 Pa. 440; Clark v. Hedden, 109 La. 147; Groos & Co. v. First Nat. Bank (Tex. Civ. App.) 72 S. W. 402; First Nat. Bank v. Flynn, 117 Iowa, 493; Cheesman v. Nicholl (Colo. App.) 70 Pac. 797. **But see** Arnold v. Arnold, 137 Cal. 291, 70 Pac. 23; Harraway v. Harraway, 136 Ala. 499; Teague v. Teague (Tex. Civ. App.) 71 S. W. 555. But in Arkansas it is held that parol evidence is not admissible to dispute the recitals of consideration in a deed—Davis v. Jernigan (Ark.) 76 S. W. 554.

Want or failure of consideration—Holmes v. Farris, 97 Mo. App. 305. Particularly where the statement of the consideration is ambiguous—Burke v. Mead, 159 Ind. 252.

92. Caudle v. Ford, 24 Ky. L. R. 1764, 72 S. W. 270; Medical College Laboratory v. New York University, 76 App. Div. (N. Y.) 48; Clark v. Ducheneau (Utah) 72 Pac. 331. But see contra, Findley v. Means (Ark.) 73 S. W. 101; Third Nat. Bank v. Reichert (Mo. App.) 73 S. W. 893; Sargent v. Cooley (N. D.) 94 N. W. 576. That the contract was not to be delivered until further directions (McCormick Harvesting Mach. Co. v. Morlan [Iowa] 96 N. W. 976) or was not to be used unless another signed as joint obligor is admissible (People v. Sharp [Mich.] 94 N. W. 1074) but where the subject matter of such condition is embodied in the contract it cannot be shown by parol (Jamestown Business College Ass'n v. Allen, 172 N. Y. 291) and evidence of a condition subsequent on which the contract should become void is inadmissible—Central Sav. Bank v. O'Connor (Mich.) 94 N. W. 11.

Oral agreement making payment of interest on mortgage conditional on payment of another debt by the mortgagee (Mott v. Rutter [N. J. Ch.] 54 Atl. 159) or notes conditional on certain machinery being put in good working order (Aultman v. Hawk [Neb.] 95 N. W. 695) or on funds for payment being realized from a certain source (Fuller v. Law [Pa.] 56 Atl. 333; Boone v. Mierow [Tex. Civ. App.] 76 S. W. 772) or that security given by another would be first exhausted—Anderson v. Matheny (S. D.) 95 N. W. 911.

93. The maker of a note may show that it was given to secure the performance by him of a contract and that he has performed the same—Gifford v. Fox (Neb.) 95 N. W

as that a deed absolute on its face was charged with a trust[94] or was intended as security,[95] that a bill of sale was intended to operate as a chattel mortgage;[96] but not that a sale was conditional where the bill of sale was absolute;[97] and the real nature of the obligation of persons signing or indorsing promissory notes may be shown by parol.[98]

The rule excluding parol evidence to vary a written contract applies only to the parties thereto and their privies,[99] and not where the writing is merely collateral to the issue.[1]

§ 6. *Hearsay. A. General rules.*—Subject to certain exceptions, either arising ex necessitate rei from the difficulty of other proof or from circumstances giving added guaranty of their reliability, statements out of court by persons not parties to the suit are not admissible in evidence,[2] and this rule applies equally to letters and other private writings.[3] Matters of age or family history, by reason of the difficulties of direct proof form an exception to the hearsay rule.[4] Where the statements are admissible for a purpose other than of proving the facts stated, the hearsay rule does not apply.[5]

1066. As that it was given for money to be used by him in the purchase of property for the payee and that the property has been purchased and accepted by payee—Louisville Tobacco Warehouse Co. v. Stewart, 24 Ky. L. R. 934, 70 S. W. 285.

94. Booth v. Lenox (Fla.) 34 So. 566; Martin v. Martin (Or.) 72 Pac. 639. But it is otherwise held in Kentucky—Holtheide v. Smith, 24 Ky. L. R. 2535, 74 S. W. 689. Evidence that a purchase at foreclosure sale was for the benefit of a third person does not vary the sheriff's certificate of sale—Emery v. Hanna (Neb.) 94 N. W. 973.

95. Brown v. Johnson, 115 Wis. 430; Ross v. Howard, 31 Wash. 393, 72 Pac. 74; Stafford v. Stafford (Tex. Civ. App.) 71 S. W. 984; Hurlbert v. Kellogg Lumber Co., 115 Wis. 225; Beebe v. Wisconsin Mortg. Loan Co. (Wis.) 93 N. W. 1103; Northern Assur Co. v. Chicago Mut. Bldg. & Loan Ass'n, 198 Ill. 474. But it has been held that in an action at law such proof is inadmissible—Billingsley v. Stutler, 52 W. Va. 92.

96. Miller v. Campbell Commission Co. (Okl.) 74 Pac. 507.

97. Finnigan v. Shaw (Mass.) 68 N. E. 35; Hess v. Liebmann, 84 N. Y. Supp. 178.

98. Indorser—Loeff v. Taussig, 102 Ill. App. 398; Lyndon Sav. Bank v. International Co. (Vt.) 54 Atl. 191; Elliott v. Moreland (N. J. Law) 54 Atl. 224; Jaster v. Currie (Neb.) 94 N. W. 995; Young v. Sehon (W. Va.) 44 S. E. 136; Herndon v. Lewis (Mo.) 74 S. W. 976; Marshall Nat. Bank v. Smith (Tex. Civ. App.) 77 S. W. 237. But see Williams Bros. Co. v. Hanmer (Mich.) 94 N. W. 176. Maker—McDavid v. McLean, 104 Ill. App. 627; Markham v. Cover (Mo. App.) 72 S. W. 474. As that a maker signed for accommodation—Tobriner v. White, 19 App. D. C. 163. A transferror may show an oral agreement for a retransfer on certain conditions—Playa de Oro Min. Co. v. Gage, 172 N. Y. 630.

99. Central Coal & Coke Co. v. Good (C. C. A.) 120 Fed. 793; British & A. Mortg. Co. v. Cody (Ala.) 33 So. 832; Provident Sav. Life Assur. Soc. v. Johnson, 24 Ky. L. R. 1902, 72 S. W. 754; Pacific Biscuit Co. v. Dugger, 42 Or. 513, 70 Pac. 523; French v. Westgate, 71 N. H. 510; Northern Assur. Co. v. Chicago Mut. Bldg. & Loan Ass'n, 198 Ill. 474. A principal, suing his agent for the consideration received by the agent under a contract made by the latter in his own name may contradict the recitals of the contract as to consideration—Barbar v. Martin (Neb.) 93 N. W. 722; Livingston v. Stevens (Iowa) 94 N. W. 925; Livingston v. Heck (Iowa) 94 N. W. 1098; Crockett v. Miller (Neb.) 96 N. W. 491; First Nat. Bank v. Tolerton (Neb.) 97 N. W. 248.

1. Bill of sale introduced to prove agency therein recited—Pacific Biscuit Co. v. Dugger, 42 Or. 513, 70 Pac. 523.

2. Kramer v. Kramer, 80 App. Div. (N. Y.) 20; Rich v. Hayes, 97 Me. 293. Declarations by a husband that he was forced into the marriage are inadmissible—Love v. Love (Mo. App.) 73 S. W. 255. Statement of decedent before accident may be received under Gen. St. 1898, c. 535, providing that statements of a deceased person made in good faith before suit shall not be considered hearsay—Boyle v. Columbian Fire Proofing Co., 182 Mass. 93.

Market price. Offers received by the owner are no evidence of value—Loloff v. Sterling (Colo.) 71 Pac. 1113; Walker v. Farrell, 84 N. Y. Supp. 182; Stewart v. James (Neb.) 95 N. W. 778; Wells, Fargo Exp. Co. v. Williams (Tex. Civ. App.) 71 S. W. 314.

General reputation. Adultery cannot be proved by neighborhood repute (Hopkins v. Hopkins, 132 N. C. 25) nor can financial standing (Coleman v. Lewis [Mass.] 67 N. E. 603), or ownership of locomotives by a certain railroad company—Louisville & N. Terminal Co. v. Jacobs (Tenn.) 72 S. W. 954.

3. Black v. First Nat. Bank, 96 Md. 399; Culver v. Smith (Mich.) 91 N. W. 608; Weigley v. Kneeland, 172 N. Y. 625; Oliver v. Columbia R. Co., 65 S. C. 1. A letter stating the writer's reasons for placing his sister in an insane asylum held inadmissible—Kuster v. Press Pub. Co., 80 App. Div. (N. Y.) 615.

4. Declarations by father held inadmissible to show age—Bowen v. Preferred Acc. Ins. Co., 82 App. Div. (N. Y.) 458. But a book of original entry by family physician has been admitted—Smith v. State (Tex. Cr. App.) 73 S. W. 401. One may testify to his own age—State v. Scroggs (Iowa) 96 N. W. 723; Hancock v. Supreme Council, C. B. L. (N. J. Err. & App.) 55 Atl. 246.

5. Statements of an injured person are

(§ 6) *B. Res gestae.*—Acts and declarations of the parties to a transaction contemporaneous therewith and growing naturally therefrom are admissible as part of the res gestae,[6] as are the involuntary exclamations of bystanders at an accident,[7] and the rule includes, to an extent incapable of precise definition, acts and declarations before[8] and after[9] the transaction in issue if intimately connected therewith.

admissible to show that he was conscious—Hayes v. Pitts-Kimball Co. (Mass.) 67 N. E. 249. Statements of a grantor at the time of a conveyance admissible as tests of mental capacity—Thorn v. Cosand (Ind.) 67 N. E. 257.

6. A declaration must be made under such circumstances as to raise a presumption that it was spontaneous; whether a particular declaration is within this rule rests largely in the discretion of the trial court—Pledger v. Chicago R. Co. (Neb.) 95 N. W. 1057. The acts or declarations must accompany and tend to illustrate the fact in issue—Shannon v. Castner, 21 Pa. Super. Ct. 294. Under this rule have been admitted statements by an agent while attending to the principal's business (Hoffman v. Chicago Title & Trust Co., 198 Ill. 452) if contemporaneous with the transaction and forming a natural part of it (Balding v. Andrews [N. D.] 96 N. W. 305) conversion during the transportation of cattle between the owner and the carrier's servants (Louisville, etc., R. Co. v. Landers, 135 Ala. 504) declaration of employe in charge of machine that it worked satisfactorily, made in presence of representatives of the seller (Stecher Lithographic Co. v. Inman, 175 N. Y. 124) declaration of a surveyor at the time of locating a boundary (Hornberger v. Giddings [Tex. Civ. App.] 71 S. W. 989) direction to prepare a new will, made on learning of the destruction of the old one (McElroy v. Phink [Tex. Civ. App.] 74 S. W. 61), or that a bond was not to be used unless another signed (People v. Sharp [Mich.] 94 N. W. 1074) declarations of a street commissioner as to the orders under which he was acting (Haggart v. California Borough, 21 Pa. Super. Ct. 210) declarations of signer of note at the time of signing as to the purpose for which it was given (Terrill v. Tillison [Vt.] 54 Atl. 187) statements made by a seller for the purpose of tendering the goods for inspection—Pittsburgh Plate Glass Co. v. Kerlin Bros. (C. C. A.) 122 Fed. 414.

The general understanding of persons in the vicinity that one had gone to a certain place for a specified purpose is no part of the res gestae—Southern Kansas R. Co. v. Crump (Tex. Civ. App.) 74 S. W. 335. On an issue whether there was heat in a depot, a direction of the agent to a boy to get coal is part of the res gestae—St. Louis S. W. R. Co. v. Patterson (Tex. Civ. App.) 73 S. W. 987. Where injuries were caused by the negligence of a person not an engineer who was running a switch engine it may be shown who sent him out, as part of the res gestae—Chicago Terminal Transfer R. Co. v. Stone (C. C. A.) 118 Fed. 19. On an issue whether theatrical performances were meritorious, remarks of the audience while leaving during the performance are admissible as part of the res gestae—Charley v. Potthoff (Wis.) 95 N. W. 124. In an action for maintaining a nuisance, statements of plaintiff's boarders when leaving are admissible—Hoffman v. Edison Elec. Illuminating Co., 87 App. Div. (N. Y.) 371. On an issue of residence statements of the person made on his trial for vagrancy that he was a tramp are part of the res gestae—Thomas v. Macon County (Mo.) 74 S. W. 999.

Contemporaneous memoranda. Entries of log measurements made by a seller when the logs were measured by him and the buyer are admissible—Place v. Baugher, 159 Ind. 232. But not memorandum taken during conversation without the knowledge of the other party thereto—Gans v. Wormser, 83 App. Div. (N. Y.) 505. The numbers as called out by the men counting a flock of sheep may be shown as part of the res gestae—Gresham v. Harcourt (Tex. Civ. App.) 75 S. W. 808.

Declarations characterizing possession. Declarations of owner in possession as to title, etc., have been admitted (Ratliff v. Ratliff, 131 N. C. 425) but only where declarant has both title and possession (Whelchel v. Gainesville R. Co., 116 Ga. 431; Enneking v. Woebkenberg, 88 Minn. 259) as have declarations at the time of erecting building by one claiming adversely (Kellum v. Mission of Immaculate Virgin, 82 App. Div. [N. Y.] 523) declarations of intent accompanying a trespass (United States v. Gentry [C. C. A.] 119 Fed. 70) declarations of ownership by one in possession of a contract (New York Life Ins. Co. v. Johnson's Adm'r, 24 Ky. L. R. 1867, 72 S. W. 762) but declarations of one in possession as agent are not within rule admitting declarations characterizing possession (Perkins v. Brinkley [N. C.] 45 S. E. 652) and declarations of one in possession may characterize his possession but cannot establish (Dozier v. McWhorter [Ga.] 45 S. E. 61) nor are admissions by occupant that his possession was not adverse admissible when made after the running of the statutory period—Baty v. Elrod (Neb.) 92 N. W. 1032.

7. Exclamation of bystander indicating belief that defendant's effort to run a train over an injured bridge was dangerous (Harrill v. South Carolina R. Co., 132 N. C. 655) or outcry by a bystander who saw the impending danger (Oliver v. Columbia R. Co., 65 S. C. 1) are admissible, but not declarations of bystanders after an accident (Gosa v. Southern R. [S. C.] 45 S. E. 810) as to the conductor immediately after the accident that if the car had stopped the plaintiff would not have been hurt—Indianapolis St. R. Co. v. Whitaker (Ind.) 66 N. E. 433.

8. An assault upon a woman and the fact that she informed her husband and he went immediately to the scene of the assault are part of the res gestae of the killing of the husband by the assailants of the wife—Petrie v. Cartwright, 24 Ky. L. R. 954, 70 S. W. 297, 59 L. R. A. 720. Declarations of insured shortly before death indicating suicidal intent are admissible (Kerr v. Modern Woodmen of America [C. C. A.] 117 Fed. 593) as is a letter indicating intent to commit suicide found in the room of one who disappeared

(§ 6) *C. Admissions or declarations against interest.*[10]—Upon the presumption that one will not readily speak untruthfully against his own interest, admissions and declarations out of court are admissible if made by a party[11] or one in

during the night from a steamer—Rogers v. Manhattan Life Ins. Co., 138 Cal. 285, 71 Pac. 348.

9. Statement of decedent's daughter after a suicide as to where the revolver was is admissible but not her statements as to how it came to be there (Treat v. Merchants' Life Ass'n, 198 Ill. 431) declarations by an assailant some time after the assault (Gollbart v. Sullivan, 30 Ind. App. 428) declarations as to the fact of a sale made some time afterward not admissible (Lumm v. Howells [Utah] 74 Pac. 432) declarations of a foster parent after adoption and not in the presence of the child as to their relations Rulofson v. Billings [Cal.] 74 Pac. 35) declarations of maker two days after execution of note as to amount thereof (Union Trust Co. v. Seelig, 83 App. Div. [N. Y.] 568) statements as to the origin of a fire after it was over (Atchison, etc., R. Co. v. Phipps [C. C. A.] 125 Fed. 478) or 15 minutes after it started (Lyman v. Southern R. Co., 132 N. C. 721) declarations of bystander after an accident (Gosa v. Southern R. [S. C.] 45 S. E. 810) declarations by testator 15 minutes after executing will (Davidson v. Davidson [Neb.] 96 N. W. 409) subsequent narrations of a party as to what was said at the making of a contract (New York Life Ins. Co. v. Johnson's Adm'r, 24 Ky. L. R. 1867, 72 S. W. 762; Standard Life & Acc. Ins. Co. v. Holloway, 24 Ky. L. R. 1856, 72 S. W. 796) are no part of the res gestae. But threatening language by a carrier's employe immediately after an assault by him on a passenger is admissible—Shaefer v. Missouri R. Co. (Mo. App.) 72 S. W. 154.

Employes. Statement of conductor coming to the scene of the accident immediately after it occurred as to the cause thereof (Kansas City Southern R. Co. v. Moles [C. C. A.] 121 Fed. 351) declarations as to cause of accident immediately afterward (Union Casualty & Surety Co. v. Mondy [Colo.] 71 Pac. 677; Early's Adm'r v. Louisville R. Co., 24 Ky. L. R. 1807, 72 S. W. 348) declarations by a superintendent while examining into the cause of an accident (Roberts v. Port Blakely Mill Co., 30 Wash. 25, 70 Pac. 111) of a ship captain immediately after an accident on board (Lambert v. La Conner Trading & Transp. Co., 30 Wash. 346, 70 Pac. 960) declarations of an employe while in the act of endeavoring to rescue deceased (Hupfer v. National Distilling Co. [Wis.] 96 N. W. 809) a declaration of a motorman while alighting immediately after a collision, "that comes of running without a headlight" (Ensley v. Detroit United R. [Mich.] 96 N. W. 34) an exclamation by a brakeman immediately on discovering that he had closed the car door on plaintiff's hand (Trumbull v. Donahue [Colo. App.] 72 Pac. 684) have been held part of the res gestae. But statement of motorman immediately after running over a child that he was looking in another direction (Koenig v. Union Depot R. Co. [Mo.] 73 S. W. 637) declaration of an employe an hour (Leonard v. Mallory, 75 Conn. 433) or half an hour after an accident as to the cause thereof (Briggs v. East Broad Top R. & Coal Co. [Pa.] 56 Atl. 36) statement of agent the day after the transaction in question (Helm v. Missouri R. Co. [Mo. App.] 72 S. W. 148) statement of motorman after accident that he "could not help it" (Rogers v. Interurban St. Ry. Co., 84 N. Y. Supp. 974) statements by employes as to cause of fire made after it was over (Marande v. Texas R. Co. [C. C. A.] 124 Fed. 42) refusal of conductor to stop the car after an accident (Gotwald v. St. Louis Transit Co. [Mo. App.] 77 S. W. 125) and statements by manager after accident in response to inquiry by injured man (Luman v. Golden Ancient Channel Min. Co. [Cal.] 74 Pac. 307) have been excluded.

Injured person. Declarations as to cause of accident by injured person immediately afterward (Sutcliffe v. Iowa State Traveling Men's Ass'n [Iowa] 93 N. W. 90; Scheir v. Quirin, 77 App. Div. [N. Y.] 624; Missouri, etc., R. Co. v. Schilling [Tex. Civ. App.] 75 S. W. 64) immediately on regaining consciousness (Ft. Worth, etc., R. Co. v. Partin [Tex. Civ. App.] 76 S. W. 236) or two minutes afterward (Murray v. Boston & M. R. [N. H.] 54 Atl. 289) have been admitted. But statements of collateral circumstances immediately afterward (Bumgardner v. Southern R. Co. [N. C.] 43 S. E. 948) and declarations one minute afterward (Pledger v. Chicago R. Co. [Neb.] 95 N. W. 1057) ten minutes afterward (Missouri, etc., R. Co. v. Tarwater [Tex. Civ. App.] 75 S. W. 937) statements several hours afterward (McCowen v. Gulf R. Co. [Tex. Civ. App.] 73 S. W. 46) narration of injury long after (Tenney v. Rapid City [S. D.] 96 N. W. 96; Hicks v. Galveston R. Co. [Tex. Civ. App.] 71 S. W. 322) and a deliberate narration to one called by the injured person because "he wanted to make a statement" (Atchison, etc., R. Co. v. Logan, 65 Kan. 748, 70 Pac. 878) have been excluded.

Complaints of present suffering are admissible (Hamilton v. Mendota Coal & Min. Co. [Iowa] 94 N. W. 282; Gosa v. Southern R. [S. C.] 45 S. E. 810; Indiana R. Co. v. Maurer [Ind.] 66 N. E. 156; Styles v. Decatur [Mich.] 91 N. W. 622; Oliver v. Columbia R. Co., 65 S. C. 1; Hicks v. Galveston R. Co. [Tex. Civ. App.] 71 S. W. 322; St. Louis, etc., R. Co. v. Brown [Tex. Civ. App.] 69 S. W. 1010; Arrington v. Texas R. Co. [Tex. Civ. App.] 70 S. W. 551; Bredeau v. Town of York, 115 Wis. 544) as are statements to physician for the purpose of receiving treatment are admissible (Sellman v. Wheeler, 95 Md. 751. But see International, etc., R. Co. v. Boykin [Tex. Civ. App.] 74 S. W. 93) but not statements for the purpose of enabling him to testify—Chicago, etc., R. Co. v. Donworth, 203 Ill. 192.

10. Only admissibility as original evidence is included. Admissions and declarations for the purpose of impeaching a witness whose testimony is inconsistent therewith are treated in Witnesses.

11. Declarations of strangers against a party's interest not admissible—Mizell v. Travelers' Ins. Co. (Fla.) 33 So. 454.

privity with him,[12] and against his interest,[13] and such admissions are original evi-

12. Persons jointly interested. Where persons have a joint interest in property the admissions of one are ordinarily admissible against all in actions relating thereto—Seymour v. Richardson Fueling Co., 103 Ill. App. 625. Joint legatees are in privity within this rule (Gibson v. Sutton, 24 Ky. L. R. 868, 70 S. W. 188; Wall v. Dimmitt, 24 Ky. L. R. 1749, 72 S. W. 300) as are joint receivers (Shirk v. Brookfield, 77 App. Div. [N. Y.] 295) and joint administrators Crouse v. Judson, 41 Misc. [N. Y.] 338) but not joint trustee (Belding v. Archer, 131 N. C. 287) codefendants (Finelite v. Sonberg, 75 App. Div. [N. Y.] 455, 12 Ann. Cas. 1; Shannon v. Castner, 21 Pa. Super. Ct. 294) tenants in common (Naul v. Naul, 75 App. Div. [N. Y.] 292) or connecting carriers—Thyll v. New York R. Co., 84 N. Y. Supp. 175.

Privity of title. Declarations made after parting with possession by grantor (Holton v. Dunker, 198 Ill. 407; Adair v. Craig, 135 Ala. 332; Ikard v. Minter [Ind. T.] 69 S. W. 852; Ellis v. Newell [Iowa] 94 N. W. 463; Pfeffer v. Kling, 171 N. Y. 668; McKnight v. Reed [Tex. Civ. App.] 71 S. W. 318), or mortgagor (Newgass v. Auburn Loan Co., 81 App. Div. [N. Y.] 411), or by a seller of chattels (Moravec v. Grell, 78 App. Div. [N. Y.] 146, 12 Ann. Cas. 294; Wooley v. Bell [Tex. Civ. App.] 76 S. W. 797), or chattel mortgagor (Meyer v. Munro [Idaho] 71 Pac. 969; Ward v. Johnson [Kan.] 72 Pac. 242), are not admissible against the grantee or mortgagee. Declarations by a dowress in possession are not admissible against the holder of the fee—Maraman v. Troutman, 24 Ky. L. R. 1539, 71 S. W. 861. To make declarations of a grantor as to fraudulent intent admissible against the grantee, prima facie evidence of fraud must be first given—Moore v. Robinson (Tex. Civ. App.) 75 S. W. 890.

Agents and Employes. Declarations of agents and employes must be made while they are in the employ of the principal (American Copper, etc., Works v. Galland-Burke Brew. Co., 30 Wash. 178, 70 Pac. 236; Loving v. Hesperian Cattle Co. [Mo.] 75 S. W. 1095; Small v. McGovern [Wis.] 94 N. W. 651) within the scope of their authority (Leary v. Albany Brew. Co., 77 App. Div. [N. Y.] 6; Hill v. Bank of Seneca [Mo. App.] 73 S. W. 307; Gulf, etc., R. Co. v. Irvine [Tex. Civ. App.] 73 S. W. 540; Huebner v. Erie R. Co. [N. J. Err. & App.] 55 Atl. 273), and statements as to a contract by an agent who had nothing to do with making the same (Wallingford v. Aitkins, 24 Ky. L. R. 1995, 72 S. W. 794) are inadmissible. Thus the manager of ranch having nothing to do with sales cannot bind employer by admissions as to condition of goods sold—Peterson v. Mineral King Fruit Co. (Cal.) 74 Pac. 162. To bind the employer, the declarations must be made in the course of the performance of a duty, subsequent narrations not being admissible—National Bank v. Byrnes, 82 N. Y. Supp. 497; King v. Phoenix Ins. Co. (Mo. App.) 76 S. W. 55. To be admissible against his principal, the declarations of an agent must have been made (1) in respect to a matter within the scope of his authority (2) in reference to the subject matter of his agency (3) while actually engaged in the transaction and as part of the res gestae thereof—Cooper Grocer Co. v. Britton (Tex. Civ. App.) 74 S. W. 91. In North Carolina the entire doctrine that an admission of an agent not part of the res gestae is admissible against the principal is denied—McEntyre v. Levi Cotton Mills Co., 132 N. C. 598. Authority of an agent cannot be proved by his own declarations—Orange Belt R. Co. v. Cox (Fla.) 33 So. 403; Currie v. Syndicate Des Cultivators, 104 Ill. App. 165; Parker v. Brown, 131 N. C. 264; Dyer v. Winston (Tex. Civ. App.) 77 S. W. 227. Evidence of a shipper that he had always paid the freight to a certain person is insufficient to show that he is authorized to bind the carrier by declarations as to shipments—Helm v. Missouri Pac. R. Co. (Mo. App.) 72 S. W. 148. Proof of agency of insurance adjuster insufficient—Legnard v. Standard Life & Acc. Ins. Co., 81 App. Div. (N. Y.) 320. Admission by teamster as to condition of goods delivered to him held unauthorized—Sibley Warehouse & Storage Co. v. Durand & Kasper Co., 200 Ill. 354.

Corporate officers and agent. A corporation is bound to the same extent as an individual by the authorized declarations of its agents—Ulysses Elgin Butter Co. v. Hartford Fire Ins. Co., 20 Pa. Super. Ct. 384; Lipscomb v. South Bound R. Co., 65 S. C. 148. Statements of selling agents held admissible to show combination of corporations to fix prices—State v. Armour Packing Co., 173 Mo. 356. But not by declarations outside the agent's duty—Harper v. Western Union Tel. Co., 92 Mo. App. 304. Thus statements by a street railroad official about the safety of a coupling device (Hayzel v. Columbia R. Co., 19 App. D. C. 359), of a corporate officer present at the test of a machine to be purchased by the corporation (Haney-Campbell Co. v. Preston Creamery Ass'n [Iowa] 93 N. W. 297; Allington & C. Mfg. Co. v. Detroit Reduction Co. [Mich.] 95 N. W. 562), admissions by corporate officers as to previous decisions of the board of directors or trustees (Central Elec. Co. v. Sprague Elec. Co. [C. C. A.] 120 Fed. 925), and a letter written by a bank president as a personal communication (Utica City Nat. Bank v. Tallman, 172 N. Y. 642) have been excluded. But statements of the officer who employed a clerk as to his compensation (Meislahn v. Irving Nat. Bank, 172 N. Y. 631), and directions by the conductor to a passenger as to the length of time the train would stop (Chicago & A. R. Co. v. Gore, 202 Ill. 188; Childs v. Ponder, 117 Ga. 553), and to board a moving train (Chicago & A. R. Co. v. Gore, 202 Ill. 188; Chicago & A. R. Co. v. Flaherty, 202 Ill. 151) are admissible.

Public officer. An admission by one who had been a public officer of the receipt of a paper during his term of office is admissible against the city—South Omaha v. Wrzensinski (Neb.) 92 N. W. 1045. Reports by a policeman of facts not within his personal knowledge are inadmissible against the city—Sterling v. Detroit (Mich.) 95 N. W. 986.

Insured and Beneficiary. Admissions by an insured are not admissible against the beneficiary—Sutcliffe v. Iowa State Traveling

dence and no foundation need be laid.[14] The rule includes not only declarations in ordinary conversation but admissions implied from acquiescence by silence to

Men's Ass'n (Iowa) 93 N. W. 90. But see (Callies v. Modern Woodmen of America [Mo. App.] 72 S. W. 713) and it is otherwise where the insured retains the right to change the beneficiary at will—Foxhever v. Order of Red Cross, 24 Ohio Circ. R. 56. Nor are the admissions of a local lodge of a fraternal order which under its bylaws made proofs of loss for the beneficiary (Cox v. Royal Tribe, 42 Or. 365, 71 Pac. 73) such lodge being the agent of the society—Patterson v. United Artisans (Or.) 72 Pac. 1095.

Coconspirators. Declarations of a conspirator in pursuance of the common purpose are admissible against his coconspirators—Connecticut Mut. Life Ins. Co. v. Hillmon, 188 U. S. 208, 47 Law. Ed. 446; Suttles v. Sewell, 117 Ga. 214; Mosby v. McKee, etc., Commission Co., 91 Mo. App. 500; Cleland v. Anderson (Neb.) 92 N. W. 306; Cohn v. Saidel, 71 N. H. 558; Congleton v. Schreihofer (N. J. Eq.) 54 Atl. 144; Boyer v. Weimer, 204 Pa. 295; Lasher v. Littell, 202 Ill. 551.

Assignee and creditors. Declarations of a trustee for creditors as to the purposes of the assignment held admissible against those claiming under the assignment—Fourth Nat. Bank v. Albaugh, 188 U. S. 734, 47 Law. Ed. 673.

Guardian and ward. Complaint by guardian ad litem for accident not witnessed by him not admissible against ward in subsequent proceeding—Shlotterer v. Brooklyn & N. Y. Ferry Co., 75 App. Div. (N. Y.) 330.

Husband and wife. Declarations of husband are not admissible against wife as to property in respect to which they claim adversely—Vermillion v. Parsons (Mo. App.) 73 S. W. 994. And declarations by a husband in respect to the wife's business or property are not admissible against her unless it is shown that he was specially authorized—Montgomery v. Mann (Iowa) 94 N. W. 1109; Winans v. Demarest, 84 N. Y. Supp. 504.

Principal and Surety. Declarations of principal in fidelity bond while in the performance of his guaranteed duties is admissible against the surety—Guarantee Co. v. Phenix Ins. Co. (C. C. A.) 124 Fed. 170.

Deceased and heir, legatee or personal representative. Admissible against heirs—Deuterman v. Ruppel, 103 Ill. App. 106. But the declarations must be against interest—Johnson v. Cole, 76 App. Div. (N. Y.) 606. Declaration against interest as to fact of partnership by deceased partner admissible against survivor—Card v. Moore, 173 N. Y. 598. Declarations of deceased trustee admissible againts beneficiary as to ownership of securities—Putnam v. Lincoln Safe Deposit Co., 39 Misc. (N. Y.) 738. Declaration by deceased donor admissible on behalf of donee—Gross v. Smith, 132 N. C. 604. Declarations by decedent are not admissible against an heir as to the existence of an indebtedness—Pym v. Pym (Wis.) 96 N. W. 429. Declarations of deceased absolving employer from negligence are admissible in action for his death —Dixon v. Union Iron Works (Minn.) 97 N. W. 375. Declarations of ancestor that he held land in trust are admissible against his heirs—McClellan v. Grant, 83 App. Div. (N. Y.) 599. Declaration by deceased grantor that the deed was not fraudulent is admissible against his heir in a suit to set aside the deed—Donnelly v. Rees (Cal.) 74 Pac. 433. Declarations of want of testamentary capacity made by a sole legatee are admissible against the will. but admissions by one legatee are not admissible against others—Stull v. Stull (Neb.) 96 N. W. 196. Admissibility of declarations of testamentary intent on issue of undue influence see Wills.

13. As a general proposition any statement inconsistent with the position of the party in the action in which it is offered is against his interest. Admission of purchase of property by one sued for price—Moore v. Crosthwait, 135 Ala. 272. Declaration of beneficiary under will that testator was incompetent—Lundy v. Lundy, 118 Iowa, 445. Declarations of intent to pay a member of declarant's family for domestic services—Tuohy v. Trail, 19 App. D. C. 79; Bonebrake v. Tauer (Kan.) 72 Pac. 521. Declarations of insolvency—Quinby v. Ayres (Neb.) 95 N. W. 464. Declarations of agent that he had no authority to make a contract in suit against him personally thereon—Anderson v. Adams (Or.) 74 Pac. 215. Statement that plaintiff's services were to be paid for by another than defendant—Wright v. Reed, 118 Iowa, 333. Admission that the claim sued on had been settled—Upton v. Adeline Sugar Factory Co., 109 La. 670. Admissions by plaintiff of truth of alleged libel —Davis v. Hamilton, 88 Minn. 64. Admissions as to the purpose for which stock was transferred—Collins v. McGuire, 76 App. Div. (N. Y.) 443. Declarations of owner as to value of property—Houston v. Western R. Co., 204 Pa. 321. Statements by beneficiary of insurance policy that insured committed suicide—Voelkel v. Supreme Tent, K. of M. (Wis.) 92 N. W. 1104, 1135. As to amount of property tending to show that an assignment for the benefit of creditors was fraudulent—Armour v. Doig (Fla.) 34 So. 249. Tax returns are admissible to show falsity of representations as to property—Mashburn v. Dannenberg Co. (Ga.) 44 S. E. 97.

Self serving declarations inadmissible—Stockley v. Cissna (C. C. A.) 119 Fed. 812; Work v. Kinney (Idaho) 71 Pac. 477; Edwards v. Bates County, 117 Fed. 526; Duvall v. Hambleton & Co. (Md.) 55 Atl. 431; McNicol v. Collins, 30 Wash. 318, 70 Pac. 753; National Lumberman's Bank v. Miller (Mich.) 91 N. W. 1024; Healy v. Malcolm, 77 App. Div. (N. Y.) 69. Report of accident by street railroad employe—West Chicago St. R. Co. v. Lieserowitz, 197 Ill. 607. Pleading in another action—Bennett v. City of Marion (Iowa) 93 N. W. 558. Statement as to accident delayed until witnesses were present—Atchison, etc. R. Co. v. Logan, 65 Kan. 748, 70 Pac. 878. Declarations of husband that transfer by him to wife was not gift but trust—Johnson v. Johnson, 96 Md. 144. Memorandum discharging broker not communicated to him inadmissible for principal—Diamond v. Wheeler, 80 App. Div. (N. Y.) 58. As to title to land—Ratliff v. Ratliff, 131 N. C. 425. Declaration of seller that he intended to make delivery—Price v. Beach, 20 Pa. Super. Ct. 291. Declaration of the maker of a note that he owed part of the

statements made in the party's presence,[15] and, of course, admissions in the course of judicial proceedings,[16] and in books of account.[17] Subsequent repairs are sometimes urged as an implied admission of negligence, but as such evidence is usually excluded on grounds of relevancy, it is elsewhere treated.[18] For reasons of public policy, offers of compromise are not admissible as implied admissions,[19] though express admissions of fact therein are competent.[20]

§ 7. *Documentary evidence.*[21] *A. General rules—Private writings.*—Contracts, conveyances, and correspondence between the parties are admissible if their contents is material, but there must be preliminary proof of their execution and authenticity;[22] proof of handwriting or that the letter or telegram was part of a reg-

amount thereof held self serving—Luke v. Koenen (Iowa) 94 N. W. 278. Declarations of insured that policy was in force—New York Life Ins. Co. v. Johnson's Adm'r, 24 Ky. L. R. 1867, 72 S. W. 762. A sale of property as chattels pending a proceeding to subject them to a mortgage as fixtures held self serving—Lord v. Detroit Sav. Bank (Mich.) 93 N. W. 1063. Declarations tending to excuse declarant from contributory negligence—Over v. Missouri R. Co. (Tex. Civ. App.) 73 S. W. 535. Self serving declarations in a will not admissible in favor of the estate—Bennett's Estate v. Taylor (Neb.) 96 N. W. 669.

14. Moore v. Crosthwait, 135 Ala. 272; Second Borrowers & Investors Bldg. Ass'n v. Cochrane, 103 Ill. App. 29; Dunafon v. Barber (Neb.) 92 N. W. 198.

15. Silence when charged with acts constituting contributory negligence—Holston v. Southern R. Co., 116 Ga. 656; Givens v. Louisville R. Co., 24 Ky. L. R. 1796, 72 S. W. 320. But the silence of one suffering from recent injuries is not to be construed as an admission—Schilling v. Union R. Co., 77 App. Div. (N. Y.) 74. Failure to contradict a statement made by a witness at a former trial is not to be construed as an admission of its truth—Horan v. Byrnes (N. H.) 54 Atl. 945. Declarations made in the presence of the adverse party are not admissible unless it appears that he heard them—Platt v. Hollands, 85 App. Div. (N. Y.) 231.

16. In pleadings—Younglove v. Knox (Fla.) 33 So. 427; Tague v. Caplice (Mont.) 72 Pac. 297; Seymour v. Richardson Fueling Co., 103 Ill. App. 625; Houston, etc., R. Co. v. De Walt (Tex.) 70 S. W. 531. An abandoned pleading referred to in a substitute is admissible for admissions against interest therein—Orange Rice Mill Co. v. McIlhinney (Tex. Civ. App.) 77 S. W. 428.

In motion papers—Fidelity & Casualty Co. v. Brown (Ind. T.) 69 S. W. 915.

In affidavits—Cornelissen v. Ort (Mich.) 93 N. W. 617.

In previous testimony—Rosenfeld v. Siegfried, 91 Mo. App. 169; Congleton v. Schreihofer (N. J. Eq.) 54 Atl. 144; Sternbach v. Friedman, 75 App. Div. (N. Y.) 418; Egyptian Flag Cigarette Co. v. Comisky, 40 Misc. (N. Y.) 236. A deposition of a party though filed too late may be used by the adverse party as an admission—Profile & F. Hotels Co. v. Bickford (N. H.) 54 Atl. 699.

17. Entries against interest in account books may be introduced as admissions—Kent v. Richardson (Idaho) 71 Pac. 117; Second Borrowers & Investors Bldg. Ass'n v. Cochrane, 103 Ill. App. 29.

18. See § 2, ante.

19. Kelly v. Strouse, 116 Ga. 872; Higgins v. Shepard, 182 Mass. 364. But merely saying "Let us settle up this matter" is not an offer of compromise—Collins v. McGuire, 76 App. Div. (N. Y.) 443. Nor is the filing of a written claim for damages—Ft. Worth, etc., R. Co. v. Lock (Tex. Civ. App.) 70 S. W. 456; St. Louis S. W. R. Co. v. Smith (Tex. Civ. App.) 77 S. W. 28. Offer to purchase outstanding title admissible—Hughes v. Rowan, 27 Mont. 500, 71 Pac. 764. Offer by defendant in bastardy proceedings to pay for an abortion is not an offer of compromise—Gatzmeyer v. Peterson (Neb.) 94 N. W. 974. Letter seeking to procure an adjustment of dispute not admissible—Halstead v. Coen (Ind. App.) 67 N. E. 957. But it has been held that negotiations looking to ascertainment of amount due are admissible between the parties for admissions therein contained—Hunter v. Helsley, 98 Mo. App. 616. An amicable adjustment is not as to third persons an admission by either party—Creighton v. Chicago R. Co. (Neb.) 94 N. W. 527.

20. Offers of compromise are not admissible unless they contain admissions of fact, and a proposition to settle "our affair" and stating that plaintiff should be paid but not stating for what is not an admission of fact within this rule—Rudd v. Dewey (Iowa) 96 N. W. 973.

21. Only the admissibility of documents as such is here treated. Questions of the competency and relevancy of facts are treated under the various rules of evidence irrespective of whether they are shown by oral or documentary evidence.

22. Peycke v. Shinn (Neb.) 94 N. W. 135; Hugumin v. Hinds, 97 Mo. App. 346; Nye v. Daniels, 75 Vt. 81; Baum v. Rainbow Smelting Co., 42 Or. 453, 71 Pac. 538; Brinkley v. Smith, 131 N. C. 130. Burns' Rev. St. 1901, § 486, provides that if inspection of a material writing is given before trial with notice of intent to introduce the same, proof of execution is unnecessary unless denied by affidavit, and this includes all papers material as evidence and not merely those on which the suit is founded—Boseker v. Chamberlain (Ind.) 66 N. E. 448. Admission of contract without production of subscribing witnesses held proper—National Computing Scale Co. v. Eaves, 116 Ga. 511. Where the writer of a letter denies the genuineness of a postscript, it is not admissible without proof of authenticity—Love v. Love, 98 Mo. App. 562. Authentication of insurance policy by circumstances held sufficient—Price v. Garvin (Tex. Civ. App.) 69 S. W. 985. A telegram must be authenticated by some

ular course of correspondence being sufficient,[23] and where the signature is of one as a corporate officer, his authority must be shown.[24] Formal execution and acknowledgment are usually held to dispense with proof of execution,[25] and proof of execution is unnecessary as to ancient documents.[26] Interlineations and alterations apparent on the face of the writing must be shown to have been made before execution.[27] Mere private memoranda are inadmissible.[28]

Photographs and drawings are usually admissible,[29] as are the standard mortality tables.[30] Printed books as a rule are not.[31]

proof of genuineness—Reynolds v. Hinrichs (S. D.) 94 N. W. 694; Peycke v. Shinn (Neb.) 94 N. W. 135.

23. A telegram in answer to one shown by the evidence is admissible without further proof—People v. Hammond (Mich.) 93 N. W. 1084. Testimony of a son of the signer that it looked like his father's signature but he could not tell is insufficient—Farrell v. Manhattan R. Co., 83 App. Div. (N. Y.) 393. A letter must be identified by proof either of the handwriting or that it was received in answer to previous letters—Whitwell v. Johnson (Neb.) 96 N. W. 272. Where a letter is signed with a rubber stamp, there must be evidence as to who affixed the same—Reynolds v. Phillips (Neb.) 95 N. W. 491. Testimony that the letter was on the stationery of a party and signed in the same way as other letters received in regular course of correspondence is sufficient to identify a letter signed with a rubber stamp—Price v. Oatman (Tex. Civ. App.) 77 S. W. 258.

24. Where a document is signed by one as officer of a corporation there must be proof of his authority (Coney Island Automobile Race Co. v. Boyton, 87 App. Div. [N. Y.] 251) though written on the letter head of a corporate officer (Wickham v. Lehigh Valley R. Co., 85 App. Div. [N. Y.] 182) and it must be shown that a corporate seal was affixed with authority where it appears that the seal was accessible to unauthorized persons—Quackenboss v. Globe & R. Fire Ins. Co., 77 App. Div. (N. Y.) 168. But in Montana it has been held that authority of corporate officers to execute a contract will be presumed—Tague v. Caplice (Mont.) 72 Pac. 297.

25. Brown v. Collins (Neb.) 96 N. W. 173; McKenzie v. Beaumont (Neb.) 97 N. W. 225. A conditional bill of sale, duly attested and recorded is admissible under the same rules as govern registered mortgages—Anderson v. Leverette, 116 Ga. 732. Probate of a deed in another state which does not identify the deed in question as the one which the witnesses saw signed is insufficient and is not aided by a certificate of the clerk of court that the probate is sufficient—Brinkley v. Smith, 131 N. C. 130. Where the execution of a bond (Craw v. Abrams [Neb.] 94 N. W. 639), or deed (Williamson v. Gore [Tex. Civ. App.] 73 S. W. 563) is denied there must be affirmative proof of execution. Execution of a bond for title must be proved though it has been recorded—Burkhart v. Loughridge (Ky.) 76 S. W. 397.

See article on Acknowledgments for necessity and sufficiency of acknowledgment to admit conveyance in evidence.

26. Kimball v. Morris (Tex. Civ. App.) 71 S. W. 759; Bradley v. Lightcap, 201 Ill. 511. Possession of property by grantee is not necessary to the admission of an ancient deed—Hodge v. Palms (C. C. A.) 117 Fed. 396. And an ancient notarial copy of an act of sale stands on the same footing as the original—Hodge v. Palms (C. C. A.) 117 Fed. 396. Plan and report of railroad company filed under the chartering act many years before is admissible without proof of the authority of the persons signing as executive committee—MacDonald v. New York, etc., R. Co., 25 R. I. 40.

27. Landt v. McCullough, 103 Ill. App. 668; Rambousek v. Supreme Council (Iowa) 93 N. W. 277; Consumers' Ice Co. v. Jennings (Va.) 42 S. E. 879. Died-Long v. Stanley, 79 Miss. 298; Landt v. McCullough, 103 Ill. App. 668; Rambousek v. Supreme Council (Iowa) 93 N. W. 277; Holladay-Klotz Land Co. v. Moss Tie Co., 87 Mo. App. 167.

28. Turner v. Cochran (Tex. Civ. App.) 70 S. W. 1024. Ancient memorandum as to adverse possession admitted—Hamerschlag v. Duryea, 172 N. Y. 622.

29. X-ray photographs are admissible for the purpose of showing the condition of internal tissues of the body—City of Geneva v. Burnett (Neb.) 91 N. W. 275. Photographs of place of accident, shown to be accurate, are admissible—Sterling v. Detroit (Mich.) 95 N. W. 986. Must be identified as photograph of locality in question—Smart v. Kansas City, 91 Mo. App. 586. Photographs taken after the events in issue, if it appears that the situation of the premises has not changed—Chicago & A. R. Co. v. Corson, 198 Ill. 98; Robinson v. St. Joseph, 97 Mo. App. 503; Leeds v. New York Tel. Co., 79 App. Div. (N. Y.) 121. Where it appears that a photograph (in this case an X-ray photograph) truly represents the object in question, it is not necessary to show that it was taken by a skilled photographer—Carlson v. Benton (Neb.) 92 N. W. 600. And a photograph taken by an eye witness of the accident in controversy may be admitted in connection with his testimony though he is unskilled in photography—McGovern v. Smith, 75 Vt. 104. Evidence of one familiar with the person represented that the photograph is a good likeness dispenses with the necessity of authentication by the photographer—Stiasny v. Metropolitan St. R. Co., 172 N. Y. 656. A map made from notes whose correctness is not shown cannot be received—Hays v. Ison, 24 Ky. L. R. 1947, 72 S. W. 733. It is in the discretion of the court to allow a witness to produce a sketch to illustrate his testimony—Chicago v. Le Moyne (C. C. A.) 119 Fed. 662. A photograph of a hall where an accident is admissible to show the situation of the premises though the alleged negligence is insufficient lighting which the photographer does

The provision of the war revenue act of 1898 excluding documents not bearing revenue stamps required by that act is applicable only to federal courts.[32]

(§ 7) *B. Books of account.*—Books of account are admissible as admissions against interest,[33] and are admissible in favor of the person keeping the same when the entries are made in the ordinary course of business, contemporaneously with the transaction in question and by an authorized person.[34] The shop book rule extends only to books of a party,[35] and the rule obtains generally that cash entries are admissible only when small amounts are involved.[36] There must be preliminary proof of the identity and genuineness of the books offered,[37] and of the facts necessary to render them admissible in evidence.[38]

not show—Bretsch v. Plate, 82 App. Div. (N. Y.) 399.

30. Galveston, etc., R. Co. v. Mortson (Tex. Civ. App.) 71 S. W. 770; Galveston, etc., R. Co. v. Hubbard (Tex. Civ. App.) 70 S. W. 112; San Antonio & A. P. R. Co. v. Moore (Tex. Civ. App.) 72 S. W. 226; Coffeyville Min. & Gas Co. v. Carter, 65 Kan. 565, 70 Pac. 635. The Carlisle mortality tables are admissible without preliminary proof of correctness or identity—Atlanta Ry. & Power Co. v. Monk (Ga.) 45 S. E. 494. As are the Northampton tables—Banta v. Banta, 84 App. Div. (N. Y.) 138. One relying on the mortality tables must show that deceased was of the class of sound and healthy persons on which the tables are based—Vicksburg R., Power & Mfg. Co. v. White (Miss.) 34 So. 331.

31. Scientific book—McEvoy v. Lommel, 78 App. Div. (N. Y.) 324. Private catalogue of horse dealer not admissible as pedigree record—Louisville & N. R. Co. v. Frazee, 24 Ky. L. R. 1273, 71 S. W. 437. Proof of foreign law by printed volume of statutes, see § 7, c, post.

32. Davis v. Evans (N. C.) 45 S. E. 643; Pierpont v. Johnson, 104 Ill. App. 27; Dillingham v. Parks, 30 Ind. App. 61; State v. Glucose Sugar Refining Co., 117 Iowa, 524; Ratliff v. Ratliff, 131 N. C. 425; Foster v. Pacific Clipper Line, 30 Wash. 515, 71 Pac. 48.

33. Kent v. Richardson (Idaho) 71 Pac. 117; Second Borrowers' & Investors' Bldg. Ass'n v. Cochrane, 103 Ill. App. 29. Entry of payments on debtor books as evidence to avoid bar of limitations—Kirkpatrick v. Goldsmith, 81 App. Div. (N. Y.) 265.

34. Duty v. Storrs (Tex. Civ. App.) 70 S. W. 357. **Books of original entry.** Entries must be contemporaneous—Wells v. Hobson, 91 Mo. App. 379. Where the book of original entry is destroyed a ledger is admissible—Burr v. Shute, 24 Ohio Circ. R. 62. On an issue as to solvency in general a cash book made up from memoranda and not verified by testimony of the bookkeeper is admissible to show the general nature and extent of the business—Kuh v. Glucklick (Iowa) 94 N. W. 1105. The appearance of the account in question and other entries in the book may be considered in determining the admissibility of the book—Holden v. Spier, 65 Kan. 412, 70 Pac. 348. Book held admissible when made from contemporaneous memoranda, and the person making the memoranda testified to their general correctness—Bloomington Min. Co. v. Brooklyn Hygienic Ice Co., 171 N. Y. 673.

Data from which made. Entries made from information telephoned to bookkeeper held not admissible—Rathborne v. Hatch, 80 App. Div. (N. Y.) 115. Entries made from weight slips held admissible—Bloomington Min. Co. v. Brooklyn Hygienic Ice Co., 171 N. Y. 673. Where the person making the entries testifies that they were made at the time from his personal knowledge the book is admissible—Alabama Const. Co. v. Wagnon (Ala.) 34 So. 352. Books made up from memoranda furnished to the bookkeeper held not admissible without testimony as to the correctness of the memoranda—Trainor v. German-American Sav. Loan & Bldg. Ass'n (Ill.) 68 N. E. 650.

Usual course of business. Book entries of money not being customary are not admissible—Rothschild v. Sessell, 103 Ill. App. 274. Mere memoranda (Hottle v. Weaver [Pa.] 55 Atl. 838) such as a memorandum of date of execution of contract (Tobler v. Austin [Tex. Civ. App.] 71 S. W. 407), pencil memorandum on books of bank as to name of transferee of a certain pledge (Rankin v. Fidelity Ins., Trust & Safe Deposit Co., 189 U. S. 242) or of delivery of deed (Lloyd v. Simons [Minn.] 95 N. W. 903) are not admissible, nor are entry of payments in books of mortgagor—Rarden v. Cunningham, 136 Ala. 263. Or maker of note—Gregory v. Jones (Mo. App.) 73 S. W. 899.

Non-commercial books. Register kept at hospital inadmissible to show entries as to symptoms and condition of patient—Price v. Standard Life & Acc. Ins. Co. (Minn.) 95 N. W. 1118.

Copies of corporate books. Burns' Rev. St. § 474, providing that corporate acts may be proved by a sworn copy of the record does not allow a sworn copy of a corporate book of account to be introduced—Coppes v. Union Nat. Sav. & Loan Ass'n (Ind. App.) 67 N. E. 1022.

35. Books kept by an agent of his own business are not admissible on behalf of the principal—Rathborne v. Hatch, 80 App. Div. (N. Y.) 115; McKeen v. Providence County Sav. Bank (R. I.) 54 Atl. 49.

36. See Davis v. Sanford, 9 Allen (Mass.) 216; Bustin v. Rogers, 11 Cush. (Mass.) 346; Silver v. Worcester, 72 Me. 322. Rev. St. 1898, § 4187, makes inadmissible books containing cash items exceeding $5.00—Brown v. Warner (Wis.) 93 N. W. 17.

37. Wilson v. Morse, 117 Iowa, 581.

38. Wimmer v. Key (Minn.) 92 N. W. 228. Account book not verified in manner prescribed by Rev. St. 1898, § 4186, is not admissible—Brown v. Warner (Wis.) 93 N. W. 17. Accounts with other persons cannot be introduced as corroboration—Gregory v. Jones (Mo. App.) 73 S. W. 899. A book kept

(§ 7) *C. Public and judicial records and documents.*—Public and judicial records and documents are admissible in evidence,[39] and in view of the public inconvenience resulting from use of the originals in evidence, certified copies are almost universally authorized by statute.[40]

by one who is the joint agent of the parties is admissible against either—Copeland v. Boston Dairy Co. (Mass.) 68 N. E. 218.

39. A record book prepared by the general land office as a substitute for one destroyed in a local office is admissible as an original—Jessé D. Carr Land & Live Stock Co. v. United States (C. C. A.) 118 Fed. 821. Original declaration of homestead (Smith v. Veysey, 30 Wash. 18, 70 Pac. 94) and tax roll (Smith v. Scully [Kan.] 71 Pac. 249) are admissible. Tract book of land office is prima facie evidence that lands therein listed are public—Jesse D. Carr Land & Live Stock Co. v. United States (C. C. A.) 118 Fed. 821. Record of survey admissible under How. Ann. St § 619 though it is recorded on two pages if they are shown to be connected—Sherrard v. Cudney (Mich.) 96 N. W. 15. Report of commission to define county boundaries inadmissible without proof of appointment and authority of commissioners —Daniel v. Bailey (Ga.) 45 S. E. 379. Records of United States weather bureau are admissible in evidence (Nolt v. Crow, 22 Pa. Super. Ct. 113) without the testimony of the officer keeping the same—Scott v. Astoria R. Co. (Or.) 72 Pac. 594. Health board record of vital statistics is not admissible—Beglin v. Metropolitan Life Ins. Co., 173 N. Y. 374. Nor is school census admissible to show age of person listed therein—Edwards v. Logan, 24 Ky. L. R. 1099, 70 S. W. 852. The fact that an original marriage license is in the hands of a private person who does not account for his possession thereof does not render it inadmissible—State v. Pendleton (Kan.) 72 Pac. 527.

Certificates. Certificate of officer admissible when so declared by statute—Robles v. Cooksey (Tex. Civ. App.) 70 S. W. 584. A certificate of death made in pursuance of statute is admissible—Ohmeyer v. Supreme Forest Woodmen Circle, 91 Mo. App. 189. There is no authority for the admission of a clerk's certificate to the non-existence of a fact—Boyd v. Chicago, etc., R. Co., 103 Ill. App. 199. A statement of the account of a public officer from the books of the treasury department and properly certified is admissible—Laffan v. United States (C. C. A.) 122 Fed. 333.

Statutes and ordinances. Municipal ordinances may be proved by the certificate of the city clerk (Florida Cent. & P. R. Co. v. Seymour [Fla.] 33 So. 424) as may the publication of an ordinance (Hazen v. Mathews [Mass.] 68 N. E. 838) and by a printed certificate of the clerk to a compilation—Chicago & E. I. R. Co. v. Beaver, 199 Ill. 34. But the non-existence of an ordinance on a particular subject cannot be proved by certificate of the clerk—Boyd v. Chicago, etc., R. Co., 103 Ill. App. 199. The record book of the secretary of the council is admissible to prove an ordinance without proof that its keeping was authorized by the act of incorporation—McCaffrey v. Thomas (Del.) 56 Atl. 382. Minutes of council proceedings held sufficiently authenticated by testimony of city clerk—State v. Badger, 90 Mo. App. 183. Printed volumes of laws of another state do not prove themselves—Hewitt v. Bank of Indian Territory (Neb.) 92 N. W. 741. Copies of English statutes authenticated by testimony of English attorney admissible—Nashua Sav. Bank v. Anglo-American Land, etc., Co., 189 U. S. 221.

Judicial proceedings. Pleadings (Church v. Pearne, 75 Conn. 350) and decrees are admissible—Alexander v. Grand Lodge, A. O. U. W. (Iowa) 93 N. W. 508. Judgment is admissible though rehearing in appellate court is pending—Salt Lake City Water & Electrical Power Co. v. Salt Lake City, 25 Utah, 441, 71 Pac. 1067. But the judgment of a justice of the peace must be authenticated by proof of his handwriting—Patterson v. Freeman, 132 N. C. 357. Judicial opinions (Work v. Kinney [Idaho] 71 Pac. 477) or transcripts of evidence (Walker v. Walker, 117 Iowa, 609) are not admissible; and a coroner's inquest is not a judicial proceeding so as to be admissible in evidence—Cox v. Royal Tribe, 42 Or. 365, 71 Pac. 73. Order admitting will to probate held sufficient to admit will in evidence—Turner v. Hause, 199 Ill. 464. The manner of proving testimony on a former trial is discussed in § 8, post; the admissibility of testimony and proceedings as admissions against interest in § 6C, ante.

40. A certificate of the rendition of a judgment summarizing its terms is not admissible as a certified copy thereof—United States v. Lew Poy Dew, 119 Fed. 786. But a certificate embodying the judgment has been held a sufficient certified copy thereof—Kentucky Land, etc., Co. v. Crabtree, 24 Ky. L. R. 743, 70 S. W. 31. Certified copy of commissioner's deed held admissible without proof of the judgment authorizing it—Helton v. Belcher, 24 Ky. L. R. 927, 70 S. W. 295. The bond of a constable required to be recorded in the county court is a "judicial record" and accordingly the seal of the court is essential to a certified copy thereof—Morgan v. Betterton, 109 Tenn. 84. And where such bonds are required to be filed with the county clerk they are records of his office and may be proved by his certificate—State v. Yourex, 30 Wash. 611, 71 Pac. 203. Certified copy of foreign grant—Hollifield v. Landrum (Tex. Civ. App.) 71 S. W. 979. Certified copies which have been recorded under Rev. St. art. 4642, providing that a deed may be recorded in any county and a certified copy of such record recorded elsewhere are admissible—Moody v. Ogden (Tex. Civ. App.) 72 S. W. 253; Logan's Heirs v. Logan (Tex. Civ. App.) 72 S. W. 416. A certified copy of an adjudication of bankruptcy in federal court is admissible in a state court—Rosenfeld v. Siegfried, 91 Mo. App. 169. Certified copies of tax collector's delinquent list held admissible—Davis v. Pacific Imp. Co., 137 Cal. 245, 70 Pac. 15. Copy of school warrant is properly certified by the auditor—Mitchelltree School Tp. v. Hall (Ind. App.) 68 N. E. 919. Certified copy of assessment roll admissible as "public record" (Rev. St. art. 2305)—Brummer v. Galveston (Tex. Civ. App.) 77 S. W. 239. Judicial record authenticated ac-

(§ 7) *D. Proceedings to procure production of documents.*[41]—The customary process to procure production of documents at the trial is the subpoena duces tecum,[42] and in case of documents in the possession of third persons this is the only available remedy, but the court will frequently, by order in the course of the trial, require a party to produce papers.[43] The books of a going concern needed in its business should not be required to be left in court.[44]

§ 8. *Evidence adduced in former proceedings.*[45]—Statutes in many states provide that where a witness who testified on a former trial of the action is dead or beyond the jurisdiction, his testimony at the former trial may be introduced.[46] Evidence at a former trial may be proved by any person who heard it,[47] by the notes of the court stenographer if supported by his testimony to their correctness,[48] or by the return or bill of exceptions on appeal when certified by the court,[49] or supported by the testimony of the stenographer.[50]

§ 9. *Expert and opinion evidence. A. Conclusions and nonexpert opinions.*—As a general rule, it is improper for a witness to state a mere conclusion, whether the same be of law or by way of inference from facts,[51] and on matters which are

cording to the statute is admissible without proof that the court is one of record—Brown v. Collins (Neb.) 96 N. W. 173. A certified copy of a county map from the office of the secretary of state is admissible without preliminary proof—Berry v. Clark, 117 Ga. 964. Under the act of Congress judicial records must have certificate of judge showing that he is commissioned and qualified—Taylor v. McKee (Ga.) 45 S. E. 672. Authentication of English court record held sufficient—Linton v. Baker (Neb.) 96 N. W. 251. A transcript of a Federal judgment in the same state is admissible if certified by the clerk though not by the judge—Allison v. Robinson, 136 Ala. 434.

41. Notices to produce documents, as laying a foundation for secondary evidence are treated in § 4, ante, while proceedings to procure inspection of documents before trial are discussed in Discovery and Inspection.

42. Plaintiff in action for newspaper libel is entitled to subpoena duces tecum for the mailing and subscription lists—Palmer v. Mahin (C. C. A.) 120 Fed. 737. A preliminary showing that the documents are pertinent to the issue is usually required (Prac. Act, § 12) —Bentley v. People, 104 Ill. App. 353. An attorney for a party may be required by subpoena duces tecum to produce a lease in his possession—Jones v. Reilly, 174 N. Y. 97.

43. Rarden v. Cunningham, 136 Ala. 263; Neukirch v. Keppler, 174 N. Y. 509. It must appear that the documents are material—Bucki & Son Lumber Co. v. Atlantic Lumber Co. (C. C. A.) 121 Fed. 233.

44. In re Randall, 87 App. Div. (N. Y.) 245.

45. Includes only use thereof in lieu of appearance of witness, former testimony as an admission against interest being discussed in § 6C, ante, and use thereof for impeachment in Witnesses.

46. Sievers-Carson Hardware Co. v. Curd, 24 Ky. L. R. 1317, 71 S. W. 506; Persons v. Persons (N. D.) 97 N. W. 551. Testimony of witness beyond the jurisdiction admitted though no effort was made to procure his attendance—McGovern v. Smith, 75 Vt. 104. Testimony before referee admitted though the reference was never concluded on account of the death of the referee—Taft v. Little, 78 App. Div. (N. Y.) 74. Evidence of deceased witness in action between other parties is not admissible—Ellis v. Le Bow (Tex. Civ. App.) 71 S. W. 576. Search for missing witness held sufficient diligence—People v. McFarlane, 138 Cal. 481, 71 Pac. 568, 72 Pac. 48; People v. Witty, 138 Cal. 576, 72 Pac. 177. Evidence that a witness who resided in Mexico was seen to take a train presumably bound there is sufficient—State v. Bolden, 109 La. 484. Where the witness resided within the state and where his deposition might be taken though beyond the reach of process to compel attendance at the trial, his testimony at a former trial cannot be read—Southern Foundry Co. v. Jennings (Ala.) 34 So. 1002.

47. Egyptian Flag Cigarette Co. v. Comisky, 40 Misc. (N. Y.) 236.

48. Dady v. Condit, 104 Ill. App. 507. But not unless so verified—Cerrusite Min. Co. v. Steele (Colo. App.) 70 Pac. 1091. Transcript certified by him, not being admissible—Jordan v. Howe (Neb.) 95 N. W. 853.

49. Egyptian Flag Cigarette Co. v. Comisky, 40 Misc. (N. Y.) 236. Testimony taken down by a magistrate but not certified and the magistrate having no independent recollection in respect thereto cannot be received —Gamblin v. State (Miss.) 33 So. 724.

50. Smith v. Scully (Kan.) 71 Pac. 249. But it has been said that this practice, though not erroneous, is of doubtful propriety—Pittsburgh, etc., R. Co. v. Story, 104 Ill. App. 132.

51. Veum v. Sheeran, 88 Minn. 257; Read v. Valley Land & Cattle Co. (Neb.) 92 N. W. 622. **Statements held conclusions.** For whom property was bought—Arnold v. Cofer, 135 Ala. 364. Whether a foreign corporation was doing business in New York—Huey v. Rothfeld, 84 N. Y. Supp. 883. Whether another acted in good faith—Durrence v. Northern Nat. Bank, 117 Ga. 385. Whether an instrument was a bill of sale or a mortgage—Stuart v. Mitchum, 135 Ala. 546. As to the construction of a written contract—Independent School Dist. v. Swearngin (Iowa) 94 N. W. 206. That certain improvements were intended to be provided for in a deed of trust —Martin v. Texas Briquette & Coal Co. (Tex. Civ. App.) 77 S. W. 651. That a balance of a certain sum was due—Smith v. Castle, 81

the subject of expert testimony, one not an expert cannot express an opinion,[52] but certain matters are regarded as so far within the common knowledge of mankind

App. Div. (N. Y.) 638. Whether the whole of a conversation which has been testified to is embodied in a writing before the court—Union State Bank v. Hutton (Neb.) 95 N. W. 1061. Whether the conduct of parties indicated a family relation or that of master and servant—Bullard v. Laughlin (Neb.) 96 N. W. 159. Whether a road was public—Big Lake Drainage Dist. Com'rs v. Commissioners of Highways, 199 Ill. 132. Whether a stream could be forded without difficulty at a certain place—Perry v. Clarke County (Iowa) 94 N. W. 454. Whether anything occurred that would have a tendency to injure—Birmingham Ry. & Elec. Co. v. Ellard, 135 Ala. 433. As to the regularity of a writ—Faville v. State Trust Co. (Iowa) 96 N. W. 1109. Who was liable for a doctor's bill—Quincy Gas & Elec. Co. v. Bauman, 104 Ill. App. 600. Who was the owner of property—Perkins v. Knisely, 102 Ill. App. 562. That plaintiff was obliged to get on an electric car track in order to cross a railroad track—Birmingham Ry. & Elec. Co. v. Jackson, 136 Ala. 279. The purpose of a bill of sale—Emory Mfg. Co. v. Rood, 182 Mass. 166. Whether book entries showed a sale or a discount—Black v. First Nat. Bank, 96 Md. 399. Whether a marriage was according to Indian custom—Henry v. Taylor (S. D.) 93 N. W. 641. The place of delivery under a contract—Althouse v. McMillan (Mich.) 92 N. W. 941. Whether misstatements in an application for insurance were material to the risk—New Era Ass'n v. Mactavish (Mich.) 94 N. W. 599. Whether goods ordered by a party were of the kind needed by him—New York Cent. Iron Works Co. v. United States Radiator Co., 174 N. Y. 331. Whether a publication was true—Davis v. Hamilton, 88 Minn. 64. Who was the real party in interest—United Press v. Abell, 79 App. Div. (N. Y.) 550. Whether acts of ownership were exercised—Red River Valley Nat. Bank v. Monson, 11 N. D. 423. Cause of injury to cattle, as based on their appearance—Louisville & N. R. Co. v. Landers, 135 Ala. 504. That nothing could have been done to avert an accident—Springfield Consol. R. Co v. Puntenney, 200 Ill. 9; McGovern v. Smith, 75 Vt. 104. Whether a sidewalk was unsafe—Bradley v. City of Spickardsville, 90 Mo. App. 416; Gordon v. Sullivan (Wis.) 93 N. W. 457; Metz v. Butte, 27 Mont. 506, 71 Pac. 761. Whether ice on a sidewalk was formed from water from a certain source—Wittman v. New York, 80 App. Div. (N. Y.) 585. Whether an accident would have occurred if plaintiff had stopped when warned—Cosgrove v. Metropolitan St. R. Co., 173 N. Y. 628. Whether a tool was unfit for use—Nash v. Dowling, 93 Mo. App. 156. **Statements held of fact.** That a train did not stop long enough for witness to get off—St. Louis S. W. R. Co. v. Byers (Tex. Civ. App.) 70 S. W. 558. Whether witness had anything to do with a certain occurrence—Pittsburgh, etc., R. Co. v. Story, 104 Ill. App. 132. That a person came in response to a cry for help—Golibart v. Sullivan, 30 Ind. App. 428. That no one in the car with witness appeared to have suffered injury—Coldren v. Le Gore, 118 Iowa, 212. What was the habit of engineers in examining the engine for defects—Galveston, etc., R. Co. v. Collins (Tex. Civ. App.) 71 S. W. 560. Whether a car step was too high for safety in alighting—International, etc., R. Co. v. Clark (Tex. Civ. App.) 71 S. W. 587. That one was in possession of premises—Wright v. State, 136 Ala. 139. That a shipment was C. O. D.—Davidson v. State (Tex. Cr. App.) 73 S. W. 808. Whether in a certain contingency a party would have been able to meet his obligations as they arose—Buckl & Son Lumber Co. v. Atlantic Lumber Co. (C. C. A.) 121 Fed. 233. Whether a train could be seen from a certain point—Kansas City, etc., R. Co. v. Weeks (Ala.) 34 So. 16. That witness suffered pain from certain organs—Sellman v. Wheeler, 95 Md. 751. That certain injuries incapacitated one from following a certain occupation—St. Louis S. W. R. Co. v. McDowell (Tex. Civ. App.) 73 S. W. 974. That witness was made sick by certain gases complained of—Suddith v. Incorporated City of Boone (Iowa) 96 N. W. 853. That a ticket agent saw the children for whom tickets were purchased is a statement of a fact—International, etc., R. Co. v. Anchonda (Tex. Civ. App.) 75 S. W. 557. Whether a third person claimed property—Rice v. Melott (Tex. Civ. App.) 74 S. W. 935.

Intent, knowledge or understanding. One may testify directly as to his own intent (Mayers v. McNeese [Tex. Civ. App.] 71 S. W. 68; Fox v. Robbins [Tex. Civ. App.] 70 S. W. 597; Fitzgibbon v. Chicago, etc., R. Co. [Iowa] 93 N. W. 276; Pardridge v. Cutler, 104 Ill. App. 89; Warfield v. Clark, 118 Iowa, 69; Gray v. New York Cent., etc., R. Co., 77 App. Div. [N. Y.] 1) or as to his reasons for certain acts (McCormick Harvesting Mach. Co. v. Hiatt [Neb.] 95 N. W. 627) but not as to the intent (McKnight v. Reed [Tex. Civ. App.] 71 S. W. 318) knowledge of others as that an employe was familiar with the location of appliances in a switch yard (International, etc., R. Co. v. Bearden [Tex. Civ. App.] 71 S. W. 318) or knowledge of others certain fact (Sheldon v. Bigelow, 118 Iowa, 586) whether a child knew the danger of crossing railroad tracks (Over v. Missouri, etc., R. Co. [Tex. Civ. App.] 73 S. W. 535) that one person knew that another claimed certain land (Ashford v. Ashford, 136 Ala. 631) whether a third person understood certain facts (Plano Mfg. Co. v. Kautenberger [Iowa] 96 N. W. 743) or the reason for the conduct of another—Southern R. Co. v. Shelton, 136 Ala. 191; Holmes v. State, 136 Ala. 80. But statements as to the "understanding" of the parties are admissible where it is obvious that "agreement" is meant—Mallory Commission Co. v. Elwood (Iowa) 95 N. W. 176. And it has been held that a witness may testify that a person did not appear to realize that there was danger in his position—Fritz v. Western Union Tel. Co., 25 Utah, 263, 71 Pac. 209.

Computations. An accountant may state the result of his examination of a long account—Rosenfeld v. Siegfried, 91 Mo. App. 169. But computations are not admissible where data is before jury—Blauvelt v. Delaware, etc., R. Co. (Pa.) 55 Atl. 857.

52. Whether a fire could have been stopped with certain appliances—Cumberland Tel. Co. v. Dooley (Tenn.) 72 S. W. 457. Within what space a car could be stopped—

that special qualification is not necessary to entitle a witness to express an opinion thereon.[53] A nonexpert stating an opinion under this rule should be required to state with it the facts on which it is based.[54]

(§ 9) *B. Subjects of expert testimony.*—An expert opinion is not admissible as to the ultimate issue to be found by the jury,[55] nor as to matters as to which men

Bliss v. United Traction Co., 75 App. Div. (N. Y.) 235. Whether car could have been stopped had conductor been in a different position—Von Diest v. San Antonio Traction Co. (Tex. Civ. App.) 77 S. W. 632. Technical meaning of a word—Butte & B. Consol. Min. Co. v. Montana Ore Purchasing Co. (C. C. A.) 121 Fed. 524. Whether a grating forming part of a side walk was heavy enough—Lentz v. Dallas (Tex.) 72 S. W. 59. Cause of death of cattle—White v. Farmers' Fire Ins. Co., 97 Mo. App. 590; Wilson v. Southern R., 65 S. C. 421.

53. That horse tracks indicated that the animal was running—Craig v. Wabash R. Co. (Iowa) 96 N. W. 965. A witness without special knowledge cannot testify to effect of piers or dams on flow of water—Jones v. Seaboard Air Line R. Co. (S. C.) 45 S. E. 188.

Age—St. Louis S. W. R. Co. v. Bowles (Tex. Civ. App.) 72 S. W. 451; Danley v. State (Tex. Cr. App.) 71 S. W. 958; Earl v. State (Tex. Cr. App.) 72 S. W. 175.

Physical condition—That a person was suffering pain—Chicago, etc., R. Co. v. Randolph, 199 Ill. 126; Isherwood v. Jenkins Lumber Co., 87 Minn. 388. That a person was crippled and that his condition had not improved—St. Louis S. W. R. Co. v. Brown (Tex. Civ. App.) 69 S. W. 1010. That an animal was blind—Rarden v. Cunningham, 136 Ala. 263. But not cause of sleeplessness—Nichols v. Oregon Short Line R. Co., 25 Utah, 240, 70 Pac. 996.

Intoxication—Marshall v. Riley, 38 Misc. (N. Y.) 770; League v. Ehmke (Iowa) 94 N. W. 938.

Mental condition—One well acquainted with a person may express an opinion as to his sanity—Higgins v. Nethery, 30 Wash. 239, 70 Pac. 489; Keegan v. Kane, 139 Cal. 123, 72 Pac. 828; Sheehan v. Allen (Kan.) 74 Pac. 245; Halde v. Schultz (S. D.) 97 N. W. 369; Wright v. Commonwealth, 24 Ky. L. R. 1838, 72 S. W. 340; Scarborough v. Baskin, 65 S. C. 558. But not a casual visitor—Apland v. Pott (S. D.) 92 N. W. 19; Page v. Beach (Mich.) 95 N. W. 981. And that testator was easily influenced (Michael v. Marshall, 201 Ill. 70) or that he "acted foolish" (Wallace v. Whitman, 201 Ill. 59) or whether testator had capacity to understand will is improper—Baker v. Baker, 202 Ill. 595.

Value—Porter v. Hawkins, 27 Mont. 486, 71 Pac. 664; Ruckman v. Imbler Lumber Co., 42 Or. 231, 70 Pac. 811; Eckington, etc., R. Co. v. McDevitt, 18 App. D. C. 497; Houghtaling v. Chicago G. W. R. Co., 117 Iowa, 540; Chandler v. Parker, 65 Kan. 860, 70 Pac. 368; St. Joseph, etc., R. Co. v. McCarty (Neb.) 92 N. W. 750.

Distance—San Antonio, etc., R. Co. v. Griffith (Tex. Civ. App.) 70 S. W. 438.

Lapse of time—Atlanta, etc., R. Co. v. Strickland, 116 Ga. 439.

Speed of trains—Id.; Flanagan v. New York Cent., etc., R. Co., 173 N. Y. 631; Potter v. O'Donnell, 199 Ill. 119; Mathieson v. Omaha St. R. Co. (Neb.) 92 N. W. 639. One accustomed to time the speed of cars is competent to state the speed of a car on which he was a passenger—Fisher v. Union Ry. Co., 86 App. Div. (N. Y.) 365. Not proper where witness can form no opinion except from the result of subsequent calculation—Mathiesen v. Omaha St. R. Co. (Neb.) 97 N. W. 243. One having no experience in running street cars is not competent to express an opinion as to speed based solely on the noise made by its movement—Campbell v. St. Louis & S. R. Co. (Mo.) 75 S. W. 86.

Damages. Party cannot estimate amount of his damages—St. Louis, etc., R. Co. v. Hall (Ark.) 74 S. W. 293; De Wald v. Ingle, 31 Wash. 616, 72 Pac. 469; Tenney v. Rapid City (S. D.) 96 N. W. 96. Though it is otherwise held in South Carolina—Oliver v. Columbia, etc., R. Co., 65 S. C. 1. Nor can a nonexpert third person—Foote v. Malony, 115 Ga. 985.

54. Hawes v. Warren, 119 Fed. 978; State v. Barry, 11 N. D. 428. This rule has been held to apply to an opinion as to sanity by a family physician who has treated the person for other diseases—Scott v. Hay (Minn.) 97 N. W. 106. Where the opinion is shown to be erroneous by the facts elicited it should be stricken out—Keating v. Cornell, 104 Ill. App. 448. But one may testify that a person "appeared despondent" without first giving the facts on which the statement was based—State v. McKnight (Iowa) 93 N. W. 63.

55. Read v. Valley Land & Cattle Co. (Neb.) 92 N. W. 622. Whether injuries were inflicted by accident or with suicidal intent—Treat v. Merchants' Life Ass'n, 198 Ill. 431. Whether a person was competent to transact ordinary business (McGibbons v. McGibbons [Iowa] 93 N. W. 55) the amount of damages sustained (Texas & P. R. Co. v. Cochrane [Tex. Civ. App.] 69 S. W. 984) are improper. But an expert has been allowed to state that a certain article resembled or was an imitation of butter—State v. Ehinger, 67 Ohio St. 51. Difference in value of property before and after construction of railroad "excluding benefits and injuries common to the whole community" is a mixed question of law and fact and not the proper subject of an opinion—Boyer v. St. Louis, etc., R. Co. (Tex. Civ. App.) 72 S. W. 1038. Whether it was safe to work in a certain ditch without having the sides braced is not proper—Sullivan v. Rome, 86 App. Div. (N. Y.) 107. Whether a person had testamentary capacity is not proper—Page v. Beach (Mich.) 95 N. W. 981. Whether the excessive use of intoxicants is a "pernicious habit" is not a subject of expert testimony—Union Life Ins. Co. v. Jameson (Ind. App.) 67 N. E. 199. Whether it was necessary for plaintiff's intestate to do certain acts alleged to constitute contributory negligence improper—Chicago, etc., R. Co. v. Holmes (Neb.) 94 N. W. 1007. In a suit for nuisance whether filter beds would be of benefit to plaintiff is not admissible, though the general effect thereof would be—Suddith v. Incorporated City of Boone (Iowa) 96 N. W. 853. Whether

of common understanding are equally competent to form a judgment,[56] but as to questions other than the ultimate issue whose proper understanding calls for special knowledge or experience, the opinions of experts may be admitted.[57]

a building was in substantial compliance with the contract for its erection is not proper—Zimmerman v. Conrad (Mo. App.) 74 S. W. 139.

56. It is not enough that the witness know more of the subject than the jury, but the matter in question must pertain to some trade, art, or science so that persons versed therein may be supposed to have more information in regard thereto than other persons of average intelligence—Caven v. Bodwell Granite Co., 97 Me. 381. The proper height of stakes at the ends of a car loaded with ties is not a matter for expert testimony—Kerrigan v. Market St. R. Co., 138 Cal. 506, 71 Pac. 621. The dangers of a simple piece of machinery—Edwards v. Barber Asphalt Pav. Co., 92 Mo. App. 221. Whether the distance run by a car after an accident indicated that brakes were not set—Koenig v. Union Depot R. Co., 173 Mo. 698. The proper length of a "push stick"—Bookman v. Masterson, 83 App. Div. (N. Y.) 4. Whether an obstruction was calculated to frighten horses—White v. Town of Cazenovia, 77 App. Div. (N. Y.) 547. Whether telegraph poles were calculated to frighten horses—Missouri & K. Tel. Co. v. Vandevort (Kan.) 72 Pac. 771. That a shooting could not have been accidental—Barnard v. State (Tex. Cr. App.) 73 S. W. 957. That inspection would have disclosed a defect not proper—Dittman v. Edison Electric Illuminating Co., 83 N. Y. Supp. 1078. An expert railroad man may testify that a defect in a brakestaff could have been discovered by inspection—International, etc., R. Co. v. Collins (Tex. Civ. App.) 75 S. W. 814. Where the facts may be clearly shown and understood, expert opinions are not admissible—Sumner v. Sumner (Ga.) 45 S. E. 509. Whether a hammer was a safe and proper tool is not—Vant Hul v. Great Northern R. Co. (Minn.) 96 N. W. 789; Ft. Pitt Gas Co. v. Evansville Contract Co. (C. C. A.) 123 Fed. 63.

57. An expert may testify that cattle suffered no more from being left in the cars than they would from being unloaded under existing weather conditions (Southern R. Co. v. Crowder, 135 Ala. 417) as to the necessity of feeding cattle in course of shipment (Gulf, etc., R. Co. v. Irvine [Tex. Civ. App.] 73 S. W. 540) as to the probable effect of stagnant pool on health of community (West v. State [Ark.] 71 S. W. 483) as to whether bananas would decay in shipment between two certain points (Fruit Dispatch Co. v. Murray [Minn.] 96 N. W. 83) but not as to whether a person had committed suicide (Aetna Life Ins. Co. v. Kaiser, 24 Ky. L. R. 2454, 74 S. W. 203) as to the effect of pneumonia on testamentary capacity (Lorts v. Wash [Mo.] 75 S. W. 95) or as to life expectancy—Hamilton v. Michigan Cent. R. Co. (Mich.) 97 N. W. 392.

Disputed handwriting—Roy v. First Nat. Bank (Miss.) 33 So. 494. A statute allowing comparison of handwritings does not permit an opinion that certain cancellation marks through a signature were not made by the person who wrote the signature—In re Hopkins' Will, 172 N. Y. 360, 12 Ann. Cas. 55.

Construction and management of structures and appliances. Proper method of loading boilers (Palmquist v. Mine & Smelter Supply Co., 25 Utah, 257, 70 Pac. 994); effect of loosening certain bolts in a passenger elevator (Slack v. Harris, 200 Ill. 96); whether an elevator was properly constructed (Craig v. Benedictine Sisters Hospital Ass'n [Minn.] 93 N. W. 669); whether a laundry mangle was defective (Coleman v. Perry [Mont.] 72 Pac. 42); whether a furnace pit was properly constructed (Behsmann v. Waldo, 38 Misc. [N. Y.] 820); proper means of guying a derrick (Scheider v. American Bridge Co., 73 App. Div. [N. Y.] 163); whether a certain gasoline engine was liable to explode (Charter Gas-Engine Co. v. Kellam, 79 App. Div. [N. Y.] 231); possibility of a certain construction of the hoist in a mine (Hedlun v. Holy Terror Min. Co. [S. D.] 92 N. W. 31); proper method of stringing wire in proximity of a live wire (Fritz v. Western Union Tel. Co., 25 Utah, 263, 71 Pac. 209); proper manner of securing mine roof (People's Gaslight & Coke Co. v. Porter, 102 Ill. App. 461); as to whether crossing was dangerous (Seifred v. Pennsylvania R. Co. [Pa.] 55 Atl. 1061); whether a structure was safe within the meaning of the labor law (Jenks v. Thompson, 83 App. Div. [N. Y.] 343); whether a certain interior construction was safe in respect to fire (Friedman Co. v. Atlas Assur. Co. [Mich.] 94 N. W. 757); whether an iron handle was properly welded (Murphy v. Marston Coal Co. [Mass.] 67 N. E. 342) have been held proper. But whether a plank would if sound have been strong enough to support a man is not a subject of expert testimony—Cogdell v. Wilmington & W. R. Co., 132 N. C. 852.

Disease and physical injuries. Whether condition might have resulted from asphyxiation is not competent—Walden v. City of Jamestown, 79 App. Div. (N. Y.) 433, 12 Ann. Cas. 313. But it has been held proper to allow an expert to testify that a condition could have been caused by a severe contusion (Wagner v. Metropolitan St. R. Co., 79 App. Div. [N. Y.] 591); or whether certain injuries could have been produced in a certain way (Sachra v. Town of Manilla [Iowa] 95 N. W. 198) and the probable effect of injuries (Stembridge v. Southern R., 65 S. C. 440) as that they would be permanent (Walden v. City of Jamestown, 79 App. Div. [N. Y.] 433) would tend to increase (Robinson v. St. Louis & S. R. Co. [Mo. App.] 77 S. W. 493), or would result in paralysis—Walden v. City of Jamestown, 79 App. Div. (N. Y.) 433, 12 Ann. Cas. 313. But an opinion that the parties condition "might" have come from certain injuries (Moritz v. Interurban St. R. Co., 84 N. Y. Supp. 162) or that the injury was the cause of subsequent headaches is too speculative—Huba v. Schenectady R. Co., 85 App. Div. (N. Y.) 199. An expert may state his opinion as to whether injuries will unfit for ordinary labor—Palmer v. Warren St. R. Co. (Pa.) 56 Atl. 49. Or as to how long a patient continued to suffer pain—Wilkins v. City of Missouri Valley (Iowa) 96

(§ 9) *C. Qualification of experts.*—The preliminary question of fact as to the competency of an expert rests largely in the discretion of the court;[58] experience and opportunity for observation being generally sufficient as to matters not pertaining to a particular art or science,[59] and as to matters within the scope of a profession, a practitioner thereof is presumptively competent.[60]

N. W. 868. Value of services—Donk Bros. Coal Co. v. Stroff, 200 Ill. 483.

Cause of overflow—Read v. Valley Land & Cattle Co. (Neb.) 92 N. W. 622; Akin v. St. Croix Lumber Co., 88 Minn. 119.

Knowledge or intent. Whether a mining shaft had been sunk with an intention of concealing the vein is not a subject of expert testimony—Davis v. Shepherd (Colo.) 72 Pac. 57.

Technical words—Heyworth v. Miller Grain & Elevator Co., 174 Mo. 171.

58. Garr v. Cranney, 25 Utah, 193, 70 Pac. 853; Czarecki v. Seattle, etc., R. & Nav. Co., 30 Wash. 288, 70 Pac. 750; State v. Barry, 11 N. D. 428; Davis v. State (Fla.) 32 So. 822; Schmuck v. Hill (Neb.) 96 N. W. 158. Court may deem that statement of what witness "guesses" is intended to express his judgment—Hunter v. Helsley, 98 Mo. App. 616. Preliminary cross examination as to qualifications should be allowed—Friday v. Pennsylvania R. Co., 204 Pa. 405.

59. One who has seen animals which were struck by lightning is competent as to whether a particular animal was so killed—White v. Farmers' Fire Ins. Co., 97 Mo. App. 590. The fact that experts were not able to give the date of experiments on which they base certain conclusions does not render them incompetent—Orient Ins. Co. v. Leonard (C. C. A.) 120 Fed. 808. One accustomed to handle shoes is competent as to weight though he has never weighed a box of shoes—Hunter v. Helsley, 98 Mo. App. 616. One who has dissected horses is competent as to condition of organs, though not a veterinary—Wisecarver v. Long (Iowa) 94 N. W. 467. A physician familiar with the work of a nurse may give an opinion as to her competence—Ward v. St. Vincent's Hospital, 78 App. Div. (N. Y.) 317. One engaged for many years in lumber business and familiar with certain tract of timber is competent as to whether the same could be profitably cut and manufactured—Belding v. Archer, 131 N. C. 287. Dealers in precious stones are not competent as to the commercial uses of imitations thereof—Lorsch v. United States, 119 Fed. 476. One familiar with a certain class of clothing may testify as to effect of rain thereon, though he has never seen the particular clothing—Henry Sonneborn & Co. v. Southern R., 65 S. C. 502. Surveyor held competent as to amount of land lost by lappage of surveys—Belding v. Archer, 131 N. C. 287. An expert as to seepage and leakage from irrigation reservoirs is competent as to probability of damage to adjacent lands therefrom—Loloff v. Sterling (Colo.) 71 Pac. 1113.

Machinery and construction. Steam fitter held incompetent as to cause of explosion of engine (Wolff Shirt Co. v. Frankenthal, 96 Mo. App. 307) and millwright as to cause of breaking of pulley—Duntley v. Inman, 42 Or. 334, 70 Pac. 529, 59 L. R. A. 785. Mechanical engineer competent as to strain of a certain structure on its supports—Caven v. Bodwell Granite Co., 97 Me. 381. A carpenter and builder is not competent as to the tensile strength of wire cables—Id. It is not error to hold an experienced contractor or builder incompetent as to strength of a certain board—Thompson v. Worcester (Mass.) 68 N. E. 833. A civil engineer may testify as to the slope which should be given to the sides of a railroad cut, though he has never been engaged in railroad construction—Scott v. Astoria R. Co. (Or.) 72 Pac. 594.

Operation of trains and street cars. Railroad fireman competent as to proper management of engine—Texas Southern R. Co. v. Hart (Tex. Civ. App.) 73 S. W. 833. An experienced railroad employe is competent as to the time within which a train can be stopped—Buckman v. Missouri, etc., R. Co. (Mo. App.) 73 S. W. 270. A motorman without experience in the use of reverse power is not competent as to the distance within which a car could be stopped by that means—Bliss v. United Traction Co., 75 App. Div. (N. Y.) 235. Witness who is familiar with steam railroads may testify to general effect of curves on speed of an electric car—Atlanta R. & Power Co. v. Monk (Ga.) 45 S. E. 494.

Disease and insanity. Women who claim to have had miscarriages are not competent to testify from a comparison of symptoms that plaintiff had so suffered—Gray v. Brooklyn Heights R. Co., 175 N. Y. 448. One who had been a physician for 21 years and had treated many cases of insanity is competent as to sanity of testator—White v. McPherson (Mass.) 67 N. E. 643.

Values. One who has dealt in cattle for many years is competent—Louisville & N. R. Co. v. Landers, 135 Ala. 504. As is one who has been for twenty years engaged in farming—Choctaw, etc., R. Co. v. Deperade (Okl.) 71 Pac. 629. One who has owned hunting dogs all his life is competent as to the value of such dogs—American Exp. Co. v. Bradford (Miss.) 33 So. 843. One who has learned the market value of cattle from daily market reports which he habitually consults is competent—St. Louis S. W. R. Co. v. Barnes (Tex. Civ. App.) 72 S. W. 1041. One familiar with the horse market and who has spent several days investigating the market price at a certain place is competent though he never sold any horses there—Cleveland, etc., R. Co. v. Patton, 203 Ill. 376. An inspector of ten years' experience with a certain commodity is competent in respect to deterioration from delay and dampness—San Antonio, etc., R. Co. v. Josey (Tex. Civ. App.) 71 S. W. 606. One who knows the value of the article in question is not incompetent because he does not know the value of similar articles of smaller size—Ruckman v. Imbler Lumber Co., 42 Or. 231, 70 Pac. 811.

Physician competent as to value of services of nurse—Beringer v. Dubuque St. R. Co., 118 Iowa, 135.

Familiarity with the property in question and with the general selling price of property in the vicinity is necessary to constitute one an expert as to land values—Friday v.

(§ 9) *D. Basis of expert testimony and examination of experts.*—The opinion of an expert may be based on his personal knowledge of the facts,[61] on the evidence of other witnesses heard by the expert,[62] on real evidence or other exhibits before the court,[63] or on a hypothetical question;[64] but where a hypothetical question is asked,

Pennsylvania R. Co., 204 Pa. 405. One who lived in the vicinity, bought and sold much land therein, and operated stone quarries, is competent as to value of land containing a quarry—Seattle & M. R. Co. v. Roeder, 30 Wash. 244, 70 Pac. 498. One familiar with property, its location, soil, etc., is competent though he has had no expert training and though there have been no previous sales of land in the vicinity—Board of Levee Com'rs v. Nelms (Miss.) 34 So. 149. One who was a member of a firm and of a corporation formed from it and another firm is competent as to the value of the good will of both firms—White, Corbin & Co. v. Jones, 79 App. Div. (N. Y.) 373. Though a witness to land value states that he knows the market price from what he paid for it, his testimony will not be excluded unless it appears that he based his opinion on this alone—Houston, etc., R. Co. v. Charwaine (Tex. Civ. App.) 71 S. W. 401. Witness familiar with land for many years and who knows from sales the value of land in the neighborhood is competent as to value—Smith v. Pennsylvania R. Co., 205 Pa. 645; Leiby v. Clear Spring Water Co., 205 Pa. 634. But one who knew nothing of property before the running of a railroad line thereon is incompetent as to the damage—Shimer v. Easton R. Co., 205 Pa. 648. And witnesses who are familiar with land but do not know its market value are incompetent as to depreciation by construction of railroad—Chicago, etc., R. Co. v. Douglass (Tex. Civ. App.) 76 S. W. 449. One having no knowledge of property in the vicinity is not competent—Lynch v. Troxell (Pa.) 56 Atl. 413. One who has occupied premises is competent to testify to the value of the use and occupation thereof—Ish v. Marsh (Neb.) 96 N. W. 58.

Handwriting. An expert as to handwriting is not rendered incompetent by the fact that he did not become familiar with the writing of the person in question till after the writing in dispute was written—Ratliff v. Ratliff, 131 N. C. 425. An agent who has received letters from his principal is competent as to the principal's handwriting—Monumental Bronze Co. v. Doty (Mo. App.) 73 S. W. 234. An expert in handwriting may testify that a forged signature was written by a certain person other than the purported signer, but mere familiarity with the writing of such person does not qualify—Neall v. United States (C. C. A.) 118 Fed. 699. An instructor in penmanship of thirty years' experience, who has for many years made special study of the comparison of handwritings, is competent—Heffernan v. O'Neill (Neb.) 96 N. W. 244.

Foreign law. A lawyer familiar with the civil law generally, but not with the laws of Mexico other than that the civil law is the basis of its jurisprudence, is not competent as to the Mexican law on a particular question—Banco De Sonora v. Bankers' Mut. Casualty Co. (Iowa) 95 N. W. 232.

60. Physician assisting at operation competent as to probable duration of injuries—San Antonio, etc., R. Co. v. Moore (Tex. Civ. App.) 72 S. W. 226.

61. It may be based on information derived by physician from examination of patient—Skelton v. St. Paul City R. Co., 88 Minn. 192; Oliver v. Columbia, etc., R. Co., 65 S. C. 1; State v. Johnson (S. C.) 44 S. E. 58. But the court may require the facts to be stated—O'Malley v. Commonwealth, 182 Mass. 196. And an opinion on undisclosed facts within the witness' knowledge is incompetent—Raub v. Carpenter, 187 U. S. 159, 47 Law Ed. 119; Thayer v. Smoky Hollow Coal Co. (Iowa) 96 N. W. 718. The fact that the knowledge of the expert as to a machine was acquired after the time is immaterial if there was no change in its condition—Huber Mfg. Co. v. Hunter (Mo. App.) 72 S. W. 484. An opinion as to the best method of doing certain work based in part on the practice of the trade is inadmissible—Independent School Dist. v. Swearngin (Iowa) 94 N. W. 206.

62. Rafferty v. Nawn, 182 Mass. 503. It has been held improper as usurping the province of the jury to ask an expert his opinion based on all the evidence in the case as to the sanity of defendant in a criminal case—Porter v. State, 135 Ala. 51.

63. If a witness can state the nature and cause of a defect from the article itself its history need not be shown—White Mfg. Co. v. De La Vergne Refrigerating Mach. Co., 84 N. Y. Supp. 192. An article somewhat similar to that concerning which an expert is asked to testify may be shown to him in connection with a hypothetical question—Murphy v. Marston Coal Co. (Mass.) 67 N. E. 342.

64. A hypothetical question must not assume any fact not shown by the evidence (Bennett v. City of Marion [Iowa] 93 N. W. 558; Nichols v. Oregon Short Line R. Co., 25 Utah, 240, 70 Pac. 996; Galveston, etc., R. Co. v. Baumgarten [Tex. Civ. App.] 72 S. W. 78; Hicks v. Galveston, etc., R. Co. [Tex. Civ. App.] 71 S. W. 322; Smart v. Kansas City, 91 Mo. App. 586) and where the evidence is wholly insufficient to establish the facts assumed it must be excluded (Berry v. Safe Deposit & Trust Co., 96 Md. 45) and it is not enough that such facts appear in a pleading (Bennett v. City of Marion [Iowa] 93 N. W. 558) but any fact which may reasonably be inferred from the evidence may be assumed (Economy Light & Power Co. v. Sheridan, 200 Ill. 439; Turney v. Baker [Mo. App.] 77 S. W. 479) it not being necessary that the evidence in respect thereto be uncontradicted—Chicago v. Early, 104 Ill. App. 398; Orient Ins. Co. v. Leonard (C. C. A.) 120 Fed. 808.

Hypothetical questions need not cover all the evidence and may embrace any state of facts which it tends to prove (Kirsher v. Kirsher [Iowa] 94 N. W. 846; Williams v. State [Fla.] 34 So. 279) and may be based on any state of facts which the evidence justifies and does not assume facts beyond the evidence though it does not assume every fact in the case—Woodward v. Chicago, etc., R. Co. (C. C. A.) 122 Fed. 66; Chicago, etc., R. Co. v. Wallace, 104 Ill. App. 55; Id., 202 Ill. 129; Herpolsheimer v. Funke (Neb.) 95 N. W. 688. All the undisputed facts must be

the witness must base his answer wholly on the facts assumed therein.[65] Comparison of handwritings is of course based on the standards introduced.[66] The expert must give his judgment, not his conjectures,[67] in a direct manner,[68] but may state the reasons for his opinion and the names of standard authors supporting it.[69] Cross-examination may be directed both to the competency of the expert and to the conclusion to which he testifies.[70]

§ 10. *Real or demonstrative evidence.*—Demonstrative evidence, being the best of which the matter is susceptible, is usually admissible whenever available. It includes articles connected with the issue,[71] exhibition of physical injuries sued for,[72] comparison of handwritings by the jury.[73] Whether experiments in court shall be allowed rests largely in the discretion of the trial judge.[74]

embodied in the question, but the adverse party's theory of disputed facts need not be—Schulz v. Modisett (Neb.) 96 N. W. 338. The facts necessary to the formation of an opinion must be included—Birmingham R. & Elec. Co. v. Butler, 135 Ala. 388. Question as to quantity of earth a miner could move in a day, not stating season or character of soil, is properly excluded—Walton v. Wild Goose Min. Co. (C. C. A.) 123 Fed. 209. Question as to interior construction in respect to danger of fire held to present sufficient facts to elicit an intelligent opinion—Friedman Co. v. Atlas Assur. Co. (Mich.) 94 N. W. 757. Evidence held insufficient to show injury to spine assumed in question—Maynard v. Oregon R. Co. (Or.) 72 Pac. 590. Hypothetical question to elicit opinion as to whether overitis resulted from fall held proper—O'Neill v. Kansas City (Mo.) 77 S. W. 64.

65. Hicks v. Galveston, etc., R. Co. (Tex.) 72 S. W. 835.

66. Notice of intended production of standards and formal evidence of their genuineness is unnecessary where the other party had full opportunity to investigate them—Storey v. First Nat. Bank, 24 Ky. L. R. 1799, 72 S. W. 318. The word "paid" written on one instrument is not admissible as a standard of comparison with the same word written on another instrument—Sheppard v. Love (Tex. Civ. App.) 71 S. W. 67. Expert may compare disputed signature with signature of party to pleas in the case—Tower v. Whip (W. Va.) 44 S. E. 179. Though the statute allows a disputed signature to be compared not only with that of the purported signer but with that of any person accused of the forgery, it cannot be so compared without evidence connecting the person with it—Cook v. Strother (Mo. App.) 75 S. W. 175.

67. A statement that witness thought there must have been about a certain number of bushels raised on a field by the looks of the crop is not a mere guess but an expression of judgment—La Rue v. St. Anthony & D. Elevator Co. (S. D.) 95 N. W. 292.

68. Statements that plaintiff is a mental and physical wreck; is in a condition in which there is no enjoyment of life, etc., are inadmissible—Sterling v. Detroit (Mich.) 95 N. W. 986.

69. Scott v. Astoria R. Co. (Or.) 72 Pac. 594.

70. Facts not in evidence may be assumed for the purpose of testing the expert's knowledge—Bennett v. City of Marion (Iowa) 93 N. W. 558; Houston Biscuit Co. v. Dial, 135 Ala. 168. Where a physician testified that an injured woman could not walk he may be asked if she could not hobble with frequent rests—Birmingham R. & Elec. Co. v. Ellard, 135 Ala. 433. A witness who testifies to having prospected certain land may be asked how he spent his time when so doing—Belding v. Archer, 131 N. C. 287. A physician may be asked whether many men do not have similar ailments and do considerable work—McGovern v. Smith, 75 Vt. 104. A handwriting expert may be asked whether on a former trial he did not examine spurious signatures and pronounce them genuine—Hoag v. Wright, 174 N. Y. 36. An expert as to land value may be required to state the neighboring property with which he is familiar and the source of his information—Friday v. Pennsylvania R. Co., 204 Pa. 405. It is incompetent to ask an expert whether he subscribes to a passage read from a medical book—Pahl v. Troy City R. Co., 81 App. Div. (N. Y.) 308. An expert may be asked as to the amount of his compensation—Shannon v. Castner, 21 Pa. Super. Ct. 294. An expert may be asked whether one who has testified to a contrary opinion is not regarded as an eminent authority—State v. Greenleaf, 71 N. H. 606. A question as to whether other physicians might not come to a different conclusion is improper—Root v. Boston El. R. Co. (Mass.) 67 N. E. 365. **Redirect.** Witness who has been cross-examined as to whether certain injuries were feigned may be asked on redirect whether when examining the party he thought the injuries were feigned—Chicago Union Traction Co. v. Fortier (Ill.) 68 N. E. 948.

71. Clothing worn by plaintiff at time of accident—Quincy Gas & Elec. Co. v. Bauman, 104 Ill. App. 600. Part of a machine belt by the breaking of which plaintiff was injured—Boucher v. Robeson Mills, 182 Mass. 500. Piece of flange of car wheel—Roberts v. Port Blakely Mill Co., 30 Wash. 25, 70 Pac. 111. Bar and rope used by convict in escape, though same are not in exact condition as when used—People v. Flanigan, 174 N. Y. 356.

72. Orscheln v. Scott, 90 Mo. App. 352. Examination of injury by physician in the presence of the jury may be refused—Aspy v. Botkins (Ind.) 66 N. E. 462.

73. As to comparison by experts see § 9, ante. The authenticity of the writings offered as standards must be proved—Shannon v. Castner, 21 Pa. Super. Ct. 294.

74. Clark v. Brooklyn Heights R. Co., 78 App. Div. (N. Y.) 478.

§ 11. *Quantity required and probative effect.*[75]—The party sustaining the burden of proof in a civil action must establish his cause of action or defense by a preponderance of the evidence,[76] even though the cause of action is based on acts constituting a crime,[77] though on some issues greater certainty of proof is required,[78] and where the testimony is in equilibrium, the party having the burden of proof must fail.[79] Positive evidence is usually, but not always, of greater weight than negative.[80] The weight of testimony is ordinarily for the jury, even where there is no contradiction,[81] but uncontradicted testimony of an unimpeached witness free from all suspicious circumstances is said to be conclusive,[82] and a party is necessarily bound by uncontradicted evidence introduced by himself,[83] and by his own testimony.[84]

An expert opinion is sometimes held to make a prima facie case,[85] but cannot prevail against positive testimony,[86] and opinions based on a hypothetical case are of less value than those based on observation of the facts.[87]

75. The credibility of witnesses and the means by which they are impeached or sustained will be treated in Witnesses.

76. Preponderance of evidence means that the evidence on one side appears more credible than that on the other—McKee v. Verdin, 96 Mo. App. 268. Requirement of a "fair" or "clear" preponderance states the rule too strongly—Travelers' Ins. Co. v. Rosch, 23 Ohio Circ. R. 491; Western Mattress Co. v. Potter (Neb.) 95 N. W. 841. Such proof as satisfies the jury is not required—Collins v. Clark (Tex. Civ. App.) 72 S. W. 97; Ball v. Marquis (Iowa) 92 N. W. 691. **Circumstantial evidence** need not exclude every other reasonable conclusion—Chicago, etc., R. Co. v. Wood (Kan.) 72 Pac. 215. But the inference must be clear and direct—Jolivette v. Young's Estate, 103 Ill. App. 394. And where it was attempted to establish by circumstances that plaintiff's intestate stopped, looked, and listened before crossing a railroad track it was said that the inference must be the only one which can fairly and reasonably be drawn from the facts—O'Reilly v. Brooklyn Heights R. Co., 82 App. Div. (N. Y.) 492.

77. Preponderance is sufficient in civil action for assault—Clasen v. Pruhs (Neb.) 95 N. W. 640; Kurz v. Doerr, 86 App. Div. (N. Y.) 507.

78. To contract a written receipt (Rouss v. Goldgraber [Neb.] 91 N. W. 712); establish that a deed absolute on its face was intended as a mortgage (In re Holmes, 79 App. Div. [N. Y.] 264; Little v. Braun, 11 N. D. 410; Holladay v. Willis' [Va.] 43 S. E. 616); or to warrant reformation of a deed (Forester v. Van Auken [N. D.] 96 N. W. 301) the evidence must be clear and convincing. And evidence of grantor is insufficient to impeach certificate of acknowledgment—Adams v. Smith (Wyo.) 70 Pac. 1043.

79. Ahern v. Melvin, 21 Pa. Super. Ct. 462. But the mere fact that witnesses directly contradict each other does not necessarily produce a balance—West Chicago St. R. Co. v. Lieserowitz, 197 Ill. 607. And mere number of witnesses does not determine the preponderance of the evidence—Campbell v. Delaware & A. Tel. Co. (N. J. Sup.) 56 Atl. 303. Testimony of husband and wife in their own interest will not prevail against a single disinterested witness—Greditzer v. Continental Ins. Co., 91 Mo. App. 534.

80. Evidence that signals were not given, by one who must have heard them if they had been, is of as much weight as evidence that they were given—Stanley v. Cedar Rapids R. Co. (Iowa) 93 N. W. 489; Selensky v. Chicago G. W. R. Co. (Iowa) 94 N. W. 272.

81. Blount v. Medbery (S. D.) 94 N. W. 428. Circumstances in evidence tending to discredit testimony—Phoenix Life Ins. Co. v. Opper, 75 Conn. 295. Appearance of witness or inherent improbability of story may discredit uncontradicted testimony—United States v. Lee Huen, 118 Fed. 442. Testimony of child of tender years—Shannon v. Swanson, 104 Ill. App. 465. Similarity of testimony of two witnesses not necessarily suspicious where they live together and must have frequently discussed the transaction—Fatjo v. Seidel, 109 La. 699. Though evidence is contradictory and improbable the jury may consider it—Shortsleeve v. Stebbins, 77 App. Div. (N. Y.) 588; Hallett v. Fish, 120 Fed. 986.

82. Testimony of party—Second Nat. Bank v. Weston, 172 N. Y. 250.

83. Haas v. Zimmermann, 39 Misc. (N. Y.) 304; Stadermann v. Heins, 78 App. Div. (N. Y.) 563. One who proves an admission is not concluded by the accompanying explanation—Detroit Electric Light & Power Co. v. Applebaum (Mich.) 94 N. W. 12.

84. Daugherty v. Lady (Tex. Civ. App.) 73 S. W. 837. A party is concluded by the admissions in his testimony to the full extent of the strongest admission made by him—Cogan v. Cass Ave., etc., R. Co. (Mo. App.) 73 S. W. 738.

85. As to significance of technical term—Barber Asphalt Co. v. Howcott, 109 La. 692. Not sufficient as to whether title to land was defective—Hess v. Eggers, 38 Misc. (N. Y.) 726. Opinion that 16 men were necessary to lift a 600 pound rail disregarded as absurd—Haviland v. Kansas City, etc., R. Co., 172 Mo. 106.

86. Testimony of witnesses to execution of instrument sustained as against testimony of experts that signature was forgery—Card v. Moore, 173 N. Y. 598. That loans to insured were on account of premiums paid—Smith v. Mutual Life Ins. Co., 173 Mo. 329. Opinion that dislocation could not result from certain accident cannot overcome evidence of physician that dislocation existed—Highfill v. Missouri Pac. R. Co., 93 Mo. App.

Admissions are not conclusive,[88] but are usually held to be prima facie evidence,[89] but their weight varies with the circumstances under which they were made.[90]

The sufficiency of evidence is generally questioned on a request for an instruction,[91] or for a special finding or on objection or exception to findings,[92] or on motions to dismiss or nonsuit,[93] or to direct a verdict or on a demurrer to the evidence,[94] or on motion for new trial or other revisory proceeding.[95] Facts which evidence or which in accurate speech constitute or form a predicate for a given right, cause of action, defense or duty, are assigned to such titles as treat of the particular matter.

EXAMINATION OF WITNESSES.

§ 1. **General Rules.**—Repetition; Leading; Hypotheses; Refreshing Memory; Interpreters; Responsiveness.
§ 2. **Cross-examination.**—Scope of Direct; Scope of Issues; Credibility; Probability; Documents; Character.
§ 3. **Re-direct Examination.**
§ 4. **Recalling Witness.**
§ 5. **Privilege of Witness.**—Waiver.

§ 1. *General rules of examination.*—The form of questions and methods of examination are largely within the discretion of the trial court.[1] The questions should be definite[2] and contain a single interrogatory,[3] though questions asking for answers in a narrative form are sometimes allowed.[4]

Models, diagrams, and tools may be used to illustrate evidence.[5]

219. Opinions that "green stick fracture" could not occur to man 69 years old cannot overcome testimony that such fracture was present—Gorman v. St. Louis Transit Co., 96 Mo. App. 602.

87. Evidence of family physician and attorney more valuable as to capacity than experts testifying from hypothetical questions—In re Kane's Estate (Pa.) 55 Atl. 917. Evidence of physicians to testamentary capacity is entitled to more weight than that of laymen if they have had opportunity for personal observation of the testator; otherwise it is not—Ward v. Brown (W. Va.) 44 S. E. 488. Expert opinion on hypothetical case of little value where facts are disputed—In re Richmond's Estate (Pa.) 55 Atl. 970.

88. Houston, etc., R. Co. v. De Walt (Tex. Civ. App.) 71 S. W. 774. Approval of account rendered—White City State Bank v. St. Joseph Stock Yards Bank, 90 Mo. App. 395.

89. Joralman v. McPhee (Colo.) 71 Pac. 419; Burk v. Hill (Ga.) 45 S. E. 732. The insertion of a claim against himself in an inventory by an executor is not of itself sufficient to sustain a plea of set off in an action by him against the estate—Siebert v. Steinmeyer, 204 Pa. 419.

90. Their intrinsic weakness is enhanced by death of declarant and lapse of time—Kinney v. Murray, 170 Mo. 674; Reed v. Morgan (Mo. App.) 73 S. W. 381.

91. See Instructions.

92. See Verdicts and Findings.

93. Dismissal and Nonsuit.

94. Directing Verdict and Demurrer to Evidence.

95. New Trial, etc.; Appeal and Review; Certiorari.

1. Burson v. Bogart (Colo. App.) 72 Pac. 605; Mathis v. State (Fla.) 34 So. 287. It is within the discretion of the court to deny a request for a consultation with a party's witness called to the stand before an examination, though he had not had an opportunity to do so before—Hudson v. State (Ala.) 34 So. 854. **Harmless error.** Error in allowing a witness to be asked an improper question is harmless if the answer contains no incompetent testimony—Younglove v. Knox (Fla.) 33 So. 427. And see Harmless Error for a full discussion.

2. Whether a foreman had given any orders on any other day than the day of the accident, as to the position the men should occupy on a hand car, is too general and indefinite—Western R. Co. v. Arnett (Ala.) 34 So. 997. A witness may not be asked in regard to defendant's complaints as to his physical condition unless there is reference to some particular time that will not render the statement open to the objection of a self serving declaration—State v. Bailey, 31 Wash. 89, 71 Pac. 715.

3. A question whether a witness had not made a certain statement and knew it to have been a fact, is objectionable as involving two interrogatories—State v. Burrell, 27 Mont. 282, 70 Pac. 982.

4. Where questions could easily be framed which would have brought out the same testimony, a party will not be prejudiced by the court allowing testimony to be given in a narrative form—Goldsmith v. Newhouse (Colo. App.) 72 Pac. 809.

5. A model may be used by a witness for the purposes of illustration though not introduced in evidence—Geist v. Rapp (Pa.) 55 Atl. 1063. But such exhibits should not be considered by the jury as evidence—State v. Wilson (Kan.) 71 Pac. 849. Where in an action for injuries caused by a defective weld in a piece of machinery, another sim-

The court may, in furtherance of justice, question a witness,[6] but the practice of extended examination by the court is not approved.[7]

The question should not assume facts,[8] nor call for conclusions.[9]

Repetition of questions fully answered should not be allowed.[10]

Leading questions are questions which suggest to the witness the answer desired.[11] Their allowance by the trial court is discretionary.[12]

ilar piece of machinery on which was an old weld, was put in evidence without objection, the latter could be used in framing hypothetical questions propounded to experts—Murphy v. Marston Coal Co. (Mass.) 67 N. E. 342. It is not good practice to allow witness to indicate the position of the parties by reference to objects in the court room, without evidence in the record as to the distance to aid the appellate court in reviewing the case—Rachmel v. Clark, 205 Pa. 314.

6. South Omaha v. Fennell (Neb.) 94 N. W. 632. While the practice by a court of injecting a series of questions on the examination of each witness, may easily grow into an abuse calling for reversal in a proper case, this will not be the result where the questions were asked without objection or exception of any kind and in an apparent impartial desire to elicit the truth—Metcalfe v. Gordon, 86 App. Div. (N. Y.) 368.

7. Pardridge v. Cutler, 104 Ill. App. 89.

8. The question is not open to the objection that it assumes facts where its purpose is merely to identify an occurrence—Traveler's Ins. Co. v. Hunter (Tex. Civ. App.) 70 S. W. 798. Asking a witness whether on a former trial he did not testify to a certain fact, is not objectionable for assuming the fact of a former trial—Gilliland v. Dunn & Co., 136 Ala. 327. The question what, if anything, witness had to do with a transaction is not objectionable as assuming that she had something to do with it—Coldren v. Le Gore, 118 Iowa, 212. A question why, if witness was such a good friend of deceased he did not tell him of threats against him is improper as assuming a friendship and that the witness had not told deceased—Stewart v. State (Ala.) 34 So. 818.

9. Sheldon v. Bigelow, 118 Iowa, 586; Birmingham R. & Elec. Co. v. Jackson, 136 Ala. 279. Admissibility of conclusions of witness are discussed in Evidence, § 9A.

10. Toledo, etc., R. Co. v. Gilbert, 24 Ohio Circ. R. 181; State v. King (Iowa) 96 N. W. 712; Hutchins v. Missouri Pac. R. Co., 97 Mo. App. 548. Where question has been fully answered on direct examination there is no error in excluding it on cross examination—Quincy Gas & Elec. Co. v. Baumann, 203 Ill. 295; Edwards v. State (Neb.) 95 N. W. 1038; Carlson v. Holm (Neb.) 95 N. W. 1125. Where a witness testifies that his recollection is not aided by newspaper articles relating to the matter in controversy, the court may refuse to allow him to be again examined as to the matter—U. P. Steam Baking Co. v. Omaha St. R. Co. (Neb.) 94 N. W. 533. A witness may not be cross examined as to matters fully covered by his previous cross examination in the case—Hoover v. State (Ind.) 68 N. E. 591.

11. "On what part of the running board when you first saw him?" a party was standing (San Antonio Traction Co. v. Bryant [Tex Civ. App.] 70 S. W. 1015); whether a locomotive was properly handled when passing a certain point (Texas So. R. Co. v. Hart [Tex. Civ. App.] 73 S. W. 833); whether witness had ever witnessed objects floating down a stream and if so, whether the course taken was toward a certain shore (State v. Johnson [S. C.] 44 S. E. 58); whether witness has ever received anything by way of payment (Rothstein v. Siegel, 102 Ill. App. 600); whether it was or was not dangerous to do a certain thing (Galveston, etc., R. Co. v. Puente [Tex. Civ. App.] 70 S. W. 362); whether or not witness' foot was twisted or wrenched at the time of the injury (Indiana R. Co. v. Maurer [Ind.] 66 N. E. 156) have been held not to be leading. A question reciting fact already testified to by a witness is not leading—Oliver v. Columbia, etc., R. Co., 65 S. C. 1. Where it is not clear from the answer whether a witness intended to place his damages at one amount or another, the question whether or not his actual damage was one of the amounts, was not objectionable as leading—Harzburg & Co. v. Southern R. Co., 65 S. C. 539. In an action against a city where the issue is a defect in a grating on a sidewalk, a question—"Those grates were mighty light to start with,"—is leading—Lentz v. Dallas (Tex.) 72 S. W. 59. Asking a prosecutrix whether she had told any one what defendant had done to her should be excluded as leading in a prosecution for rape—Oakley v. State, 135 Ala. 29.

12. Anthony v. State (Fla.) 32 So. 818; Rio Grande Western R. Co. v. Utah Nursery Co., 25 Utah, 187, 70 Pac. 859; Campion v. Lattimer (Neb.) 97 N. W. 290; Pittsburgh, etc., R. Co. v. Kinnare, 203 Ill. 388; Colvin v. McCormick Cotton Oil Co., 66 S. C. 61; Rainey v. Potter (C. C. A.) 120 Fed. 651; Edwards v. State (Neb.) 95 N. W. 1038; Carlson v. Holm (Neb.) 95 N. W. 1125. Particularly in examination of prosecutrix in prosecution for seduction—State v. Burns (Iowa) 94 N. W. 238. A reversal will not necessarily result because an attorney persists in asking leading and suggestive questions which are immediately excluded as the matter is discretionary with the trial court—Sullivan v. Chicago, etc., R. Co. (Iowa) 93 N. W. 367. Leading questions allowable by auditor where ends of justice may be subserved thereby—Rusk v. Hill (Ga.) 45 S. E. 42. Where both the court and the attorneys are uncertain as to the meaning of statements made by witness, the court may allow the attorney to propound a leading question to get a clearer understanding of facts and this particularly where the other party was not prejudiced thereby—Rio Grande Western R. Co. v. Utah Nursery Co., 25 Utah, 187, 70 Pac. 859. The witness may be asked leading questions as to an undisputed matter—San Antonio Traction Co. v. Crawford (Tex. Civ. App.) 71 S. W. 306. Questions asked for the purpose of contra-

Code provisions allowing examination of a party as if under cross-examination extend only to adverse parties.[13]

Hypothetical questions used in the examination of expert witnesses,[14] must be based on facts proved,[15] or which the evidence tends to prove,[16] and it is not necessary that they should contain all the facts in evidence.[17] It is no objection that the recital is partisan.[18]

Refreshing memory.—A witness may refresh his memory by reference to memoranda in the preparation of which he participated and the accuracy of which he has personal knowledge of,[19] though he has no independent personal recollection.[20]

dicting former testimony may be leading—Jensen v. Steiber (Neb.) 93 N. W. 697. The master in an undefended divorce case may examine a witness by leading questions if he seems inclined to evade disclosure, but this does not allow the counsel of the party to also ask leading questions—Seeley v. Seeley, 64 N. J. Eq. 1. A witness disappointing the party calling him, may be asked questions tending to test his memory by recalling previous statements and drawing out explanations of apparent inconsistency, and tending to show the circumstances under which the witness was called—Creighton v. Modern Woodmen, 90 Mo. App. 378. Where the answers are relevant and admissible, the error in allowing leading questions on direct examination will not work a reversal—Rome v. Stewart, 116 Ga. 738.

13. Non answering partners in an action against several as partners are not adverse parties—Moore v. May (Wis.) 94 N. W. 45. And may not be invoked in a suit in equity in a federal court—Calivada Colonization Co. v. Hays, 119 Fed. 202.

14. Not necessary where facts are within knowledge of witness—Rafferty v. Nawn, 182 Mass. 503. See Evidence, § 9D for a discussion of the basis of expert testimony.

15. Birmingham R. & Elec. Co. v. Butler, 135 Ala. 388; Kirsher v. Kirsher (Iowa) 94 N. W. 846; Maynard v. Oregon R. Co. (Or.) 72 Pac. 590. Error in a hypothetical question which embraces facts not proven, is cured by an instruction that the value of an opinion on a hypothetical question depends on facts proven which are embraced in the question—Thomas v. Dabblemont (Ind. App.) 67 N. E. 463.

16. The hypothetical question asked an expert need only be based on what the evidence tends to prove and need not cover all of that—Kirsher v. Kirsher (Iowa) 94 N. W. 846.

17. Chicago, etc., R. Co. v. Wallace, 104 Ill. App. 55; Galveston, etc., R. Co. v. Baumgarten (Tex. Civ. App.) 72 S. W. 78. A hypothetical question which assumes and fairly states the existence of any state of facts which the evidence directly and reasonably tends to establish or justify, and which does not assume facts beyond the range of the evidence and the legal presumptions in the case, may be properly asked and answered though it does not assume every fact in the case—Woodward v. Chicago, etc., R. Co. (C. C. A.) 122 Fed. 66. A hypothetical question is not to be rejected because it does not include all the facts in evidence, where other elements are omitted; the other party deeming such elements material and desiring the opinion of a witness, in view of such elements may impeach him in the further questioning on cross-examination—Herpolsheimer v. Funke (Neb.) 95 N. W. 688. A hypothetical question reciting the methods used to remodel and improve the entire interior of a building and asking if the witness thought the construction perfectly safe, is not objectionable as not stating facts sufficient to enable witness to give an intelligent opinion—Friedman Co. v. Atlas Assur. Co. (Mich.) 94 N. W. 757.

18. Murphy v. Marston Coal Co. (Mass.) 67 N. E. 342.

19. Titus v. Gunn (N. J. Err. & App.) 55 Atl. 735; Lenney v. Finley (Ga.) 45 S. E. 317; Taft v. Little, 78 App. Div. (N. Y.) 74. A physician may refer to a memorandum made at the time of visiting patient, to refresh his memory as to condition of patient at time of visit—Bailey v. Warner (C. C. A.) 118 Fed. 395. Memoranda kept in connection with a cash register are sufficient where witness testifies as to their correctness—Gross v. Scheel (Neb.) 93 N. W. 418. A depositor may refresh his recollection as to the denominations of money deposited, by reference to the original deposit slip written by him at the time he made deposit—State v. Stevens (S. D.) 92 N. W. 420. **Books of account.** A witness may refresh his recollection by reference to entries made by him in due course of business of his firm, by reference to the original entries—Hodgkins v. Smith, 104 Ill. App. 420. To book entries where a witness saw goods sold and charged all entries of the same—Sonneborn & Co. v. Southern R., 65 S. C. 502. Where a book is not the book of original entries and has not been offered in evidence and is shown to have been made up by a clerk from memoranda furnished by others, the clerk cannot testify as to sales by refreshing his memory from the bill book—Owen v. Rothermel, 21 Pa. Super. Ct. 561. A witness testifying to particular items of stock of goods and their value, may refresh his memory by reference to an inventory of the goods made by himself—Gross v. Scheel (Neb.) 93 N. W. 418. Though a physician could not state the number of calls he made, from memory, or even from memory refreshed by the books, yet if the books enabled him to say on oath that the fact was as the books stated, the evidence was admissible—Mayberry v. Holbrook, 182 Mass. 463. On the question of the residence of a person at a certain place on a certain date, a merchant may be permitted to testify that he sold the party a bill of goods on that day and may refresh his memory as to the day by reference to his books of account and enumerate the articles sold—Shannon v. Castner, 21 Pa. Super. Ct. 294. Books being

The memorandum must be made at the time of the transaction or so directly thereafter as to be a part of the same,[21] but need not necessarily be admissible as evidence,[22] nor is it necessary that the memorandum should have been made by the witness provided he is able to testify from his own recollection after an inspection.[23] A witness may testify from a memory refreshed by a transcript of former testimony.[24] A copy of the memorandum may not be used unless the absence of the original is satisfactorily accounted for.[25]

The memorandum used by witness is admissible not as original evidence but as an aid to the jury.[26]

Interpreters.—Witnesses may be examined through interpreters.[27]

Responsiveness.—The answer of the witness should be responsive to the question, and where the witness fails in this respect the answer should be stricken.[28] The trial court has large discretion in the matter.[29]

in evidence a public examiner testifying as to solvency may refresh his memory by reference to memoranda made at the time of examination. Held in prosecution for receiving a deposit after insolvency—State v. Stevens (S. D.) 92 N. W. 420.

20. So long as he knows that the memorandum was made in accordance with the truth—Loose v. State (Wis.) 97 N. W. 526. A landlord of a hotel after his examination of a register may testify that a certain person was a guest at his hotel on certain days though independently of the register he had no recollection of the party having been in the hotel on such days—State v. Douette, 31 Wash. 6, 71 Pac. 556. But see Volusia County Bank v. Bigelow (Fla.) 33 So. 704.

21. Sibley Warehouse Co. v. Durand, 102 Ill. App. 406; Volusia County Bank v. Bigelow (Fla.) 33 So. 704; Johnson v. Spaulding (Neb.) 95 N. W. 808; Welch v. Greene (R. I.) 54 Atl. 54.

22. One testifying as to goods furnished an estate may refer to the bill rendered therefor in order to refresh his memory, though the bill itself would have been inadmissible on account of not having been made by the witness and not being an original entry—Ellis v. Baird (Ind. App.) 67 N. E. 960. As where a witness testifying to dying declarations made a memorandum at the time but failed to have same signed—Fuqua v. Commonwealth, 24 Ky. L. R. 2204, 73 S. W. 782; Foley v. State (Wyo.) 72 Pac. 627.

23. Telegrams—Commonwealth v. Burton (Mass.) 67 N. E. 419. In Pennsylvania a witness may refresh his memory from a written notice signed by him in his own handwriting though the notice was written by a clerk at his order—Athens Car & Coach Co. v. Elsbree, 19 Pa. Super. Ct. 618.

24. Connell v. State (Tex. Cr. App.) 75 S. W. 512. Under Code Civ. Proc. Cal. § 2047, provision allowing a witness to testify from anything written by himself or under his direction when he testifies as to the correctness of the writing, though retaining no recollection of the fact, the testimony of a witness to facts appearing in the testimony on a previous trial is admissible, the witness stating that if the record represented him as testifying as appeared, the testimony was true and that his memory was better at that time, and tried to tell the truth and did so, so far as he knew, but that the reading of the record did not refresh his recollection so that he had any present memory of the facts to which he had formerly testified—People v. McFarlane, 138 Cal. 481, 71 Pac. 568, 72 Pac. 48. A court reporter's evidence is admissible where he swears from his notes to statements of the witness though he has no recollection independent of his notes—Miles v. Walker (Neb.) 92 N. W. 1014.

25. Volusia County Bank v. Bigelow (Fla.) 33 So. 704. A witness may refresh his memory from a copy of the original memorandum which had been made by him or under his direction at the time the event occurred—Welch v. Greene (R. I.) 54 Atl. 54.

26. Alabama & V. R. Co. v. Sol Fried Co. (Miss.) 33 So. 74; Gross v. Scheel (Neb.) 93 N. W. 418. A cash register memorandum may be introduced as detailed statement of items where the witness testifies to its correctness—Gross v. Scheel (Neb.) 93 N. W. 418. Books or papers used by a witness to refresh his memory do not become primary evidence unless the opposing party makes them so by cross examination as to the entries—McKeen v. Providence County Sav. Bank (R. I.) 54 Atl. 49. Where a witness testifies fully to a fact and his memory is perfect, and his testimony is not impeached on cross examination, memorandum prepared by him will not be received—Zwangizer v. Newman, 83 N. Y. Supp. 1071. The admission of the entire memorandum may not be required. Where a member of the grand jury who acted as secretary, when called on to impeach certain witnesses, refreshed his memory from stenographic notes taken by him of proceedings taken before the grand jury, it was not error to refuse to allow all such notes to be read to the jury, counsel not having asked to see the notes and cross examine upon them—People v. Salsbury (Mich.) 96 N. W. 936. It being admitted that an absent witness would swear to a certain fact does not authorize the admission of books with which he could have refreshed his memory—McKeen v. Providence County Sav. Bank (R. I.) 54 Atl. 49.

27. It is within the discretion of the trial judge to appoint an interpreter for a witness claiming inability to talk English (Code Civ. Proc. § 1884)—People v. Morine (Cal.) 72 Pac. 166; Brzozowski v. National Box Co., 104 Ill. App. 338. A case will not be reversed because a witness testified in a foreign tongue where it is not claimed that his testimony was not correctly interpreted—Commonwealth v. Greason, 204 Pa. 64.

§ 2. *Cross-examination.*[30] *Limitation to scope of direct examination.*—As a general rule a party has no right to cross-examine a witness without leave of court as to any facts or circumstances not connected with matters testified to on his direct examination,[31] and where this is done the witness becomes the witness of the cross-examiner and he is bound by the evidence adduced.[32] Where a portion of a conversation is testified to on direct, the cross-examiner may ask for the remainder,[33] and where a part of a conversation is called out by cross-examination, the opposite party may call for the entire conversation.[34] A subscribing witness called to testify as to the execution of a will may be cross-examined on the whole case.[35]

Limitation to issues.—Subject to many exceptions, principally as to testing memory or attacking credibility, the witness should not be cross-examined as to matters irrelevant to the issues,[36] and may not be impeached for answers to such

28. Golibart v. Sullivan, 30 Ind. App. 428; Birmingham R. & Elec. Co. v. Jackson, 136 Ala. 279; Lisker v. O'Rourke (Mont.) 72 Pac. 416; Union Life Ins. Co. v. Jameson (Ind. App.) 67 N. E. 199; State v. King (Iowa) 96 N. W. 712.

29. Neifeld v. State, 23 Ohio Circ. R. 246; Carle v. People, 200 Ill. 494. An answer that the witness had been a married man for 21 years is not open to the objection that it was not responsive to the question "You have been a railroad man for 30 years and have not been affected with a venereal disease?"—International, etc., R. Co. v. Collins (Tex. Civ. App.) 75 S. W. 814. Where the witness' answer tended to support a contention as to the excessive speed of street cars it was held competent though not strictly responsive—Reagan v. Manchester St. R. (N. H.) 56 Atl. 314.

30. The statutory right to examine an adverse party as on cross examination is discussed in § 1, ante.

31. McKnight v. United States (C. C. A.) 122 Fed. 926; Rudd v. Dewey (Iowa) 96 N. W. 973; Goldstein v. Morgan (Iowa) 96 N. W. 897; Mock v. Garson, 84 App. Div. (N. Y.) 65; Peaden v. State (Fla.) 35 So. 204; Black v. Webber (Neb.) 96 N. W. 606; Sheldon v. Bigelow, 118 Iowa, 586; State v. Fullerton, 90 Mo. App. 411; Sauntry v. United States (C. C. A.) 117 Fed. 132; Commonwealth v. Scouton, 20 Pa. Super. Ct. 503; Jordan v. Seattle, 30 Wash. 298, 70 Pac. 743; Blauvelt v. Delaware, etc., R. Co. (Pa.) 55 Atl. 857; Glenn v. Philadelphia, etc., Traction Co. (Pa.) 55 Atl. 860; Rogers v. State (Tex. Cr. App.) 71 S. W. 18. A witness testifying merely to the construction of a bridge and a displacement discovered after an injury to it, may not be asked on cross examination as to the effect of the impact of a boat against the bridge —Hopper v. Empire City Subway Co., 78 App. Div. (N. Y.) 637. One who testifies merely as to the length of time a piece of machinery has been in use, may not on cross examination be asked as to injuries caused to others by the machinery in question—Duntley v. Inman, 42 Or. 334, 70 Pac. 529. In an action against a railway company for a crossing accident, an engineer testifying that he made a report at the time, may not on cross examination be asked as to negligence at other times and that on one such occasion he made no report—Texas & P. R. Co. v. Meeks (Tex. Civ. App.) 74 S. W. 329. Where in an action on notes it is shown that they had been pledged by the payee and indorsed to plaintiff, and the defendant on direct examination of plaintiff had inquired into the circumstances under which the notes were taken, it is proper on cross examination to allow plaintiff to show witness the note for which the notes sued on were pledged as security and admit the same in evidence—Black v. First Nat. Bank, 96 Md. 399. Under a procedure allowing an accused to make a supplemental statement to the jury, he may be cross examined as to a matter to which his attention is directed by his counsel—Walker v. State, 116 Ga. 537. Defensive matter may not be drawn from the witness (Freehill v. Hueni, 103 Ill. App. 118; State v. Bailey, 31 Wash. 89, 71 Pac. 715) and if it is the party calling the witness may discredit him as to such matter—Hubner v. Metropolitan St. R. Co., 77 App. Div. (N. Y.) 290.

32. Deutschmann v. Third Ave. R. Co., 78 App. Div. (N. Y.) 413; Goldstein v. Morgan (Iowa) 96 N. W. 897; Sheldon v. Bigelow, 118 Iowa, 586; Barton v. Bruley (Wis.) 96 N. W. 815.

33. People v. Rich (Mich.) 94 N. W. 375; Glenn v. Philadelphia, etc., Traction Co. (Pa.) 55 Atl. 860. Where the witness who drew a will, testified that a certain inventory contained a true list of testator's property, he may on cross examination be allowed to state that the testator, the day the will was executed, told him that he had agreed to sell certain stock contained in the inventory and would deposit the proceeds in a certain bank, and that the witness had the bank book showing that deposit, as the conversation testified to enabled the witness to identify the sum deposited as the proceeds of the sale—Berry v. Safe Deposit & Trust Co., 96 Md. 45.

34. Hudson v. State (Ala.) 34 So. 854.

35. O'Connell v. Dow, 182 Mass. 541.

36. Cabell v. McKinney (Ind. App.) 68 N. E. 601; State v. King (Iowa) 96 N. W. 712; Hoover v. State (Ind.) 68 N. E. 591; Edwards v. State (Neb.) 95 N. W. 1038; Carlson v. Holm (Neb.) 95 N. W. 1125. On cross examination of a witness as to injuries received in a street car accident and testifying on cross examination as to injuries to himself by the company at another time, he may not be asked as to whether he presented a claim —Daum v. North Jersey St. R. Co. (N. J. Sup.) 54 Atl. 221. On a prosecution for an assault, the prosecuting witness having testified that he had some difficulty with defendant over

questions.[37] The test whether a matter inquired about on cross-examination is collateral is, whether the cross-examining party would be entitled to prove it as a part of his case tending to establish his plea.[38]

Examination going to credibility of witness.—A large discretion is left with the trial court as to the extent of cross-examination to test the credibility and accuracy of witnesses,[39] and much latitude is allowed in the examination of parties testifying in their own behalf,[40] persons accused of crime,[41] and prosecuting

some mining claims, it was proper to exclude a question on cross examination as to whether he had made re-locations as it might have misled the jury into seeking for an excuse to justify the assault—State v. McCann (Or.) 72 Pac. 137. In Texas, one suing for personal injuries may not be asked on cross examination whether he refused to submit to a physical examination—Austin, etc., R. Co. v. Cluck (Tex. Civ. App.) 73 S. W. 569; Gulf, etc., R. Co. v. Brooks (Tex. Civ. App.) 73 S. W. 571. A retired partner testifying as to the relations of a new partner of the firm with the old firm and the new, may not on cross examination be asked questions tending to show false statements of witness to other partners with reference to financial condition of the firm on his retirement, that matter being a collateral and immaterial issue—Sheldon v. Bigelow, 118 Iowa, 586. In an action for damages caused by an overflow, a witness may not be cross examined as to the manner in which he irrigated his land, or whether he promised his tenant to protect him from water by a levee—Crossen v. Grandy, 42 Or. 282, 70 Pac. 906. In a prosecution for keeping a disorderly house the court properly refused to permit cross examination of a state's witness as to whether in his opinion the fact that certain persons of low character who frequented the place were relatives of defendant, would excuse him in receiving them—State v. Babcock (R. I.) 55 Atl. 685. On cross examination of a surgeon testifying as to his conclusion in regard to a disease, the court properly excluded a question as to whether other surgeons might not arrive at a different conclusion—Root v. Boston El. R. Co. (Mass.) 67 N. E. 365. Where the witness testifies to an immaterial matter, he may not be further questioned as to what he said in regard to the same immaterial matter—Hutchins v. Missouri Pac. R. Co., 97 Mo. App. 548.

37. Chicago, etc., R. Co. v. Stewart, 104 Ill. App. 37; Lankaster v. State (Tex. Cr. App.) 72 S. W. 388; George Burke Co. v. Fowler (Neb.) 93 N. W. 760; State v. Pucca (Del.) 55 Atl. 831; Trussell v. Western Pennsylvania Gas Co., 20 Pa. Super. Ct. 423.

38. George Burke Co. v. Fowler (Neb.) 93 N. W. 760.

39. Jennings v. Rooney (Mass.) 67 N. E. 665; Commonwealth v. Foster, 182 Mass. 276; Root v. Boston El. R. Co. (Mass.) 67 N. E. 365; Gatzmeyer v. Peterson (Neb.) 94 N. W. 974; Glenn v. Philadelphia, etc., Traction Co. (Pa.) 55 Atl. 860; Guertin v. Hudson, 71 N. H. 505.

40. Bassett v. Glass, 65 Kan. 500, 70 Pac. 336. Where the plaintiff testifies to the removal of a corner stone he may be cross-examined to show acquiescence—Grogan v. Leike, 22 Pa. Super. Ct. 59. In an action by an officer of a corporation for services performed outside of his regular duties, where he testifies as to the services performed outside his duties, he may be asked as to the duties of his position; and where he testifies that he had nothing to do with the preparation of certain reports, he may be asked who did prepare the report in question and other similar reports; and where he testifies as to certain departmental services, cross examination intended to show that the subject was generally before the officers of the company and one in which they took part and rendered services, is proper—Stout v. Security Trust & Life Ins. Co., 82 App. Div. (N. Y.) 129. In an action for the balance of an account, defendant may cross examine plaintiff as to certain of the items sued on and a refusal of the court to allow such cross examination is erroneous—Smith v. Castle, 81 App. Div. (N. Y.) 638. Where in an action for the value of goods, plaintiff in his own behalf testified as to their value, defendant may have plaintiff identify certain of the articles shown him on cross-examination and ask him what value he placed on such articles—Lemon v. McBride (Mich.) 96 N. W. 453. Where defendant alleged an alteration of a chattel mortgage by inserting after the description the words "in her store house" she may on cross examination be asked if she did not intend to mortgage goods in her store house—Cabell v. McKinney (Ind. App.) 68 N. E. 601. On cross examination of plaintiff in an action for assault she may be questioned as to her character as a lewd woman—Osborne v. Seligman, 39 Misc. (N. Y.) 811. In an action on a note against which an alteration is averred where plaintiff alleges transfer of the note for value before maturity, the defendant on cross examination of plaintiff may dispute the testimony, that the payee had assigned before maturity, and show why he had not received payment and dispute that the note had not been in his possession as testified by him—Reese v. Bell, 138 Cal. XIX, 71 Pac. 87. A party denying his signature to a note may be cross examined as to his ability to identify his own handwriting—Brown v. Woodward, 75 Conn. 254.

41. Accused testifying in his own behalf may be cross examined as to former criminal delinquencies—Williams v. United States (Ind. T.) 69 S. W. 871; State v. Callian, 109 La. 346; State v. Blitz, 171 Mo. 530; Powell v. State (Tex. Cr. App.) 70 S. W. 218; Jones v. State (Tex. Cr. App.) 71 S. W. 962; McDonald v. State (Tex. Cr. App.) 72 S. W. 383. The party on trial for keeping a disorderly house, may on cross examination as affecting his credibility, be asked if he has not previously been convicted of the same offense—State v. Babcock (R. I.) 55 Atl. 685. The accused on his cross examination may be asked as to his denial of the killing, as to his reasons therefor and also as to his reasons for concealing the offense—Rogers v. State (Tex. Cr. App.)

witnesses.[42] The witness may be asked as to previous contradictory statements,[43] and inconsistencies between his present and previous testimony.[44] Bias or interest of the witness may be inquired into,[45] and a witness may be properly asked

71 S. W. 18. Where accused had not offered evidence of good character, the court should not permit the state on cross examination, to ask him as to a previous arrest and then strike out that part of his affirmative answer in which he stated he was not guilty of the offense for which he had been arrested—State v. Nussenholtz (Conn.) 55 Atl. 589. Though one accused may not be compelled to give evidence against himself yet where he is examined in chief and has testified to his life, occupation and habits from boyhood he may be examined with reference thereto for the purpose of affecting his credibility, the state being bound by his answers—State v. Melvern (Wash.) 72 Pac. 489. Where the code provides that a statement shall not be under oath, an accused sworn on such examination may not on cross examination on the trial be asked whether his testimony on direct examination was not contradictory of such statement—State v. Parker, 132 N. C. 1014.

42. Where a prosecutrix testifies to complaints to different persons and they testify in corroboration, defendant has a right to cross examine as to the details of the complaints—State v. McCoy, 109 La. 682. An abuse of this discretion will work a reversal —O'Connell v. Pennsylvania Co. (C. C. A.) 118 Fed. 989.

43. Alabama Great Southern R. Co. v. Brooks, 135 Ala. 401; People v. Adams, 137 Cal. 580, 70 Pac. 662; People v. Payne (Mich.) 91 N. W. 739; State v. Broadbent, 27 Mont. 342, 71 Pac. 1. Where a witness is asked as to whether he has not made inconsistent statements, it is not necessary that the times, places and persons present should be stated, these facts only being required where it is sought to impeach the witness—State v. Burrell, 27 Mont. 282, 70 Pac. 982. One testifying that nothing was said as to the price to be paid for an article may be asked if it was not agreed that the price should be the same as that paid at a certain market—Smith v. Castle, 81 App. Div. (N. Y.) 638.

44. Gilliland v. R. G. Dun & Co., 136 Ala. 327. As preliminary to impeachment a witness may be asked whether he has not on a previous trial made a statement contradictory to his present testimony—Palmer v. Burleigh (Neb.) 93 N. W. 1049. Limiting examination of witness as to testimony of witness in former trial—McCoy v. Munro, 76 App. Div. (N. Y.) 435. In an action for the death of a child in a street railroad accident, where it is claimed by plaintiff that the motorman was not looking ahead and this prevented his stopping the car in time, and the defendant claimed that the motorman was looking ahead and the child ran in front of the car, plaintiff on cross examination of the motor man may inquire particularly as to his methods of operating the car at particular places and as to his testimony on a former trial and whether or not the present version differed from his previous testimony—Willsen v. Metropolitan St. R. Co., 80 App. Div. (N. Y.) 98. Plaintiff may read to a witness for defendant his testimony on a former trial as reported by the stenographer—Southern R. Co. v. Shelton, 136 Ala. 191. In an action for conversion, the court properly refused to allow defendant to introduce plaintiff's answers to interrogatories on plaintiff's cross-examination before defendant's side of the case had been reached, the court having stated that plaintiff might be asked on cross-examination for the purpose of contradiction, whether certain responses had been made to the interrogatories —Wilson v. Hoffman, 123 Fed. 984. Where it is desired to impeach a witness by contradictory statements his attention must be called to the conversation on which it is proposed to contradict him and also to the time, place and person to whom he is supposed to have made such statements—Gordon v. Funkhouser (Va.) 42 S. E. 677; Dunafon v. Barber (Neb.) 92 N. W. 198. Does not obtain as to written statements—Hanlon v. Ehrich, 80 App. Div. (N. Y.) 359. See, also, Witnesses as to foundation for impeachment.

45. Rarden v. Cunningham, 136 Ala. 263; Houston Biscuit Co. v. Dial, 135 Ala. 168; Styles v. Village of Decatur (Mich.) 91 N. W. 622; State v. Broadbent, 27 Mont. 342, 71 Pac. 1; New Omaha Thomson-Houston Elec. Light Co. v. Johnson (Neb.) 93 N. W. 778; Hedlun v. Holy Terror Min. Co. (S. D.) 92 N. W. 31. A witness may be examined as to collateral matters where such examination goes to the question of the witness' interest or bias—Kizer v. Walden, 198 Ill. 274. A physician testifying in an action against a street railroad for personal injuries, admitting that he had been sent by the company to the injured person, but denying that he was its physician, may be asked on cross examination whether he had not frequently visited and examined persons hurt in accidents on the company's line as its representative—Guckavan v. Lehigh Traction Co., 203 Pa. 521. A defendant in ejectment claiming to have taken possession and made valuable improvements relying on an oral contract of sale and plaintiff's assurance that he would make deed on obtaining patent, may be asked on cross examination whether he had not contributed a fund for the purpose of breaking the patent under which plaintiff held—Cobban v. Hecklen, 27 Mont. 245, 70 Pac. 805. Where a witness in a prosecution for malicious injury testifies that defendant had nothing to do with the commission of the offense and that the witness had no interest in shielding defendant, he may on cross-examination be asked why he did not make any disclosure of the evidence—People v. Boren, 139 Cal. 210, 72 Pac. 899. A real estate dealer testifying as to the amount he had received from a city for services in making investigations in special assessment proceedings, may not on cross examination, be asked as to how his income from his real estate business compared with his income from the city—Gordon v. Chicago, 201 Ill. 623. On cross examination of a physician participating in the procuring of a release he may be asked whether he had not witnessed other releases of the same character for plaintiff—Dorsett v. Clement-Ross Mfg. Co., 131 N. C. 254. Where the accuracy of a map used in a pros-

as to the reasons for living under an assumed name,[46] as to violation of a rule against talking about a case,[47] as to the binding effect of his oath as a witness.[48] The witness may be asked whether he is as positive as to every other fact testified to by him as he is to the particular fact asked about.[49] Cross-examination beyond reasonable limits to test credibility or show bias will not work reversal where the witness gave no testimony pertinent to any material issue in the case.[50]

As to probability of testimony.—A large latitude is allowed the cross-examiner in testing the probability of the direct evidence,[51] and the witness may be asked as to knowledge and conduct inconsistent therewith,[52] and these rules have been applied to witnesses to value of property,[53] witnesses as to the operation of trains,[54] and of experts generally.[55]

Examination as to documents.—Where a party produces his books of original entry, he may be cross-examined as to the entries without any subpoena duces tecum.[56] A cross-examiner may not require surrender to him of letters and notes

ecution for murder was disputed, it is proper on cross examination of the witness who made the map to allow defendant to show the directions given by the county attorney for its preparation—State v. Tighe, 27 Mont. 327, 71 Pac. 3.

46. A woman having testified for a party may be properly asked as to her relation with the party, and as to her reasons for living under an assumed name, the cross-examination tending to impeach credibility—McCarty v. Hartford Fire Ins. Co. (Tex. Civ. App.) 75 S. W. 934.

47. Birmingham R. & Elec. Co. v. Ellard, 135 Ala. 433.

48. In this case a Jew was asked as to the binding effect of an oath taken by him with his hat off—Birmingham R. & Elec. Co. v. Mason (Ala.) 34 So. 207.

49. Central of Ga. R. Co. v. Edmondson, 135 Ala. 336. The rejection by a court of a question on cross examination, whether the witness' recollection by reason of his condition was the same on all answers made by him as on a certain answer just made, is within the court's discretion—Zwangizer v. Newman, 83 N. Y. Supp. 1071.

50. State v. King, 88 Minn. 175.

51. Shannon v. Castner, 21 Pa. Super. Ct. 294. On cross examination of a witness testifying as to the habits of an insured as to sobriety, may be asked on cross-examination as to complaints made by insured to the witness of pains in his head and chest—Union Life Ins. Co. v. Jameson (Ind. App.) 67 N. E. 199. One testifying to an act and that it was witnessed by others may be asked to name some of the parties—Bigcraft v. People, 30 Colo. 298, 70 Pac. 417.

52. Welch v. Greene (R. I.) 54 Atl. 54. On cross examination of plaintiff suing for personal injuries he may be asked whether a few months earlier he had met with a serious accident without saying anything to any one about it—Brace v. St. Paul City R. Co., 87 Minn. 292. One testifying that an elevator shaft was not dangerous may be asked on cross examination whether other persons had not fallen down the shaft—Reid v. Linck (Pa.) 55 Atl. 849. A foreman of a section gang testifying that he had given orders that none of the men should stand in front of the lever to pull it, may be asked on cross examination as to whether he made any objection to the way in which the men were operating the car or gave any orders as to the position they should occupy on the occasion of the accident—Western R. v. Arnett (Ala.) 34 So. 997.

53. Witnesses asked to fix the value of property in condemnation proceedings, may be asked on cross examination as to the methods by which they arrived at their conclusions, what elements of damage they considered and the reasons for their opinions—Seattle & M. R. Co. v. Roeder, 30 Wash. 244, 70 Pac. 498. Where party in an action for damages caused by the falling of a building, testifies in chief as to the value of different items of property in question by reference to invoice made by himself and wife with view of selling an interest in the same, he may be asked on cross examination as to the fair market value of the property at the time of the injury—Payne v. Moore (Ind. App.) 67 N. E. 1005.

54. An operative testifying as to his manner of starting a car, may be asked on cross examination how he usually started his car from a station—Birmingham R. & Elec. Co. v. Ellard, 135 Ala. 433. Where a brakeman has testified as to manner in which train was stopped and that it was stopped without any unusual jerk, he may be asked on cross examination as to the difference between a long and short train with reference to stopping it, and whether if there is air on two-thirds of the cars, he would have to put on as many brakes as if he had air on only a part of it—Southern R. Co. v. Crowder, 135 Ala. 417.

55. Belding v. Archer, 131 N. C. 287; McGovern v. Smith, 75 Vt. 104; Birmingham R. & Elec. Co. v. Ellard, 135 Ala. 433. And authorities holding their views—State v. Greenleaf, 71 N. H. 606. On cross examination of a physician testifying as to numerous diseases affecting decedent, he may be properly asked on cross examination if he treated decedent for all of them—Ellis v. Baird (Ind. App.) 67 N. E. 960. Where a physician as a witness in a will contest, testifies on direct that testator a year before the execution of the will sustained a fall which shocked his nervous system for a day or two, he may on cross examination be asked whether the shock in any way impaired his mind—Berry v. Safe Deposit & Trust Co., 96 Md. 45.

used by the examiner.[57] A witness denying his signature, on being asked if certain signatures other than that on the instrument in question were his, is not entitled to see the instrument to which they are attached.[58]

Character witnesses may be asked as to specific acts of the person as to whom they testify,[59] the cross-examiner being bound by the answers.[60]

§ 3. *Redirect examination.*—The redirect examination is properly limited to matter drawn from the witness on cross-examination, and the examiner may ask questions allowing an explanation of the sense and meaning of expressions used on cross-examination.[61] This does not allow the witness to put his own interpretation on his testimony.[62] Where a witness on cross-examination has been asked as to a former statement made by him, the party calling him may re-examine him as to the same matter and in rebuttal introduce evidence to support him.[63]

§ 4. *Recalling of witness for further examination.*—It is within the discretion of the trial court to allow witness to be recalled for further examination at the instance of either party.[64] It is properly allowed where its purpose is to answer matter introduced by the opposing party as part of his case.[65]

56. Elliott v. Moreland (N. J. Law) 54 Atl. 224.

57. Where letters written by the payee to the maker of a note, were produced by the state in a prosecution of the payee for forgery and defendant had the full benefit thereof, the court properly refused to compel a delivery of the letters to defendant's counsel during his cross examination of the maker of the note—State v. Donovan (Vt.) 55 Atl. 611. Where the prosecuting attorney had possession of notes of testimony taken before the grand jury from which he questioned defendant's witness, it was not error to refuse to allow defendant's counsel to examine these notes—People v. Salsbury (Mich.) 96 N. W. 936. Where a party, for the purpose of showing mental incapacity, introduces a paper on which testator had made incorrect calculations he may on cross examination be required to produce another paper on which the calculations were correct—Berry v. Safe Deposit & Trust Co., 96 Md. 45. The opposite party may examine memorandum used by witness to refresh his memory—Volusia County Bank v. Bigelow (Fla.) 33 So. 704; Schwickert v. Levin, 76 App. Div. (N. Y.) 373, 12 Ann. Cas. 96.

58. Brown v. Woodward, 75 Conn. 254.

59. On cross examination of a character witness testifying that he had heard that the witness sought to be impeached had been indicted he may be asked as to the court in which the indictment was found—Bohlman v. State, 135 Ala. 45. Where defendants offered evidence as to their reputation for honesty and integrity, the witnesses on cross examination may be asked whether they did not know that the defendants were not generally reputed to be gamblers—State v. Thornhill (Mo.) 74 S. W. 832. Where on cross examination of a witness as to the character of deceased, he testifies as to some difficulties deceased had been involved in at one time, he may not be asked whether he had been prosecuted therefor—Bearden v. State (Tex. Cr. App.) 73 S. W. 17.

60. Barnes v. Commonwealth, 24 Ky. L. R. 1143, 70 S. W. 827.

61. Merrell v. State (Tex. Cr. App.) 70 S. W. 979; Commonwealth v. Carter (Mass.) 66 N. E. 716. A claim agent in the prosecution of a party for false pretences in obtaining settlement of a claim, on cross examination testifying to a warning that he had received from some unknown person, that the injuries claimed were received prior to the accident for which the railroad company was sued may on re-direct examination be permitted to state that he did not believe the warning, as bearing on the question as to whether he relied on defendant's statement in making settlement—Commonwealth v. Burton (Mass.) 67 N. E. 419. Where on cross examination of one seeking to recover for the obstruction of an elevated road, inquiry is made as to the effect on other property, the party on redirect examination may fully inquire with reference thereto but he cannot give evidence as to additional property not embraced in the examination—Robinson v. New York El. R. Co., 175 N. Y. 219. On a criminal prosecution, a prosecutrix asked whether the act had not been committed by others and who answered yes, may be asked on redirect whether the statement so made was true—Smith v. State (Tex. Cr. App.) 74 S. W. 556. A witness testifying in a prosecution of a distillery company for creation of a nuisance that the distillery was operated by a company other than defendant may explain that he did not know but what it had been changed to defendant—Kentucky Distilleries & Warehouse Co. v. Commonwealth, 24 Ky. L. R. 2154, 73 S. W. 746. In a prosecution for keeping a disorderly house allowing state's counsel on redirect examination to ask whether it was since the last winter that the witness went there, is not objectionable as allowing the state to cross examine its own witness and this where the witness was uncertain as to the date of his visit—State v. Babcock (R. I.) 55 Atl. 685.

62. Golibart v. Sullivan, 30 Ind. App. 428.

63. Martin's Adm'r v. Richmond, etc., R. Co. (Va.) 44 S. E. 695.

64. Dixon v. State, 116 Ga. 186. The court in its discretion may allow a witness who has been examined, to take the stand a second time after conference with his counsel and correct his original testimony—Central of Ga. R. Co. v. Duffey, 116 Ga. 346.

§ 5. *Privilege of witness.*—The privilege of a witness to refuse to answer questions tending to criminate him is secured by the fifth amendment to the federal constitution and the constitutions of many of the states,[66] and may not be abrogated by statute.[67] The privilege is secured by the common law.[68] A constitutional provision that one may not be compelled to be a witness against himself is available to all witnesses and is not limited to parties.[69] The privilege may be violated by orders requiring the production of books,[70] or by laws compelling a person to plead or deny upon oath a charge involving a criminal offense.[71] It is not violated by asking accused to stand up in court for identification by the prosecuting witness,[72] nor by the use of his shoes for comparison with tracks made by the person committing the crime,[73] nor by merely requiring a witness to be sworn before the grand jury.[74] One is compelled to be a witness against himself by a prosecution under an indictment founded on his own involuntary testimony.[75] The extent to which the privilege may be invoked rests solely with the witness,[76] and the privilege being a personal one may not be claimed by another.[77] A witness called upon to testify to self-criminating evidence may, where his privilege is wrongfully refused, decline, and if imprisoned for contempt, may obtain redress by habeas corpus.[78] If he yields, he may save his exceptions and obtain a reversal of the judgment.[79]

65. Where defendant in action for personal injury introduced testimony to show that plaintiff's physical condition was as bad before as since the injury, plaintiff may be recalled as to her condition before the accident—Birmingham R. & Elec. Co. v. Ellard, 135 Ala. 433.

66. The provision in the federal constitution is not extended to the states by the fourteenth amendment—People v. Wyatt, 39 Misc. (N. Y.) 456. There is no such prohibition in the constitution of New Jersey—State v. Zdanowicz (N. J. Err. & App.) 55 Atl. 743.

67. The constitutional provision that no one can be compelled in a criminal case to be a witness against himself, justifies a witness' examination before a magistrate on information charging another with keeping a gambling house, to refuse to give evidence tending to incriminate himself, notwithstanding the Penal Code provides that no person shall be excused from giving testimony upon any investigation or proceeding for violation of the chapter, because of the tendency of the evidence to convict him of a crime, but such testimony cannot be received against him upon any criminal investigation or proceeding, as a witness cannot be compelled to even disclose circumstances or sources of evidence which would aid his prosecution, and any statutory protection short of absolute immunity is insufficient—People v. O'Brien, 81 App. Div. (N. Y.) 51.

68. State v. Zdanowicz (N. J. Err. & App.) 55 Atl. 743.

69. A Code provision that the neglect or refusal of a defendant to testify shall not create a presumption against him, applies only to defendants and is not the same as the constitutional provision against compelling a witness to testify against himself, which provision includes not only defendants but all witnesses (Code Cr. Proc. N. Y. § 393)—United States v. Kimball, 117 Fed. 156.

70. Bankrupt will not be required to produce his books where he deposes that the furnishing of such books and the filing of schedules pursuant to usual order would tend to incriminate him and compel him to be a witness against himself—In re Kanter, 117 Fed. 356.

71. The New York Liquor Tax Law which allows a forfeiture of a certificate unless the holder files a verified answer to the petition in a proceeding for its revocation and denies every alleged violation compels the certificate holder if guilty to confess to his guilt either by his oath or by silence (Liquor Tax Law, § 28, subd. 2)—In re Cullinan, 82 App. Div. (N. Y.) 445.

72. Coles v. State, 23 Ohio Circ. R. 313.

73. People v. Van Wormer, 175 N. Y. 188; Thornton v. State (Wis.) 93 N. W. 1107.

74. United States v. Kimball, 117 Fed. 156.

75. State v. Gardner, 88 Minn. 130. An affidavit on a motion to quash an indictment because found on evidence that defendant was compelled to be questioned before the grand jury, need not set forth the evidence given by defendant in detail, it being sufficient if it fairly alleges the fact of compulsion—Id. Evidence given in a grand jury investigation by persons subsequently indicted is not by finding indictment on such evidence used elsewhere, in violation of a statute declaring that any evidence voluntarily given by a witness, cannot be used against him in any criminal prosecution (Rev. St. U. S. § 860)—United States v. Kimball, 117 Fed. 156.

76. A witness prosecuted for robbery and concealment of the stolen property, though testifying to the robbery, may under his privilege refuse to testify as to the concealment—People v. Loomis, 76 App. Div. (N. Y.) 243.

77. May not be invoked by accused as against testimony of accomplice—Barr v. People, 30 Colo. 522, 71 Pac. 392.

78, 79. State v. Faulkner (Mo.) 75 S. W. 116.

A witness may refuse to answer a question collateral to the issue, the answer to which will degrade him.[80] The privilege is personal and may not be invoked by another.[81] The court in its discretion may allow or refuse an answer where the witness does not refuse to answer.[82]

A witness may refuse to answer questions tending to subject him to penalty or forfeiture.[83]

Acts securing one from prosecution for disclosures made thereunder are constitutional.[84] The provision of the bankruptcy act that no testimony given by the bankrupt shall be used against him in any criminal proceeding does not prevent the introduction of incriminating circumstances obtained from sources other than the bankrupt, though knowledge of such sources was obtained from the bankrupt's testimony.[85] The proper method for one claiming the protection of the statute exempting him from prosecution for an offense of which he gave testimony in another case is by motion to quash the indictment.[86]

Waiver of privilege.—A witness may waive his right to refuse to give self-criminating evidence, as the privilege is a personal privilege, which he will be held to have waived, if he voluntarily answers without objection.[87] Where a defendant becomes a witness for himself, he waives any constitutional or common-law protection against being compelled to be a witness against himself, and may be cross-examined by the prosecutor.[88]

EXCHANGE OF PROPERTY.

Validity.—Contracts for exchange of property must be mutual.[89] They must be written if involving land.[90]

Transition of title need not be simultaneous to each party.[91]

Performance.—A party cannot complain of nonperformance if he is in default,[92] or cannot make clear title,[93] or has assented to the delay.[94]

80. The asking of the question is not error—State v. Hill, 52 W. Va. 296. On prosecution for assault with dangerous weapon, the complainant's witness may not be asked on cross examination as to whether he had not conducted a disorderly resort, and whether he was not in the same business at the time of the trial. An affirmative answer would have tended to degrade him, and the fact that he was engaged in such business was without relevancy on the question of his guilt or innocence—Meehan v. State (Wis.) 97 N. W. 173.

81, 82. State v. Hill, 52 W. Va. 296.

83. The postal department under the laws of the United States may prohibit officials from furnishing information regarding registered mail on penalty of removal—Nye v. Daniels, 75 Vt. 81.

84. The Illinois anti-trust act exempts corporate officers from criminal prosecution for anything truthfully disclosed by affidavit as to compliance with the law—People v. Butler St. Foundry & Iron Co., 201 Ill. 236.

85. State v. Burrell, 27 Mont. 282, 70 Pac. 982.

86. Sandwich v. State (Ala.) 34 So. 620.

87. Rev. St. U. S. § 860—United States v. Kimball, 117 Fed. 156; State v. Faulkner (Mo.) 75 S. W. 116; Litton v. Commonwealth (Va.) 44 S. E. 923. Where the bankrupt on examination before a referee made no objections to testimony on the ground that his answers might incriminate him, he waived his privilege and admissions could be used on cross examination in a criminal proceeding against him—State v. Burrell, 27 Mont. 282, 70 Pac. 982.

88. State v. Zdanowicz (N. J. Err. & App.) 55 Atl. 743; People v. Tice, 131 N. Y. 651; People v. Dupounce (Mich.) 94 N. W. 388. See case for list of authorities supporting text.

89. A contract for exchange from which one party reserves the right to withdraw cannot be specifically enforced—Tryce v. Dittus, 199 Ill. 189.

90. Beckmann v. Mepham, 97 Mo. App. 161. Exchange of possession under a parol contract of exchange of land passes title as against subsequent transferees—Baldwin v. Sherwood (Ga.) 45 S. E. 216. Appropriation by cotenant of exclusive use of land jointly held and relinquishment to other cotenant of land held by first solely—Laufer v. Powell (Tex. Civ. App.) 71 S. W. 549.

91. Pratt v. Wickham (Mich.) 94 N. W. 1059.

92. Agreement to execute deed as soon as plaintiff should execute deeds individually and as guardian—Ellis v. Light (Tex. Civ. App.) 73 S. W. 551.

93. Representation that there was no incumbrance proved untrue—Godfrey v. Rosenthal (S. D.) 97 N. W. 365.

94. Delay pending proceedings to remove cloud from title—Godfrey v. Rosenthal (S. D.) 97 N. W. 365.

Rescission is warranted where the exchange is secured by fraud or misrepresentation.[95] Rescission must be prompt, but time is not alone to be considered.[96] An accounting will be taken to place the parties in statu quo.[97]

Effect.—Title passes on turning of the property over to the other with such intent.[98] Insurance for improvements thereon, which without knowledge of either party were destroyed by fire before the exchange was consummated passes by the exchange.[99]

Vendor's liens may be implied on exchange of land.[100]

EXCHANGES AND BOARDS OF TRADE.

Discipline and expulsion of members.—Methods provided for discipline of members are supreme unless violative of the law of the exchange or of the land, or void for unreasonableness. The member may have a remedy in equity, if he has none other, if the corporation violates its laws in his trial to the injury of his property rights.[1] A judgment of the governing committee as to disciplinary matters will not be reviewed.[2] A decision expelling a member is presumed to be justified,[3] and will not be reviewed on the merits.[4] The trial of members cannot be enjoined on the ground that the committee will commit jurisdictional error,[5] or on the ground that the charges are not sufficiently specific to comply with the rules of the corporation.[6] Where there is no by-law to the contrary, charges against a member may be preferred by a member of the board of triers.[7]

By-laws may warrant trial for dealings outside the jurisdiction of the body, or with strangers.[8] On an investigation of the conduct of a member, the exchange

95. Exchange of land for mortgage falsely represented to be first lien—Nisley v. Spencer (Neb.) 95 N. W. 798. Fraud in agent acting for opposite party in effecting exchange—Brown v. Holden (Iowa) 94 N. W. 482. Concealment and misrepresentation as to title—Campbell v. Spears (Iowa) 94 N. W. 1126. Where one party to an exchange assumes payment of a mortgage barred by limitations of which fact he has knowledge and the other party has not, the second party may rescind if had he had such knowledge he would not have exchanged. He is entitled to relief also on the ground of mistake (Civ. Code, §§ 1568, 1572, 1577)—Hartwig v. Clark, 138 Cal. 668, 72 Pac. 149. On misrepresentation as to title the possession of the party desiring to rescind need not have been disturbed to allow such action—Campbell v. Spears (Iowa) 94 N. W. 1126.

On rescission for fraud of a trade of a stock of goods for land by retaking the goods, the retakers are liable only in nominal damages for conversion though they retake a day or two before they complete the rescission by tendering back the deed for the land—Wilcox v. Morten (Mich.) 92 N. W. 777.

96. Depends on all the circumstances—Beardsley v. Clem, 137 Cal. 328, 70 Pac. 175. Delay of three months not laches—Nisley v. Spencer (Neb.) 95 N. W. 798. Delay of year after discovery of fraud not laches—Campbell v. Spears (Iowa) 94 N. W. 1126. Bringing an action is a sufficient demand to prevent laches being urged against a second action for rescission brought immediately on dismissal of the first—Hartwig v. Clark, 138 Cal. 668, 72 Pac. 149.

97. Rents, taxes, improvements, disbursements, etc.,—Campbell v. Spears (Iowa) 94 N W. 1126.

98. Instruction as to effect of alteration of bull exchanged held to embody this rule—Pratt v. Wickham (Mich.) 94 N. W. 1059.

99. Beardsley v. Clem, 137 Cal. 328, 70 Pac. 175.

100. To the extent title to the land conveyed as consideration fails—Johnson v. Burks (Mo. App.) 77 S. W. 133.

1. Wood v. Chamber of Commerce (Wis.) 96 N. W. 835. **Notes.** Control of exchanges by the courts, see note to 68 Am. St. Rep. 860, 862. Review of decisions of exchange, see note 49 L. R. A. 358, 361, 364.

2. Bank of Montreal v. Waite, 105 Ill. App. 373; Alton Grain Co. v. Norton, 105 Ill. App. 385.

3. All the evidence on which it rested need not be introduced in defense to an injunction to compel recognition of expelled member. Plaintiff is confined to the issue of sufficiency of evidence of fraud authorizing expulsion, and the decision need be based only on such evidence as to justify honest minds in the conclusion—Young v. Eames, 78 App. Div. (N. Y.) 229.

4. Weukirch v. Keppler (N. Y.) 66 N. E. 1112.

5. Where by laws gave power to board of directors to censure, suspend, or expel members, equity will not determine whether the facts alleged constitute an offense against the corporation—Wood v. Chamber of Commerce (Wis.) 96 N. W. 835.

6, 7. Wood v. Chamber of Commerce (Wis.) 96 N. W. 835.

8. By laws of Milwaukee Chamber of Commerce held to authorize such trial—

is not limited to fraud in a single transaction which is set out in the specification as furnishing evidence of what is the real charge.[9] The same transaction may be both a fictitious sale and a fraud, either authorizing expulsion of a member.[10]

Where an expulsion is based on fraud of the member, the authority, if questioned, to expel for fraud on proof of fictitious sales, must be specifically challenged.[11]

Arbitrary expulsion must be malicious to impose liability for injury to business reputation, nor can dues for the current year be recovered as against the members.[12]

The right of membership is regarded as property in a limited sense,[13] though held not subject to transfer tax as personalty.[14] It has been held subject to the owner's debts.[15]

Board contracts.—Liability of members on board contracts is controlled by board rules,[16] but equity will relieve against rules compelling submission of disputes involving property rights to a committee of the board, where power to make such rules is not conferred by charter.[17]

Market quotations.—Quotations will not be protected in equity where based on gambling operations.[18]

Market quotations cannot be copied from the tape of a gathering company by a rival and sold to other persons,[19] and a company which pays a board of trade for the privilege of disseminating its quotations has a property right which will be protected by injunction.[20] A telegraph company furnishing quotations may reasonably require subscribers to agree not to engage in bucket-shopping.[21]

Wood v. Chamber of Commerce (Wis.) 96 N. W. 835.

9. Expulsion on charge of fraud in fictitious sales—Young v. Eames, 78 App. Div. (N. Y.) 229.

10. Young v. Eames, 78 App. Div. (N. Y.) 229.

11. Pleadings held insufficient to raise such issue on injunction to compel recognition of member—Young v. Eames, 78 App. Div. (N. Y.) 229.

12. Erroneous expulsion of member of coffee exchange without hearing for violation of rules—Lurman v. Jarvie, 82 App. Div. (N. Y.) 37.

13. Seat is taxable in New York though owned by non-resident—In re Glendinning's Estate, 171 N. Y. 684.

14. Laws 1896, § 2, subd. 5, §§ 220, 221—In re Hellman's Estate, 77 App. Div. (N. Y.) 355. It is not taxable in Maryland. Wheat in an unincorporated exchange not transferable except to person selected by governing committee not within Bill of Rights, § 15 or Poe's Supp. Code Pub. Gen. Laws 1900, art. 81, § 2—Baltimore v. Johnston (Md.) 54 Atl. 646.

15. Not "tools of trade" exempted from execution—Leggett v. Waller, 39 Misc. (N. Y.) 408. Not exempt in bankruptcy (Bankr. Act 1898, §§ 6, 70, 30 St. 566, c. 541, §§ 6, 70)—Page v. Edmunds, 187 U. S. 596. May be reached in supplementary proceedings—Leggett v. Waller, 39 Misc. (N. Y.) 408.

16. Member in refusing to be bound by unratified contract of clerk where rule forbids clerk contracting cannot be held to have violated rules of board—Bartlett v. L. Bartlett & Son Co., 116 Wis. 450.

17. Payment of money under decision of such a committee settling a "corner" enjoined—Bank of Montreal v. Waite, 105 Ill. App. 373; Alton Grain Co. v. Norton, 105 Ill. App. 385.

18. So held where proof showed 90 per cent of transactions for future delivery, determining quotations, were closed by payment of differences—Board of Trade of Chicago v. Donovan Commission Co., 121 Fed. 1012; Board of Trade of Chicago v. Kinsey Co., 125 Fed. 72; Christie Grain & Stock Co. v. Board of Trade of Chicago (C. C. A.) 125 Fed. 161 (In opinions below the circuit court held contra, 116 Fed. 944, and also on final hearing, 121 Fed. 608, that a requirement that persons to whom quotations were furnished should not conduct bucket shops was not in violation of the Sherman Anti-Trust act, 26 Stat. 209).

19. Reproduction on the tape not regarded as a publication—National Tel. News Co. v. Western Union Tel. Co. (C. C. A.) 119 Fed 294.

20. Taking quotations from wires or offices of patrons restrained—Illinois Commission Co. v. Cleveland Tel. Co. (C. C. A.) 119 Fed. 301.

21. Sullivan v. Postal Tel. Cable Co. (C. C. A.) 123 Fed. 411.

EXECUTIONS.[22]

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§ 17. **Restitution on Reversal of Judgment.**

§ 1. *The right to have execution.*—A judgment is essential.[23] A fee bill is the proper process for the collection of costs in civil actions, and an execution may not issue therefor solely.[24] Mandamus takes the place of an execution to enforce judgments against a municipality.[25] A surety on a note may have execution issued first against the maker.[26] A creditor may not have an execution against his own property.[27] A party entitled to an execution under a decree is not deprived of that right by a later decree ratifying an auditor's report by consent of parties that property was insufficient to pay claims and directing distribution among lienors other than complainant.[28]

§ 2. *Stay and how procured.*—Execution may be stayed by the execution of a supersedeas bond[29] by order of court,[30] by stipulation of the parties.[31] Liability of certain property to execution should be raised by appeal and the court should not stay execution as to such property.[32]

§ 3. *Procedure to procure issuance of writ.*—The judgment need contain no special direction for issuance of execution.[33] The New York code requires se-

22. Procedure for collection of judgments against receivers, see Receivers. Supplementary proceedings, see Supplementary Proceedings. Execution against the person, see Civil Arrest.

23. Attempt to collect costs in criminal case without judgment therefor—Hendon v. Delvichio (Ala.) 34 So. 830. Chancery decrees are enforced the same as judgments at law in Illinois—Whalen v. Billings, 104 Ill. App. 281. Under Code Civ. Proc. § 779, providing for execution against personalty to enforce an order, on failure to perform an order requiring clients to pay an attorney his compensation on substitution of other attorneys, the attorney may have an execution—Kane v. Rose, 87 App. Div. (N. Y.) 101.

24. Decker v. St. Louis, etc. R. Co., 92 Mo. App. 50.

25. United States v. Saunders (C. C. A.) 124 Fed. 124.

26. Hollimon v. Karger (Tex. Civ. App.) 71 S. W. 299. And where not satisfied and the surety pays the judgment he may have execution against the maker for the amount paid —Id.

27. Land reverted to seller and he levied on same—Missouri & S. W. Land Co. v. Quinn, 172 Mo. 563.

28. McCarthy v. Holtman, 19 App. D. C. 150.

29. A supersedeas bond is not effectual prior to receipt of countermand by the sheriff (Code Iowa, §§ 4128, 4130, 4131)—Edwards v. Olin (Iowa) 96 N. W. 742. The effect of a stay or supersedeas bond is merely to stay proceedings on the judgment or order appealed from. It does not destroy or vacate the judgment—State v. Superior Court (Wash.) 73 Pac. 779. See as to stay pending appeal Appeal & Review, ante, pp. 124-127 and see generally Stay & Supersedeas.

30. Courts in the exercise of equitable powers may stay execution on a judgment confessed on notes under powers of attorney pending a hearing on motion to quash and may allow judgment to be opened on a proper showing—Pearce v. Miller, 201 Ill. 188.

31. The acceptance of a check to be applied on a judgment on condition that the execution be stayed, otherwise the check to be returned, is a sufficient consideration for the agreement to stay execution—Standard Oil Co. v. Goodman Drug Co. (Neb.) 95 N. W. 667.

32. Lewis v. Linton, 204 Pa. 234.

33. Knotts v. Crossly (Neb.) 95 N. W.

curity of a guardian ad litem before he may proceed by execution to collect a judgment.[34] A substituted writ may issue after sale and delivery of deed where there is a showing of loss of the original.[35]

§ 4. *Power and authority to issue or allow issuance of writ.*—The right to execution against lands on transcripted judgments is a statutory right and precedent conditions must be complied with.[36] The time within which execution must issue is regulated by statute in the various states.[37] Execution cannot be ordinarily issued to a county other than that where the judgment was rendered or has been docketed.[38]

§ 5. *Form and contents of writ.*—An execution must conform to the judgment[39] or the order of the court.[40] An execution against one as agent for another is against the former; the words "agent for" being merely descriptio personæ.[41] Failure of the clerk to affix the seal of the court renders the execution voidable only.[42] Trivial errors of form will be disregarded after a long lapse of time.[43] Less formality is required in executions issued from justice courts.[44]

The transfer of an execution under the laws of Georgia must be in writing.[45]

848. The judgment of a district court entered on appeal of a claim against an estate, should not direct the issuance of an execution to satisfy the judgment—Bennett's Estate v. Taylor (Neb.) 96 N. W. 669. A direction in a decree that certain property be sold as upon execution sufficiently authorizes a sale by the sheriff—Cochran v. Cochran (Neb.) 95 N. W. 778.

34. Wileman v. Metropolitan St. R. Co., 80 App. Div. (N. Y.) 53.

35. Morrison v. Taylor (Del.) 55 Atl. 335.

36. Execution cannot issue on a transcripted judgment under the laws of Illinois unless the return on the execution from the justice shows that defendant was without personalty sufficient to satisfy the judgment (2 Starr & C. Ann. St. [2d Ed.] p. 2454, c. 79, par. 135)—Merrick v. Carter (Ill.) 68 N. E. 750. A return indorsed "Demand made on" a certain date does not show insufficiency of personalty—Id. Where a judgment has been registered in the office of the probate judge in Alabama the proper method of enforcing the judgment is by execution (Code, 1896, §§ 1920, 1921)—Emrich v. Gilbert Mfg. Co. (Ala.) 35 So. 322. Though a lien against realty is created by filing a transcript of a judgment rendered in another county, an execution sale based on such transcript is void unless authorized by statute. Ball. Ann. Codes & St. Wash. § 5132, governing matter of liens of transcripted judgments confers no such authority—Humphries v. Sorenson (Wash.) 74 Pac. 690. Where the only proof of the issuance of an execution on a judgment, an abstract of which had been filed in another county, was an execution which appeared never to have been delivered to an officer for service, it was insufficient to sustain the lien of the judgment as against land subsequently acquired—Schneider v. Dorsey (Tex.) 74 S. W. 526.

37. In Iowa, at any time within twenty years from the date of the judgment though the lien of the latter has expired—Hawkeye Ins. Co. v. Maxwell (Iowa) 94 N. W. 207. The Kansas Code provision that if execution is not sued out within five years from the date of the judgment it shall become dormant, refers only to general executions against the property of the debtor and not to special executions (Code Kan. § 445)—Watson v. Keystone Iron Works Co. (Kan.) 74 Pac. 269. A provision that a dormant judgment shall cease to be a lien does not apply to a decree for the sale of specific realty (Code Kan. § 445)—Id.

38. In Iowa, a decree in a chattel foreclosure may direct the issuance of two special executions to different counties—King v. Nelson (Iowa) 94 N. W. 1095. A decree of foreclosure of a chattel mortgage directing sale under special execution in an adjoining county, cannot be collaterally attacked—Id. In Texas, the first execution must be issued to the county in which the judgment was rendered, and not to a county in which it was filed to obtain a lien—Schneider v. Dorsey (Tex.) 74 S. W. 526. In North Carolina, a levy on land located in another county may be made without docketing the transcript in the county where the land is located—Evans v. Aldridge (N. C.) 45 S. E. 772.

39. There is no variance between a judgment against a minor and his next friend and an execution against the minor alone, the whole judgment showing that a personal judgment against the next friend was not intended—Day v. Johnson (Tex. Civ. App.) 72 S. W. 426.

40. Special execution—Norton v. Reardon (Kan.) 72 Pac. 861.

41. Armour Pkg. Co. v. Lovell (Ga.) 44 S. E. 990.

42. Defect cured by a later act, that defects and irregularities in issuance of execution should be disregarded (Mont. Act Mar 2, 1899, p. 145, § 2)—Kipp v. Burton (Mont.) 74 Pac. 85.

43. Incorrect date for docketing judgment raised 45 years after sale—Dixon v. Dixon, 38 Misc. (N. Y.) 652.

44. Brann v. Blum (Cal.) 72 Pac. 168. See Justices of the Peace.

45. Civ. Code 1895, § 3682—Jones v. Hightower (Ga.) 45 S. E. 60.

§ 6. *Quashal of writ.*—A justice has no power to quash an execution,[46] no appeal having been taken, nor can a United States commissioner do so on the ground that his judgment is invalid.[47] An order overruling[48] or granting[49] a motion to quash is appealable.

§ 7. *Successive, alias and pluries writs.*—An alias writ of special execution is not allowed in Illinois.[50] An alias execution for interest on a judgment will not issue where money levied upon is held by the sheriff under stipulation until the determination of a claim proceeding.[51] Where court has jurisdiction, an officer may not refuse to execute an alias writ for irregularities in prior execution.[52]

§ 8. *The levy. A. Leviable property and order of leviability.*[53]—The general rule is that any property which may be sold by the owner is, except as affected by exemption laws, subject to levy on execution against him, as growing crops,[54] but not beer in a state of intermediate fermentation.[55]

Under the laws of some of the states, both the equitable and legal interest of the judgment debtor in lands and tenements,[56] may be levied on, but not a contingent remainder,[58] the interest of the grantee of a mortgagee,[59] curtesy initiate,[60] nor the interest acquired by a purchaser of land at a commissioner's sale before a commissioner's deed is executed.[61] Where a trust makes no valid direction for accumulation, the surplus beyond support of the beneficiary may be applied to claims of creditors.[62] Partnership personalty is subject to levy for an individual debt,[63] and corporate lands are subject to execution to the same

46. Brownfield v. Thompson, 96 Mo. App. 340.

47. Time to appeal had expired—Little v. Atchison, etc., R. Co. (Ind. T.) 76 S. W. 283.

48. Ballinger's Ann. Codes & St. § 6500—Hewitt v. Root, 31 Wash. 312, 71 Pac. 1021.

49. Little v. Atchison, etc., R. Co. (Ind. T.) 76 S. W. 283. An appeal from an order quashing an execution is not an appeal from a final judgment for the recovery of money within Ballinger's Ann. Codes & Stat. § 6505, providing that an appeal bond shall be double the amount of the judgment involved (State v. Superior Court [Wash.] 73 Pac. 779) and certiorari will lie to review an order fixing the amount thereof—Id.

50. Keeley Brew. Co. v. Carr, 198 Ill. 492.

51. Adams v. National Bank, 30 Wash. 20, 70 Pac. 105.

52. Mollineux v. Mott, 78 App. Div. (N. Y.) 493. He may not object that prior executions were invalid—State v. Rainey (Mo. App.) 73 S. W. 250. An alias execution issued on a justice's judgment is not invalid because prior executions were returned by plaintiff's direction before they had run the statutory time—State v. Stokes (Mo. App.) 73 S. W. 254.

53. See Exemptions.

54. Johns v. Kamarad (Neb.) 96 N. W. 118.

55. Goepper v. Phoenix Brew. Co., 25 Ky. L. R. 84, 74 S. W. 726.

56. Whiteford v. Hootman, 104 Ill. App. 562. The interest of an heir not subject to homestead right of a mother, is subject to sale under execution against such child—Dinsmoor v. Rowse, 200 Ill. 555. Heirs are owners in common of residue of property remaining for distribution and have a leviable interest therein, though the purchaser will be deferred in receiving any benefit therefrom until it can be ascertained what share of the proceeds he was entitled to—Hardy v. Wallis, 103 Ill. App. 141. A lien reserved in a deed for additional purchase price to be conditionally paid is property subject to execution sale—Fryberger v. Berven, 88 Minn. 311. A mortgagor taking up a mortgage with money furnished by a third person and turning same over as collateral security for a loan has a leviable equity in the mortgaged premises which may be subjected to the payment of his debts subject to the lien of the holder of the mortgage—Bracken v. Milner (Mo. App.) 73 S. W. 225. A debtor conveying land to secure a debt without taking back a defeasance has an unenforceable equity in the land which may be sold for whatever a purchaser may choose to give—Eberly v. Shirk (Pa.) 55 Atl. 1071.

Right of a locator who has fully paid for public lands though he has yet no patent (Sayles' Civ. St. art. 4218f)—Martin v. Bryson (Tex. Civ. App.) 71 S. W. 615.

58. Shannon's Code, § 63, allows execution against rights and interests in the land whether legal or equitable, but a remainderman has no interest legal or equitable previous to life tenant's death—Nichols v. Guthrie, 109 Tenn. 535. Code Iowa, §§ 3801, 48, par. 8—Taylor v. Taylor, 118 Iowa, 407.

59. Johnston v. Case, 131 N. C. 491.

60. Rev. St. Mo. 1899, § 4339, expressly exempting it—Ball v. Woolfolk (Mo.) 75 S. W. 410.

61. Civ. Code Proc. Ky. §§ 394, 397, 399; Ky. St. §§ 1681, 1709—Goodin v. Wilson, 24 Ky. L. R. 1521, 71 S. W. 866.

62. Code Civ. Proc. Cal. § 859—Magner v. Crooks, 139 Cal. 640, 73 Pac. 585.

63. Standing timber in the hands of a purchaser under a contract specifying no time for its removal is realty for the purposes of an execution sale. The contention was that it was partnership personalty and accordingly not subject to levy for individual debt—Dils v. Hatcher, 24 Ky. L. R. 826, 69 S. W. 1092. And see Partnership.

extent as if owned by individuals.[64] Personalty in possession of the owner is generally subject to levy,[65] and where the judgment debtor is left in possession, a levy is good against a purchaser[66] or mortgagee,[67] and a creditor may levy on property fraudulently transferred by his debtor.[68] Where a sale of property is not completed, the seller may rescind the sale so as to defeat an execution against the buyer levied meantime.[69] In like manner property conveyed without consideration and with a secret agreement to reconvey is subject to execution against grantee.[70] Money deposited in lieu of an undertaking for appearance belonging to another may not be levied upon for debt of the party bound.[71] Property in custodia legis is not subject to levy.[72] Under the national bankruptcy act, levies within four months before filing the petition are void.[73] An agreement that no levy shall be made on certain property cannot be enforced by injunction prior to an actual levy.[74]

(§ 8) *B. Mode of making levy.*—A sheriff is not required to notify a debtor of his homestead rights where he has abandoned same.[75] The description of the wrong mortgage in the levy on an equity of redemption vitiates the levy.[76] Fixtures may not be levied on as personalty.[77] A leasehold is an interest in real estate within laws governing manner of levy.[78] Standing timber sold on contract fixing no time for its removal is to be levied on as realty.[79]

(§ 8) *C. Duty to make levy. Indemnification of officer.*—An officer is liable for failure to make levy,[80] but may require indemnity.[81]

64. Poor v. Chapin, 97 Me. 295.

65. Taylor v. Plunkett (Del.) 56 Atl. 384; Peters v. Cape May, etc., S. S. Co. (N. J. Eq.) 53 Atl. 692. Sufficiency of evidence to create prima facie presumption that purchaser in possession was in control of business at time of levy—Wood v. Matter, 88 Minn. 123. Sufficiency of evidence to show property in judgment debtor—Harmon v. Church (Neb) 93 N. W. 209.

66. The stock of one doing business in his own name is liable for his debts to one without notice though the title to the property in another is of record—Partlow v. Lickliter, 100 Va. 631. Personalty may be levied on as the property of the seller unless it has been delivered to the buyer with reasonable dispatch—Taylor v. Plunkett (Del.) 56 Atl. 384.

67. Where the mortgagee is not in possession and the mortgage is not on file at the date of the levy, a purchaser at the execution sale under a judgment against the mortgagor will take free of the mortgage, though he had notice of its existence prior to the sale—Johns v. Kamarad (Neb.) 96 N. W. 118.

68. Brasie v. Minneapolis Brew. Co., 87 Minn. 456. He may maintain ejectment to recover possession—Id.

69. State v. Jenkins, 170 Mo. 16.

70. It is not material to the validity of a levy that the property was conveyed to the judgment debtor for a bad purpose—Oliver v. Wilhite, 201 Ill. 552. A promise by a son against whom an execution was levied to his mother that he would not record a deed will not avail as against a creditor without knowledge of the promise—Id.

71. People v. Gould, 75 App. Div. (N. Y.) 524, 12 Ann. Cas. 6.

72. Property taken from an officer under a writ of replevin and returned to him on the giving of a re-delivery bond, is in custodia legis and a sale of the property on an execution after the property is so taken and during the pendency of the replevin proceedings may be prevented by injunction—Overton v. Warner (Kan.) 74 Pac. 651. Pendency of an action for the foreclosure of an alleged chattel mortgage in which a temporary injunction has been granted restraining defendant from disposing of the property during the pendency of the action, does not withdraw the property so as to prevent creditors in another court from levying an execution, the property is not in the custody of the law, and the principles applicable are those pertaining to the doctrine of lis pendens—Ryan v. Donley (Neb.) 96 N. W. 49.

73. In re Darwin (C. C. A.) 117 Fed. 407; Gabriel v. Tonner, 138 Cal. 63, 70 Pac. 1021; Ninth Nat. Bank v. Moses, 39 Misc. (N. Y.) 664; Rodgers v. Forbes, 23 Ohio Circ. R. 438.

74. Crook v. Lipscomb (Tex. Civ. App.) 70 S. W. 993.

75. Smith v. Thompson, 169 Mo. 553. A requirement that notice of levy shall be filed in the county in which land occupied as a homestead is situated does not apply where the homestead is abandoned after rendition of judgment (Rev. St. Mo. 1899, § 3178)—Id.

76. Bartlett v. Gilcreast (N. H.) 55 Atl. 189.

77. Taylor v. Plunkett (Del.) 56 Atl. 384.

78. State v. Superior Court (Wash.) 73 Pac. 779.

79. Dils v. Hatcher, 24 Ky. L. R. 826, 69 S. W. 1092.

80. A sheriff cannot excuse failure to levy on the ground that the execution was issued before return of a previous execution (Mollineaux v. Mott, 78 App. Div. [N. Y.] 493). He has the burden of showing the validity of a homestead exemption claim—Johns v. Robinson (Ga.) 45 S. E. 727. A recital in a constable's return that he returned the same

(§ 8) *D. Extent and adequacy of levy.*—An insufficient levy cannot be fortified or perfected by a levy made after the return of the execution.[82] The entry of levy must show the property levied upon.[83]

(§ 8) *E. Conflicting levies and liens and priorities between them.*—Under the laws of Kentucky, the lien of an execution attaches from the moment the execution is placed in the hands of an officer for collection.[84] The plaintiff in a junior judgment by suing out execution and levying upon land acquires priority over an older judgment upon which execution is subsequently issued.[85] Where a chattel mortgage was not filed as required by law, the mortgagor could transfer the property so as to vest in transferee a title superior to the rights of the judgment creditor.[86]

(§ 8) *F. Relinquishment and dissolution of levy. Replevin.*—A levy is not abandoned by leaving ponderous articles on the debtor's premises in charge of a custodian in the employ of the debtor, who continues using them.[87] In Iowa, property cannot be replevied from an officer by the owner unless he shows it to be exempt.[88] Where the property is returned to him on his executing an undertaking, it is his duty to retain the property in his possession until determination of the replevin suit,[89] and an attempted sale meantime will be restrained by injunction.[90]

(§ 8) *G. Release of property on receipts or forthcoming or delivery bonds.*—Garnishees, receipting for property of the judgment debtor delivered to them by the sheriff, are estopped from showing that the sheriff never had possession.[91] An adjudication in favor of plaintiff in execution proceedings is necessary to right to proceed on a forthcoming bond.[92] A surety on a forthcoming bond is released from liability, where the levying officer subsequently seized and sold the property under a lien of superior dignity, applying the proceeds to such superior lien.[93]

(§ 8) *H. Liability of officer for loss of property levied upon.*—A sheriff making a levy is not excused from liability for loss of the property by the fact that the attorney of plaintiff permitted him to leave the property of the debtor until it could be disposed of.[94]

(§ 8) *I. Effect of death of execution debtor.*—The death of the execution debtor after issuance of execution will not affect validity of levy made thereunder.[95]

by direction of plaintiff's attorney in order that another execution might be issued to another constable, is only prima facie evidence of such fact in an action against the constable for failure to execute writ—State v. Rainey (Mo. App.) 73 S. W. 250.

81. A constable may require an indemnity bond on claim of property by a third person though he has previously attached the property in the suit on which the execution was based—Smith v. Rogers (Mo. App.) 73 S. W. 243. An indemnity bond is not invalidated by a variance between the levy and bond as to name of a machine where there is no variance in the description of the machine—Id. Where a constable threatens to release property claimed by third persons, unless given a bond of indemnity, the bond is a good common law obligation and not invalid for duress—Id.

82. Canfield v. Browning (N. J. Law) 55 Atl. 101.

83. Where an execution against several defendants is levied on certain land, and the entry of levy does not show whose property was levied on, a sale and deed made under the levy will not divest the title of the real owner—Cooper v. Yearwood (Ga.) 45 S. E. 716.

84. Richart v. Goodpaster (Ky.) 76 S. W. 831.

85. Canfield v. Browning (N. J. Law) 55 Atl. 101.

86. McDonald v. City Trust, Safe Deposit & Surety Co., 39 Misc. (N. Y.) 552.

87. Meyer v. Michaels (Neb.) 95 N. W. 63.

88. Code Iowa, § 4163—Young v. Evans, 118 Iowa, 144.

89. Rev. St. Ohio, 1892, § 5820—Uphaus v. Roof, 68 Ohio St. 401. There is a prima facie case of regularity where there is an admission that an officer held the goods in pursuance to an execution issued on a judgment rendered—Gruber v. Janns, 84 N. Y. Supp. 882.

90. Uphaus v. Roof, 68 Ohio St. 401.

91. Colbath v. Hoefer (Or.) 73 Pac. 10.

92. Pepperdine v. Hymes (Mo. App.) 72 S. W. 1078.

93. Floyd v. Cook (Ga.) 45 S. E. 441.

94. Johns v. Robinson (Ga.) 45 S. E. 727.

95. Under the laws of Indiana the death of a judgment debtor does not affect an execution issued before his death (Burns' Rev. St. 1901, §§ 802, 2484)—Blumenthal v. Tibbits (Ind.) 66 N. E. 159. A sheriff's sale after the death of the execution debtor on an execution issued in his lifetime, will not be set aside.

(§ 8) *J. Liability for wrongful levy.*—A levying officer is not bound to inquire into the validity of proceedings on which execution is based.[96] A sheriff is liable for levy on exempt property.[97] The action for selling exempt property is not for misconduct in office within acts conferring jurisdiction on certain courts.[98] A sheriff may not interpose an appraisement as a defense where he fails to inform appraisers of exemption and appraisement is made without allowance therefor.[99] A seizure under void process is a naked trespass as against a stranger in rightful possession of property.[1] A mortgagee may recover for conversion against one who sells mortgaged chattels on execution against the mortgagor after he is in default so that the mortgagee's right of possession is complete.[2] The purchaser taking no part in the removal of property is not jointly liable with the officer for the trespass and conversion.[3] The fact that the debtor had personal property sufficient to satisfy the execution at the time of the levy on land will not invalidate the sale, the debtor having a remedy against the sheriff for damages sustained.[4] A petition alleging that there were no proceedings on which an execution could issue, but that to exact illegal costs an execution was levied on plaintiff's property, sets out a cause of action against the levying officer.[5] An officer levying on live stock belonging to a third person must deliver same to the party and is not relieved from liability by turning it back on the range without notice to him.[6] Where a judgment has been paid, there is no issue of its validity for a jury in an action for wrongful levy.[7] Cases on damages for wrongful levy are found in footnote.[8]

§ 9. *Claims of third persons.*—Affidavit of property required on claim by third person is not necessary, when at the time of the seizure the property is in the lawful possession of the claimant.[9] The issue is between a right to subject the property and the claimant's title, not the right of property between claimant

though at the time of the sale no legal representative of the deceased debtor had been appointed and there were minor heirs and debts due by the estate of a higher dignity than the lien of the execution—Hudgins v. McLain, 116 Ga. 273.

96. Wilbur v. Stokes, 117 Ga. 545.

97. Thompson v. Donahoe (S. D.) 92 N. W. 27; Baughn v. Allen (Tex. Civ. App.) 73 S. W. 1063.

98, 99. Strong v. Combs (Neb.) 94 N. W. 149.

1. Hagar v. Haas (Kan.) 71 Pac. 822.

2. Biehler v. Irwin, 84 N. Y. Supp. 574.

3. Hoxsie v. Nodine (C. C. A.) 123 Fed. 379.

4. Allen v. Farley (Ky.) 76 S. W. 538.

5. Hathaway v. Smith, 117 Ga. 946.

6. Kieffer v. Smith (S. D.) 93 N. W. 645.

7. Deleshaw v. Edelen (Tex. Civ. App.) 72 S. W. 413.

8. In an action for wrongful levy on the ground that defendant was denied the right to point out property to be levied on, the measure of damages is the value of the goods seized at the time of the levy less the amount of the judgment—Avindino's Heirs v. Beck (Tex. Civ. App.) 73 S. W. 539. In an action against a sheriff for trespass, the levy being unlawful and the sale illegal, the plaintiff will not be liable for the expenses of the levy and sale—Hillman v. Edwards (Tex. Civ. App.) 74 S. W. 787. In an action for unlawful seizure of property under an execution where defendant sets up the judgment in justification, but asks no affirmative relief and prays that it be dismissed with costs, he is not entitled to a set-off against plaintiff's damages in any amount—Id. In an action against an officer for forcible entry of premises to seize property on an execution, it is proper to show what amount of the proceeds of the property taken subject to the execution had been credited on the judgment in mitigation of the damages—Id. The measure of damages for trespass committed by an officer in making a levy and seizing property, is the value of the property as assessed by the jury less the amount that had been credited on the judgment—Id. In an action for wrongful execution, one compelled to employ attorneys may recover attorney's fees as part of the punitive damages—Deleshaw v. Edelen (Tex. Civ. App.) 72 S. W. 413. An instruction submitting profits lost as a measure of damages is properly given where the petition in an action for wrongful execution avers a levy on plaintiff's business and injury to his business and trade—Id. The measure of damages is the value of the chattels, the difference between it and the mortgage debt being the subject of an account between the parties on an accounting—Biehler v. Irwin, 84 N. Y. Supp. 574. $250 held not inadequate for levy of a wrongful execution—Avindino's Heirs v. Beck (Tex. Civ. App.) 73 S. W. 539. In an action for damages for levy on a homestead there can be no recovery for worry and discomfort and failure to dispose of the property unless there is a showing of the actual loss suffered—Whitworth v. McKee (Wash.) 72 Pac. 1046.

9. Gen. St. Minn. 1894, § 5296—Wood v. Matter, 88 Minn. 123.

and defendant in execution.[10] In Texas, a levy made by seizing property instead of by giving notice as provided by the laws, though one of the claimants was in possession as joint owner, is not void, though irregular.[11] A claimant of property with knowledge of its seizure who sued the officer but dismissed his suit without fault of the officer could not afterwards prosecute his claim though he was not served with the statutory notice by the officer.[12] Where property is returned to claimant on the execution of bond to the sheriff, the title vests in the claimant and the execution lien is at an end.[13] One giving a claimant's bond, a proceeding under the Texas statute to test rights to the property, waives the manner of the levy.[14] In a claim case, the plaintiff in fi. fa. assumes the burden of proof.[15] On the trial of a claimant's issue, plaintiff to recover must offer in evidence the judgment; the offer of the execution and the judgment roll is not sufficient.[16] See note for sufficiency of evidence in claim cases.[17] Under the laws of Louisiana, minors whose property has been illegally sold as that of another person are not forced to attack, by direct action, title of the party in possession; they may ignore it as an absolute nullity, and institute a petitory action for its recovery.[18]

Property levied on may be replevined from the officer by persons having property therein other than the execution defendant.[19]

10. Volusia County Bank v. Bigelow (Fla.) 33 So. 704.

11. Rev. St. 1895, art. 2349, provides for taking possession of personalty on levy where the defendant in execution is entitled to possession; where he has an interest in the personalty but is not entitled to possession the levy to be made by giving notice to the person entitled to possession or to one of them where there are several. Article 2352 requires a levy on the interest of a partner to be made by leaving a notice with one or more of the partners or with a clerk —Davis v. Jones (Tex. Civ. App.) 75 S. W. 63.

12. Small v. Finch (Ind. App.) 66 N. E. 1015. Burns' Rev. St. 1901, §§ 1613, 1614, requires officer to give notice within 20 days where it is likely that there are claimants.

13. Meyer v. Knight, 21 Pa. Super. Ct. 1. In West Virginia, the delivery to the sheriff of a suspending bond by a claimant of property levied on under a fi. fa. stays the execution and the sale is void (Code W. Va. 1899, c. 107, § 4)—August v. Gilmer (W. Va.) 44 S. E. 143. A purchaser at a sale after the claimant of property has given a suspending bond acquires no title to the property and on a rule to show cause may be summarily required to return the property to the custody of the sheriff—Id.

14. Property levied on as the property of a debtor was claimed by two joint claimants, one of whom was the debtor's wife, the bill of sale ran to the debtor and he signed notes for deferred payments, but had paid nothing, although claimant had paid certain sums on account of the purchase price, and the money paid by the debtor's wife and part of it paid by the other claimant was paid on one of the notes after the levy was made. Held not to show no interest in the property subject to the execution—Davis v. Jones (Tex. Civ. App.) 75 S. W. 63.

15. Cannon v. Shahan (Ga.) 44 S. E. 824.

16. Blalack v. Stevens (Miss.) 33 So. 508.

17. Where a security deed is given to secure a note and after judgment on the note the land re-conveyed and execution levied, a claim is filed by a third person, proof of the possession of land by the grantor in the security deed at the time of its execution, makes a prima facie case against the claimant—Ford v. Nesmith, 117 Ga. 210. On the trial of a claim filed to the levy of an execution issued on a mortgage foreclosure, where the plaintiff in execution fails to introduce any evidence of title or possession in the mortgagor at the time of the execution of the mortgage, and a prima facie case against the claimant is not made out, a verdict finding the property subject, should be set aside as contrary to the law—Jones v. Hightower, 117 Ga. 749. There is evidence that the property seized was subject to the levy, where the bill of sale to a claimant was made about the time of bringing the action, and the consideration was for services rendered a father by a son during his minority, and the sale was not intended to be absolute —Parsons v. Smith (Ga.) 45 S. E. 697.

18. Jewell v. De Blanc (La.) 34 So. 787. Where property belonging to minors has been levied on and sold as the property of another, a bad faith purchaser at such sale in possession cannot require as a condition to the commencement of a suit for its recovery, that plaintiff offer to reimburse him the amount he has paid for the property—Id.

19. Evidence sufficient to show that plaintiff in replevin was the owner and entitled to possession of property levied on as property of other parties—Leschen & Sons Rope Co. v. Craig (Colo. App.) 71 Pac. 885. Where one of the parties to replevin claims the property by virtue of a levy made by him as an officer, it is proper to direct the jury in case they find for him, to find the fair, reasonable and market value of the property without at the same time directing their attention to the manner in which the property was sold by the officer and his want of discretion possessed by other owners of goods to accept or reject such offers as are not

§ 10. *Appraisement.*—Under the Kentucky code, the execution lien is not lost by the fact that the constable levying on joint property failed to make an inventory and appraisal.[20] Where the sale is made with reference to a tax lien, the purchaser taking advantage of the deduction thereof from the appraisement may not deny the validity of taxes in a proceeding to enjoin their collection.[21] Certificates of lien against land sold on execution may be waived, and, where waived, the sheriff may proceed with the sale without them.[22] An objection as to the form of certificates of liens goes to the appraisement and must be raised before sale.[23] On allotment of the wife's dower as against a purchaser claiming under execution sale against the husband, the value of permanent improvements made by the purchaser cannot be taken into consideration in estimating the value of the land.[24]

§ 11. *Execution sales. In general.*—A sale will relate back to an attachment.[25] Under the Kentucky laws, all sales under execution of land of which another person has adverse possession are null and void.[26]

Notice and advertisement.—The description is sufficient where lands levied on can be distinguished and identified.[27] It is not important that the description includes more property than that subject to levy.[28] In New York, provision is made for inclusion of diagram in notice.[29] The right to raise the question of insufficiency of description may be waived.[30] In Washington, the notice must be posted in a conspicuous place on the land to be sold, but where tracts are widely separated it is not necessary that notice should be posted on all such tracts.[31] Posting in a public place at the court house satisfies a requirement that notice be posted at the court house doors.[32] An act requiring publication of notice once a week during a certain number of weeks does not allow a shortening of the period by publishing the last notice early in the week.[33]

Conduct of sale.—Under a provision requiring sales to take place between specified hours, a sale at a later hour is void.[34] Lands should be sold in the manner most likely to produce the largest returns. This will ordinarily result where they are offered in parcels.[35] The sale must be made for cash.[36] Where there is

considered fair—Meyer v. Michaels (Neb.) 95 N. W. 63.

20. Civ. Code Ky. § 660—Richart v. Goodpaster, 25 Ky. L. R. 889, 76 S. W. 831.

21. Omaha Sav. Bank v. Omaha (Neb.) 95 N. W. 593; Equitable Trust Co. v. Omaha (Neb.) 95 N. W. 650.

22. Moore v. Hornsby (Neb.) 95 N. W. 853.

23. Northwestern Mut. Life Ins. Co. v. Marshall (Neb.) 95 N. W. 357. Nebraska Code does not require the use of a seal by officers who have no seal, and it is sufficient if they certify under their hands—Id.

24. Ewell v. Tye, 25 Ky. L. R. 976, 76 S. W. 875.

25. Poor v. Chapin, 97 Me. 295.

26. Farmers' Bank of Beattyville's Assignee v. Pryse, 25 Ky. L. R. 807, 76 S. W. 358.

27. Canfield v. Browning (N. J. Law) 55 Atl. 101. Land described as a certain parcel of land containing a given number of acres situated in the northeast corner of a certain league of land is insufficient—Edrington v. Hermann (Tex.) 77 S. W. 408.

28. Barber Asphalt Pav. Co. v. Kiene (Mo. App.) 74 S. W. 872. A notice of sale is not invalid by reason of including more than the sheriff is authorized to, or in fact did sell—Northwestern Mut. Life Ins. Co. v. Marshall (Neb.) 95 N. W. 357.

29. Francis v. Watkins, 72 App. Div. (N. Y.) 15. A purchaser will be relieved on the ground of mistake in a diagram included in notice where the mistake was unintentional and the property was correctly described in the notice—Id. That purchaser was not misled by a mistake in diagram into bidding an amount in excess of the value is shown where another bidder bid within $50 of the successful bid of $54,500—Id.

30. Where a debtor's grantee suing an execution purchaser to enjoin the execution of a deed, alleges that the purchaser levied on the land as the property of the debtor and advertised a sale and purchased the same, she may not take advantage of an insufficiency of the description in the sale proceedings—McCormick v. McCormick Harvesting Mach. Co. (Iowa) 95 N. W. 181.

31. Laws Wash. 1899, p. 85—Whitworth v. McKee (Wash.) 72 Pac. 1046.

32. Whitworth v. McKee (Wash.) 72 Pac. 1046.

33. Currens v. Blocher, 21 Pa. Super. Ct. 30.

34. Ind. T. Ann. St. 1899, § 2163—Hancock v. Shockman (Ind. T.) 69 S. W. 826.

35. Palmour v. Roper (Ga.) 45 S. E. 790. A sheriff is not required to sell lots separately by reason that the deed securing the notes described the property by the number of the lots composing the tract, the description not

no collusion, a wife may purchase her husband's land at execution sale and acquire good title to the same which may not be subjected to the payment of his debt.[37]

Bids and acceptance thereof.—On default of bid, the sheriff may, on repayment of the advertising fees, treat the matter as no sale, and sell again.[38] On default of bidder, the purchaser is liable for the difference between the amount of the bid and the price for which the property subsequently sold.[39] Inadequacy of bid at execution sale is not notice to the grantee of the purchaser of want of title in the judgment debtor.[40] An agreement to bid in property and hold it in trust for one who is insolvent is void as against creditors.[41]

Liability of officer for failure to sell.—A sheriff in an action for failure to sell must make it affirmatively appear that he parted with possession under order of a competent court or that the execution could not be legally enforced.[42] There can be no recovery of damages against a sheriff for refusal to sell realty on execution, where there is a complicated condition of title, and no damage appears to have been sustained by the parties by reason of such refusal.[43] An action will not lie against an officer for failure to execute the writ where the failure complained of was directed by the party's attorney.[44] Where the equity of redemption is levied on, it requires the consent of the mortgagor, mortgagee, and plaintiff in fi fa to sell the entire interest in the property so as to free it from the strict lien.[45]

Proceeds.—The courts of New Jersey may order money, which by the terms of the writ is payable to a person named, to be paid into court.[46] The surplus proceeds of the sale should be turned over to the estate of a deceased judgment debtor.[47] The judgment creditor has a right of action for wrongful disposition.[48]

§ 12. *Return or certification of sale to court and confirmation. Return.*—Statutes fixing time for return do not apply to special executions.[49] Under a code provision allowing return nulla bona to be made two days after issuance of execution, an execution issued on the 21st, and returned nulla bona on the 23d, is invalid.[50] A sheriff is exonerated for failure to make return where he shows that the levy was abortive by reason of the failure of the creditor to give a proper indemnifying bond.[51] An order to an officer to return an execution should not direct the form of the return.[52] An officer's return giving only the initials of plaintiff's name is

necessarily implying that the lots were separately pledged—Id. An injunction will issue to restrain a sheriff from selling realty in bulk, where a showing is made that larger returns will be received from a sale in parcels—Reynolds & H. Estate Mortg. Co. v. Kingsberry (Ga.) 45 S. E. 235. The objection that lots should have been sold separately may not be raised for the first time on appeal—Allen v. Farley, 25 Ky. L. R. 930, 76 S. W. 538. After lapse of 45 years a sale will not be held invalid for sale in bulk—Dixon v. Dixon, 38 Misc. (N. Y.) 652.

36. Bradley v. Challoner's Sons Co., 103 Ill. App. 618. A purchaser of land under a levy against a resulting trust deed may not hold the land as against the beneficiaries of the trust, unless he pays a consideration therefor other than the giving of credit for the price on the judgment—Hicks v. Pogue (Tex. Civ. App.) 76 S. W. 786.

37. Bracken v. Milner (Mo. App.) 73 S. W. 225.

38. And may not compel a payment of the bid—Bradley v. Challoner's Sons Co., 103 Ill. App. 618.

39. Hughes v. Miller (Pa.) 55 Atl. 793.

40. Hart v. Gardner (Miss.) 33 So. 442.

41. Gibson v. Jenkins, 97 Mo. App. 27.

42. Woodward v. McDonald, 116 Ga. 748.

43. Porter v. Trompen (Neb.) 96 N. W. 226.

44. State v. Rainey (Mo. App.) 73 S. W. 250.

45. Civ. Code, § 2759—Milner v. Pitts (Ga.) 45 S. E. 67.

46. Gifford v. McQuinness, 63 N. J. Eq. 834.

47. Carr v. Berry, 116 Ga. 372.

48. The presumption of application of proceeds to the payment of the judgment may be rebutted as far as the judgment debtor is concerned that the creditor was deprived of the proceeds by operation of law or the act of the judgment debtor—Adams v. National Bank of Commerce, 30 Wash. 20, 70 Pac. 105. In an action against a sheriff for a wrongful disposition of proceeds plaintiff must not only show a lien but a right to participate and payment to persons not entitled—Dowd v. Crow, 205 Pa. 214.

49. Norton v. Reardon (Kan.) 72 Pac. 861.

50. Graves v. Spry (Del.) 55 Atl. 334.

51. State v. Jenkins, 170 Mo. 16.

52. Mollineaux v. Mott, 78 App. Div. (N. Y.) 493.

sufficient.[53] A return may be amended by leave of court.[54] An entry by an officer on an execution issued from a justice's judgment, unless recorded on the execution docket of the superior court of the county where defendant resides, will not arrest the running of the Georgia Dormancy Statute.[55]

Confirmation.—A sale on execution is not complete until confirmed by the court.[56] A confirmation continues in full force, notwithstanding an appeal therefrom, until reversed.[57] A sale is sufficiently confirmed by a trial had before a jury who find that the sale was valid, the verdict being approved by the trial court and judgment rendered.[58] Under the laws of Washington, it is not required that notice be given a debtor of a motion for confirmation.[59] Where a judgment on which the sale was made had been paid when the execution was issued, and an agreement was made to satisfy the same, a motion to set aside the confirmation of the sale should have been sustained.[60]

§ 13. *Purchaser's certificate of sale.*—The description of realty in the certificate of purchase is sufficient, though not as particular as that required in tax sales.[61] There is no presumption of knowledge of secret equities against the assignee of a certificate.[62]

§ 14. *Redemption.*—The purchaser acquires no right to the possession of fixtures during the redemption period.[63] A redemption terminates the effect of a sale.[64] Judgment creditors having a lien may redeem.[65] A debtor may confess a judgment expressly for the purpose of enabling the judgment creditor to redeem if there is a bona fide indebtedness existing and due to such creditor.[66] The assignee of the undivided interest of joint owner of judgment may redeem from a prior lien to the same extent and for the same purpose as the assignor.[67] Generally an attaching creditor has no enforceable lien entitling him to redeem from a former execution sale.[68] The grantee of an unrecorded deed is not such a creditor of the grantor as will entitle him to redeem under the laws of Michigan.[69] The right is denied to the grantee of a fraudulent conveyance.[70] Redemption by a creditor taking a quit claim from the owner will not displace the liens of judgments obtained by assignees of certificates of sale.[71]

53. Poor v. Chapin, 97 Me. 295.
54. State v. Jenkins, 170 Mo. 16.
55. Smith v. Bearden (Ga.) 45 S. E. 59.
56. Hendryx v. Evans (Iowa) 94 N. W. 853.
57. Hendryx v. Evans (Iowa) 94 N. W. 853. On affirmance a confirmation order is ratified and confirmed as originally entered, and the rights of the parties relate back to that time—Id.
58. Evidence held insufficient to sustain the claim of debtor's children, that property levied upon belonged to them—Smith's Heirs v. Johnston (La.) 34 So. 677.
59. Whitworth v. McKee (Wash.) 72 Pac. 1046.
60. Linton v. Cathers (Neb.) 95 N. W. 1044.
61. McCormick v. McCormick Harvesting Machine Co. (Iowa) 95 N. W. 181.
62. Blumenthal v. Tibbits (Ind.) 66 N. E. 159.
63. Off v. Finkelstein, 200 Ill. 40.
64. Brand v. Baker, 42 Or. 426, 71 Pac. 320.
65. Byers v. McEniry, 117 Iowa, 499. The holders of a subsequent judgment lien may redeem by paying a proper amount to the clerk, and need not produce a certified copy of the judgment docket, files and records on which the redemption is based, but it is sufficient if the clerk has knowledge thereof, and the papers are called to his attention—Hunter v. Mauseau (Minn.) 97 N. W. 651. In California, the purchaser at execution sale acquires a title allowing him to redeem from another sale but this does not divest the judgment creditor of his right also to redeem—Pollard v. Harlow, 138 Cal. 390, 71 Pac. 454, 648. Where realty has been attached and sold according to law, a second attaching creditor takes nothing by purchase under his execution at sheriff's sale except the right of redemption from the sale on execution under the first attachment—Poor v. Chapin, 97 Me. 295.
66. Becker v. Friend, 200 Ill. 75.
67. Hunter v. Mauseau (Minn.) 97 N. W. 651.
68. Code, § 3989, making levy a lien from entry in clerk's office is intended to act simply as a lis pendens—Byers v. McEniry, 117 Iowa, 499.
69. Spring v. Raymond (Mich.) 95 N. W. 1003.
70. Warden v. Troutman, 25 Ky. L. R. 247, 74 S. W. 1085.
71. Byers v. McEniry, 117 Iowa, 499. A redemptioner redeeming under a quit claim from the owner may not claim that the redemption was by agreement to preserve the

Equity will entertain a bill by heirs to redeem where valuable property of decedent was sold to creditors for a grossly inadequate amount.[72] One seeking to have redemption set aside must act promptly.[73]

One entitled to redeem from two sales, the last of which covers the equity of redemption, must pay the amount of both purchases.[74] The purchaser at an execution sale holding the property as security for advancements and the purchase price is entitled to interest on moneys expended to pay mortgages necessary to the preservation of his security.[75] There may be a right of redemption independent of a right of possession, and vice versa.[76] A purchaser at execution sale is not liable for rents on redemption where he had not been in possession and had not received benefits of crops.[77] The purchaser may consent to an extension of the time to redeem.[78]

§ 15. *Deeds and title under sales.*—The successor of the sheriff making a sale may execute a deed to assignee of the heirs of a deceased certificate holder and the deed will relate back to the time of the sale.[79] The deed may be avoided for insufficiency of description.[80] Under the Iowa laws, the rights of a purchaser become vested when he pays his money for a sheriff's certificate, and hence an act curing defective certificates of acknowledgment to deeds theretofore executed but which expressly provides that it shall not apply to vested rights does not affect a purchaser who paid his money before the act took effect.[81]

The deed passes title as of the date of the levy and free from later incumbrances.[82] A purchaser acquires no greater title than the judgment debtor has.[83]

land subject to the claims of himself and other creditors under a parol agreement and that this purpose having failed he was entitled to return of the redemption money and this more particularly where he was not a party to the agreement—Id.

72. Property worth $10.000 incumbered for $1,847 sold to creditor's attorney for $500. Another tract worth $15,000 sold in the same manner for $835—Barstow v. Beckett, 122 Fed. 140.

73. The holder of a certificate under a judgment who had notice of redemption a short time after it was effected but brought no action to set it aside and compel issuance of a deed to him until six years later, was guilty of laches preventing relief—Becker v. Friend, 200 Ill. 75.

74. Ky. St. 1899, §§ 2364, 2365—Warden v. Troutman, 25 Ky. L. R. 247, 74 S. W. 1085.

75. Natter v. Turner (N. J. Eq.) 55 Atl. 650.

76. Hartman Mfg. Co. v. Luse (Iowa) 96 N. W. 972. Under a Code provision allowing the debtor to redeem realty from execution sale at any time within a year from the day of sale, and entitling him to possession thereof in the meantime, a judgment creditor levying on and purchasing his debtor's statutory right of redemption in the mortgaged premises at foreclosure sale acquires no right to the possession of the premises—Id.

77. Laws Wash. 1899, p. 85, c. 53, §§ 13, 15—Kennedy v. Trumble (Wash.) 73 Pac. 698. Where in proceedings to redeem the statement of rents and profits is not sworn to the time for redemption is as though no statement was given (Laws Wash. 1899, p. 85, c. 53, §§ 12, 13)—Id.

78. Botts v. Botts, 25 Ky. L. R. 300, 74 S. W. 1093. A valid agreement by an execution purchaser to permit the debtor to redeem does not require that the time for such redemption should be fixed—Throckmorton v. O'Reilly (N. J. Eq.) 55 Atl. 56. There is a sufficient consideration where the creditor purchases premises at a grossly inadequate sum—Id. A mere parol agreement to allow an execution debtor to redeem land made after the statutory period has expired, cannot be enforced by the debtor—Herring v. Johnston, 24 Ky. L. R. 1940, 72 S. W. 793.

79. Certificate on execution sale issued 40 years thereafter—Dixon v. Dixon, 38 Misc. (N. Y.) 652.

80. A sheriff's deed describing land as a certain number of acres in the northeast corner of a certain league is void for insufficiency of description, where the execution defendant owned no land in the extreme corner, though he did own land which would have been included in a square survey of that number of acres in such corner—Edrington v. Hermann (Tex. Civ. App.) 74 S. W. 936.

81. Iowa act of 24th Gen. Assem. c. 42—Koch v. West, 118 Iowa, 468.

82. Pepperdine v. Bank of Seymour (Mo. App.) 73 S. W. 890. Where the deed of a purchaser at execution sale passes the legal title and is recorded, the title is as against one claiming under a later deed from the execution debtor valid, though the grantee of the execution purchaser makes no claim to the land—Williamson v. Gore (Tex. Civ. App.) 73 S. W. 563.

83. Costello v. Friedman (Ariz.) 71 Pac. 935; Markley v. Carbondale Inv. Co. (Kan.) 73 Pac. 96. The thing actually sold and transferred is the real interest of the debtor in the property, and not merely his interest as determined by the appraisers—Hart v. Beardsley (Neb.) 93 N. W. 423. The title of grantee of swamp lands conveyed by a county to which they were patented by the state, grantee having been in actual possession by

He takes title subject to equities of third persons of which he has knowledge,[84] and this rule has particular application to a creditor purchasing at his own sale,[85] and free from unrecorded deeds[86] and trust agreements of which he has no knowledge.[87] A purchaser at execution sale of interest of heirs takes title subject to administration.[88] The interest of a mortgagee in land is not affected by sale under execution against the mortgagor.[89] The purchaser of land subject to mortgage buys merely the right to redeem the land by paying the mortgage debt,[90] and may not contest its validity,[91] and previous to redemption, he is not entitled to possession.[92] In the absence of proceedings to set aside a homestead right, an execution sale of homestead property vests in the purchaser only the legal title to the excess over the amount of the homestead allowance.[93] The sale of a husband's realty under an execution on a judgment against him alone does not extinguish the wife's inchoate right of dower.[94] Where the husband's property was sold under execution, the dower right of the wife therein is to be determined by the law in force at the time of the sale.[95]

The right of the purchaser to protection against defects affecting the sale may depend on whether he is a bona fide purchaser.[96] The rights acquired by a bona

a tenant claiming title to the whole, is superior to the title acquired under execution sale on judgment against the county after the county had parted with its title—Houck v. Patty (Mo. App.) 73 S. W. 389.

84. Perry v. Trimble, 25 Ky. L. R. 725, 76 S. W. 343. A judgment creditor taking land on execution from a debtor with notice of an outstanding equitable title in another is in no better position than he would have been had he with such notice taken a direct conveyance from his debtor—Hengeveld v. Stuver, 104 Ill. App. 362. Where there is no affirmative showing that one purchasing land at execution sale subsequent to a deed by the judgment debtor to his wife purchased without notice and in good faith, parties claiming through the wife need show no more than the sufficiency of the deed to pass title—Watts v. Bruce (Tex. Civ. App.) 72 S. W. 258.

85. Beidler v. Beidler (Ark.) 74 S. W. 13; Perry v. Trimble, 25 Ky. L. R. 725, 76 S. W. 343; Throckmorton v. O'Reilly (N. J. Eq.) 55 Atl. 56. An execution creditor having notice of the existence of a deed should proceed by bill in aid of execution before sale to ascertain the rights of a judgment debtor in the land—Spring v. Raymond (Mich.) 95 N. W. 1003.

86. Hart v. Gardner (Miss.) 33 So. 497. A conveyance by a husband and wife and possession by their grantee was not constructive notice to a purchaser under a judgment against the husband in whose name record title stood when judgment was rendered, of a prior unrecorded deed from such husband to his wife antedating judgment—Koch v. West, 118 Iowa, 468. Where the judgment creditor before recovery of judgment, had no notice of an unrecorded deed of the debtor, a purchaser at an execution sale will not be affected with notice given on the day of sale, as he is entitled to the same protection as the judgment creditor—Danner v. Crew (Ala.) 34 So. 822. Under the Nebraska Code, a prior unrecorded deed or mortgage executed in good faith and for valuable consideration, takes priority over a conveyance based on sheriff's sale, if recorded before evidence of the execution sale is recorded, otherwise if recorded afterwards—Hendryx v. Evans (Iowa) 94 N. W. 853.

87. A purchaser at an execution sale under judgment against the grantee of land takes the land free from a trust therein in favor of the grantor, of which he had no notice—Home Sav. & State Bank v. Peoria Agricultural & Trotting Soc. (Ill.) 69 N. E. 17.

88. Hahn v. Willis (Tex. Civ. App.) 73 S. W. 1084.

89. The judgment creditor who has levied on the land mortgaged by the judgment debtor cannot maintain a writ of entry against the mortgagee in possession—Carrasco v. Mason (N. H.) 54 Atl. 1101.

90. Steele v. Walter, 204 Pa. 257; Bartlett v. Gilcreast (N. H.) 55 Atl. 189. Ky. St. §§ 1689, 1709 subsecs. 1, 3—Wilson v. Flanders, 24 Ky. L. R. 1302, 71 S. W. 426.

91. Steele v. Walter, 204 Pa. 257.

92. Wilson v. Flanders, 24 Ky. L. R. 1302, 71 S. W. 426.

93. Butler v. Brown (Ill.) 69 N. E. 44; Whitworth v. McKee (Wash.) 72 Pac. 1046. Where the land sold was worth more than the value of the debtor's homestead interest therein and the sheriff failed to set off such interest, the purchaser after conveyance to him under the sale may maintain a bill to have such interest set off or to pay the debtor the value thereof in cash—Krupp v. Brand, 200 Ill. 403.

94. Martin v. Abbott (Neb.) 95 N. W. 356.

95. Hanley v. Kubli (Or.) 74 Pac. 224.

96. A creditor acquiring a sheriff's deed is a good faith purchaser for value and entitled to protection—Hendryx v. Evans (Iowa) 94 N. W. 853. The application of the bid of a judgment creditor for land sold under execution to costs of the sale under execution will not render such a creditor a bona fide purchaser—Hicks v. Pogue (Tex. Civ. App.) 76 S. W. 786. A purchaser cannot claim land as an innocent purchaser, where he bought from a purchaser at an execution sale knowing of fatal irregularities in the execution sale and that it had been set aside by the court for that reason—Day v. Johnson (Tex. Civ. App.) 72 S. W. 426. On a sale under execution on a voidable judgment, findings that a purchaser from one who bought at execu-

fide purchaser for value under an execution on a justice's judgment, fair on its face, will not be disturbed, though the judgment be invalid.[97] Purchasers at judicial sales are not bona fide purchasers as against a claim of fraud on the debtor in the sale, the doctrine of caveat emptor applying.[98] Parties having knowledge of the fact may not take advantage of a sale on an execution for the full amount of the judgment where the judgment was fully paid except a small amount of costs.[99]

A tenant renting land before the execution is entitled to the crops on maturity as against the purchaser.[1] The purchaser is entitled to crops planted after confirmation.[2]

Under the laws of Nebraska, a sheriff's deed is of itself prima facie evidence of the validity of the judgment on which execution sale is had,[3] and that the grantee holds all the title and interest in the land that was held by the judgment debtor at the rendition of the judgment or at any time thereafter up to the sale.[4]

The mere filing of a supersedeas bond will not prevent the issuance of a deed, the code requiring the filing of a petition in error to make the bond operative as a stay.[5] Where the sale is made under a special execution based on two judgments rendered in the same action to foreclose first and second mortgages, the fact that the judgment on the inferior mortgage is afterwards reversed does not affect the validity of the sale though the judgment plaintiff is purchaser.[6]

Whether the notice of a motion against the execution defendant for writ of possession is sufficient may not be raised by persons coming into the case by petition claiming interest in the land and who on the issues on their petition are defeated.[7] Under a provision allowing revivor of judgment for purchaser's benefit on failure to recover possession for irregularities in the sale, a totally void execution is an irregularity.[8] An agreement of an execution creditor to hold a purchaser harmless covers necessary expenses of the purchaser in defending the title where the creditor fails to make the defense after request.[9]

Equity will not entertain a suit, by a purchaser of realty at execution sale who is not in possession against a party who is in possession, to set aside a prior conveyance made by a judgment debtor as a cloud on complainant's title, on the ground that such conveyance was in fraud of creditors.[10]

§ 16. *Remedies against defective levy or sale. Setting aside sale.*—A sale to plaintiff in an action may be set aside on motion.[11] Where there is no irregularity or defect in the judgment and the land is purchased by persons not parties to the action, a sale will be set aside only by action in the proper court.[12] A sale will not be set aside for mere technical irregularities in the proceedings which

tion sale knew that the judgment debtor claimed the land and that the judge ordering the judgment did not inquire into the terms of the agreement on which judgment was ordered, are insufficient to show that he had notice of facts rendering the judgment voidable—Id.

97. Carpenter v. Anderson (Tex. Civ. App.) 77 S. W. 291. One buying property which he knows to be worth $2.500 for $53 is not an innocent holder for value, so as to support the conveyance, where the judgment is invalid—Id.

98. Barstow v. Beckett, 122 Fed. 140.

99. Baird v. Given, 170 Mo. 302.

1. Johnson v. Cook, 96 Mo. App. 442. Where a lease is made after the date of the judgment, a purchaser acquires only the interest of the owner in the growing crops—Garrison v. Parker, 117 Ga. 537.

2. Jaques v. Dawes (Neb.) 92 N. W. 570.

3. Code Civ. Proc. Neb. § 500—Everson v. State (Neb.) 92 N. W. 137.

4. Everson v. State (Neb.) 92 N. W. 137.

5. Rev. St. § 590, p. 498—Hendryx v. Evans (Iowa) 94 N. W. 853.

6. Falk v. Ferd. Heim Brew. Co. (Kan.) 72 Pac. 531.

7. Read v. Cochran, 24 Ky. L. R. 1412, 71 S. W. 487.

8. Code Civ. Proc. Cal. § 708—Merguire v. O'Donnell, 139 Cal. 6, 72 Pac. 337. A failure to recover possession is not complete until an adverse determination of the matter in the judgment debtor's suit to quiet title—Id.

9. Cassidy v. Taylor Brew. Co., 79 App. Div. (N. Y.) 242.

10. Ropes v. Jenerson (Fla.) 34 So. 955.

11, 12. McCarthy v. Speed (S. D.) 94 N. W. 411.

could not have been prejudicial.[13] Want of knowledge of confirmation will not authorize setting aside sales in states where notice of motion for confirmation is not required,[14] nor may party avail himself of disobedience of orders by agent where he retains the fruits.[15] An executor in his individual capacity may move to set aside a sale of his property on an execution on a judgment against him as executor.[16] Where the execution is set aside for invalidity of the judgment which was fair on its face, the vendee is entitled to reimbursement.[17] The evidence on application to set aside a levy on land as the debtor's homestead must show that the debtor was the head of a family or entitled to the homestead, or that the land levied on had been selected as a homestead.[18] A finding that a judgment was paid before execution will not be disturbed on appeal where the evidence is conflicting.[19]

Inadequacy of price, though gross, will not be sufficient to set aside a sale, unless coupled with other circumstances sufficient to give rise to a presumption of fraud.[20]

Injunction.—An injunction will not lie to restrain a sale, where there is an adequate legal remedy to protect the title,[21] nor for the purpose of reviewing the action of the lower court.[22] The enforcement of a judgment fully satisfied may be restrained by injunction.[23] An injunction will not lie to enjoin an execution issued on a void judgment.[24] The privilege of defendants to have suit to enjoin execution brought in the county where judgment was rendered may be waived by proceeding to trial without objection or plea to jurisdiction.[25] An injunction restraining sale under execution in favor of a county was properly commenced, not in that county, but in the county in which the sheriff having charge of the sale and on whom the writ was general had his domicile.[26] A county court of one

13. Cochran v. Cochran (Neb.) 95 N. W. 778.

14, 15. Brand v. Baker, 42 Or. 426, 71 Pac. 320.

16. McCarthy v. Speed (S. D.) 94 N. W. 411.

17. Carpenter v. Anderson (Tex. Civ. App.) 77 S. W. 291.

18. Cope v. Snider (Mo. App.) 74 S. W. 10.

19. Hamilton v. Perry, 25 Ky. L. R. 547, 76 S. W. 52.

20. Palmour v. Roper (Ga.) 45 S. E. 790; Koch v. West, 118 Iowa, 468; Martin v. Bryson (Tex. Civ. App.) 71 S. W. 615. A sale will not be set aside for mere inadequacy on account of the failure of a lienholder to bid where such lienholder left the matter of bidding to a representative who forgot about the sale because of unusual business duties—Westmoreland Guarantee Bldg. & Loan Ass'n v. Nesbit, 21 Pa. Super. Ct. 150. An execution sale is properly set aside where the purchaser was appointed an appraiser and valued the property worth $200 at $20 and purchased it for $14—Hamilton v. Perry, 25 Ky. L. R. 547, 76 S. W. 52. A sale will be set aside where land was sold for a grossly inadequate price, and defendant was not called to point out the property levied upon, the writ was made returnable in 90 days instead of 60 days as required by law and sale took place after 60 days and the description of the land sold was doubtful—Day v. Johnson (Tex. Civ. App.) 72 S. W. 426. Sale for $140 of an incumbered title worth $2,000 and equity of redemption worth $4,000, the superior liens amounting to $5,330 will be set aside for inadequacy—Simmons v. Sharpe (Ala.) 35 So. 415.

21. Hahn v. Willis (Tex. Civ. App.) 73 S. W. 1084. A judgment debtor claiming that certain of the costs taxed as part of the judgment was illegal, has an adequate remedy at law by motion to re-tax the cost and by a stay of execution pending the motion, and hence may not maintain a suit to restrain the levy of the execution—Ward v. Rees (Wyo.) 72 Pac. 581. Under the laws of Georgia, the owner of abutting property on which an execution has been levied for a street improvement assessment has a complete statutory remedy by affidavit of the illegality and is not entitled to an injunction to restrain sale by execution—Rice v. Macon, 117 Ga. 401.

22. Where a justice has jurisdiction to determine a plea of res adjudicata involving an amount insufficient to authorize an appeal, he will not be restrained from issuing an execution on the judgment rendered on determination of the plea—St. Louis, etc., R. Co. v. Coca Cola Co. (Tex. Civ. App.) 75 S. W. 563.

23. A petition averring payment and satisfaction and praying that an injunction be made perpetual and for general relief justifies a decree enjoining issuance of execution on the judgment—Deleshaw v. Edelen (Tex. Civ. App.) 72 S. W. 413.

24. Howlett v. Turner, 93 Mo. App. 20.

25 Foust v. Warren (Tex. Civ. App.) 72 S. W. 404.

26. Little v. Griffin (Tex. Civ. App.) 77 S. W. 635.

county may not enjoin execution of a judgment of a county court of another county.[27] A provision requiring writs of injunction to restrain execution to be made returnable to and tried in the court rendering the judgment does not apply to judgments of justice courts as such courts have no authority to issue writs of injunction.[28] When an action is brought by one judgment debtor to restrain the sale of land owned by him on execution, on the ground that the land is not liable to execution, his co-judgment debtors are not necessary parties to the action.[29] Complainant must state facts either on personal knowledge or on information reasonably sufficient on which to base his relief.[30] An execution debtor is not entitled to equitable relief where he makes no complaint that the judgment is unjust, nor that the debt on which it was founded was not a valid demand against him.[31] The suit should be dismissed where there was no request to amend a complaint vulnerable to a general demurrer.[32] Where to obtain an equitable set-off, the judgment debtor sought to enjoin the enforcement of a judgment against it by a member of a firm against which he had suits pending and which subsequently resulted in favor of the firm, he could, on petition for permanent injunction, prove that he expected to move for a new trial.[33] On review, it will be presumed that sufficient facts were found to warrant making the order.[34] The defendant's death leaving an estate to be administered as insolvent dissolves the attachment under the laws of New Hampshire and justifies the court in overruling an exception to a refusal to modify an injunction staying execution against the estate so as to admit of the sheriff's further prosecution of his action.[35]

§ 17. *Restitution on reversal of judgment.*—On reversal of judgment, restitution of property sold on execution may be ordered,[36] and where the debtor has died in the meantime, it should be made to his personal representative.[37] Under the California code, the measure of damages in an action to recover property sold under an execution on a judgment subsequently reversed is limited to the proceeds of an execution sale less the expense thereof.[38] Under the same provision, attorney fees may not be recovered.[39]

EXEMPTIONS.[40]

§ 1. The Right to Exemptions Generally.
§ 2. Persons Who may Claim.
§ 3. Goods and Chattels Exempted.
§ 4. Debts Inferior or Superior to Exemption.
§ 5. Loss of Exemption Rights.
§ 6. Selling or Transferring Exempt Property.
§ 7. How Claimed and Enforced.
§ 8. Recovery for Selling Exempt Property or Evading Exemption Laws.

§ 1. *The right to exemptions generally.*—Exemption statutes are to be liberally construed to effect their intent and purpose.[41] They have no extra terri-

27. Aultman v. Higbee (Tex. Civ. App.) 74 S. W. 955.
28. Foust v. Warren (Tex. Civ. App.) 72 S. W. 404; Osborne v. Gatewood (Tex. Civ. App.) 74 S. W. 72.
29. McGill v. Sutton (Kan.) 72 Pac. 853.
30. Magruder v. Schley, 18 App. D. C. 288.
31. Kendall v. Smith (Kan.) 72 Pac. 543. An execution will not be enjoined on the ground that the judgment debtor was not served with summons, where he fails to allege or prove an equitable defense—Foust v. Warren (Tex. Civ. App.) 72 S. W. 404.
32. Noerdlinger v. Huff, 31 Wash. 360, 72 Pac. 73.
33. Harris v. Gano, 117 Ga. 934.
34, 35. Fairfield v. Day (N. H.) 55 Atl. 219.
36. Where a judgment is subsequently reversed and the property ordered to be reconveyed, the debtor is entitled to the rents and profits which were or might have been received by the purchaser during his occupation less the amount paid for repairs, insurance and taxes and the amount paid by the purchaser in interest—Cavenaugh v. Wilson, 24 Ky. L. R. 1507, 71 S. W. 870. It is the duty of the judgment creditor to restore the property to the judgment debtor after the reversal of the judgment—Nelson v. City of Beatrice (Neb.) 96 N. W. 288.
37. Black v. Vermont Marble Co., 137 Cal. 683, 70 Pac. 776.
38. Code Civ. Proc. Cal. § 957—Dowdell v. Carpy, 137 Cal. 333, 70 Pac. 167.
39. Dowdell v. Carpy, 137 Cal. 333, 70 Pac. 167.
40. See, also, Taxes for exemption from.

torial effect and operate only against executions issued in the state of claimant's residence,[42] being governed in bankruptcy proceedings by the law of the domicile.[43] The state may regulate and change exemptions at will.[44]

§ 2. *Persons who may claim exemptions.*—Exemption laws are frequently confined to certain classes of persons, such as laborers[45] or heads of families.[46]

§ 3. *Goods and other chattel properties exempted.*—The laws of some of the states exempt the proceeds of insurance policies and beneficiary certificates,[47] pension money,[48] wages or earnings,[49] tools or implements of trade,[50] live stock,[51] and

taxation; Homesteads for exemption of homesteads; Estates of Decedents for widow's allowance.

41. Cook v. Allee (Iowa) 93 N. W. 93; Caldwell v. Renfro (Mo. App.) 73 S. W. 340.

42. Sexton v. Phoenix Ins. Co., 132 N. C. 1; Pennsylvania R. Co. v. Rogers, 52 W. Va. 450; Dinkins v Crunden-Martin Woodenware Co. (Mo. App.) 73 S. W. 246.

43. In re Le Vay, 125 Fed. 990; Pulsifer v. Hussey, 97 Me. 434; In re Boyd, 120 Fed. 999; McKenney v. Cheney (Ga.) 45 S. E. 433; In re Staunton, 117 Fed. 507. Decisions of the state court declaring certain specific property exempt will be followed—In re Stone, 116 Fed. 35; Page v. Edmunds, 187 U. S. 596.

44. Kittel v. Domeyer, 175 N. Y. 205. Laws increasing their amount are not objectionable as impairing the obligation of contracts—Folsom v. Asper, 25 Utah, 299, 71 Pac. 315.

45. One engaged at manual labor is not to be deprived of his exemption as a laborer by the fact that he has control of other employes engaged in similar work—Stothart v. Melton, 117 Ga. 460. A person having the care of a stallion kept for breeding purposes is a laborer (Code of Iowa, § 4008)—Krebs v. Nicholson, 118 Iowa, 134.

46. A person bound to support a child of a former marriage is the head of a family within a statute exempting wages of such persons—Maag v. Williams, 92 Mo. App. 674. A partner though the head of a family cannot claim an exemption in the partnership property levied on by firm creditors—Lynch v. Englehardt, etc., Mercantile Co. (Neb.) 96 N. W. 524. A married woman claiming the benefit of the South Dakota exemption laws must show that she is head of a family—Blount v. Medbery (S. D.) 94 N. W. 428. In some states the wife may claim the exemption where the husband neglects or refuses to make the claim (Comp. Laws S. D. § 5133)—Thompson v. Donahoe (S. D.) 92 N. W. 27; Baum v. Turner, 25 Ky. L. R. 600, 76 S. W. 129.

47. Pulsifer v. Hussey, 97 Me. 434. The provision of the bankruptcy act that an insured shall pay to the trustee the cash surrender value of a policy payable to himself, his estate, or personal representatives and thereafter may continue to hold such policy free from claims of creditors, does not include policies payable to the wife or kindred of insured, but only applies to policies payable to insured or his personal representatives—Id. Moneys received from a fraternal insurance society are exempt under the laws of New York (Laws N. Y. 1901, c. 397)—Ellenson v. Schwartz, 38 Misc. (N. Y.) 669. Under the law that life insurance premiums in excess of $500 annually renders the insurance purchased with the excess liable to insured's debts, premiums on policies assigned by the wife and her husband before his death to secure a debt of the husband will not be considered as part of $500 or charged against the wife in determining the amount of life insurance to which she is entitled—Kittel v. Domeyer, 175 N. Y. 205. Under such laws, the wife is not deprived of any portion of the insurance moneys, until it is determined that the other assets of deceased will not satisfy the creditors' claims and until such claims are discharged, they are a lien on the insurance purchased in excess of the premium allowed by law—Id. A provision exempting the proceeds of insurance policies for prior debts of beneficiary exempts property purchased therewith (Code Iowa, § 1805)—Cook v. Allee (Iowa) 93 N. W. 93. A mutual aid society having no ritual composed of members of a secret society is not within an act exempting benefits received from secret societies having a lodge system with a ritualistic form of work—Miles v. Odd Fellows Mut. Aid Ass'n (Conn.) 55 Atl. 607.

48. Under laws exempting pension moneys and property purchased therewith property of less value than the statutory exemption on which a mortgage has been discharged with pension money is exempt (Code Civ. Proc. Neb. § 531b)—Dargan v. Williams (Neb.) 91 N. W. 862. The pension money exemption extends to property taken in exchange for property discharged from a lien with pension money and the increase of such property—Id.

49. A provision that one-half the earnings of a debtor shall be exempt and that the exemption sum in all cases shall not exceed a certain sum, means that the exemption shall not be reduced to a less amount (Rev. St. 1899, p. 1019, § 3951)—Lafferty v. Sistalla (Wyo.) 72 Pac. 192. Where money due the laborer is exempt it cannot be reached by garnishment—Hill v. Arnold, 116 Ga. 45. The Missouri statute exempting apparel and implements of unmarried persons does not cover salary or wages of such persons (Rev. St. Mo. 1899, § 3158)—Dinkens v. Crunden-Martin Woodenware Co., 91 Mo. App. 209. The laws of Montana allow a placer miner the gold dust taken from claim within 30 days next preceding a levy where he is a poor man at the head of a family and the debt is not for necessaries (Code Civ. Proc. § 1222, subd. 7)—Dayton v. Ewart (Mont.) 72 Pac. 420.

50. A laborer having the care of a stallion kept for breeding purposes may claim a road cart and harness used as a means of conveyance to different standing stations (Code Iowa, § 4008)—Krebs v. Nicholson, 118 Iowa, 134.

51. An exemption of a certain number of

in some cases property of a specified value to be selected by the debtor.[52] In such case the debtor may claim as exempt a debt,[53] a judgment,[54] a seat in a stock exchange,[55] property not paid for by him where the seller had no lien thereon,[56] the proceeds of property which had been assigned by him for the benefit of his creditors in the hands of his trustee,[57] a liquor license.[58] In Nebraska, one against whom property is partitioned in proceedings by a creditor may not claim an exemption in the proceeds.[59]

The proceeds of the sale of exempt property,[60] and homesteads, are exempt,[61] as is a judgment recovered in protecting an exemption.[62]

§ 4. *Debts and liabilities inferior or superior to right of exemption.*—In some states, there may be no exemption in property against a creditor for the purchase price,[63] or for necessaries.[64] Court costs cannot be enforced against the bankrupt's exemptions,[65] nor can a court of bankruptcy subrogate the trustee to the right of a creditor who had acquired a lien on the bankrupt's exempt property.[66] Exemptions cannot be claimed against penalties for violation of laws.[67]

§ 5. *Loss of exemption rights.*—The exemption is lost by a fraudulent disposition of the debtor's property.[68] The right is not lost by failure to make im-

hogs to the head of a family, is for the purpose of furnishing food and will not include a hog chiefly valuable for exhibition use on account of his large size (Rev. St. Mo. 1899, § 3159)—Wabash R. Co. v. Bowring (Mo. App.) 77 S. W. 106.

52. The $300 exemption allowed the head of a family in Missouri is in addition to the household and other specifically exempt property (Rev. St. Mo. 1899, § 3162)—Rolla State Bank v. Borgfeld, 93 Mo. App. 62.

53. Rolla State Bank v. Borgfeld, 93 Mo. App. 62; Green v. Baxter, 91 Mo. App. 633.

54. Bowen v. Holden, 95 Mo. App. 1. The assignor of a judgment having a residuary interest therein may claim an exemption in such interest though the assignment would have been constructively fraudulent as to creditors—Green v. Baxter, 91 Mo. App. 633.

55. Pennsylvania court decisions so holding followed (Page v. Edmonds, 187 U. S. 596) but see as to a working tool under Code Civ. Proc. N. Y. § 1391—Leggett v. Waller, 39 Misc. (N. Y.) 408.

56. In re Butler, 120 Fed. 100.

57. In re Talbott, 116 Fed. 417. But exemptions cannot be claimed out of property recovered by the trustee which had been transferred as a preference—In re Long, 116 Fed. 113. But where he had transferred a judgment to a trustee for certain creditors, and the trustee did not assume ownership and it was paid to the trustee in bankruptcy the bankrupt may claim exemption therein—Bashinski v. Talbott (C. C. A.) 119 Fed. 337.

58. In re Celewine, 125 Fed. 840.

59. First Nat. Bank v. Snyder (Neb.) 96 N. W. 285.

60. Brand v. Clements, 116 Ga. 392.

61. Lee v. Hughes (Ky.) 77 S. W. 386.

62. Long v. Collins (S. D.) 94 N. W. 700. A judgment for the value of exempt property seized and sold on execution is exempt—Treat v. Wilson, 65 Kan. 729, 70 Pac. 893.

63. Cannon v. Dexter Broom & Mattress Co. (C. C. A.) 120 Fed. 657. Under the laws subjecting personalty to execution for the purchase price, the right of a creditor to seize such property is not lost by the fact that the purchaser gave notes providing that until payment was made title should remain in the seller who could take possession on default without legal process as the right given by the note was cumulative and not exclusive of the statutory right (Rev. St. Mo. 1899, § 3170)—De Loach Mill Mfg. Co. v. Lathan (Mo. App.) 72 S. W. 1080. Where a bankrupt invoked the benefit of the bankrupt act and prevented the seller of exempt property from obtaining judgment and levying execution thereon as required by a law declaring that none of the exemptions prescribed should be allowed against the execution for the purchase money of the property, he could not object that the court of bankruptcy had no jurisdiction to order the property sold and the proceeds applied to the unpaid purchase price on the ground that no judgment had been recovered or execution levied—In re Boyd, 120 Fed. 999.

64. What are necessaries within the exemption statutes making wages liable for necessaries, is a question of fact dependent on circumstances of the case—Fisher v. Shea, 97 Me. 372. Legal services rendered in behalf of defendant in an action for assault have been held necessaries—Id. The fact that defendant was not arrested in the action, but was liable to arrest on execution after judgment against him, may be considered in determining the necessity of attorney's services—Id.

65. In re Hines, 117 Fed. 790; In re Le Vay, 125 Fed. 990.

66. In re Rosenberg, 116 Fed. 402.

67. Under the gambling statute of Indiana, the state's right to recover depends on the statute solely and one winning at gambling is not entitled to the benefit of the exemption law as against an execution issued on a judgment against him in its favor—State v. Morgan (Ind.) 67 N. E. 186.

68. Hoodinpyle v. Bagby, 104 Ill. App. 620; In re Duffy, 118 Fed. 926; In re Taylor, 114 Fed. 607; In re Evans, 116 Fed. 909. As where he carried on a business in the name of another as agent, and nearly all the indebtedness was created within five months

mediate claim,[69] nor by mere promises before right to claim becomes available,[70] nor by a husband's abandonment of his family, they may still be claimed by the wife.[71] The right of the head of a family to an exemption attaches at the time of the levy and is not lost by a later removal from the state.[72] An agreement of partners that their business be continued by another, the proceeds to be devoted to the payment of debts waives the exemptions of the members of the firm.[73] An instrument waiving exemptions is binding on an assignee.[74]

§ 6. *Selling or transferring exempt property.*—The ownership of exempt property is absolute,[75] and a sale by a debtor to his creditor is not in fraud of other creditors.[76] In some states, a mortgage of exempt property requires joint execution by the husband and wife.[77]

§ 7. *How the right is claimed and enforced.*—The exemption right is personal and may not be claimed by another.[78] The claim may be made at any time before the actual appropriation of the property to the payment of the debt.[79] The manner of claiming exemptions is regulated by the statutes of the various states,[80] and in bankruptcy proceedings by the bankruptcy act.[81]

preceding his bankruptcy and the better portion of the stock was sold off at auction, the balance being worth less than the exemption—In re Williamson, 114 Fed. 190. Sufficiency of evidence to show that the bankrupt was not chargeable with fraud in concealing property from creditors, such being the ground of forfeiture of exemptions under Georgia Code, § 2830—In re Stephens, 114 Fed. 192; In re Boorstin, 114 Fed. 696; In re Thompson, 115 Fed. 924. Evidence held insufficient to show a fraudulent disposition of property by a bankrupt so as to effect a forfeiture of his exemptions under the state law—In re Duffy, 118 Fed. 926. There is a showing of fraud preventing one from claiming exemptions where he makes a showing as to his property as largely in excess of liabilities and seven months later makes another showing indicating a shrinkage of about nine-tenths and there is no explanation of the cause of depreciation—Blount v. Medbery (S. D.) 94 N. W. 428. Where the sale is for a fair consideration and with an honest motive the right will not be lost though the effect is to leave nothing for creditors—In re Duffy, 118 Fed. 926. A sale of property held fraudulent does not restore title to the vendor beneficially so that he may claim an exemption therein. The vendee may claim any right there is to exemption—Williamson v. Wilkinson (Miss.) 33 So. 282.

69. Mere failure of debtor to assert right in attachment suit by motion or application to discharge the attachment or for a release of the property on the ground that it is exempt is not a waiver—Rempe v. Ravens (Ohio) 67 N. E. 282. Demand may be made at any time before actual appropriation to the creditor's claim—Id.

70. A prospective exemption in the avails of an insurance policy is not lost by mere statement of insured that he intends their use for the payment of his debts (Code Iowa, § 3313)—O'Melia v. Hoffmeyer (Iowa) 93 N. W. 497.

71. Baum v. Turner, 25 Ky. L. R. 600, 76 S. W. 129.

72. Caldwell v. Renfro (Mo. App.) 73 S. W. 340.

73. Levy v. Rosell (Miss.) 34 So. 321.

74. Barhyte v. New Hampshire Real Estate Co. (Kan.) 71 Pac. 837.

75. Creditors may not question its transfer—Skinner v. Jennings (Ala.) 34 So. 622.

76. Heisch v. Bell (N. M.) 70 Pac. 572.

77. Searle v. Gregg (Kan.) 72 Pac. 544. Idaho Act Feb. 16, 1899—Kindall v. Lincoln Hardware & Imp. Co. (Idaho) 70 Pac. 1056; Alexander v. Logan, 65 Kan. 505, 70 Pac. 339. In Wisconsin the mortgage is invalidated by want of witness to wife's signature—Lashua v. Myhre (Wis.) 93 N. W. 811. Laws requiring joint consent of husband and wife to mortgage of exempt property require joint signature and not joint acknowledgment (Code Iowa, § 2906)—Brown v. Koenig (Mo. App.) 74 S. W. 407.

78. Assignee, (Wabash R. Co. v. Bowring [Mo. App.] 77 S. W. 106) garnishee—Dinkins v. Crunden-Martin Woodenware Co. (Mo. App.) 73 S. W. 246.

79. Rempe v. Ravens (Ohio) 67 N. E. 282; Messenger v. Murphy (Wash.) 74 Pac. 480. The claim may be made while the fund realized on execution is in the hands of the court when the levying officer did not notify the debtor of his exemption—Rolla State Bank v. Borgfeld, 93 Mo. App. 62. The exemption laws of North Carolina do not prevent an action to charge the separate estate of a married woman though her personal estate does not exceed the statutory amount (Code N. C. § 443)—Harvey v. Johnson (N. C.) 45 S. E. 644.

80. Under the laws of New Jersey wages can be reached under execution only under an order of court determining the amount to be paid from time to time. Acts N. J. 1901, p. 372, may not be evaded by attachment against non-absconding debtor—Morgarum v. Moon, 63 N. J. Eq. 586. The debtor need not cite the law under which he makes his claim—Rolla State Bank v. Borgfeld, 93 Mo. App. 62. A second affidavit of exemption is not required on a second garnishment—Lafferty v. Sistalla (Wyo.) 72 Pac. 192. Under acts exempting earnings for personal services rendered within 60 days next before commencement of supplementary proceedings and necessary for support the debtor must show that the money was the result of his personal services—In re Wyman, 76 App.

§ 8. *Recovery for selling exempt property or evading exemption laws.*—A wife abandoned by her husband may sue for the wrongful attachment of exempt property.[82] Where special damages are not averred, the recovery is the value of the property with interest from the date of the levy.[83] In an action for conversion of exempt property, a judgment will not be allowed as a set-off.[84]

Injunction will lie to prevent the prosecution of a suit in a foreign jurisdiction in evasion of the exemption laws.[85] It will not lie to prevent the employer from paying wages to a nonresident assignee; the remedy is by action against the employer for the wages.[86] A judgment creditor assigning his judgment to a nonresident to evade the exemption laws of the debtor's state is made liable to the debtor by the laws of Nebraska.[87]

EXHIBITIONS AND SHOWS.

Public buildings cannot be used for entertainment purposes for private profit.[88] To permit persons to stand in the passageways leading to exits in theatres is

Div. (N. Y.) 292. Allegation that property levied on is not exempt must be proved. Plaintiff must prove the allegation of a garnishment affidavit that the indebtedness is not exempt—Eastlund v. Armstrong (Wis.) 94 N. W. 301. The laws allowing an exemption of personalty, household goods and tools worth $1,250 evidence of ownership of household goods, a piano, tools and office furniture worth upwards of $1,000 does not show personalty subject to execution—Whitworth v. McKee (Wash.) 72 Pac. 1046.

81. The particular property which the bankrupt wishes to retain under the state exemption laws must be set up in his schedule (In re Duffy, 118 Fed. 926; In re Le Vay, 125 Fed. 990) and he must follow the procedure required by the state statute. Merely claiming the benefit of the statute held insufficient—In re Garner, 115 Fed. 200. If the trustee failed to follow the statute in setting aside the exemption to which the bankrupt is entitled, he will not be allowed the payment. Bankruptcy Act, § 47, subd. 11, makes it the duty of the trustee to set aside exemptions of the bankrupt and "report the same to the court"—In re Hoyt, 119 Fed. 987. Where no trustee has been appointed, the bankruptcy court has jurisdiction to set apart particular property belonging to the bankrupt as exempt, though § 47, (11) makes it the duty of the trustee to set it apart—Smalley v. Laugenour, 30 Wash. 307, 70 Pac. 786. In ejectment brought by a purchaser under execution sale three days after the defendants filed a petition in bankruptcy, the defendants may show an order made by the bankruptcy court setting aside the particular property as exempt (Id.). If the only assets of a voluntary bankrupt were exempt and there was no necessity for the appointment of a trustee, the court still had jurisdiction to order it set apart, (Id.). The order relates back to the time of the filing of the petition and it is an adjudication that there are no existing liens thereon—Id. The act of the trustee in bankruptcy in setting aside exempt property is a ministerial act—In re Campbell, 124 Fed. 417. Where an exemption is set apart under the state law the trustee in bankruptcy acquires no title to the exempt property—McKenney v. Cheney (Ga.) 45 S. E. 433. As no title to exempt property passes to the trustee in bankruptcy, creditors having claims for unpaid portions of the purchase price of property, claiming the right to have it sold and the proceeds applied to their claims are proper persons to present the action and not the trustee in bankruptcy (In re Boyd, 120 Fed. 999) and it is no longer within the jurisdiction of the bankruptcy court (In re Seydel, 118 Fed. 207); therefore the court cannot entertain a petition after the discharge of the bankrupt for a readjustment of the exemptions. If the creditor had notice of the claim of exemptions and failed to appear and object to the allowance he would at any rate be precluded by laches to have the proceedings re-opened after discharge of the bankrupt and the exemptions readjusted, (In re Reese, 115 Fed. 993) or to enforce a special lien against it, (In re Seydel, 118 Fed. 207) or a lien not affected by the bankrupt's discharge—White v. Thompson (C. C. A.) 119 Fed. 868. A creditor may object to a bankrupt's exemption allowance—In re Campbell, 124 Fed. 417. Where on the hearing of the exceptions to the report setting aside exempt property to the bankrupt neither the bankrupt nor creditors holding notes waiving exemptions made proof that the property set off was paid for and the referee decided against the right of exemption the cause will not be reopened for such proof after sale of the property by agreement of the parties in interest—Id.

82. Baum v. Turner, 25 Ky. L. R. 600, 76 S. W. 129.

83. Morris v. Williford (Tex. Civ. App.) 70 S. W. 228. Plaintiff's conclusion as to the amount of the damages is inadmissible; he must show the circumstances—Id.

84. Staggs' Heirs v. Piland (Tex. Civ. App.) 71 S. W. 762.

85. Galbraith v. Rutter, 20 Pa. Super. Ct. 554; Biggs v. Colby (Ind. T.) 69 S. W. 910. An injunction to restrain the prosecution of a suit in a foreign jurisdiction in evasion of the exemption laws is to prevent a fraud and not to stay proceedings within a law against injunction to stay proceedings on judgments under a certain amount—Id. The writ will not be denied by reason of statutes against its issuance where the judgment is

by some laws forbidden.[89] The space between the orchestra circle seats and the rear wall has been held not a "passageway,"[90] but the space necessary to reach a side entrance to the theatre is.[91] A statute making it unlawful to refuse to admit to an opera house, theatre, or race course any adult person who produces a ticket, is a proper exercise of the police power of the state,[92] and a recovery under such statute will not include damages for injuries to the business of the person refused admittance,[93] though exemplary damages may be awarded.[94]

For injuries to spectators resulting from the negligence of the exhibitor, he may be held liable,[95] and whether proper precautions were taken to protect spectators is a question for the jury.[96]

EXPLOSIVES AND COMBUSTIBLES.

Cities may regulate the storage of combustibles and explosives,[97] and prohibit the explosion of firecrackers without the written consent of the mayor.[98]

A statute punishing the manufacture of compressed gases in tenements does not prohibit their use therein in the manufacture of other compounds.[99] Ignorance of the existence or scope of an ordinance against shooting firecrackers and the fact of general violation of same without punishment will not excuse a violation of the ordinance.[1] The inspector of combustibles in New York, knowing of an illegal storage, may confiscate same without orders from the fire commissioner.[2]

The care required in the use of explosives is that of ordinarily prudent men having in mind the dangerous nature of the agency,[3] and it is the duty of a seller to notify purchasers of inherent dangers.[4] The placing of dynamite par-

less than a stated amount as such statutes have no extra territorial effect—Id.

86. Galbraith v. Rutter, 20 Pa. Super. Ct. 554.

87. Sufficiency of evidence of an evasive assignment—Frieden v. Conkling (Neb.) 96 N. W. 615.

88. The owner of an opera house, however, cannot restrain such use—Amusement Syndicate Co. v. Topeka (Kan.) 74 Pac. 606. School buildings—Sugar v. Monroe, 108 La. 677, 59 L. R. A. 723.

89. Laws 1897, c. 378; New York City Charter—Sturgis v. Grau, 39 Misc. (N. Y.) 330.

90. Sturgis v. Grau, 39 Misc. (N. Y.) 330.

91. Sturgis v. Hayman, 84 N. Y. Supp. 126.

92. St. 1893, p. 220, c. 185—Greeneberg v. Western Turf Ass'n (Cal.) 73 Pac. 1050.

93. Evidence of other refusals than the one sued on is therefore not admissible—Greeneberg v. Western Turf Ass'n (Cal.) 73 Pac. 1050.

94. Under Code Cal. § 3294—Greeneberg v. Western Turf Ass'n (Cal.) 73 Pac. 1050.

95. Held not liable for injuries resulting from explosion of fireworks—Sebeck v. Plattdeutsche Volksfest Verein (C. C. A.) 124 Fed. 11. An agricultural society is in duty bound to use reasonable care in keeping its grounds and approaches thereto safe (Thornton v. Maine State Agr. Soc., 97 Me. 108) and in granting exhibition privileges to, and in the exercise of such privileges by others, it must see that public safety is not jeopardized—Texas State Fair v. Marti (Tex. Civ. App.) 69 S. W. 432; Texas State Fair v. Brittain (C. C. A.) 118 Fed. 713.

It is not, however, necessary to expressly state facts in the declaration wherein the defendant neglected its duty in failing to take proper care of its grounds—Benedict v. Union Agr. Soc., 74 Vt. 91.

96. Sebeck v. Plattdeutsche Volksfest Verein (C. C. A.) 124 Fed. 11.

97. An ordinance making it unlawful to store explosive oils within 1,000 feet of dwellings, stores, etc., in greater quantities than 250 gallons is not unreasonable as applied to a plant in operation before the erection of such buildings—Standard Oil Co. v. Danville, 199 Ill. 50.

98. Not void as a delegation of legislative power—Centralia v. Smith (Mo. App.) 77 S. W. 488.

99. Pen. Code, § 389—People v. Lichtman, 173 N. Y. 63.

1. Nor the fact that the citizens had advertised a Fourth of July celebration—Centralia v. Smith (Mo. App.) 77 S. W. 488.

2. Greater New York Charter, §§ 727, 728, 731, 763, 771—People v. Murray, 76 App. Div. (N. Y.) 118.

3. Steam boilers—Merryman v. Hall (Mich.) 91 N. W. 647. Gas—Indianapolis Abattoir Co. v. Temperly, 159 Ind. 651. Persons giving fireworks exhibitions must use the care and prudence of ordinarily prudent men to protect spectators from injury and this care is used where competent persons are employed to superintend the exhibit and spectators are required to view the exhibit at a reasonable distance from the place of discharge—Sebeck v. Plattdeutsche Volksfest Verein (C. C. A.) 124 Fed. 11.

4. A seller of champagne cider negligently charged without testing bottles and failing to notify purchaser of its intrinsic danger is liable for injuries caused by its ex-

tially exposed on a vacant lot used by children as a play ground constitutes actionable negligence.[5] Persons engaged in blasting are liable for injuries to buildings without regard to the care exercised.[6]

Under laws which require ventilation of mines, a mine owner failing in this respect is liable for injuries caused by explosion of gas.[7]

It is not unlawful or a nuisance per se to shoot bombs, rockets, and explosives in a careful and suitable manner on one's own premises.[8] It is negligence for persons giving fireworks exhibits to discharge bombs so poorly constructed that they will not explode in the air and are thrown into private premises where they may be handled by persons not acquainted with their dangerous nature.[9] Where the defect in fireworks is not apparent or discoverable on inspection, the failure of exhibitors to ascertain the defect is not negligence.[10] A fireworks company selling a bill of goods and sending a man to superintend their firing is liable for his negligence.[11]

Actions for injuries.—The negligence of defendant must be shown as in other cases of negligence.[12] An engineer injured by the explosion of oil purchased by his employer may not maintain an action against the seller.[13] For breach of warranty in the sale of a flash lamp warranted to contain no explosive compound, scienter need not be alleged.[14] On the question of negligence in blasting causing injury to building, the weight of the blasting charges used, the preparation of holes for the charge, the weight put upon the blasts, and their effect on the damaged walls, may be shown.[15] Negligence in the manufacture of lubricating oil will not be inferred from the fact of an explosion where gasolene was used in the room for lighting purposes.[16] The measure of damages for injuries to buildings caused by an explosion is the fair and reasonable cost of restoration to condition at the time of the explosion.[17] There may be a recovery for disease resulting from nervous shock caused by blasting.[18]

Contracts relating to grounds or buildings often contain stipulations regulating keeping of explosives.[19]

EXTORTION.

The crime at common law is the unlawful taking, by any officer, by color of his office, of money or other valuable thing not due to him or more than is due or before it is due. It sometimes signifies any injury under color of right.[20]

plosion—Weiser v. Holzman (Wash.) 73 Pac. 797.

5. Nelson v. McLellan, 31 Wash. 208, 71 Pac. 747.

6. Fitzsimons v. Braun, 199 Ill. 390.

7. Tenn. Acts 1881, § 7—Russell v. Dayton Coal & Iron Co., 109 Tenn. 43. Injuries from explosion of gas generally, see Gas.

8, 9. Bianki v. Greater American Exposition Co. (Neb.) 92 N. W. 615.

10. Sebeck v. Plattdeutsche Volksfest Verein (C. C. A.) 124 Fed. 11.

11. Consolidated Fireworks Co. v. Koehl (Ill.) 68 N. E. 1077.

12. That injury occurred on vacant lot of defendant used as dump and by material from the ammunition maker's plant not sufficient where explosive was not put on lot by defendant but must have been removed from plant surreptitiously—Travell v. Bannerman, 174 N. Y. 47. A manufacturer of powder fuse conducting his business with care is not liable for an explosion of a powder magazine caused by the wilful act of a stranger—Kleebauer v. Western Fuse & Explosives Co., 138 Cal. 497, 71 Pac. 617, 60 L. R. A. 377. Sufficiency of evidence as to the effect of explosion—Cameron v. New England Tel. Co.; 182 Mass. 310.

13. Standard Oil Co. v. Murray (C. C. A.) 119 Fed. 572.

14. Wood v. Anthony & Co., 79 App. Div. (N. Y.) 111.

15. Cebrelli v. Church Const. Co., 84 N. Y Supp. 919.

16. Standard Oil Co. v. Murray (C. C. A.) 119 Fed. 572.

17. Consolidated Gas Co. v. Getty, 96 Md. 683; Fitzsimons Co. v. Braun, 199 Ill. 390; Irvine v. Smith, 204 Pa. 58.

18. Watkins v. Kaolin Mfg. Co., 131 N. C. 536, 60 L. R. A. 617.

19. See Insurance; Landlord & Tenant.

20. Cyc. Law Dict. "Extortion." The term is often in loose use confused with Blackmail, ante, p. 343, and with the statutory

Threatening discharge from employment is not a menace to "property" within a statutory definition of "extortion by threats."[21]

An indictment for "extortion by threats" need not particularize the threat.[22] Evidence of relationship of parties is admissible though incidentally showing other crimes.[23]

A civil remedy to forfeit overcharges by motion in the court wherein services were rendered gives a court jurisdiction though the sum is less than the ordinary jurisdictional minimum.[24]

EXTRADITION.

§ 1. *International.*—Under the treaty with Great Britain, extradition cannot be asked where the place of the offense was not at the time thereof under British rule.[25] Stockholder working for share of profits is within embezzlement clause of French treaty.[26] Funds in municipal savings bank are public funds within the treaty with Prussia.[27] Acts "made criminal by the laws of both countries" include acts made criminal by the demanding government and the state where the fugitive is found,[28] and absolute identity of statutes is not essential.[29]

Proceedings.—A United States commissioner must have been designated to act in extradition proceedings.[30] The proceedings must be in the state or district where the fugitive is found.[31] No preliminary requisition from the demanding government is necessary,[32] nor is evidence of authority of foreign consul to make complaint.[33] The complaint must charge the offense with certainty.[34] Embassador's certificate to depositions, etc., substantially in language of Act Aug. 3, 1882, § 5, is sufficient.[35] Under the treaty with Russia, no copy of the warrant need be produced.[36]

Review.—Territorial jurisdiction of the demanding power over the place of the crime may be reviewed,[37] but sufficiency of the evidence to show criminality cannot be.[38] Objection that warrant should be returnable before judge issuing instead of commissioner cannot be raised for the first time on habeas corpus.[39] Pendency of a second complaint covering the same ground does not require dismissal of an appeal in habeas corpus proceedings.[40]

§ 2. *Interstate.*—Extradition depends on the federal constitution, not on comity.[41] One not in the demanding state at the time the offense was commit-

crime of Threats. Oppression in office, see Officers and Public Employes.

21. Pen. Code, § 7—In re McCabe (Mont.) 73 Pac. 1106. Evidence held sufficient to show putting in fear—Glover v. People (Ill.) 68 N. E. 464.

22. Glover v. People (Ill.) 68 N. E. 464. Averments held sufficient to lay threats to accused within hearing of person threatened —Id. "Willful" held equivalent to malicious —Id.

23. Demand for reimbursement of expense of a former prosecution—Glover v. People (Ill.) 68 N. E. 464.

24. State v. Reeves (Fla.) 32 So. 814.

25. Not for offense committed in South African Republic before proclamation of annexation—In re Taylor, 118 Fed. 196.

26. He is a person "hired or salaried" by the corporation—In re Balensi. 120 Fed. 864.

27. In re Reiner, 122 Fed. 109.

28. Treaty with Great Britain (26 Stat. 29)—In re Wright, 123 Fed. 463.

29. Fraudulent acts as corporate director held extraditable—Wright v. Henkel, 190 U. S. 40.

30. Rev. St. U. S. § 5270. His jurisdiction is not impaired by the fact that the designation was not made until after the warrant was issued—Grin v. Shine, 187 U. S. 181. No designation is necessary to entitle him to administer the oath to the complainant—Id.

31. In re Walshe, 125 Fed. 572.

32, 33. Grin v. Shine, 187 U. S. 181.

34. Complaint for embezzlement held sufficient—Grin v. Shine, 187 U. S. 181.

35. The certificate was that the documents were so authenticated as to be admitted "in evidence" for similar purposes in Russia the words quoted not being in the statute—In re Grin, 112 Fed. 790.

36. Grin v. Shine, 187 U. S. 181.

37. In re Taylor, 118 Fed. 196.

38, 39. Grin v. Shine, 187 U. S. 181.

40. Wright v. Henkel, 190 U. S. 40.

41. People v. Hyatt, 172 N. Y. 176.

ted is not a "fugitive from justice,"[42] though he has been there after the crime but before the extradition,[43] but to make him a "fugitive" it is not necessary that he left to avoid prosecution.[44]

Proceedings.—The act giving the federal judge in the Indian Territory the power of a governor to demand extradition is valid.[45] Extradition may be had in a prosecution commenced by information.[46] The nature of the charge must be clearly shown,[47] and that it was not barred by limitation.[48] The essential elements are that the person has been charged in another state with a crime and has fled from justice.[49] The demand, and papers accompanying it, are to be considered in determining the validity of the warrant.[50] The copy of indictment accompanying the requisition need not state that it is such;[51] and conflicts in the affidavits as to date of indictment may be resolved in favor of the indictment.[52] The warrant for arrest and delivery need not recite the governor's findings,[53] and is sufficient if it command the officer to arrest the person demanded and deliver him to the demanding officer.[54] The evidence before the governor need not meet the requirements of legal proof.[55]

Review.—The warrant is only prima facie evidence,[56] as is the finding of the governor that the person is a fugitive;[57] but the action of the governor issuing the warrant cannot be reviewed,[58] and to authorize any review beyond the face of the papers the evidence must be in the record.[59] The question of guilt will not be tried,[60] and misjoinder of counts in the indictment will not be considered.[61]

Rights of extradited persons.—Discharge from arrest in civil process is not a matter of right after appearance.[62] One extradited for robbery may be tried for larceny from the person.[63]

FACTORS.[64]

A factor has no implied authority to delegate his powers.[65] His employment

42. Hyatt v. People, 188 U. S. 691. One shown to have left the demanding state after some of the acts constituting the crime were committed is a fugitive—State v. Clough, 71 N. H. 594.

43. Hyatt v. People, 188 U. S. 691.

44. That having committed a crime within one state he was thereafter found in another is sufficient—Ex parte Dickson (Ind. T.) 69 S. W. 943.

45. Either of the three district judges has the power conferred on the single judge in office when the act was passed (Act May 2, 1890, § 41)—Ex parte Dickson (Ind. T.) 69 S. W. 943.

46. People v. Stockwell (Mich.) 97 N. W. 765.

47. Statement that charge was "uttering forged wills" held sufficient—State v. Clough, 71 N. H. 594.

48. Statement that accused was a fugitive from justice held to avoid bar apparent from date of crime—State v. Clough, 71 N. H. 594.

49. Information that prisoner hired a horse in New Jersey and failed to return same, that an indictment was found against him for larceny and that he thereafter fled from New Jersey and is now in New York is sufficient—People v. Warden of City Prison, 83 App. Div. (N. Y.) 456.

50. State v. Clough, 71 N. H. 594.

51. The governor's certificate stated that it appeared from the annexed papers that the defendant was charged with a crime, etc.—Ex parte Dickson (Ind. T.) 69 S. W. 943.

52. Affidavits were conflicting while caption of indictment agreed with the affidavit giving the date as after the crime—State v. Clough, 71 N. H. 594.

53. State v. Clough, 71 N. H. 594.

54. Pub. St. c. 263, § 8, requires that it authorize the demanding agent to take the prisoner to the state line and require all civil officers to render needful assistance—State v. Clough, 71 N. H. 594.

55. Copy of affidavit certified by demanding governor held sufficient to show that accused was a fugitive—State v. Clough (N. H.) 55 Atl. 554.

56. It may be shown that the prisoner was not in the demanding state when the crime was committed (Hyatt v. People, 188 U. S. 691) but such fact does not require his discharge on habeas corpus (Id.) and accused is not entitled of right to be heard before the governor in respect thereto—State v. Clough (N. H.) 55 Atl. 554.

57. State v. Clough, 71 N. H. 594; Id., 55 Atl. 554; Bruce v. Rayner (C. C. A.) 124 Fed. 481.

58. Hyatt v. People, 188 U. S. 691.

59. People v. Hyatt, 172 N. Y. 176.

60. Bruce v. Rayner (C. C. A.) 124 Fed. 481. But accused may show that the prosecution is barred by limitations—Id.

61. Indictment good under decisions of demanding state but constitutionality of practice doubtful—State v. Clough, 71 N. H 594.

62. It will be ordered only in case of

may be terminated at any time where duration is not specified.[66] He must make reasonable and diligent effort to make the most favorable sale.[67]

A factor is not protected by good faith in disposing of feloniously or fraudulently acquired goods.[68]

Lien.—To have a lien, factor must have actual or constructive possession.[69] It is extinguished on wrongful conversion of the property.[70]

Proceeds of sale retained for application to uses of the principal become a trust fund.[71] If the factor takes notes he becomes personally liable on their negotiation or application to his own indebtedness.[72]

Commissions.—Though the factor first place the parties in business relations, that does not entitle him to commissions on their subsequent transactions.[73]

FALSE IMPRISONMENT.

§ 1. *What constitutes, persons liable, and the recovery.*—The actual detention of a person and the unlawfulness thereof constitute a trespass, the gravamen being the unlawfulness of the imprisonment,[74] and an arrest and detention on a writ or warrant not based on information,[75] or complaint filed,[76] or if the warrant is void on its face as where it failed to state that information, complaint, or affidavit had been filed, is unlawful.[77] Malice is not an element.[78]

If there was probable cause for making the arrest without a warrant no action will lie,[79] and the officer has the burden of proving justifiable cause,[80] by a pre-

fraud or abuse of process—White v. Marshall, 23 Ohio Circ. R. 376.

63. The former offense including the latter—State v. Dunn (Kan.) 71 Pac. 811.

64. The distinction between a factor and a mere agent or broker lies in the possession of the property—People's Bank v. Frick Co. (Okl.) 73 Pac. 949. See Agency; Brokers.

65. Subagents or persons employed by him in handling the property do not become agents of his principal—People's Bank v. Frick Co. (Okl.) 73 Pac. 949.

66. Outerbridge v. Campbell, 84 N. Y. Supp. 537.

67. Where he agrees to get the highest obtainable price is not bound to obtain the highest market price—Craig v. Harrison-Switzer Milling Co., 103 Ill. App. 486. Ordinary care, skill and diligence relieves against sale for less than market value—Drumm-Flato Commission Co. v. Union Meat Co. (Tex. Civ. App.) 77 S. W. 634.

68. Liable to true owner for conversion, though not negligent in believing the goods were placed in his hands for one having title and though a carrier has been negligent in allowing the goods to be diverted from their proper destination to the factor by means of a forged way bill—Johnson v. Martin, 87 Minn. 370, 59 L. R. A. 733. So factor is liable for conversion of goods which he sells which came into his hands from a buyer who had bought for cash and not paid, though the factor act in due course of business and without notice—Flannery v. Harley, 117 Ga. 483.

69. People's Bank v. Frick Co. (Okl.) 73 Pac. 949. Advances after possession has passed to purchaser will not support lien and he must sue in the name of his principal for purchase price though he sell in his own—Ermeling v. Gibson Canning Co., 105 Ill. App. 196.

70. People's Bank v. Frick Co. (Okl.) 73 Pac. 949.

71. If deposited in bank by the factors after their insolvency the bank if with knowledge of the insolvency is placed on inquiry and liable to true owner for diversion—Interstate Nat. Bank v. Claxton (Tex. Civ. App.) 77 S. W. 44.

72. People's Bank v. Frick Co. (Okl.) 73 Pac. 949.

73. Employment to sell two trainloads of cattle which were shipped as one train, does not entitle factor to commissions on cattle subsequently shipped the purchaser who took the first on the consignor's agreement to make a further shipment of better quality—Taylor v. Johnston (Tex. Civ. App.) 70 S. W. 1022.

74. See this case for charge to jury—Petit v. Colmary (Del.) 55 Atl. 344.

75. As where defendant filed affidavits charging criminal offense informing the justice that the prosecuting attorney desired a warrant, no information being filed and no advice of a necessity of issuance of a warrant by the justice—McCaskey v. Garrett, 91 Mo. App. 354.

76. Kossouf v. Knarr (Pa.) 55 Atl. 854.

77. Church v. Pearne, 75 Conn. 350.

78. Kelly v. Durham Traction Co., 132 N. C. 368.

79. As where the plaintiff was standing on the platform of a moving train under circumstances indicating that he was intending to steal a ride under Laws 1897, p. 116—Summers v. Southern R. Co. (Ga.) 45 S. E. 27. The arrest of a person in commission of an act supposed to be criminal though not technically so, is justifiable—Van v. Pacific Coast Co., 120 Fed. 699.

80. Franklin v. Amerson (Ga.) 45 S. E. 698; Edger v. Burke, 96 Md. 715; Marshall v. Cleaver (Del.) 56 Atl. 380.

ponderance of evidence.[81] An attempted departure from the state with personalty in possession in violation of a contract is not an excuse for an arrest without a warrant.[82] A detention of the person, however, for a period longer than necessary to obtain a warrant, renders him liable for false imprisonment,[83] or if the officer of his own motion discharges the person he becomes a trespasser ab initio;[84] but if the officer made a justifiable arrest, the detention for the purpose of examining the person as to his sanity will not necessarily render the detention unlawful.[85] If the arrest was illegal because done by an officer without a warrant, recovery can be had for the detention only up to the time of delivery of custody to the officer having the warrant.[86]

If the justice who issues the warrant is without jurisdiction, he is personally liable.[87]

All persons assisting in the procurance and issuance of the void warrant,[88] or who without probable cause caused the arrest by an officer without a warrant, may be held liable.[89] Advice of counsel is not a defense by a person not acting in good faith.[90] Whether the prosecuting witness was guilty of mere inadvertence or negligence in causing a defective warrant to be issued is a question for the jury.[91] The principal is liable for the false arrest by his agent only where the latter acted within the scope of his authority in making the arrest,[92] and where the agent honestly believed that he was justified in making the arrest, but if done falsely and for the purpose of extortion, the principal would not be liable.[93] The question whether the principal ratified the acts of the agent in making the false arrest is for the jury.[94]

By accepting a discharge from the officer making the arrest without a warrant,[95] or by appearing pursuant to a void warrant,[96] or by pleading to the charge

81. Stewart v. Feeley, 118 Iowa, 524.

82. Park v. Taylor (C. C. A.) 118 Fed. 34.

83. Burns' Rev. St. 1901, § 1771—Harness v. Steele, 159 Ind. 286.

84. Stewart v. Feeley, 118 Iowa, 524; Harness v. Steele, 159 Ind. 286.

85. Particularly where the person consented to his discharge by the officer after the report of the examining physicians—Mulberry v. Fuellhart, 203 Pa. 573.

86. McCullough v. Greenfield (Mich.) 95 N. W. 532.

87. The issuance by the justices of the peace sitting as a fiscal court, of a warrant to enforce attendance of another justice, is without jurisdiction—Stephens v. Wilson, 24 Ky. L. R. 1832, 72 S. W. 336. The arrest on an attachment of a witness for failure to appear in accordance with a subpoena issued after justice had lost jurisdiction of the action, renders the justice liable—Holz v. Rediske, 116 Wis. 353. Merely because the complaint on a criminal charge was defective would not render the justice issuing the warrant thereon liable as for a false imprisonment—Smith v. Jones (S. D.) 92 N. W. 1084. Because records of the court fail to show that sentence was imposed will not subject the court or its officer enforcing the sentence to liability for false imprisonment. The Mayor's Court causing the arrest not being a court of record; the failure is a mere irregularity—Gammage v. Mahaffey (La.) 35 So. 266.

88. As the prosecuting witness who made the complaint—McCaskey v. Garrett, 91 Mo. App. 354. The mere making of a complaint in good faith without further participation in the proceeding will not render the complaining witness liable (Smith v. Jones [S. D.] 92 N. W. 1084) as where he gave information of the fact that the plaintiff was of unsound mind and dangerous to persons and property of others—Dougherty v. Snyder, 97 Mo. App. 495. Sheriff making arrest under extradition warrant acts ministerially and despite his malice is not liable unless concerned in issuing writ—Regan v. Jessup (Tex. Civ. App.) 77 S. W. 972.

89. The complaint in such case must aver that it was done maliciously and without probable cause—Dierig v. South Covington & C. St. R. Co., 24 Ky. L. R. 1825, 72 S. W. 355.

90. Burbanks v. Lepovsky (Mich.) 96 N W. 456.

91. Oates v. Bullock, 136 Ala. 537.

92. The proprietor of a department store is liable for a false arrest by a floor walker whose duty it was to watch customers and prevent them from doing wrongful acts—Cobb v. Simon (Wis.) 97 N. W. 276. Evidence held sufficient to submit the question of the consent of the husband to the wife's acts in causing arrest—Golibart v. Sullivan, 30 Ind. App. 428.

93. Cobb v. Simon (Wis.) 97 N. W. 276

94. Cobb v. Simon (Wis.) 97 N. W. 276. Ratification by the manager of a company is sufficient to render it liable—Simmon v. Bloomingdale, 81 N. Y. Supp. 499. Preparation for trial by the prosecutor without knowledge that the warrant was properly executed, is not ratification of the unlawful arrest—Oates v. Bullock, 136 Ala. 537.

without objecting to the mode of making the arrest, the plaintiff does not waive any rights.[97]

Damages.—If the arrest was unlawful, the plaintiff is entitled at least to nominal damages,[98] and exemplary damages can be recovered only when the officer acted maliciously.[99] Physical and mental pain and humiliation are proper elements of damage.[1] To warrant the recovery of special damages, they must be pleaded.[2] The amount of damages is a question for the jury.[3]

§ 2. *The action to recover damages.*—The complaint must aver detention and damage.[4] In Indiana, an allegation that the defendant unlawfully imprisoned plaintiff and deprived him of his liberty is sufficient,[5] but in New York, the complaint must set out the facts showing that the imprisonment and detention were caused by illegal means.[6]

The defense of justification must be pleaded,[7] and all the facts under which the defendant seeks to justify the arrest must be set out;[8] if the arrest was on a charge of felony, the plea need not state that it was under authority of a warrant.[9]

The defendant has the burden of establishing the legality of the arrest.[10] A discharge by the magistrate does not of itself establish that the plaintiff was improperly arrested.[11] Particular cases determining the admissibility and sufficiency of evidence and instructions by the court are collected in the footnotes.[12] The defendant may prove how much he earned, in mitigation of damages.[13]

95. Stewart v. Feeley, 118 Iowa, 524.

96. Church v. Pearne, 75 Conn. 350.

97. McCullough v. Greenfield (Mich.) 95 N. W. 532.

98. Kossouf v. Knarr (Pa.) 55 Atl. 854; Hoagland v. Forest Park Highlands Amusement Co., 170 Mo. 335; Maher v. Wilson, 139 Cal. 514, 73 Pac. 418.

99. Marshall v. Cleaver (Del.) 56 Atl. 380; Kelly v. Durham Traction Co., 132 N. C. 368; Harness v. Steele, 159 Ind. 286; Petit v. Colmary (Del.) 55 Atl. 344. As affecting the question of damages, the defendant may show want of malice by proving that he had a mortgage and that he had probable cause to believe that plaintiff had removed it, the ground for the prosecution and arrest—Oates v. Bullock, 136 Ala. 537. Handcuffing plaintiff while under arrest held not ground for increasing the damages—McCullough v. Greenfield (Mich.) 95 N. W. 532.

1. Golibart v. Sullivan, 30 Ind. App. 428; Harness v. Steele, 159 Ind. 286; Marshall v. Cleaver (Del.) 56 Atl. 380. See Petit v. Colmary (Del.) 55 Atl. 344 for charge to jury on elements of damage. In aggravation of damages plaintiff may show that he was arrested in the presence of his family—Young v. Gormley (Iowa) 94 N. W. 922.

2. Loss of time, however, may be proven on the allegation of deprivation of liberty—Young v. Gormley (Iowa) 94 N. W. 922. Under an allegation that plaintiff was put to an expense, he cannot prove an expense to secure his release—McCaffrey v. Thomas (Del.) 56 Atl. 382.

3. Young v. Gormley (Iowa) 94 N. W. 922; Pincham v. Dick (Tex. Civ. App.) 70 S. W. 333. Damages held excessive (Cobb v. Simon [Wis.] 97 N. W. 276; Pincham v. Dick [Tex. Civ. App.] 70 S. W. 333); not excessive—Harness v. Steele, 159 Ind. 286. In Kentucky a railroad may be sued for false imprisonment in a county through which it transported the plaintiff while under arrest that being the place of the injury—Evans v. Maysville & B. S. R. Co., 25 Ky. L. R. 1258, 77 S. W. 708.

4. Pease v. Freiwald, 39 Misc. (N. Y.) 549. Defect in petition held cured by answer—Evans v. Maysville & B. S. R. Co., 25 Ky. L. R. 1258, 77 S. W. 708. Complaint held not to state a cause of action—Dierig v. South Covington & C. St. R. Co., 24 Ky. L. R. 1825, 72 S. W. 355.

5. Harness v. Steele, 159 Ind. 286.

6. Pease v. Freiwald, 39 Misc. (N. Y.) 549.

7. Hoagland v. Forest Park Highlands Amusement Co., 170 Mo. 335. Mere matters of avoidance cannot be shown under a general issue—Noyes v. Edgerly, 71 N. H. 500. A general denial in an action against a justice and a constable is improper under Gen. St. Conn. 1902, § 609, and Court Rules, § 159—Church v. Pearne, 75 Conn. 350.

8. Edger v. Burke, 96 Md. 715.

9. Whether the officer was justified in making the arrest is a question to be determined by the court—Edger v. Burke, 96 Md. 715.

10. Black v. Marsh (Ind. App.) 67 N. E. 201.

11. Loughman v. Long Island R. Co., 83 App. Div. (N. Y.) 629.

12. Admissibility of evidence. (Golibart v. Sullivan, 30 Ind. App. 428; Hoagland v. Forest Park Highlands Amusement Co., 170 Mo. 335; Holz v. Rediske, 116 Wis. 353; Young v. Gormley [Iowa] 94 N. W. 922) on the question of damages—Bailey v. Warner (C. C. A.) 118 Fed. 395.

13. McCaffrey v. Thomas (Del.) 56 Atl. 382. Evidence tending to show a justification for the arrest, (Dougherty v. Snyder, 97 Mo. App. 495) or of good faith on the part of persons making arrest, is admissible—Pincham v. Dick (Tex. Civ. App.) 70 S. W. 333. The result of the trial on the criminal charge cannot be shown by the plaintiff—McCaffrey v. Thomas (Del.) 56

FALSE PRETENSES AND CHEATS.[14]

Elements of offense.—The pretense or representation must be one respecting a fact.[15] It must be with knowledge and intent to deceive and defraud,[16] must be calculated to deceive,[17] and must deceive,[18] and be relied on.[19] The general rule is that the person to whom the pretense was addressed[20] must be defrauded.[21] The thing obtained must be within the statutes.[22] It is immaterial whether that which an infant procured was a "necessary."[23] Public moneys may be the subject of the crime,[24] and donations procured for an ostensible charity are included.[25] Partial truth[26] or negligence of the defrauded person is not a defense.[27] The crime is complete when and where the goods or property are surrendered.[28]

Atl. 382. Where the arrest was for contempt in attempting to avoid a subpoena, evidence of use of abusive language to the officer making the arrest is inadmissible—Holz v. Rediske, 116 Wis. 353.

Sufficiency of evidence (Young v. Gormley [Iowa] 94 N. W. 922; Harness v. Steele, 159 Ind. 286; Burbanks v. Lepovsky [Mich.] 96 N. W. 456; Loughman v. Long Island R. Co., 83 App. Div. [N. Y.] 629) on question of probable cause (Burbanks v. Lepovsky [Mich.] 96 N. W. 456) to show bad faith on part of defendant in making the arrest, (Dougherty v. Snyder, 97 Mo. App. 495) to show ratification of an arrest caused by an employe—Kelly v. Durham Traction Co., 132 N. C. 368. The warrant on which plaintiff was arrested need not be offered in evidence, the legality of it not having been questioned—Kelly v. Durham Traction Co., 132 N. C. 368. Where the defendant is a corporation it is not necessary to prove who swore out the warrant, if it is shown that it was sworn out at the instigation or procurement of the defendant—Kelly v. Durham Traction Co., 132 N. C. 368.

Sufficiency of instructions—Edger v. Burke, 96 Md. 715; Cobb v. Simon (Wis.) 97 N. W. 276; Franklin v. Amerson (Ga.) 45 S. E. 698; Parham v. Shockler (Tex. Civ. App.) 73 S. W. 839; Harness v. Steele, 159 Ind. 286; Stewart v. Feeley, 118 Iowa, 524; Hoagland v. Forest Park Highlands Amusement Co., 170 Mo. 335; Pincham v. Dick (Tex. Civ. App.) 70 S. W. 333.

14. Includes falses pretenses proper and also analogous statutory crimes like cheats, swindling, confidence games and the like. In some states the offense is now covered by a statutory crime called larceny and as to those the title Larceny must be consulted since any separation would be impossible.

15. False representations of fact may consist in truthful statements of past facts coupled with a false declaration of future purpose—Smith v. State, 116 Ga. 587. Representations as to duty of school officers are of law—State v. Lawrence (Mo.) 77 S. W. 497.

Particular facts. Misrepresentation that one is an officer—Jackson v. State (Ga.) 44 S. E. 833. So under U. S. Comp. St. 1901, p. 3679—United States v. Ballard, 118 Fed. 757. That accused had been injured in a collision and that injuries were of a certain character—Com. v. Burton, 183 Mass. 461.

16. Edwards v. State (Fla.) 33 So. 853. Mere concealment is not criminal—Crawford v. State, 117 Ga. 247.

17. School directors are presumed to know the law relating to purchase of books—State v. Lawrence (Mo.) 77 S. W. 497.

18. Obtaining money by pretenses of official character and threats of arrest for crime is blackmail when the fear of prosecution moved the threatened person—Jackson v. State (Ga.) 44 S. E. 833. See, also, United States v. Brown, 119 Fed. 482, a prosecution for obtaining money from one who had violated revenue laws.

19. Edwards v. State (Fla.) 33 So. 853; Jackson v. State (Ga.) 44 S. E. 833. Subsequent representations not criminal—State v. Pickett, 174 Mo. 663. They need not be the sole but only the controlling inducement—State v. Morgan, 109 Tenn. 157; Baker v. State (Wis.) 97 N. W. 566; Braxton v. State, 117 Ga. 703, citing 2 Clark & Marshall, Crimes, 841 and cases cited. If false pretenses of ownership were the inducement it makes no difference that a mortgage given on property was voidable for infancy—Lively v. State (Tex. Cr. App.) 74 S. W. 321. Delivery to carrier by defrauded person is sufficient—In re Stephenson (Kan.) 73 Pac. 62. This element is not essential under Pen. Code 1895, art. 948 which makes the mere conversion by a guardian "swindling"—Walls v. State (Tex. Cr. App.) 77 S. W. 8.

20. Code, § 1025 which dispenses with allegation of ownership covers a representation made to an agent who could not pass title. Obtaining from such an agent is not larceny—State v. Taylor, 131 N. C. 711.

21. The rule that one is not defrauded where accused only used false pretense to procure performance of a duty does not apply where the liability was uncertain and unliquidated and accused meant to defraud by obtaining too much—Com. v. Burton, 183 Mass. 461. If property was reclaimed under a mortgage for the price and no loss was suffered there is no crime—Lively v. State (Tex. Cr. App.) 74 S. W. 321. A school district is not defrauded when beguiled into paying a legal obligation and a warrant if issued must be legally issued or the district being not liable is not defrauded—State v. Lawrence (Mo.) 77 S. W. 497.

22. Lodging is a "valuable thing" within the U. S. Comp. St. 1901, p. 3679 relating to impersonating a federal officer—United States v. Ballard, 118 Fed. 757.

23. Lively v. State (Tex. Cr. App.) 74 S. W. 321.

24. County defrauded by false auditing—State v. White (Del.) 54 Atl. 956.

25. Baker v. State (Wis.) 97 N. W. 566

A *"cheat"* has been held to mean such as not only to deceive the victim but also to thwart common prudence and care.[29]

The use of "false or bogus checks or other means, instruments," etc., includes worthless stocks.[30]

On a charge of presenting false pay rolls with intent to defraud, it need not be averred that he to whom they were presented had power to allow them.[31] In the crime of fraudulently disposing of goods purchased on credit,[32] it does not matter to whom they are sold.[33]

Indictment.[34]—Fraudulent intent must be averred.[35] Knowledge,[36] and the falsity of the pretense,[37] the nature of the fraud, artifice, or representation,[38] and reliance thereon,[39] the fact of defrauding,[40] the property or thing obtained,[41] and that it was obtained from the person defrauded,[42] must be set out with certainty. An indictment for aiding a cheat as a felony in another state must aver that it is such a felony there.[43]

reviewing many cases and repudiating 17 Wend. 351, 31 Am. Dec. 303.

26. Mingling opinions with misrepresentations as to extent of injuries received—Com. v. Burton, 183 Mass. 461; Baker v. State (Wis.) 97 N. W. 566.

27. The mere fact of easy access to the truth by telephone does not disentitle one to rely—Harrison v. State (Tex. Cr. App.) 70 S. W. 421. Failure to examine a so called "cotton receipt" before making loan—Elmore v. State (Ala.) 35 So. 25. Records not examined showed that statement of "no incumbrances" was false—Keyes v. People, 197 Ill. 638; Crawford v. State, 117 Ga. 247.

28. Delivery to carrier to be shipped out of state—In re Stephenson (Kan.) 73 Pac.

62. Bunco game completed beyond state is not within jurisdiction—Cruthers v. State (Ind.) 67 N. E. 930. See Criminal Law; Indictment and Prosecution.

29. State v. Hood, 3 Pen. (Del.) 418.

30. Cr. Code, § 98—Du Bois v. People, 200 Ill. 157.

31. State v. Voute (Ohio) 67 N. E. 484.

32. 9000 laths out of 20000 purchased for a building held not a remnant which contractor might divert to another building (Rev. St. 1899, § 4226)—State v. Gregory, 170 Mo. 598.

33. Information need not state it—State v. Artus (La.) 34 So. 596.

34. Held sufficient against general demurrer—People v. Cadot, 138 Cal. 527, 71 Pac. 649. Offense of pretending to be revenue officers under Act Cong. April 18, 1884—United States v. Brown, 119 Fed. 482. Indictment for fraud in sale of wool under Ohio statute—Hogue v. State, 23 Ohio Circ. R. 567. Information for attempting to defraud bank issuing a certificate of deposit—State v. Riddell (Wash.) 74 Pac. 477.

35. "Designedly" or equivalent is requisite—State v. Pickett, 174 Mo. 663. Allegations of "knowledge" of falsity and of a "purpose to deceive" etc suffice—State v. Morgan, 109 Tenn. 157.

36. "Well knew" held sufficient—Baker v. State (Wis.) 97 N. W. 566.

37. But it need not be alleged that a chattel mortgage was a subsisting lien on property represented to be free of incumbrance (Cr. Code, par. 408)—Keyes v. People, 197 Ill. 638. Allegation that note represented to be valid was void and open to defense must particularize the defense and the invalidity—Com. v. Viser, 24 Ky. L. R. 1161, 70 S. W. 832. "That [accused] was not entitled" to a certain warrant which he obtained by falsely presenting unearned items of costs, held sufficient—State v. Morgan, 109 Tenn. 157. It need not state that accused was not authorized to settle a false charge of bastardy as he professed to be—People v. Stockwell (Mich.) 97 N. W. 765.

38. State v. Pickett, 174 Mo. 663. "Fraud and duress" too uncertain though the words of the statute—Haughn v. State (Ind.) 65 N. E. 287, 59 L. R. A. 789.

See note to Com. v. Weiss, 11 L. R. A. 530. Also, cases cited in note to 59 L. R. A. 789. Indictment for fraud—State v. Jaques, 65 S. C. 178. Charging part held inconsistent and repugnant as to representations alleged—State v. Lawrence (Mo.) 77 S. W. 497. Particular description and value of certain cattle which accused claimed to own for purpose of obtaining loan need not be added—State v. Hubbard, 170 Mo. 346. Fraudulent cost bills used need not be set out—State v. Morgan, 109 Tenn. 157. Fraudulent mortgage must be set out—Lively v. State (Tex. Cr. App.) 74 S. W. 321. Sufficient allegations of fraud in obtaining county warrants—State v. Morgan, 109 Tenn. 157.

39. "By reason of" false representations accused "became possessed" is sufficient—State v. Morgan, 109 Tenn. 157. "By means of or by the use of" is requisite—State v. Pickett, 174 Mo. 663.

40. Where a teacher procured appointment of an assistant it must be averred that he was not entitled despite the falsehood to such assistance—State v. Mortimer (Miss.) 34 So. 214.

41. The procurement of a "signature" to an instrument does not appear from an allegation that the defrauded person "conveyed and delivered by warranty deed" certain land (Cr. Code, § 125)—Moline v. State (Neb.) 93 N. W. 228. County warrants may be set out by serial number and value—State v. Morgan, 109 Tenn. 157.

Proof of obtaining notes for $200 is not variant from "sum of $200."

42. It must state that he "did" deliver or part with property—State v. Kelly, 170 Mo. 151; State v. Hubbard, 170 Mo. 346. Proof of loan by a loan company not variant from allegation of loan by B (who did business in that name)—Elmore v. State (Ala.) 35 So. 25.

43. Cruthers v. State (Ind.) 67 N. E. 930.

Evidence[44] *and trial.*—Intent may be proved by similar transactions[45] or deceptions,[46] and guilty knowledge by equivocation and contradiction.[47] Circumstances may prove falsity.[48] It may be shown on re-direct examination that the defrauded person did not believe warnings given to him.[49]

Instructions.[50]—The sole testimony of accused is enough to call for a charge.[51] No instruction should be given respecting the legal rights of accused if his representations were true.[52]

Punishment.—An enactment of the same punishment as "larceny" means the same as prescribed for larceny of a like sum.[53]

FENCES.

§ 1. *Division fences between co-terminous owners.*—At common law, in the absence of agreement, an adjoining owner has no right to erect a division fence beyond his own land,[54] and the owner on whose land it is erected may remove it.[55] Statutes in many states provide for the joint maintenance of boundary fences,[56] and under them fence should rest equally upon the land of each of the co-terminus owners.[57] The adjoining owner may remove and rebuild the part of the division wall assigned to him without the consent of the other owner.[58] If the party bound to erect the division fence fails to do so, he cannot recover for a trespass committed by the adjoining owner's cattle,[59] and is liable if the animals are injured by reason of his failure to fence.[60]

§ 2. *Fencing railroad right of way.*—Railroads are usually required by statute to fence the right of way.[61] The company is entitled to a reasonable time to discover defects in the fence.[62]

44. Sufficiency of evidence. Swindling by cards—State v. Evans, 88 Minn. 262. Evidence in general—State v. Riddell (Wash.) 74 Pac. 477. Of the meaning of representations made—Smith v. State, 116 Ga. 587. Of deception of one who paid money when charged with bastardy—People v. Stockwell (Mich.) 97 N. W. 765. To show prudent reliance on verbal representations coupled with presentation of a "cotton ticket" which however was not an evidence of ownership—Elmore v. State (Ala.) 35 So. 25. Presentment of certificate of deposit at teller's window held a demand of payment—State v. Riddell (Wash.) 74 Pac. 477. **Insufficient**—State v. Lawrence (Mo.) 77 S. W. 497.

45. Com. v. Lubinsky, 182 Mass. 142; Baker v. State (Wis.) 97 N. W. 566.

46. Permitting others to be deceived as to the cause of injuries—Com. v. Burton, 183 Mass. 461.

47. State v. Riddell (Wash.) 74 Pac. 477.

48. Illustration. That a certificate of deposit was procured by a confidence game and that shortly afterwards accused presented it at bank—State v. Riddell (Wash.) 74 Pac. 477.

49. Com. v. Burton, 183 Mass. 461.

50. Instruction as to what is an "orphans' home" which accused professed to represent, sustained—Baker v. State (Wis.) 97 N. W. 566. Instructions as to validity of school warrants procured and power of directors held too narrow as omitting to submit an issue—State v. Lawrence (Mo.) 77 S. W. 497. Instruction held not misleading as to representations made to others than defrauded party (State v. Riddell [Wash.] 74 Pac. 477) as to representations of law and of fact held conflicting—State v. Lawrence (Mo.) 77 S. W. 497.

51. That accused believed the other knew the truth—Crawford v. State, 117 Ga. 247.

52. Com. v. Burton, 183 Mass. 461.

53. Three years in penitentiary sustained where $145 was obtained—People v. Wynn (Cal.) 74 Pac. 144.

54. Hoar v. Hennessey (Mont.) 74 Pac. 452. Erection of a fence by an adjoining owner enjoined as being within a contract between the parties—Silverfield v. Frank (Or.) 73 Pac. 1032.

55. The constructor cannot restrain such act—Currier v. Jones (Iowa) 96 N. W. 766.

56. The rights of private property are not invaded by a statute regulating the construction of division fences and inflicting a penalty for a violation thereof—Horan v. Byrnes (N. H.) 54 Atl. 945.

57. Hoar v. Hennessey (Mont.) 74 Pac. 452 and each must pay his proportionate share of the cost and maintenance thereof —Id.

58. Ropes v. Flint, 182 Mass. 473.

59. Oliver v. Hutchinson, 41 Or. 443, 69 Pac. 139, 1024; Gilmore v. Harp, 92 Mo. App. 77.

60. Howard v. Maysville & B. S. R. Co., 24 Ky. L. R. 1051, 70 S. W. 631.

61. A statute compelling railroads to erect fences along their right of way and on failure permitting the adjoining owner to erect same and recover the cost thereof with attorney's fees from the company is constitutional—Terre Haute & L. R. Co. v. Salmon (Ind.) 67 N. E. 918. Laws requiring railroads to fence their right of way are enacted for the benefit of the public at large—Ludtke v. Lake Shore & M. S. R. Co.,

§ 3. *Destroying or injuring fences.*—A threatened destruction of a fence may be restrained.[63] A wall used as a fence and not mentioned as a monument in any deed is not within a statute punishing the destruction of monuments,[64] but statutes exist in most states prohibiting the destruction of fences.[65]

§ 4. *Erection by municipalities under stock-fence laws.*—Statutes permitting public authorities to erect fences, generally known as stock-fence laws, to be valid must direct that the cost be assessed against the property benefited by the erection,[66] and the Arkansas statute is valid though it assesses the cost against the land, since such direction will be interpreted to mean according to the benefits.[67] Under the latter statute, a railroad right of way within the fencing district is not subject to assessment,[68] nor is the county poor farm,[69] nor are coal mines unless the lands containing the coal are also useful for agricultural or kindred purposes.[70] The proceedings creating fencing districts must be strictly followed,[71] and a written report of the plans and cost of the fence should be made to the court by the board.[72] The time within which the assessment can be questioned does not apply to jurisdictional and constitutional objections.[73]

FERRIES.[74]

County commissioners have a reasonable discretion as to the number of fer-

24 Ohio Circ. R. 120. Where the company is required to fence the duty is to the adjoining owner and not to the public. An owner of an animal therefore cannot recover for injuries to it where it entered the right of way from the unfenced land of another—Delphia v. Rutland R. Co. (Vt.) 56 Atl. 279. Generally railroads are not required to fence at places where public safety or convenience or safety of employes requires it to be kept open; as a place for switching—Redmond v. Missouri, K. & T. R. Co. (Mo. App.) 77 S. W. 768. Natural barrier held not to constitute a fence within the statute requiring railroads to fence—Taylor v. Spokane Falls & N. R. Co. (Wash.) 73 Pac. 499.

62. Colyer v. Missouri Pac. R. Co., 93 Mo. App. 147; Hendrickson v. Philadelphia & R. R. Co., 68 N. J. Law, 612; Perrault v. Minneapolis, St. P., etc., R. Co. (Wis.) 94 N. W. 348. After a lapse of two years notice of the defect is presumed—Ludtke v. Lake Shore & M. S. R. Co., 24 Ohio Circ. R. 120.

63. Lynch v. Egan (Neb.) 93 N. W. 775.

64. R. L. c. 208, § 78—Ropes v. Flint, 182 Mass. 473.

65. The destruction of another's fence which does not inclose the owner's land is not within the statute inflicting a penalty for the destruction of another's fence (Rev. St. 1899, § 4573)—Wilson v. Burton, 96 Mo. App. 686. The person pulling down or removing the fence is liable to criminal prosecution, whether he did it as agent for or under the direction of another (State v. Campbell [N. C.] 45 S. E. 344) nor is it a defense that nothing was growing in the field at the time it being a cultivated field within Code 1883, § 1062 (Id.) or that the defendant had a better title than prosecutor, the latter being in actual peaceable possession—Id. The size of the field is immaterial—Id. **Indictment and evidence.** An indictment under a statute making such offense a misdemeanor charging the offense in the language is sufficient (Sand. & H. Dig. § 1784). Sufficiency of indictment—State v. Culbreath (Ark.) 71 S. W. 254. Admissibility of evidence on trial of indictment—Smith v. State (Tex. Cr. App.) 70 S. W. 84; Caudle v. State (Tex. Cr. App.) 74 S. W. 545.

66. N. Car. act March 6, 1903 relating to New Hanover county is unconstitutional—Harper v. New Hanover County Com'rs (N. C.) 45 S. E. 526. That the property was benefitted by the fence is shown prima facie by the assessment—Stiewell v. Fencing Board (Ark.) 70 S. W. 308.

67. Stiewel v. Fencing Board (Ark.) 70 S. W. 308.

68. Stiewell v. Fencing Dist. (Ark.) 71 S. W. 247.

69. Stiewel v. Fencing Board (Ark.) 70 S. W. 308.

70. Stiewell v. Fencing Dist. (Ark.) 71 S. W. 247.

71. If the board did not take the prescribed oath it is not properly constituted—Stiewel v. Fencing Board (Ark.) 70 S. W. 308. The district, as formed, held not to vary with the district as petitioned for—Id.

72. But the objection should be made within limitation fixed by the statute—Stiewel v. Fencing Board (Ark.) 70 S. W. 308.

73. The proper constitution of the board is not such an objection—Stiewel v. Fencing Board (Ark.) 70 S. W. 308. Assessment held not excessive—Id.

74. Sufficiency of description in application for a ferry—Ferry Co. v. Russell, 52 W. Va. 356, 59 L. R. A. 513. Sufficiency of evidence as to inclusion of a certain body of water in prohibition of location of a ferry within a certain distance of an existing ferry—Robinson v. Lamb, 131 N. C. 229. Jurisdiction as to ferry privileges of Pasquotauk River as between counties of which it is the boundary settled under 2 Rev. St. p. 111 (Act 1877) creating Camden county and Code, § 2014—Id. Matters arising from the operation of ferry boats are treated in Shipping and Water Traffic.

ries to be licensed at one point.[75] The ownership or lease of land required of an applicant for a ferry does not require such an interest in land in another state on the opposite side of the river.[76]

A county court on one side of the river cannot take jurisdiction of an application for a ferry privilege by parties contesting an application for the same purpose pending in the county court on the other side. Notice of an intention to apply for a grant amounts to service of process on all interested persons.[77] A report on an application, signed by two of three viewers, is sufficient.[78] A ferry franchise may be transferred as any other incorporeal hereditament.[79] A ferry company of one state, operating on a boundary river, is deprived of property without due process of law by inclusion of a franchise from the other state, in its taxable property in the state of its domicile.[80] Failure of a ferry company to comply with statutes regulating its privilege is no defense to its suit to restrain trespass on its lands.[81]

FINES.[82]

The legislature may authorize a judgment in favor of the party aggrieved.[83] allow part of the fine to the informer.[84] or may, in the absence of constitutional restriction, provide at will for the disposition of fines.[85]

Fines paid on a conviction without jurisdiction may be recovered back,[86] unless voluntarily paid.[87]

A complaint by supervisors against a magistrate for fines collected is not invalidated by unnecessary averments of wrongful conversion.[88] Sureties on bond on appeal from fine and imprisonment are liable for fine though imprisonment is performed.[89] Only personal security for fines can be taken under the Arkansas statute.[90] An affidavit in forma pauperis is essential to discharge after ten days' imprisonment.[91]

75. Injunction will not lie against another application ([Rev. St. § 643]—Green v. Ivey [Fla.] 33 So. 711) but will lie against operation of a ferry without license—Id. An owner cannot recover for loss of business from establishment of another ferry—Ferry Co. v. Russell, 52 W. Va. 356, 59 L. R. A. 513. (In 59 L. R. A. 513-556 inclusive will be found an exhaustive monographic note on the establishment, regulation, and protection of ferries). A third ferry should not be established on application of the owner of one of two already existing where travel is insufficient and injury will result to the other existing ferry—Id.

76. Code, c. 44, § 2—Ferry Co. v. Russell, 52 W. Va. 356, reported with exhaustive note, 59 L. R. A. 513.

77. The latter court may issue a writ of prohibition under Civ. Code, § 479 to restrain the former court—Clark County Ct. v. Warner (Ky.) 76 S. W. 828.

78. Code, c. 13, § 17, cl. 2—Ferry Co. v. Russell, 52 W. Va. 356, reported with exhaustive note 59 L. R. A. 513.

79. The assignment does not change the control of the franchise-granting power and the rights of the assignee can only be questioned by that power—Evans v. Kroutinger (Idaho) 72 Pac. 882.

80. Louisville & T. Ferry Co. v. Kentucky, 188 U. S. 385.

81. St. 1899, § 1808, subsec. 3 regulating sale or lease, and St. §§ 3915, 3917-3919, against pools and combinations—Wilson v. Sullivan (Ky.) 77 S. W. 193.

82. Includes only enforcement and disposition. Propriety of particular punishments are treated in Criminal Law; procedure for their imposition in Indictment and Prosecution.

83. Such a judgment is not properly a fine and hence the provision does not contravene Const. Neb. art. 8, § 5, declaring that fines shall be for the benefit of the school fund—Everson v. State (Neb.) 92 N. W. 137.

84. The pardoning power of the governor is not thereby infringed—Meul v. People, 198 Ill. 258. Wilmington city charter providing that fines shall be paid into the city treasury "except as otherwise provided," includes subsequent exceptions, such as act May 26, 1897, allowing one-half of certain fines to a society—Law & Order Soc. v. Wilmington (Del.) 55 Atl. 1.

85. Rev. St. § 4364, providing that certain fines shall go to the municipality where imposed, sustained—Lloyd v. Dollisin, 23 Ohio Circ. R. 571.

86. Evidence held insufficient to show that the county had received same—Houtz v. Board of Com'rs (Wyo.) 70 Pac. 840.

87. Payment under mistake of law—Harrington v. New York, 40 Misc. (N. Y.) 165. Payment after giving bond for appearance at appellate court held voluntary—Houtz v. Board of Com'rs (Wyo.) 70 Pac. 840.

88. Town of Green Island v. Williams, 79 App. Div. (N. Y.) 260.

89. People v. Connolly, 84 N. Y. Supp. 617.

90. Not a chattel mortgage—Hubbard v. State (Ark.) 75 S. W. 853.

91. Ex parte Rodriquez (Tex. Cr. App.) 73 S. W. 1050.